



ARBITRATION AWARD

Case No: **PSHS1354-18/19**

Commissioner: **Maureen de Beer**

Date of award: **21 December 2020**

In the matter between:

NEHAWU obo Milanie Bennett

(Union/ Applicant)

and

Department of Health- Western Cape & 1 Other

(Respondent)

Details of hearing and representation

1. This matter was scheduled for an arbitration hearing on 24 July 2020, 17 August 2020, 12 October 2020 and 7 December 2020, at the Western Cape College of Nursing in Athlone. The applicant, Ms. Milanie Bennett, was represented by Mr. Makhaya Cagwe, an official of the union NEHAWU. The first respondent, the Department of Health – Western Cape, was represented by Mr. Mvuzo Ngqame. The second respondent, Ms. Isobel Jacobs, unrepresented.
2. The dispute concerned an alleged unfair labour practise in respect of promotion as contained in section 186(2)(a) of the Labour Relations Act 66 of 1995.

3. The arbitration of 17 August 2020 was postponed due to Ms. Jacobs being medically unfit. She notified the first respondent on 7 August 2020 but failed to notify the Council and the applicant. The applicant requested costs. I indicated that costs will be reserved until the end of the process to allow Ms. Jacobs an opportunity to respond. At the end of the arbitration process parties agreed to give closing arguments in writing. There was an outstanding issue of witness which I needed to issue a ruling on. I advised the parties that should I rule that the particular witnesses should testify, there will be no need for closing arguments and that the matter will be set down again. I further indicated that should I rule that it is not necessary for further testimonies, their closing arguments needed to be submitted by 14 December 2020. I issued a ruling on 9 December 2020 and indicated that the closing arguments must be submitted by 14 December 2020, since I deemed it unnecessary for the particular witnesses to testify. I was informed by the Council that the applicant never received the ruling. On 17 December 2020 the ruling was resent and the applicant's representative was requested whether their closing arguments could be submitted on the same day. There was no reply by the representative. Only the respondent submitted closing arguments. Due to prescribed time frames, the award was submitted to the Council on Monday, 22 December 2020.
4. The arbitration proceedings were digitally and manually recorded.
5. For the purpose of this award, I will refer to the applicant as "Bennet"; first respondent as "the respondent"; and the second respondent as "Jacobs".

Background

6. In a previous arbitration chaired by a different commissioner, Jacobs was joined as a party to the dispute.
7. Bennet applied for a position of Assistant Manager of Nursing for the Western Cape Rehabilitation Centre (WCRC), prior to the closing date of 6 October 2017. The second respondent, Ms. Isabel Jacobs, was appointed in the post on 1 April 2018. The salary level for the post was R499 95.00 per annum. The applicant was at the time

appointed as a clinical program coordinator at Khayelitsha Hospital Training Department. She was on a salary level 10 and earned approximately R400 000.00 per annum. She is now currently in the same post and earns R530 075.00 per annum. The position she applied for was on the same salary level but the salary package was higher. Currently it is R569 000.00 per annum.

8. Bennet was not shortlisted to be interviewed for the post. She lodged a grievance on 16 May 2018. On 3 October 2018 her grievance was referred to the Office of the Public Service Commission (PSC). Her grievance was found to be unsubstantiated. The respondent indicated that Bennet was not shortlisted because there was a requirement that three years out of eight years relevant experience as a nurse, must be managerial experience. Bennet's curriculum vitae (CV) never reflected the latter and she failed to quantify her experience. The interview panel only relies on the information in her CV. It was argued by Bennet that she had the relevant qualification and experience as required in the post advert. She further argued that there was a procedural irregularity by the respondent in respect of the grievance procedure. The grievance should have been resolved in 30 days. Bennet only received a response on 28 September 2018. She indicated that she sought monetary compensation as of 1 April 2018 and further to be appointed in a similar position, which should be negotiated with her by mutual agreement.

Issue to be decided

9. I am required to decide whether the respondent has committed an act or omission of unfair labour practice in relation to promotion. Should I determine that the respondent had committed an unfair labour practice, I must award appropriate relief in favour of the applicant.

Survey of evidence

The applicant's evidence and arguments

10. Bennett testified that in her post she manages the training department in Khayelitsha. She has two (2) staff members, whom she manages, being a clinical trainer for general stream and a clinical trainer for specialty stream. She also occasionally has a clerk or intern whom also supervises. She referred to the job descriptions of the people she managed. These were separate documents, which was not included in her CV. She further testified that in terms of her performance plan she is responsible for effective management and utilisation of human resources. She also managed leave of training department staff and managed her allocated cost center. Her cost center budget is for training which is needed for the hospital. She has to procure courses for managers.
11. In terms of the organogram of Khayelitsha hospital, she falls under the deputy nursing manager, in her role as assistant manager (together with five other assistant managers in various departments). She indicated that she is in line with the others, as the sixth person reporting to the deputy nursing manager. She further testified that she explained her current role thoroughly in her CV and read same into the record. She further indicated that nobody made reference to that part of her CV when she submitted a grievance. There was reference made to her work experience in the United Kingdom (UK). She however returned to South Africa in 2010 and started working in 2011. The latter was not taken into consideration by the respondent.
12. She further testified that she met the minimum educational qualification as advertised in the post and that she was registered with South African Nursing Council. At the time she applied she had 21 years' experience, as opposed to the minimum requirement of eight years appropriate or recognisable experience in nursing. She further indicated that she had five years managerial experience. The post required at least three years appropriate/ or recognisable experience at management level. She also indicated that she met the required competencies, as contained in the advertisement for the post. Bennet also referred to the short-listing sheet. This document contained the scorings of various applicants for the post in relation to the minimum advertised requirements.

Bennet indicated that no score or recognition was given to her experience under the requirement of a minimum of eight years appropriate or recognisable experience in nursing. The requirement for three years appropriate/ or recognisable managerial experience was also left open. She had computer literacy skills but a "No" was reflected in respect of that requirement. She was told that the latter was an oversight. When the matter was referred to the Office of the PSC, she was consulted by the investigator, Mr. Erasmus, who came to her in November 2018. He went through her CV word for word and admitted to her that she should have been shortlisted. When his report came, he however sided with the respondent. She requested for the investigation report but to date she has not received it. She only received a summary of the outcome. The PSC's written response indicated that her grievance was found to be unsubstantiated based on the fact that her CV did not meet the standard to be shortlisted for the post; she should have elaborated on the period of a management capacity and provided greater clarity of the actual managerial duties versus her assisting role; and her current duties was not aligned to the advertised requirements in her CV. She reiterated that no one referred to her current position as a clinical coordinator, which in short was a manager of the training department. When she asked Mr. Erasmus for the minutes of their meeting, she was then informed that he retired.

13. She further testified that she does not just handle a program but that she manages a department and staff. She further manages a budget; compile operational plans; participate in recruitment and selection; and she also manages adverse incidences. The latter occurs when something bad happens to a patient, she investigates and make recommendations. With her two staff there is not a lot conflict but when it comes up, it is dealt with.
14. On 30 August 2018 the office of Chief Director responded by saying that her grievance was referred to them since it could not be resolved on institutional level. It was further indicated that the panel revised her application and the selection criteria; that her CV did not elaborate the time period and role spent in management capacity; that she indicated in her CV that she functioned in an assisting role; that it was not clear that she managed the department or unit in a full time capacity for at least three years. It was also mentioned that feedback was given to her in a letter dated 30 July 2018.

15. She testified that she indicated on page 9 of her CV that she resigned from her previous position in December 2011. That experience calculated with the experience she had at the time she applied equaled to five years experience. She was of the opinion that she met the criteria.
16. When she was not shortlisted, she enquired first with Ms. Saville on 12 April 2018. When she failed to get a reply, she wrote a second email on 20 April 2018. There was again no response and she then wrote to human resources (HR), Ms. Van Buuren on 30 April 2018. She also failed to respond. It was only after she submitted her grievance on 16 May 2018 that she received a response from Van Buuren. In cross-examination it was pointed out to Bennet that her grievance was responded to twice: on 8 June 2018; and on 30 July 2018, by chairperson, Laetitia Saville. The responses were read into the record by Bennet. In September 2018 the Chief Director of People Management also responded to her grievance. Eventually her grievance was also unsuccessful at the PSC. It was put to her that in summery her duties were not aligned with the position. She disagreed and insisted that the duties contained in her CV were aligned with the post. It was further pointed out to Bennet that she was not shortlisted due to the information in her CV indicating that functioned in an assistant roll. Bennet submitted that she does manage a unit and that she exceeded that requirement of the post.
17. She believed she was unfairly treated; her CV was not fairly assessed; she clearly stipulated what her role was as clinical operator; she met the requirements of eight years' experience and had five years managerial experience. She managed a department and HR; hence she could not understand why the respondent did not acknowledge her function or role as a clinical coordinator. In cross-examination Bennet indicated that her work since 2012 entailed 90% managing her department and 10%, as clinical coordinator. She further indicated that even though her KPA's is training related; she still needs to see that the work gets done in relation to the purpose of her department. She disagreed that her role only involved training but indicated that it has everything to do with quality issues. It was put to her that the chairperson will testify that that her annual plan has to do with the training only and not service delivery issues, such as implementation of service delivery; operational plans; quality assurance; or

ensure a mixed skill in all areas. Bennet's comment was that it had everything to do with that. It further put to her that the statistics she worked with was training statistics and not hospital statistics. She agreed but said that the statistics indicated what she did in the hospital regarding adverse incidences as well. Bennet further indicated that she also managed complaints and that she recently dealt with a client who received incorrect wrong blood transfusion. She also indicated that the quality assurance person only deals with a complaint (investigation of blood transfusion), it when it has already been investigated. The drug register are covered when they do the training of drug management. She does not physically manage the drug books. She also does not directly work with medical equipment. She further testified that her job is integrated. She teaches people patient care, which is a service to the hospital.

18. Further and relating to management, Bennet referred to a part in her CV where she indicated that she deputised in the absence of a manager. It was put to her that she never quantified the period she did that. Bennet indicated that when a specific person was not at work for a day she would deputise. It was however very difficult for her to calculate all the times or quantify the periods she deputised. She was also not able to quantify the period she deputised in the absence of Deputy Director of Nursing (as contained in her CV).

19. The following witness called in the applicant's case was Sithembiso Sam Manga. He worked with Bennet. He was a clinical coordinator for infection control. He indicated that when he applied for the same post as Bennet, the reason given to him for not being short-listed; was the fact that he did not manage people. He confirmed that Bennet managed staff. He also referred a dispute to the Council and read sections of his award into the record. In cross-examination it was put to Manga that his case had there no relevance to Bennet's dispute. Manga indicated that their cases were similar.

The respondent's evidence and arguments

20. Ms. Grace Mashaba, the deputy manager of nursing at Khayelitsha Hospital, was the first witness for the respondent. She occupied that post since October 2013. She worked with Bennet at Khayelitsha District hospital from 2013 to 2018. She denied that

she ever appointed Bennet to deputise in her post. She will normally issue an acting letter to the person who will deputise in her post when she is not at work or at leave. It was put to Mashaba in cross-examination that the acting letters are not consistently issued. Mashaba indicated that she cannot account for the Department of Health but that she always ensures that the acting letter is issued by her personally. She indicated that someone else possibly appointed Bennet to deputise. Mashaba also said that she will appoint one of three day assistant managers, should she require someone to deputise for her. There are five assistant managers (three on day shift and two on night shift). Should one of them not be available, the next line to deputise will be the operational manager. In cross examination it was put to her that an email exists which can confirm that the applicant acted in her deputy role before. Mashaba indicated that she did not recall the email. The email was not available. It was indicated by the applicant that they were not aware that Mashaba will be called to testify and thus they have not brought a copy of the email. I allowed the applicant an opportunity to search for the mail and asked Mr. Ngqame to assist her. They were unable to find the email on the internet server at the specific venue of the arbitration. I then allowed the applicant an opportunity to send it from her email the following day. I instructed the respondent to submit an objection that same day (being 13 October 2020), should they be unhappy with the email submitted. Ms. Bennet sent the email to the respondent the next day but the respondent failed to respond. On the day of the next arbitration hearing (being 7 December 2020) the respondent submitted its objection and indicated that the email came from Ms. Mashaba's assistant, Ms. Lombi and that Ms. Mashaba denied that she issued such an instruction. Ms. Mashaba was not available to testify due to COVID-19 related issues. It was also indicated that Ms. Lombi no longer worked for the respondent. The email only reflected that the applicant deputised for one day. Several people were copied in the email, including Ms. Mashaba. The respondent failed to submit its written objection, as determined by myself. In order to save time and not to drag the matter out any further, I accepted the email on face value. In re-examination Mashaba indicated that the period Bennet deputised was also not quantified or reflected in her CV.

21. Mashaba further testified that Bennet compiles monthly training statistics and submit same to the HR Development (HRD) office. She also confirmed that Bennet was part

of the adverse care unit where she would investigate cases assigned to her relating to patient care. She would work with a team, including a manager and/ or assistant nurse; she will investigate staff competencies; and make a recommendation to be implemented.

22. In respect of the particular post, Mashaba indicated that a managerial post consists 60% administrative and managing of services; and 40% operational activity. When she compares Bennet's role with the post, Bennet coordinates the training program for the nursing department and the facility; and a manager manages the stream or section allocated to him or her. The three main streams are the general stream; obstetrics; and acute emergency. A clinical manager at training ensures that staff is trained and competent. The roles for the advertised post were based on clinical governance, community support, patient care, corporate governance and external governance. Some of these functions are performed by the clinical program coordinator but are different. It was Mashaba's opinion that when comparing the role of Bennet as contained in her CV, with the advertised post, she would not have short listed her. The clinical manager's involvement in key performance areas (KPA) and output differed from the clinical coordinator in respect of key result areas (KRA's). In cross-examination it was pointed out to her that she was not part of the panel. In cross-examination she agreed that the scope of an assistant manager was not contained in the advert. She further indicated that should she have been involved in recruitment of the post, she would have shortlisted a person who had skills in line with the post (such as an assistant manager for a specialised unit). As a nursing manager, she felt that she has the knowledge of the caliber of person needed for the post. She acknowledged that Bennet manages nursing training staff but indicated that Bennet did not have the appropriate managerial experience to be shortlisted for the post. According to Mashaba the post required an assistant manager, with the experience and skills of an assistant manager. She only knew Bennet as a clinical coordinator and was not aware of her other skills. In Mashaba's opinion she would not have shortlisted a clinical coordinator because he or she will not have the experience and exposure for the post.

23. In respect of the nursing department's organogram, Bennet's role as clinical programme co-ordinator, is aligned with the five assistant managers (referred to

earlier). Mashaba indicated that her role is aligned due to the nursing support services which that department provides; and due to the fact that Bennet reports to her. Bennet manages a clinical training department, not a nursing stream. She agreed that budgets are allocated to Bennet.

24. Her further evidence was that duties such as bed totals, patient care quality; complaints; support; drawing up of operational ward plans; etc, will be mainly fulfilled by the operational manager. The clinical coordinator will draft plans for training; not wards.

25. The second witness for the respondent was Henrietta Peach. She worked for the respondent in the department of People Strategy. She testified that there are four nursing streams, i.e. general stream; specialised stream (theatre, IUC, etc.); primary health care; and lecturer stream. When a person qualifies as a nurse, he or she qualifies as a nurse general. A clinical program coordinator also falls under general stream. A person can then advance to either operations manager nursing general or clinical program coordinator, which is the same grade. The next step is the assistant manager and general manager nursing. A person who wants to stay on the clinical side of nursing can choose a career of operations manager; and will be in charge of a unit on a hospital or in charge of a clinic. The KPA's for a clinical training coordinator; an operations manager; and an assistant manager are different. A clinical program coordinator is responsible for programs and does not manage a unit. He/ she is further responsible to see where the needs are and assist operational and assistant managers to do training for nursing personnel. An operations manager and an assistant manager will manage a unit and do clinical work. A clinical coordinator does not manage patients. An assistant manager holistically and clinically manages patients. Peach also said that in Bennet's current role she is not responsible for bed totals and bed occupancy. In cross-examination it was put to Peach that Bennet in fact does manage a unit. According to Peach it was not contained in her CV. She regarded Bennet as a supervisor. She indicated in her CV that she managed a team, not a unit. She further failed to indicate the period she was performing such managerial duties. Bennet indicated in her CV that she resigned from her post at Netcare N1 City Hospital on 31 December 2011, after being successfully recruited for the post of Clinical Programme Coordinator in the training Department of Khayelitsha Hospital. She then tabled her

role/ or duties. She failed to mention when she started at Khayelitsha Hospital. Bennet's CV also did not mention that she managed a budget; and whether it was in a unit or hospital. She further indicated that there are different types of clinical coordinators. It depends on the size of the hospital whether the specific person managed a unit or not. Bennet included in her CV that she provided monthly reports on training related matter and a financial report on her cost center expenditure. Peach explained that when there is a financial meeting; each unit will say what their cost for the month was. The finance manager will ensure that they have the necessary funds. According to her Bennet had no managerial experience.

26. In respect of the information on Bennet's CV, she indicated that she was appointed as a junior sister in an 8 bedded cardiology unit in Tygerberg Hospital. Her duties included deputising in the absence of the senior sister. The period she deputised was however not quantified. It was further indicated in her CV that in January 2000 she was promoted to senior sister to 20 bedded high dependency cardiology unit. In that post she also indicated that she deputised in the absence of her manager. Here she also failed to indicate the period(s) she deputised. In December 2001 Bennet was employed at the heart hospital. She also indicated that her daily duties included deputising in the absence of her manager. Here too Bennet failed to indicate the period she deputised. In her role as clinical program coordinator in the training department (at Khayelitsha Hospital), Bennet included into her roles that she often deputised in the absence of the Deputy Director of nursing. Here she also failed to indicate the period she deputised. Peach indicated that when a person deputise, there is normally a letter that will be issued. Without the necessary documentation and relevant periods, a person cannot be shortlisted. In re-examination Peach said that it did not make sense to her that Bennet would deputise in the role of Deputy Director of Nursing, since there will be assistant managers and clinical assistant coordinators to deputise in that role.

27. She further testified that although Bennet at the time she applied for the post, managed a team of two nurses; they looked for someone who had managed a unit, with subordinate professional nurses, i.e. staff nurses and nursing assistants. The candidate should also have managed HR, stock, etc for a unit. Bennet's experience

was similar to a supervisor and not a manager. Bennet indicated in her CV that she participates in the recruitment of staff. To Peach this did not mean that Bennet appointed her own staff. A person can sit on any interview panel, since you are invited to do so. She agreed with the outcome of the PSC in respect of Bennet's grievance. Peach further said that the short-list panel will have KRA's and also work with percentages. A benchmark will be set. Each CV will be checked against the advertisement and scored accordingly. Qualifications will first be checked. Should the qualifications not be met, the application will be disregarded. The KRA's will then be checked against the person's CV. Should all the requirements be met but the person fails the benchmark, such application will also be disregarded. Taking into account the KRA's, she would not have shortlisted Bennet.

28. It was put to Peach that grievances must normally be resolved within 30 days and that the respondent has failed to do that. Peach agreed to the time period but was not able to say why Bennet's grievance was not resolved in that time. She was not involved in the investigation of her grievance. She concluded to say that had Bennet included all the necessary requirements in her CV, she would have been invited to an interview.

29. The last witness for the respondent was Laetitia Saville. She is the Deputy Manager for Nursing at Western Cape Rehabilitation Centre. She testified that a panel was established (representing Equity) for the advertised post. She was part of the panel. She indicated that 50% of the committee will do the short-listing. Applicants' CVs will be looked at and compared against the KPAs and established benchmark. Those who reach the benchmark and score more will be invited for an interview. For high profile posts the benchmark is always 70%. She could not remember what the benchmark was for the particular post but indicated that it is never less than 60%. The post required three (3) years appropriate and recognisable experience in the clinical field. When an applicant's CV is scrutinised, the panel will look at an applicant's work from the start to the last job. They will also look at managerial experience of wards etc. When a person deputised, an acting letter must also be included. All the days a person has deputised will be added up in order to establish whether that applicant had the three years relevant experience. Saville agreed with the PSC's reasons for the non-short-listing of Bennet. She indicated that Bennet's experience was not necessarily

management related. The post was clinical on a management level. Recognised and appropriate experience in the clinical field was required. It was put to Saville that the advert did not contain that. But Saville indicated that the advert was clear.

30. She further indicated that Bennet's experience as a senior sister in 1997 was production nursing care. No managerial work was conducted there. She was just promoted to a different level, which was a rank as a promotion. On Bennet's CV she also included that she was employed at the Heart Hospital in London, in December 2001 and then resigned as deputy sister in December 2009. Saville did not believe that Bennet was a sister, since South African trained nurses must undergo UK training before they can become sisters. If she worked as a deputy sister in the UK, it is equivalent to a staff nurse. In cross-examination she indicated that this is what she heard. Bennet indicated that amongst her duties she deputised in the absence of her manager. This period was not quantified. They gave her the benefit of the doubt (since she indicated that she was a deputy sister) and checked her duties under the heading "Management" for that particular post. She indicated that she helped manage a diverse team of staff. This meant to Saville that Bennet only assisted and did not manage the team. She also noted under her duties in that post that she deputised in the absence of her manager. She also failed to mention the amount of times she deputised. Further in her CV, where it is indicated that she resigned from her post on 31 December 2011, subsequent to being recruited in her current post, she also mentioned that she managed a small team, consisting of two nurses and an intern. No time period was indicated in respect of those duties. Under the same post she also indicated that she often deputised in the absence of the Deputy Director of Nursing. There was also no time period allocated in respect of those deputising duties. There were further no supporting documents (i.e. acting letter) attached to her CV in order for the panel to verify the period. Saville also questioned why the deputy director would request Bennet to deputise, when she would have many assistant managers to fulfill her role in her absence. She then contacted the deputy director, who confirmed that she never requested Bennet to deputise in her absence. Bennet's duties were not aligned with the advert. Her role as clinical program coordinator, specifically related to training. She went through all the bullet points contained under Bennet's role as clinical program coordinator. She amongst others indicated that the costing Bennet dealt with, was in

respect of stationary and not medical or surgical supplies. She only included three functions in respect of the management of her team, being management of leave; performance in relation to their work; and Conduct and Ethics in the workplace. Saville said that HR included many things such as appointments, discipline, pension assistance, ill health, abscondment, etc. Although she indicated that she participated in recruitment, it was not specifically indicated that she recruited nursing staff. Her CV did not include management of bed occupancy. Her CV met a HR requirement but not a management requirement overall. The panel thus decided not to shortlist her.

31. In cross-examination Saville was asked why she took so long to respond to Bennet's Grievance. She indicated that the grievance was given to her via HR. Bennet was sick. Saville was also another facility and was also sick. The hospital asked for an extension to deal with the grievance. It was put to Saville that Bennet was never given the response as testified by her in the arbitration. Saville indicated that Bennet was told that she mentioned words such as "assisting" and "deputising", which was not relevant. Bennet did not meet the three year recognisable experience. She also indicated that Bennett's first enquiry was a face-to-face meeting with Melanie Van Buuren, when Bennet came on site at WCRC. Saville also indicated that she responded twice in writing to Bennet. The response in writing was a summery. Should she have given her all the details, the feedback would have been a book. She was of the opinion that her response to Bennet was satisfactory. It was only the time frame which was not complied with but apologies were made. In re-examination Saville was referred to her two written replies to Bennet's grievance. In the letter dated 8 June 2018 it reflected that three years out of eight years' experience must be appropriate/ recognisable experience at a management level. It was further stipulated that Bennet's CV did not meet that requirement because her CV mainly reflected duties in a clinical setting as a junior registered nurse and as a deputy sister in the UK. In her second response dated 30 July 2018, a more detailed description was given for why she did not meet the appropriate or recognizable management experience. Certain inclusions in her CV were highlighted and a response was given as to why it was not satisfactory. It was amongst others pointed out that her deputising periods were not clearly specified in her CV; she did not specify relevant ward training; where she indicated that she assisted with promoting opportunities for service delivery, time periods within a ward

setting were not indicated; and certain aspects of her current posts was not relevant to the particular post. It was also recommended that in future applications she needs to elaborate on the time periods in management capacity and provide greater clarity of the actual managerial duties v the assisting role on her CV.

32. It was put to Saville that Bennet reflected in her CV that she had five years experience. Saville denied this. She indicated that Bennet reflected in her CV that she commissioned a training department in 2012, which meant that she started something new. She also indicated that Bennet never mentioned in her CV that she managed trainers. The post was specific to ward management, which experience was lacking from Bennet's side. Saville admitted that on the assessment sheet completed by the regional office, Bennet was not scored for computer literacy. It was however picked up in her CV and recognised. A separate sheet was completed which comes on top of the applicant's file. That sheet was not included in the evidence bundle. She reiterated that Bennet was not shortlisted due to not having three years managerial experience. In respect of posts in the DOH, a detailed CV is required, with all the necessary certificates and diplomas must be attached. She further indicated that a manager needs attributes and characteristics that must be portrayed in a CV.

33. It was argued by the respondent that Bennet never challenged the post occupied by Jacobs, she failed to quantify the deputising roles and inadequate information was provided to the panel to shortlist her. She further misrepresented herself since Mashaba indicated that she never authorised her to deputise in her post.

Analysis of evidence and arguments

34. Unfair conduct of an employer relating to promotion of an employee, is included in section 186(2)(a) of the LRA as a form unfair labour practice. The definition or category of this matter being a promotion dispute was not disputed. Bennet has the onus to establish the existence of an unfair labour practice act or omission by the respondent. Bennet is required to show that the respondent acted capriciously, for insubstantial reasons; or on the basis of any wrong principle in a biased manner.

35. In this dispute Bennet was aggrieved that she was not shortlisted for a post; which ultimately prevented her from being promoted. In *Noonan v SSSBC and Others* [2012] 33 ILJ 2597 (LAC) it was held that there is no right to promotion in the ordinary course, only the right to be given a fair opportunity to compete for a post. Any conduct that denies an employee an opportunity to compete for a post, constitutes an unfair labour practice. If the employee is not denied the opportunity of competing for the post, then the only justification for scrutinising the selection process, is to determine whether the appointment was arbitrary or motivated by an unacceptable reason. As long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.

36. It was the Bennet's case that she should have been shortlisted for the post of assistant manager nursing at WCRC. She submitted that her CV was not fairly assessed in respect of the post she applied for. She met the minimum educational requirements and was a registered nurse. She testified that she had 21 years experience, as opposed to the required eight years. She also testified that she had five years management experience, as opposed to the required three years managerial experience. She disagreed that the role she occupied at the time she applied (and still occupies) was purely training related and gave evidence to this effect. She listed her current tasks in her CV but was of the opinion that it was not taken into account by the respondent. She also testified that she managed two trainers. She further said that she also dealt with HR. In terms of the organogram she was on the same level as other assistant managers. She also referred to the scoring sheet used to assess her competency to be selected for an interview and pointed out that there were several areas that was left blank, where she was not given recognition.

37. The respondent's case was that Bennet was not shortlisted because her CV was not compliant with the requirements of the post. In terms of her current post, Mashaba, Peach and Saville testified that her duties were not aligned with the post. Saville went through her duties point by point; and summarised that her duties were largely training related. The latter was also confirmed by Mashaba and Peach, who said that she managed a training programme and not a unit. It was testified by Mashaba that the only reason why Bennet's role was aligned with other assistant managers on the

organogram was due to the fact that Bennet directly reported to her; and that she provided a nursing support service. Peach indicated that Bennet's post was aligned with an operational manager. It was further stipulated that Bennet failed to indicate the periods she performed managerial duties and periods she deputised. No ward management experience was listed. In respect of the scoring sheet Saville indicated that Bennet was recognised for the relevant information on her CV and although it was not on the scoring sheet, it was recorded on another document.

38. I have scrutinised the requirements for the post and compared such with the CV of Bennet. The advert contained sub headings in respect of the requirements for the post. Such were: Minimum educational qualification; Registration with a professional Council; Experience; Inherent requirements of the job; and Competencies (knowledge/ skills). The aspects of minimum educational qualification and registration with a professional council were not disputed. In respect of 'experience', there was a requirement of a minimum of eight years appropriate/ recognisable experience in nursing, after registration. Bennet testified that she had 21 years relevant experience. This experience was not disputed. There was however a second requirement linked to experience, being that at least three years of the eight years (as referred above), must be appropriate/ recognisable experience at management level. The latter requirement is threefold. There must thus be managerial experience; and such must be appropriate or recognisable; and must be for a period of three years. Bennet's CV several times referred to instances where she "deputised". In one instance she included a heading "management" but indicated that she helped manage a team. She also indicated that she managed a small team of nurses in her current role. In respect of her previous roles and where she deputised, there was insufficient evidence to show the periods the applicant had deputised. Even though the duties she performed at that time may have been relevant to the post, she was required to show relevant managerial experience at that time, which she failed to quantify. Bennet thus failed to quantify the periods in order to establish whether she complied with the three-year relevant managerial experience. The current role she occupied was a training related position (i.e. the role she occupied at the time she applied for the post). Three witnesses testified that those duties were not aligned with the post. Based on the evidence submitted and a balance of probabilities, I am satisfied that Bennet thus did

not have the relevant managerial experience in respect of the role of clinical coordinator of the training department, which she occupied at the time she applied for the post. Bennet thus failed to show that she had three years appropriate/ recognisable experience at management level.

39. There was no evidence to suggest that only some requirements must be met for a candidate to be awarded an interview. In *Swarts v National Commissioner South African Police Service and other* (D/915/13) 2015 ZALCD 7 the court held that when considering an unfair labour practice dispute, it is not enough for the candidate to meet the minimum requirements required for the job. The question is whether Bennet met the inherent requirements of the job. Bennet was not denied an opportunity to compete for the post but was denied an opportunity to progress to the interview stage, since she failed to motivate in her CV that she had three years appropriate or recognisable experience at management level, which was an inherent requirement for the post. In *Noonan* the court also said that every applicant for a post is obliged to apply his or her mind carefully when applying for a post; and must do so honestly and diligently so as to compete fairly with other candidates. Bennet has thus failed to properly substantiate the relevant and necessary experience in her CV.

40. Bennet further disputed the procedural aspect of her demotion in respect of how her grievance was dealt with. She indicated that when she found out when she was not shortlisted, she wrote to Saville on 12 April 2018. There was no response and she wrote again on 20 April 2018; and still she received no response. She wrote to the HR and also received no response. She lodged a formal grievance on 16 May 2018 and only then got a response for HR. Saville indicated that she was not able to respond since she worked at another hospital; was sick and that Bennet was also sick at some time. An extension was requested. Bennet did not deny this. Two responses were given to Bennet. It was also indicated that Saville did not properly motivate her response to Bennet. I have considered the two responses given by Saville on 8 June and 30 July 2018; and find that the content was satisfactory. It summarised the clearly the decision of the respondent. In *Sun International Management (Pty) Ltd v CCMA and Others* (JR939/14) LC the court held that in promotion disputes it is not enough to merely show that there is breach of protocol or procedures in the recruitment process.

It is necessary for the complainant to show that the breach of procedure had unfairly prejudiced him/ or her. There was a valid reason for the delay in the response to Bennet and Bennet further failed to show any prejudice to her by the respondent.

41. Based on the evidence Bennet has failed to prove that the respondent has acted capriciously, for insubstantial reasons, which prevented her to be short-listed for a post where she possibly could have been promoted to the post of assistant manager nursing at the Western Cape Rehabilitation Centre.

Award

42. Bennet failed to show that the respondent committed an unfair labour practice.

43. Bennet's claim is dismissed.

44. There is no order of costs.



Commissioner Maureen de Beer