



ARBITRATION AWARD

Case No: **PSHS177-20/21**

Commissioner: **Jerald Vedan**

Date of hearing: **8 September 2020**

In the matter between:

PSA obo Thabiso Yende Wilson

Applicant

and

Department of Health- KwaZulu Natal

Respondent

DETAILS OF HEARING, REPRESENTATION AND BACKGROUND

1. The hearing took place at The Boardroom, Greys Hospital, Pietermaritzburg on 8 September 2020 at 10:00 am.
2. The Applicant was represented by S.N. Ndlovu, a Union Official.

3. The Respondent was represented by T. Ntshangase, Assistant Director: Labour Relations.
4. The parties agreed to submit closing arguments in writing by 15 September 2020, with the award being due on 23 September 2020.

ISSUES TO BE DECIDED

5. Whether the Respondent committed an unfair labour practice in terms of Section 186 (2)(a) of the Labour Relations Act by not promoting the Applicant?

OVERVIEW OF EVIDENCE AND ARGUMENT

6. It is common cause that the Applicant is a Specialist in the Orthopedics Department at Greys Hospital. He qualified in 2016, and was appointed as a Specialist in November 2017.
7. The Applicant brought a dispute regarding an unfair labour practice in terms of Section 186(2)(a) of the Labour Relations Act. He claimed that he met the requirements for an advertised position, and therefore applied for the position. However, despite him being a short-listed and successful candidate, his appointment was not processed, as the Respondent claimed that the Applicant did not have the required three years post registration experience with the Health Professions Council of South Africa.
8. The Applicant claimed that he did possess the required three years post experience after registration with the HPCSA, and therefore qualified for the advertised position.
9. The Applicant stated that despite his service record on PERSAL reflecting only two years at the time the position was advertised, he did have the required experience. When he was registered in July 2016, the Department froze the post for Specialists.

However, the Applicant had been practicing since the date of registration up until October 2017, when the post was unfrozen.

10. The Respondent contended that the Applicant did not have the required experience of three years. The Respondent stated that they are not disputing that the position was advertised, that the Applicant applied and followed processes, and that there were selection interviews.

11. The Respondent stated that the Applicant had been erroneously short-listed, along with others. The Human Resources Practitioner discovered the error. No letters of appointment were issued to anyone.

APPLICANT'S EVIDENCE

12. The Applicant stated that he qualified as a Specialist in May 2016, and registered with the HPCSA as an independent practitioner in July 2016.

13. He stated that following his registration with the HPCSA, he continued to work as a Medical Officer at Edendale Hospital or at Pietermaritzburg Complex. According to the Applicant, since that time, there was a country-wide moratorium on posts for Specialists. He continued to work as a Medical Officer, but was requested to practice Specialist duties, as there was a shortage of Specialists and the Applicant was qualified. He therefore offered the services of a Specialist since July 2016.

14. According to the Applicant, the Head of the Clinical Unit at Edendale, Dr Jacque de Wet, was his immediate Supervisor at the time, and requested that the Applicant perform Specialist duties.

15. The Applicant pointed out various intake reports, which shows that the Applicant, who was the Consultant, was running meetings for the Orthopedics Department. According to the Applicant, he was listed as a Medical Officer on the system, but was practicing

as a Specialist. The Applicant stated that the titles of “Consultant” and “Specialist” are used interchangeably.

16. The Applicant stated that he registered as a Specialist on 15 July 2016, and was requested to begin practicing.

17. According to the Applicant, he worked as a Medical Officer on the system, but practiced as a Specialist for a period of approximately fifteen months. He stated that this was due to a moratorium on the post for KwaZulu-Natal. The system has him noted as working as a Specialist since November 2017.

18. The Applicant stated that he started working as a Specialist, practically, in July 2016 and the closing date for the post in question was July 2019, which gives him an exact period of three years as experience.

19. The Applicant further stated that should the period of experience be calculated from the date he was appointed as a Specialist on the system, which was November 2017, his period of experience would be one year and eight months.

20. According to the Applicant, the request for him to practice as a Specialist since July 2016 was communicated verbally. He stated that Dr Senoge, the Metropolitan Head, was informed of that. He stated that he practiced as a Specialist, and not in an acting post.

21. The Applicant stated that he is not aware of letters outlining extra duties being issued. He only became aware of this when he was requested to perform duties as the Deputy Head of Department Of Orthopedics at Greys Hospital in 2019. He stated that had he been previously aware of the letter, he would have requested a letter from Dr de Wet.

22. He stated that though he was performing the duties of a Specialist, he received a Medical Officer’s salary.

23. The Applicant further stated that he does not believe that he was misled by Dr de Wet, but that Dr de Wet may have been giving him more experience. The Applicant possessed the qualification, and was willing to assist a community that he learned from.
24. He stated that he never submitted a claim for extra duties.
25. He stated that acting as a Specialist was a potentially higher post, however there was no post due to the moratorium. He further stated that he could not watch the community suffer while he had the skills that were needed.
26. The Applicant expressed that he did not expect remuneration, as he understands that a moratorium refers to a temporary holding of appointments due to financial issues. He further stated that he believes that the post advertised in 2019 was funded.
27. He agreed that the PERSAL system does not reflect three years, and clarified that he was practicing without being listed on the system. He stated that he believed that because he did in fact practice as a Specialist, it should be taken into account as part of his experience. These months did not appear on the system simply due to the moratorium.
28. The Applicant stated that he procured a letter from Dr de Wet that attested to his period of practicing as a Specialist. He submitted this to Human Resources. The post he applied for was re-advertised. He asked Human Resources to advise him of what went wrong with his application, and they did not respond.
29. The Applicant stated that he does not believe that the Department acted unfairly in re-advertising the post, but he does believe that he may have been treated unfairly.

30. The second witness for the Applicant, Dr Matshediso Ephraim Senoge, testified that he is the Head of Orthopedics, and the Metropolitan Head. He stated that he knew the Applicant as a student, and brought him into the system for training as a Specialist.
31. Dr Senoge stated that after the Applicant qualified, there was no available Specialist post for him. He therefore posted the Applicant at Edendale Hospital to work as a Specialist. He stated that the Applicant held the positions of Specialist and Medical Officer. He further stated that the Applicant began working as a Specialist as soon as he qualified.
32. Dr Senoge stated that he advertised the post at Greys Hospital, as he is the Manager of the post, and was the Chairperson for that interview. According to Dr Senoge, the Applicant was one of the three applicants for the post.
33. He stated that the Applicant had met the minimum requirements in terms of experience, as they counted from his date of registration. He further stated that the Applicant was successful during the interview, and had recommendations.
34. Thereafter Human Resources brought up the issue that the Applicant did not actually possess the minimum requirement for experience. Dr Senoge stated that he does not understand why they referred to the system for Greys, as the Applicant was posted in Edendale.
35. The Applicant was asked to provide proof of his stint at Edendale, which according to Dr Senoge, is a difficult task considering the years. The Applicant procured duty rosters to this effect.
36. According to Dr Senoge, Doctors count experience from the date of registration. He stated that the Applicant is registered as a Specialist, and performs the functions of a Specialist. Therefore, due to his relevant skills he cannot be referred to as a Medical Officer.

37. Dr Senoge stated they did not compensate the Applicant during the period he worked as a Specialist, as that is what they normally do when they lack a Specialist. However after the Deputy Director General stated that a person who is qualified as a Specialist cannot function as a Medical Officer, they stopped this. According to Dr Senoge, many others functioned in this manner, and did not claim payment.

38. He further stated that the Applicant's practicing as a Specialist was official.

39. According to Dr Senoge, Human Resources requested proof of the Applicant's stint as a Consultant, and when provided with duty rosters to that effect, stated that the post must be re-advertised. He stated that he did not want to re-advertise, but only did so upon insistence from Human Resources.

40. Upon re-advertisement, the requirements for the post were changed. They now required five years of experience. Dr Senoge was not happy with the re-advertisement of the post, as he was satisfied that the Applicant possessed the relevant experience.

RESPONDENT'S EVIDENCE

41. The first witness for the Respondent, Mr. Khazimule Goba, testified that he has been a Human Resources Officer since 2016. He stated that was aware of the post that the Applicant applied for. He drafted the advertisement himself, along with a Mrs Chandulal. He stated that the Applicant was short-listed for the post.

42. Mr. Goba stated that he was the Human Resource Practitioner attached to the process, who had to ensure that the process was above board. They offer advice using their selection and recruitment policies.

43. He stated that the Applicant was short-listed as he had the qualifications and more than three years of experience, according to his certificate. He was recommended for the post when the panel made recommendations.
44. Mr. Goba stated that part of his job is to verify experience, and he found that the Applicant did not meet the experience requirement, as prior to 1 November 2017 he was listed as a Medical Officer. He therefore forwarded a submission to the CEO and explained his reasons.
45. He stated that the PERSAL system does not reflect three years of experience for the Applicant. He further stated that advertisements have to be in line with OSD requirements and HRM Circulars.
46. According to Mr. Goba, Dr Senoge's statement about experience being calculated from the date of registration was incorrect, as someone could have a qualification and remain at home. He stated that a person cannot perform duties for a post that is not vacant, and cannot act if the post is not available.
47. He reconvened the panel after he discovered that the Applicant was short-listed, and interviewed, in error.
48. He stated that he relies on his system, which states that the Applicant worked as a Specialist since November 2017 and not July 2016.
49. Mr. Goba further stated that if a person was practicing, that person must provide the KPAs, a job description or rosters to prove it.

ANALYSIS OF EVIDENCE AND ARGUMENT

50. It is common cause that the Applicant is a Specialist in the Orthopedics Department.

51. It is evident from the advertisement for the position that three years' experience as a Specialist is required. Unfortunately for the Applicant, although he was regarded as a Specialist by the Health Professions Council of South Africa with effect from 15 July 2016, he was only appointed as a Specialist as set out on the PERSAL system on 1 November 2017. He thus had only about twenty months experience, as a registered Specialist, on the PERSAL system. Previous to that from July 2016 he was a Medical Officer.

52. Whilst he may have been performing some of the duties of a Specialist there is not even a letter of authorisation for him to do so. If he had done so then he would have in all probability been entitled to an acting allowance.

53. The Applicant did apply for the post of Head of the Clinical Unit (Medical) (Grade 1). The panel did recommend him for the post, and it was only during the verification process that it was ascertained that the Department had not appointed him as a Specialist until November 2017.

54. On the advertisement itself, issued by the Department of Health, the closing date of which was 26 July 2019, in the column headed directions to candidates it is stated at number 3 as follows:

“3. The appointments are subject to positive outcomes obtained from the State Security Agency (SSA) to the following checks (security clearance (vetting), criminal clearance, credit records, citizenship), verification of Educational Qualifications by SAQA, verification of previous experience from Employers and verification from the Company Intellectual Property Commission (CIPC).”

55. After the verification process was done, it was also ascertained that other candidates in the list did not meet the necessary experience. It was decided to re-advertise the post. It must be mentioned that the Applicant did re-apply for the post as well.
56. It is also required by the Occupational Specific Dispensation Policy that the applicants should have had the requisite three years' experience.
57. The Applicant's argument that he had the requisite experience was that after he had qualified, and obtained his registration certificate from the Health Councils Profession of South Africa, he would sometimes practice at Edendale Hospital as a Specialist. This was a fact that appears to be unbeknown to the Human Resources Department of the hospital, which would have monitored such deviations in employment.
58. There was no letter placed on record shown that the Applicant had been appointed to act in an acting position.
59. One is aware of the fact that the Applicant has the qualification for a Specialist, and probably has been hampered by the fact that there was a moratorium on those positions. However, the fact remains that he was not appointed as a Specialist, and therefore is excluded by the pre-requisites of the advertisement, and also Human Resource Management Circular 131/2010 which refers to the OSD Policy for Doctors.
60. We have to bear in mind that there were two other candidates who did not have the requisite experience, and if the Applicant was allowed to submit his "acting position" experience, as a criterion to be taken into account, then the other two candidates could have accumulated experience in the same manner, or claim to have accumulated experience in the same manner.
61. It was the witness for the Respondent, Mr. Khazimule Goba, the Human Resources Practitioner, who detected the lack of the requisite experience during the verification

process, and he demonstrated the attention to detail that such practitioners require in order to omit any irregularities in the process.

62. The witness for the Applicant, Mr. Matshediso Ephraim Senoge, as the Chairperson of the Selection Committee had taken the recommendation of Human Resources into account when the committee, under his chairmanship, resolved that the post be re-advertised.

63. In the case of *Damon v Cape Metropolitan Council* (1999) 20 ILJ 714 (CCMA) it was stated that, “It is important to note that unfairness as a general rule of law could be defined by the failure to meet an objective standard in and during the process, and that the conduct could not be said to be arbitrary, capricious or inconsistent. In determining the same, it should be noted that mere unhappiness of the Applicant cannot be equated to unfairness. The selection process will inevitably involve the one candidate being promoted and the other being disappointed.”

64. In this case the standard was objective, and was consistent for all the candidates.

65. In the *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* (2013) 34 ILJ 1156 (LC) it was held that “the overall test is one of fairness, and that in deciding whether or not the employer had acted unfairly in failing or refusing to promote the employee, relevant factors to consider include whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer; or whether the employer’s decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; whether there were insubstantial reasons for the employers decision not to promote; whether the employers decision not to promote was based upon a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions. The list is not exhaustive.”

66. In the case of *Ga-Segonyana Local Municipality v Venter N.O. and Others* (JR961/13 [2016] ZALC JHB 391) it was stated that, “[21] Central to appointments or promotion of employees is the principle that courts and commissioner alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions. In my view, good cause would entail a consideration of the factors set out in *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others* as above.”

67. In view of the above principles, outlined in the cases, I am of the view that although the Applicant was either better qualified, or received a higher recommendation from the Selection Committee, this does not mean that the employer engaged in unfair or arbitrary conduct in respect of application of its policy.

FINDINGS

68. I therefore find that the Respondent has not committed an unfair labour practice against the Applicant.

AWARD

69. I make the following award:

70. The Applicant's claim is dismissed.

71. There is no order as to costs.



JERALD VEDAN
Commissioner