



ARBITRATION AWARD

Panellist: Bhekinhlanhla Stanley Mthethwa
Case No.: PSHS1459-17/18
Date of Award: 11 February 2019

In the ARBITRATION between:

HOSPERSA obo Govender, Yushan

(Union / Applicant)

and

Department of Health: KZN

(Respondent)

Union/Applicant's representative: A Johannes
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Respondent's representative: D Gabela
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Details of hearing and representation

1. The matter was scheduled for arbitration on 10 October 2018 and remained part heard; it was heard again on 16 November 2018 and 24 January 2019 at RK Khan Hospital in Chatsworth under the auspices of the Council. Ms A Johannes, a trade union official from HOSPERSA represented Mr Govender Yushan (hereinafter referred to as the Applicant) and Mr D Gabela who is a Senior Human Resource Practitioner represented the Department of Health in KwaZulu/Natal province (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases the parties agreed to submit heads of argument by 31 January 2019 and they did so.

Preliminary points

3. There were no preliminary points raised.

Issues to be decided

4. I have to decide whether or not the respondent committed an “unfair act or omission... involving unfair conduct...relating to the promotion” of the applicant, as contemplated in section 186 (2) (a) of the Labour Relations Act 66 of 1995, (“the Act”), as amended. In the event that I find in the affirmative, I have to determine the appropriate relief the applicant would be entitled to.

Background to the issue

5. The applicant was appointed as a Mortuary Services Assistant (“MSA”) on 1 December 2005. It was common cause that the applicant had never performed the duties of the MSA since 1 December 2005. From the first day he was placed at the Card Office to perform clerical duties. Amongst others, he was directed to write and print out patients’ cards and pulling out patients’ cards. It was also common cause that the applicant was still performing these functions to this date.
6. According to the applicant he raised concerns concerning this anomaly around July 2006 and the respondent undertook ‘to sort the matter out’. However, the respondent reneged on its promise.

7. In the belief that the respondent's action amounted to an unfair labour practice, the applicant referred a dispute to the Council in terms of section 186(2)(a) of the Act on 14 May 2018.
8. The applicant sought as a remedy, protective promotion to Finance Service Officer ("FSO") salary level V and to be compensated accordingly as provided for in section 193 read with section 194 of the Act.
9. On the other hand, the respondent contended that the applicant was not performing all the functions of the FSO. The applicant was allocated all the functions of FSO but he refused to perform those functions. The applicant refused to perform all the functions of the FSO on the basis that he was at salary IV, whereas the FSO was at salary level V.
10. In terms of Human Resource Circular 13 of 2013 and Human Resource Circular 64 of 2013 the applicant was precluded to be translated to FSO salary level V.
11. The respondent sought as a remedy, that the matter be dismissed.

Survey of evidence and arguments

12. All the witnesses gave evidence under oath. The respondent led the evidence of Messrs. Vusumuzi Ziqubu and Babs Supersad. The applicant also testified and called Mr Vijay Sewak to testify in support of his case.
13. Mr Ziqubu testified that he was a Supervisor in the Card Office. According to his evidence the applicant was one of his subordinates.
14. Translations were regulated by Human Resource Circular 13 of 2013. In terms of HRM Circular 13 of 2013 the applicant was not eligible to be translated because he was not performing all the functions of the FSO post. The applicant was performing limited duties of the post. It was the applicant himself who refused to perform all the functions of the FSO post. The applicant's contention was that he could not perform all the functions because he was paid at salary level IV. He then discussed that issue with Mr Supersad who confirmed that the applicant was supposed

to perform all three functions of the post i.e. filing of patients' cards, neatening of racks and collection of the files from other sections.

15. As a result of the applicant's refusal to perform all the functions of the FSO he directed the applicant on 11 December 2017 to resume the duties of the MSA with effect from 2 January 2018. However, the applicant did not comply with his instruction.
16. It was Mr Supersad's testimony that he was employed as a Senior Finance Management Officer. Currently, he was the Acting Deputy Director: Systems Manager.
17. The applicant was appointed as a MSA; however, he had never worked as a MSA. The applicant was employed during the time when the institution was doing a work study. As a result of the work study the institution required more hands in the Administration Section. They then decided to create three posts for MSAs and put those MSAs in the Administration, Casualty and Card Office. The applicant was then placed in the Card Office in the Finance Section.
18. Mr Govender stated that he was employed as a MSA on 1 December 2005. On his first day at work he was placed at the Card Office. He was tasked to write patients' cards, pulling out patients' cards, filing pink cards and filing outpatients' cards. He performed these functions from day one and he was still performing the same functions.
19. He has been performing his functions satisfactory. His supervisor has not raised any concerns about his performance. During the Performance Management Development System (the PMDS) appraisal he has been consistently receiving three points in his ratings. As a result of his satisfactory performance he has been awarded 1.5% of his salary since the inception of the PMDS. He was the only FSO that has not been translated to salary level V in the Section.
20. Mr Sewak testified that he was employed as an FSO. He was at salary level VI. He has been performing the same functions that are being performed by the applicant. He was translated from salary level V to VI in 2002. Amongst others, his translation was influenced by the number of years in the service.
21. Ms Johannes averred that the applicant was due for translation in April 2013 but was overlooked.

22. In closing Mr Gabela contended that there were no provisions in the respondent's policies to translate the applicant.

Analysis of evidence and arguments

Legal principles

23. Section 23 (1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") provides that everyone has the right to fair labour practices. Unfair Labour Practice concept is defined in section 186 (2) (a) of the Act as follows:

"Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee ;

Does respondent's refusal to translate applicant constitute unfair labour practice?

24. Firstly, it is important to consider whether failure to translate and/or absorb an employee in the post is an unfair labour practice as contemplated in section 186 (2)(a) of the Act. I view translation and/or absorption into a post as promotion as envisaged in section 186 (2)(a) of the Act in cases where translation of an employee would be vertical. However, in the instance where translation of an employee horizontal in the organisational structure, that could not be regarded as a promotion as anticipated in section 186 (2) (a) of the Act.
25. Having carefully considered evidence produced by both parties in this instance it is my conclusion that translation and or absorption of the applicant would have been a promotion as defined in the Act.

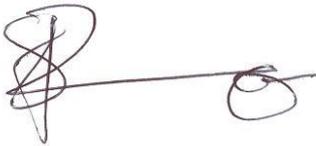
26. It is therefore my conclusion that the respondent's conduct and the manner in which it applied and implemented Human Resource Circular 13 of 2013 to the exclusion of the applicant was arbitrary and inconsistent.
27. In my view it is neither here nor there that the applicant refused to perform all the functions of the FSO as alleged by Ziqubu and Supersad. The applicant's refusal to perform certain functions is a disciplinary issue and it had absolutely nothing to do with his translation as a FSO. It is for this reason that the respondent committed an unfair labour practice within the ambit of section 186 (2) (a) of the Act.
28. Both Ziqubu and Supersad testified that in terms of Human Resource Circular 13 of 2013 the applicant was not entitled to translation. They were asked quite a number of times under cross-examination to read through relevant clauses in Human Resource Circular 13 of 2013 and Public Service Regulations 1 of 2001 in support of their versions. Their responses were far from satisfactory. Their responses varied from bald allegations to hearsay evidence. By way of example, Ziqubu did not know why the applicant's job title was not MSA. Instead he relied on what he heard from people he could not even mention their names during this arbitration. They clearly offered no explanation as to the circumstances that led to the being assessed as a FSO and remunerated as a MSA. Ziqubu relied heavily on hearsay evidence to substantiate his reasons in amending the applicant's job description including the job title on 11 December 2017. In reality no tangible evidence was led to substantiate their allegation that the applicant was not eligible to be translated to the FSO post. I therefore reject the respondent's contention that the applicant was not eligible for translation.
29. Human Resource Circular 13 of 2013 amongst others provides that in view of the benchmarking of clerk posts, it will be necessary for public service institutions to ensure that officials who occupy production level clerk posts are placed on the correct salary level being salary level V. It further states that the provisions of Public Service Regulations 1 of 2001 Chapter 1 Part V C.6 must be applied and employees should be absorbed in posts on the basis of their competency profiles and ability to operate at least at a satisfactory level in these posts. The effective date shall be 13 April 2013.

30. Public Service Regulations 1 of 2001 Chapter 1, Part V C.6 states that “ If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-
- (a) already performs the duties of the post;
 - (b) has received a satisfactory rating in her or his most recent performance assessment ; and
 - (c) starts employment at the minimum notch of the higher salary range”.
31. Both the provisions of Human Resource Circular 13 of 2013 and Public Service Regulations do not specify that only those employees who are performing all the clerical functions would be translated to salary level V. However, they both provide that the employee shall be absorbed into that clerical post on condition that she/he performs the responsibilities of the post satisfactorily. There is no other condition to be met in order to be absorbed into a clerical post.
32. In this instance it is common cause that the applicant had never performed any other functions other than that of the clerical duties since his employment on 1 December 2005. His performance has been as assessed as a Finance Service Officer. His job description is that of a Finance Service Officer. It was against this background that R K Khan Hospital as an institution motivated for the applicant to be translated on 2 August 2013. Unfortunately, this motivation was turned down by the provincial administration office in Pietermaritzburg. Therefore, it does not make sense for R K Khan Hospital as an institution to turn around and argue that the applicant was not eligible to be translated.
33. Accordingly, I am persuaded to hold that the respondent committed unfair labour practice within the meaning of section 186 (2) (a) of the Act. The evidence before me clearly demonstrates that the applicant was performing FSO responsibilities and remunerated at salary level IV of Mortuary Services Assistant. This is grossly unfair and it was done on capricious and arbitrary grounds.
34. It follows that the respondent committed an unfair labour practice as I have alluded to above.
35. In the circumstances I make the following award:

Award:

36. The Department of Health committed an unfair labour practice by placing Mr Yushan Govender at salary level IV of Mortuary Services Assistant, whereas, he performed the functions of the Finance Service Officer post.
37. I therefore order Mr Yushan Govender's "protective promotion" to the Finance Service Officer post retrospectively from 14 March 2018 which was the date of his referral to the Council. From this date onwards, the applicant shall be retrospectively remunerated at salary level V of the Finance Service Officer post.
38. **In the event that the parties cannot agree on the amount to be paid to the applicant within 14 days after having received the award; any one of the parties may request the Council to have the matter rescheduled before me for the determination thereof.**
39. There is no order as to costs.

DONE AND SIGNED IN RICHARDS BAY ON THIS 11TH DAY OF FEBRUARY 2019.



Arbitrator: Bhekinhlanhla Stanley Mthethwa