



ARBITRATION AWARD

Panelist/s: Leslie Martin
Case No.: PSHS85-10/11
Date of Award: 4-May-2011

In the ARBITRATION between:

P.S.A. on behalf of W. Vermaack

(Union / Applicant)

and

Department of Health- Western Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration took place at the offices of the Premier for the Western Cape, 4 Dorp Street Cape Town on Wednesday 13 April 2011. The applicant, Mr. Wayne Vermaack (Vermaack), was represented by Mr. J. Kapp of the P.S.A. The respondent, the Department of Social Development was represented by Ms. Delene Lippert an Assistant Director and Mr. D. Apollis, a Manager in labour relations.

ISSUE TO BE DECIDED

2. Does the failure of the respondent to appoint Vermaack into the position of State accountant constitute unfair conduct as contemplated in section 186 (2)(b) of the Labour Relations Act 66 of 1995 as amended (the LRA)?

BACKGROUND TO THE ISSUE

3. Vermaack has been in the respondent's employ since November 2001. He is currently an accounts clerk and earns R90,000.00 (ninety thousand rand) per annum.

4. Vermaack had applied for the position of State accountant. After he had been shortlisted for the position Vermaack was called for an interview. He had also been acting in the position since it had become vacant and for which function he received an acting allowance.

SURVEY OF EVIDENCE AND ARGUMENT

5. The parties handed a common bundle of documents into evidence and which was supplemented on the day of the arbitration. There were no objections recorded by the parties to any of the documents in the bundle.

6. Vermaack testified under oath on his own behalf. Mr Thembani Ngantweni (Ngantweni) and Ms Patience Faith Hurst (Hurst) testified under oath for the respondent.

THE EVIDENCE:

7. Vermaack had performed the functions required by the position even prior to its having become vacant.

8. There were other candidates for the position and one, Ms. Colleen Gouws (Gouws) was the successful candidate. Vermaack was an internal candidate while Gouws was a contract worker.

9. At the time that Vermaack had been appointed to act in the position Gouws was already in the respondent's employ.

10. When Vermaack learned that he was not the successful candidate he lodged a grievance wanting to know the reasons why he had not been appointed. When there was no official response to the grievance Vermaack launched this dispute.

11. Vermaack alleged that he scored the highest mark at the interviews. The respondent does not dispute this and in fact concedes in argument that that was the case.

12. According to Ngantweni Gouws had however been appointed on the basis that she had more confidence gained through her managerial experience in the private sector.

13. This was confirmed by Hurst in her testimony.

14. The post of State accountant itself started at junior management level.

15. Gouws could also learn the other requirements for the job while in the position. It was clear to the interview panel that Gouws could immediately manage a difficult department as opposed to a person who had never been in management.

16. While Vermaack was acting in the position he had performed a limited management function as most of that function was performed by Kobus Joubert (Joubert), an assistant director in the department.

ANALYSIS OF EVIDENCE AND ARGUMENT

17. An unfair Labour Practice dispute is a subject of proof by the party alleging existence and such proof is on a balance of probabilities.

18. In *SAPS v Safety and Security Sectoral Bargaining Council and Others [2010] 8 BLLR 892 (LC)* the Court set out the following principles to be applied when considering a promotion dispute:

The decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promotion is seriously flawed, the court and arbitrator should not readily interfere with the exercise of the discretion. Where the employee complains about the fact that another employee was promoted, he or she must show that he or she has the necessary skills and that the person who was promoted does not possess the same or same level of skills. The mere fact that the candidate who was eventually promoted did not score the highest mark or is not better qualified does not, however, necessarily justify the conclusion that the decision not to promote was unfair.

A commissioner or arbitrator is not the employer. It is not the task of the commissioner or the arbitrator to decide who the best or most suitable candidate is. The role of the commissioner is to oversee that the employer did not act unfairly towards the candidate that was promoted.

The mere fact that an employee is already in a post, does not give him or her an automatic right to promotion, even if such a position becomes available. Between these two principles, namely that an incumbent does not have an automatic right to promotion and the principle that the decision not to promote should be exercised in a manner that does not amount to an unfair labour practice, arbitrators (and the courts) must strike a balance as to what is fair or not in the context of a decision not to promote. In doing so, the court and arbitrator should be mindful of the fact that the right to promote, or not to promote, falls within the managerial prerogative of the employer. [At 897 B – 897 D]

19. There is clearly nothing in the evidence presented at this arbitration that would lead me to conclude that the respondent had acted in bad faith when deciding not to promote Vermaack.

20. The evidence shows in fact that while Vermaack did score the highest mark, that the consideration of the interview panel focused on an aspect of what Gouws had to offer the respondent in terms of adding greater value to the respondent.

21. The exercise of its managerial prerogative by the respondent was clearly not irregular and clearly not flawed in any manner whatsoever.

22. It is also clear from the aforesaid judgement that the incumbent in a post, such as Vermaack clearly was, does not have an automatic right to the position.

23. Having considered all the evidence presented at this arbitration I find that the conduct of the respondent in not promoting Vermaack into the position of State accountant does not constitute an unfair labour practice as contemplated in section 186(2)(b) of the LRA.

Award:

24. This application for relief in terms of the provisions of the LRA is dismissed.

COMMISSIONER: L. MARTIN

A handwritten signature in black ink, appearing to read 'Leslie Martin', written in a cursive style.

- i. Panellist/s: **Leslie Martin**
- ii. Sector: **Public Health & Social Development**