



ARBITRATION AWARD

Commissioner: **Janine Carelse**

Case No: **PSHS1167-19/20**

Date of award: **24 August 2020**

In the matter between:

PSA obo CHRISTIAAN MYNHARDT

APPLICANT

and

DEPARTMENT OF HEALTH – WESTERN CAPE

FIRST RESPONDENT

and

RICHARD PIETERSEN

SECOND RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was set down for 13 August 2020 and was heard by means of Zoom Video Communication technology. The parties agreed to the matter being heard in this manner. The proceedings were digitally and manually recorded, and the matter proceeded in English.
2. The applicant was present and represented by Mr. C Appels, an official at PSA. The first respondent was represented by Mr. Mniki, a labour relations official employed in the

respondent's labour relations unit. The applicant referred an alleged unfair labour practise dispute relating to promotion.

3. The first respondent handed in a bundle of documents on which it relied as documentary evidence.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the first respondent committed an unfair labour practice against the applicant when it failed to promote him to the position of Chief Forensic Pathology Officer.

BACKGROUND TO THE MATTER

5. The applicant is employed by the first respondent as a Forensic Pathology Officer Grade 2. The applicant applied for the promotion post of Chief Forensic Pathology Officer at the Salt River branch. He was invited for a practical and an interview, however, he was unsuccessful and ranked second at the interview process. The applicant averred that he was not aware that the interview and practical would be held on the same day. He stated that if he was aware that his interview would be on the same day as his practical and if he had time to prepare for the interview, he would have ranked first and been promoted to Chief Forensic Pathology Officer. The applicant seeks to be promoted to Chief Forensic Pathology Officer.

SURVEY OF EVIDENCE AND ARGUMENT

Evidence

Applicant's evidence

6. The applicant testified under oath and stated that he is currently a Forensic Pathology Officer Grade 2 and he applied for a promotion position of Chief Forensic Officer at Salt River. On 18 September 2019, Ms. Safia Samodien (Samodien), sent him an email inviting him to an interview on 26 September 2019. She sent a subsequent email on the same day a few minutes later stating as follows: "Apologies it should read prepare yourself for a practical". He contended that after this email, he was under the impression

that only the practical part of the interview process would take place, where he would have to answer HR and budget questions. He stated that the practical is usually done before the actual interview which is held at a later date. The preparation for the practical and the interview is different. When he arrived at the Head Office on 26 September 2019, he was advised that the practical and the interview would be conducted on the same day. He told Samodien that it is not fair that he is interviewed on the same day as the practical because he was under the impression that it would only be the practical. He contended that had he known that the interview would be conducted on the same day, he would have prepared for the interview by gathering information relating to the relevant facility. He referred to the document in the respondent's bundle showing that he scored 64% at the interview which made him the second-best candidate for the post. He stated that he only prepared for the practical and had he been aware that he would be interviewed on the same day, he would have contacted the facility manager to find out the quantity of vehicles, storage, doctors and number of admin people there are at the facility. The second respondent, Pietersen, was a Senior Forensic Officer at Salt River and acting Chief Forensic Officer. He feels that Pietersen had an advantage over him because he worked at the facility and he knows the ins and outs of the facility. What is more, the chairperson is stationed at Salt River and therefore he knew Pietersen, which was a further advantage for the successful candidate.

7. Under cross-examination he stated that he has acted in a Chief Forensic Officer post previously and he has an idea of what is required for the position. The core job is the same, but it differs from facility to facility. He has only acted in rural facilities, whereas Salt River is one of the biggest facilities. He stated that it is difficult to plan on anything if you don't know how many vehicles, personnel and shifts there are. In this case, Pietersen knows what resources there are at Salt River. He conceded that he can strategize if he makes up hypothetical situations. He conceded that Pietersen did not have an unfair advantage over him. The unfairness comes in when he was invited for a practical but interviewed on the same day too. Previously when he was invited to participate in interviews, he would first be invited to a practical and if successful in practical, he would be called for a formal interview. He scored 64% in the interview, whereas Pietersen scored 71%. He does not know and cannot say how Pietersen scored more than him for the interview. He conceded that he has been interviewed for Chief Forensic Officer post

before. He conceded that being called for an interview does not mean that he will be successful. He averred that he was misled by Samodien when she advised that he was invited for a practical only. He believed that when Samodien sent the second email, she thereby cancelled the first email. He denied that the panel of interviewers' version that he told them that he had travelled all the way there so the interview may continue. He stated that the chairperson told him that "you cannot prepare for an interview". The panel insisted that he must continue with the interview. He conceded that he did not ask for the interview to be held on another day.

8. Under re-examination he stated that he informed the panel that he was not prepared for the formal interview because of the email he received from Samodien informing him that he must prepare for a practical. He further averred that it is not normal to go for an interview and a practical on the same day and that that is the normal practise. He contended that nothing prevented him from asking questions to the panel, that he was not able to ask the relevant people at the facility, prior to the interview.

First respondent's evidence

9. Mr. Wayne Mitten testified for the first respondent under oath and stated that he was the chairperson of the interview panel and the facility manager at Salt River. The benchmark was set at 70% and the successful candidate scored 71% and the applicant 64%. He averred that the applicant stated that he was not aware that the formal interview would be held on the same day as the practical. He asked the applicant if he wants to postpone the interview and he said that he wants to proceed. He contended that the applicant said that he had driven all the way from Hermanus and so they might as well carry on. He stated that the Salt River facility is one of the busiest in the country and a lot of responsibility is attached to that post. He stated further that if the applicant had contacted him prior to the interview to ask him questions about the facility, he would not have been able to assist him, considering his position as the chairperson of the interviews. The applicant is aware of what the job entails and has the inherent requirements for the job. The interview questions were based on forensic pathology and nothing exceptional to the facility was asked. At the end of the interview the applicant agreed that he was happy. They would have postponed the interview if the applicant wanted to.

10. Under cross-examination he stated that Samodien's email was not misleading and that the applicant had indicated that he will attend the interview, even after Samodien's email that he must prepare for the practical. The applicant was therefore aware because why would he say, "I will attend the interview". He denied saying that one cannot prepare for an interview. The applicant had already been in Forensic Pathology Services when he applied for the post. If the applicant wanted to postpone the interview, then they would have most likely postponed the interview. He averred that he is a fair person and he will give each person a fair opportunity. The applicant worked at there for a period of about five years. As the chairperson, he is not allowed to take into account his personal knowledge of the candidate's experience into account.
11. Under re-examination he stated that there were four interview panel members and they all scored individually. He believes that the communication sent by Samodien was sufficient.
12. Ms. Safia Samodien testified for the respondent under oath and stated that she was the scribe for HR on the day of the applicant's interview and she represented the panel as the HR representative. She was responsible for inviting the shortlisted candidates to their interviews and she communicated with them via email. The emails that she sent out was exactly the same for all of them. She did not have any complaints from the other shortlisted candidates, only the applicant. She recalls the applicant saying that he came all the way from Hermanus and that the interview must continue. She stated that she initially invited the candidates to their interviews and her second email was simply to alert them to the fact that there will also be a practical and therefore her second email did not replace her first email. She averred that the panel continued with the applicant's email because he told them that he had come all the way from Hermanus. Her second email was to correct the typo she made in the first email. The applicant did not say that he was not ready for the interview, he said that he did not know that he also had to attend a formal interview. She contended that the panel has the prerogative to do a practical and interview on the same day and there is no policy preventing it from doing this. In the Metro they do both on the same day and in the rural areas it is usually done separately, first practical and then interview.

13. Under cross-examination she stated that she is an assistant director in HR and at the interview she was the scribe and representing HR. She simply followed up her email to indicate that the candidates will be subject to a practical as well. A practical assessment is a competency assessment which is different to an interview. The applicant had an opportunity to state that he did not prepare from the interview and that he needs more time to prepare. She cannot recall Mitten saying that one cannot prepare for an interview. They would have rescheduled if the applicant said that he was not ready for the interview. As far as she knows, all of the functions are the same for chief forensic officers.

ANALYSIS OF EVIDENCE AND ARGUMENT

14. It is trite law that an employee who alleges that the employer perpetrated an unfair labour practice relating to promotion bears the onus of proving the claim on a balance of probabilities. It is a well-established principle that employees do not have a right to be promoted in the ordinary course and that they only have a right to be given an opportunity to compete for a position. In *Noonan v Safety and Security Sectoral Bargaining Council and Others* [2012] 33 ILJ 2597 (LAC), the Court confirmed that an employee must be given a fair opportunity to apply for a post and to be considered and unless the selection process is rigged or arbitrary, an arbitrator ought not to intervene. A process will be rigged if it is motivated by improper consideration such as discrimination, victimization or corruption. The Court went on to hold that it will be arbitrary if the decision has little or no rational basis.

15. The applicant's version is that the respondent failed to provide him with sufficient time to prepare for his interview. He stated that after Samodien sent a second email, after inviting him for an interview, he was placed under the impression that he was only invited for a practical. The first email Samodien sent is as follows:

"Dear Mr Mynhardt

You are accordingly invited for the an interview in respect of the vacant post of Chief Forensic Officer, Salt River Laboratory:

Date: 26 September 2019

Time: 11h30

Venue: FPS Boardroom, Tygerberg, Head Office

Kindly prepare yourself for an interview and also confirm your availability

Kindest Regards

Safia Samodien.....”

16. The second email reads as follows:

“Apologies it should read prepare yourself for a practical.”

17. Samodien testified that she made a typographical error in the first email and that she sought to rectify it in her second email. She stated that she only sought to amend the last sentence in her first email and not the first email in its entirety. I agree with this version, as it is the only logical and probable version in the circumstances. It is clear that Samodien left the first sentence unaltered in her second email, which categorically states that the applicant is invited for an interview. Both Samodien and the applicant testified that a practical and an interview are different. It should be borne in mind that the applicant is used to having the practical conducted separately from the interview. He testified that usually a practical is conducted first, where after the interview is done at a later date. Samodien confirmed that this is how it is done in the rural areas. In view hereof, and on a balance of probabilities, I am convinced that the applicant had read Samodien’s email in this context and based on his previous experience of how the recruitment process was conducted. I do not find any arbitrary or malicious intent on Samodien’s part and find that she had made a genuine error in her first email.

18. The applicant testified that the second respondent had an advantage over him, as he was employed at the Salt River branch at the time of the interviews, however, he conceded that the second respondent was not given an unfair advantage over him. The applicant further alleged that the Chairperson of the interviews is employed at the Salt River branch and therefore second respondent had a further advantage because of this. The respondent led evidence that the interview panel consisted of four panellists and the chairperson was not the only person making decisions. The chairperson, Mitten, testified and he came across as a reliable witness. I have no reason not to believe that Mitten was an impartial and unbiased chairperson. The applicant thus failed to prove that

interview and selection process was rigged, and that Mitten acted arbitrary in the interviewing process.

19. The applicant further testified that if he had time to prepare for the interview, he would have been the successful candidate. The applicant contended that he would have contacted the facility to establish what the numbers were, inter alia, in relation to the vehicles, storage, shifts, doctors at the facility. Under re-examination the applicant stated that nothing prevented him from obtaining this information from the panel at the interview itself. Moreover, the evidence is clear that the applicant was given an opportunity to request a postponement of the interview and that he relinquished that opportunity by insisting that his interview proceed. This evidence was given by both the first respondent's witnesses, which I have no reason to doubt. In the light of the aforesaid, I find that the applicant failed to substantiate his averment that he would have been the successful candidate if he had time to prepare for the interview. The applicant's chances of being successful may have been increased had he prepared for the interview but contending that he would have been successful is a bit farfetched. Did the first respondent act unreasonably? I think not, it seems to me that they would have postponed the interview had the applicant requested it. The applicant on his own volition and maybe to his detriment, wanted to continue with the interview. In the light of the aforesaid, I find that the first respondent has not caused the applicant to suffer any prejudice.

20. In the result, I find that the applicant has failed to prove, on a balance of probabilities, that the first respondent committed an unfair labour practise against him when it failed to promote him to Chief Forensic Pathology Officer.

AWARD

21. The first respondent did not commit an unfair labour practice against the applicant.

22. The applicant's claim is dismissed and he is not entitled to any relief.



.....
Janine Carelse