



ARBITRATION AWARD

Case Number:	<i>PSHS 585 -11 /12</i>
Commissioner:	<i>Adv. Thabang T. Serero</i>
Date of Award:	<i>6 March 2014</i>

In the arbitration between:

NUPSAW obo Motubatse

(Union/Applicant)

And

Department of Health – Gauteng

(Respondent)

Union/Applicant's representative:	<i>Mr M. Moyo</i>
Union/Applicant's address:	<i>P. O. Box 12217</i>
	<i>Tramshed</i>
	<i>0126</i>
Telephone:	<i>(012) 327 – 8989</i>
Telefax:	<i>(012) 327 – 8978</i>

Respondent's representative:	<i>Mr M. Lelaka</i>
Respondent's address:	<i>37 Cnr Market and Sauer Street</i>
	<i>14th floor Bank of Lisbon</i>
	<i>Johannesburg 2001</i>
Telephone:	<i>(011) 355-3184</i>
Telefax:	<i>(011) 355-3358/086-618-4403</i>
E-mail:	

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1. This matter was set down for arbitration on 13 February 2014. A union official, Mr M. Moyo represented the applicant, whilst the respondent was represented by its Labour Relations Officer, Mr M. Lelaka.
- 1.2. At the conclusion of the proceedings the parties agreed to submit written closing arguments within 7 days. However, only the applicant's written arguments had been received at the time of writing this award.
- 1.3. A number of issues were raised in the parties' evidence, but for the sake of brevity, I shall not repeat same in this award.

2. ISSUE TO BE DECIDED

- 2.1. Whether the respondent committed an unfair labour practice in relation to promotion.

3. APPLICANT'S TESTIMONY

- 3.1. The applicant testified that he is employed as an Emergency Care Officer. The gist of his case is that the respondent failed to appoint him as a Shift Supervisor. This was despite the fact that he met the minimum requirements of the job. He further alleged that the Human Resources Manager left during his interview, and therefore failed to take notes.
- 3.2. He further intimated that he had a bad relationship with his supervisor who was part of the panel during the interview. He believes that the latter influenced the negative outcome of his interview. According to the applicant, his supervisor had tried to remove him from the acting position, resulting in him lodging a complaint. The Acting District Manager, Mr Mahlangu allowed him to continue in the acting position.
- 3.3. He stated that the panel did not give him a chance to object to its composition. He was also not provided with an opportunity to ask the panel questions. The respondent had also failed to grant the union the observer status at the interviews.
- 3.4. According to the applicant, the respondent ought to have appointed him because he had acted in the position for a long time. Furthermore, the respondent failed to resolve his grievances.
- 3.5. During cross – examination he admitted that the acting post he had occupied in 2005 was not a funded post. He however, denied that he was assisted by another employee to perform in the acting position. He nevertheless conceded to the fact that acting in a position did not mean he was entitled to be promoted. It is correct that he still had to be subject to an interview and compete with other candidates.
- 3.6. He (applicant) insisted that his supervisor, Mr Phele had influenced the outcome of his interview. Additionally, his interview was not successful because the Human Resources Manager did not record the minutes during the interview. The latter had instead left the room to answer her cell phone. Yet he stated that he did not know who had the authority to make a decision on the appointments following the interview.
- 3.7. In total contrast to his earlier testimony that his relationship with his superior, Mr Phele soured when the latter tried to remove him from the acting position, he stated that he did not know what led to their fall out. He instead stated that he did not know the reason except for the fact that Mr Phele no longer appointed him to act.

3.8. Furthermore, the applicant admitted that he had no evidence to substantiate his claims that Mr Phele had influenced the outcome of his interview. Most significantly, the applicant admitted that he was not a better candidate in comparison to the other candidates, specifically Ms Molefe and Mr Apane who were successful during the interview. Yet he could not explain why he sought to challenge his non-appointment.

5. RESPONDENT'S TESTIMONY

- 5.1. The respondent called three witnesses namely; Mr J. K. Mahlangu, Mr F. M. Phele and Ms R. Mokoena.
- 5.2. The first witness, Mr J. K. Mahlangu confirmed that at the time of the interviews he was the Acting Regional Manager for the Tshwane Motsweding District. In this capacity, he was required to oversee the interview process together with the Human Resources Manager. Thus, he was the chairperson of the interview panel.
- 5.3. Further, Mr J. K. Mahlangu denied that the applicant was treated unfairly during the interview. He instead stated that the other two candidates who were ultimately appointed fared better than the applicant during the interview.
- 5.4. The interview panel had no obligation to ask any candidate whether he or she is comfortable with the panel. It is incumbent on the aggrieved candidate to lodge a complaint should they believe that there was some nepotism. Yet, the applicant stated that he had no problem with the panel.
- 5.5. During cross – examination Mr J. K. Mahlangu insisted that the respondent always ensured that all employees are treated fairly during the interviews. The competencies for the job were outlined in the advertisement. The members of the interview panel were appointed based on their respective levels of expertise. The questions for the interview were drafted by the District Managers in consultation with the Human Resources Department.
- 5.6. The respondent's second witness, Mr F. Phele confirmed that he is employed as the Station Manager at the Odi – Tshwane District. It is correct that the applicant was one of his subordinates.
- 5.7. Mr F. Phele vehemently denied that he had previously ill-treated the applicant. Similarly, he denied that he had influenced the negative outcome during the applicant's interview. The applicant was struggling during the interview he constantly requested the panel to rephrase the questions. He appeared to be very nervous. The other two candidates who were appointed fared better than the applicant.
- 5.8. During cross – examination Mr F. Phele insisted that he continued to enjoy a good relationship with the applicant. He had invited the applicant to take photographs and operate the music system at his child's party. Perhaps the applicant was angry at the fact that he was not allowed to drive the ambulance after his Public Driver's Permit had expired.
- 5.9. The respondent's third witness, Ms R. Mokoena corroborated the testimony of Mr J. K. Mahlangu and Mr F. Phele in all material respects. Notably, she emphasized the fact that as a Human Resources Practitioner she was required to oversee and guide the interview process. At no stage did she leave the process while the applicant was being interviewed. Nor did she respond or use her cell phone during the interview.
- 5.10. Further, the applicant was afforded a fair opportunity like the other candidates but he struggled to answer questions during the interview. She is not aware of any undue influence that Mr F. Phele allegedly exerted on the interview panel.

5.11. During cross – examination she confirmed that at some stage after the interview the applicant alleged that he was victimized by Mr F. Phele. Indeed, the applicant was shortlisted and interviewed because he complied with the minimum requirements of the job. He however, performed badly during the interview.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1. The applicant's version is that the respondent had committed an unfair labour practice by failing to promote him to the position of Shift Supervisor. He blamed his immediate superior; Mr F. Phele, for his non-appointment. He claimed that the latter had influenced the interview panel negatively. Additionally, his relationship with Mr Phele soured when he prevented him from abusing the department's resources.

5.2. Further, the applicant's closing statement made reference to a number of issues that were not canvassed during the arbitration. As result, I shall not attach any weight to such submissions. It is not permissible for parties to raise new issues in their closing statements.

5.3. The crux of the matter is whether indeed the respondent has erred by not appointing the applicant. He (applicant) correctly conceded during the arbitration that acting in a position did create an entitlement for appointment.

5.4. Most significantly the applicant conceded to the fact that he was not the best candidate for the position. In fact; he stated that he did not believe that he was better than the other two candidates who were successful during the interview. He also admitted that he could not present any evidence to substantiate his claims that his superior influenced the interview panel negatively.

5.5. It is trite that the employer has an obligation to act fairly towards an employee in the selection and promotion process, but apart from that, it is the prerogative of the employer whom it intends to appoint (See Department of Justice v CCMA & Others (2004) 13 (LAC). In casu, the applicant has failed to substantiate his claims that his supervisor had adversely influenced his non-appointment. The fact that he could have had some differences with his superior does not necessarily render the interview process unfair. In fact it was incumbent on the applicant to alert the interview panel about any reservations he had on its composition. It is worth noting that the applicant did not even dispute the fact that he performed very badly during the interview.

5.6. The crux of the matter is that the applicant has failed to substantiate his claims that he was subjected to unfair conduct during the interview.

5.7. In the circumstances, the applicant has failed to prove that the respondent has committed an unfair labour practice in relation to promotion.

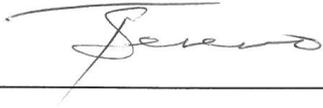
6 . AWARD

6.1. The applicant has failed to prove that the respondent has committed an unfair labour practice in relation to promotion.

6.2. The application is dismissed

6.3. There is no order as to costs.

Signature:



Adv. T. T. Serero.

Public Health
