



ARBITRATION AWARD

Panelist: **Minette van der Merwe**

Case No.: **PSHS1055- 16/17**

Date of award: **16 August 2017**

In the matter between:

NUPSAW obo NL Moeti

(Union / Applicant)

and

Department of Social Development-Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION:

- [1] The arbitration was held on **26 July 2017** at the Respondent's offices in Bloemfontein.
- [2] The Applicant was present and represented by Mr Danny Sour, an Official from the NUPSAW whereas the Respondent was presented and represented by Mr Pule Utloa, a Labour Relations Officer from the provincial office of the Respondent.
- [3] No interpretation was required. The proceedings were not recorded as no evidence was led.

BACKGROUND TO THE DISPUTE:

- [4] The matter was scheduled for Arbitration in terms of section 186(2)(a) of the Labour Relations Act (Act 66/1995) (hereinafter referred to as “the LRA”), related to an alleged unfair labour practice in respect of promotion.
- [5] The following was agreed by parties:
- [5.1] The parties agreed to argue the merits of the dispute on heads of arguments only, as no witnesses were going to be called to testify and no oral evidence were going to be led.
- [5.2] The Applicant would submit heads of arguments no later than 02 August 2017.
- [5.3] The Respondent would submit heads of arguments in reply no later than 08 August 2017.
- [5.4] The Applicant may supplement its heads of arguments by no later than 11 August 2017, which it elected not to file.
- [5.5] Heads of arguments had to be submitted via e-mail to myself as well as the Bargaining Council.
- [5.6] An extension for the filing of the heads of arguments were granted, and the Respondent was granted time to file its heads of arguments until 11 August 2017 and the Applicant until 15 August 2017.
- [6] A further application for extension was sought on 15 August 2017, which was denied. On the date of the issuing of this award, I have not received the heads of arguments that was due on 15 August 2017.

ISSUE TO BE DECIDED:

- [7] I was called upon to determine the following:
- [7.1] Whether the Applicant is entitled to an upgrade from salary level 5 to salary level 7.
- [7.2] Whether the dispute was one related to promotion or not
- [8] As remedy, the Applicant sought to be upgraded from a salary level 5 to a salary level 7, with retrospective effect.

SURVEY OF EVIDENCE AND ARGUMENTS:

Heads of arguments from Applicant:

NOTE: This is a summary of the heads of arguments submitted:

- [9] The Applicant sought a promotion by way of an upgrade from salary level 5 to salary level 7. The basis of her claim is that she has been executing functions and duties on salary level 7 since the date of her appointment (27 October 2008), but has been remunerated on salary level 5. Logic dictates that the Applicant had been performing duties on level 7 salary level, and as such was entitled to a promoted to that effect. She lodged an internal grievance which was not entertained by the Respondent.
- [10] The Applicant relied on a Progression Performance Plan signed during 2014, and her Benchmark Job Description in support of her arguments, contained in bundle "A".
- [11] The Applicant submitted that the Employer is obliged to treat Employees the same and create a working environment where application and interpretation of the rules would create consistency and certainty. The Applicant was treated differently than other Employees despite the fact that she was due for an upgrade.

Heads of arguments from the Respondent:

NOTE: This is a summary of the heads of arguments submitted:

- [12] The Executive Authority may promote an Employee to a vacant post on the approved establishment of the Department if the vacancy has been advertised in terms of the Public Service Regulations Act. If there are sufficient funds, such a vacancy would then be filled in accordance with the advertised criteria and in accordance with the Respondent's Policies and Procedures.
- [13] The Applicant was appointed as a Human Resources Officer on salary level 5. She was placed correctly according to the approved Departmental Organization Structure. The Applicant is not being treated unfairly.

[14] The Applicant was placed on a salary level 7 for an uninterrupted 12 months to gain experience as a Principal Personnel Officer, and she is remunerated accordingly. The duties the Applicant alleged she is doing, is highly disputed.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[15] I was referred by the Applicant to cases before the PHSDSBC of similar matters. I am not bound by the awards of other PHSDSBC Arbitrators.

[16] In deciding whether a dispute involves a promotion one has to compare the Employee's current job with the job or post applied for to determine whether promotion is involved. See ***Mashegoane & another v University of the North*** [1998] 1 BLLR 73 (LC) as well as ***Jele v Premier of the Province of KwaZulu-Natal & others*** (2003) ILJ 1392 (LC). The Applicant, Moeti, did not prove that she applied for a vacancy or an advertised position within the Department.

[17] A person's subjective desire to be promoted does not necessarily satisfy the criteria for a dispute to be categorized as an unfair labour practice related to promotion.

[18] In ***Noonan v Safety and Security Sectoral Bargaining Council and Others*** [2012] 33 ILJ 2597 (LAC) it was held that there is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. From the Applicant's arguments, it seems that the Applicant, Moeti, is of the view that she has an entitlement to promotion in the ordinary course.

[19] Most importantly is the judgment of ***Mathibeli v Minister of Labour*** [2015] 3 BLLR 267 (LAC) where the Labour Appeal Court held that a dispute about regarding or upgrading may be categorized as an unfair labour practice dispute related to promotion, but an Applicant still needs to discharge the onus and make out a case for a promotion dispute.

[20] The onus vested in the Applicant to prove that an unfair act was committed by the Respondent related to promotion, in terms of section 186(2)(a). The Applicant did not prove that the Respondent has exercised a discretion in terms of an appointment, or

that it exercised a discretion and that its discretion was exercised capriciously, for unsubstantiated reasons or that the decision was taken on a wrong principle or in a biased manner. The Applicant further did not prove that the dispute related to an alleged unfair failure or refusal to promote (my emphasis). A disputed failure to appoint (my emphasis) an Applicant to a different position, albeit upgraded, will not necessarily be classified as a dispute concerning promotion.

[21] The Applicant further alleged discriminatory treatment by the Respondent, a claim over which the Bargaining Council lacks jurisdiction. Should the Applicant wish to pursue a claim related to discrimination, she is advised to refer such a claim to the CCMA.

[22] The dispute does not fall within the ambit of section 186(2)(a) and therefore the Bargaining Council lacks the jurisdiction to determine this matter.

AWARD:

[23] The Applicant, **NL Moeti**, failed to prove that the Respondent, **Department of Social Development**, committed an unfair labour practice in terms of section 186(2)(a), and therefore the Bargaining Council lacks the jurisdiction to determine this matter.

[24] The claim for unfair labour practice related to promotion is hereby dismissed.

[25] I make no order as to cost.

Signature:

A handwritten signature in black ink, appearing to read 'M. van der Merwe', is written on a light green rectangular background.

Panelist: **Minette van der Merwe**