



ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS179-20/21**

Date of award: **18 November 2020**

In the matter between:

MEGAN O'CONNOR

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was scheduled for 10 and 30 October 2020 at Natalia Building in Pietermaritzburg. The Applicant appeared in person and was represented by the Union Official, Mr. Sookraj Jaya from Workers Regression Union. The respondent, Department of Health- KwaZulu Natal was represented by Mrs Bonisiwe Shezi, a deputy director labour relations officer. The proceedings were digitally recorded and I also took notes by hand. Both parties agreed to submit written closing arguments on 06 November 2020.

ISSUES TO BE DECIDED

2. I am required to determine whether the respondent committed an unfair labour practice or not.

BACKGROUND TO THE DISPUTE

3. The applicant, Megan O'Connor is employed by the respondent as an Orthopedic Specialist Grade 1 in 2011. She is earning R54 000.00 monthly and stationed at Stanger Hospital. The respondent advertised the post of an Orthopedic Specialist Grade 1 and the applicant applied for the position, but she did not make it to the shortlist. It is the applicant's argument that the respondent committed an unfair labour practice as the respondent overlooked her for the post. It is the respondent's argument that the respondent did not commit an unfair labour practice.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

4. Dr. Megan O'Connor stated that the respondent advertised the post of Orthopedic Specialist Grade 1 at Greys Hospital and she applied for the position on 20 January 2020, but she did not make to the shortlist.
5. She submitted that the respondent promoted her to an Orthopedic Specialist Grade 1 at Stanger Hospital in February 2020, but she was looking for a promotion closer to her family as her husband also works at Greys Hospital. She stated that the promotion would have increased her responsibility, but not her salary as she was already holding the same position.

The Respondent's case

Witness 1

6. Dr. Ephraim Matshediso Senoge (Chief Specialist) stated that the respondent advertised an Orthopedic Specialist Grade 1 in October 2019 and January 2020. He testified that he was the chairperson of the interview panel. He submitted that the employment Equity target was the African Male and the respondent did not shortlist the applicant

as she did not meet the post requirements. He stated that the appointment of the applicant would have resulted in a promotion since the applicant was already a Medical Specialist Grade 1. He submitted that no promotion was done into the position.

Witness 2

7. Mr. Gary Stoffels (Assistant Director Human Resources Manager) stated that the applicant was promoted to Orthopedic Specialist Grade 1 on 30 January 2020. He submitted that the applicant applied for the aforesaid post at Greys Hospital which she was already occupying at Stanger Hospital. He testified that no promotion was done into the position.

ANALYSIS OF EVIDENCE AND ARGUMENTS

8. The applicant referred an unfair labour practice dispute to the council in terms of section 186(2) (a) of the Labour Relations Act. I am required to decide whether the respondent committed an unfair labour practice or not. The applicant bears onus to prove that the respondent committed an unfair labour practice.
9. It is common cause that Dr. O'Connor was the only applicant who applied for the post in question. It appeared as common cause that no appointment was made into this position. It further appeared as common cause that the post targeted the African Male in terms of the Employment Equity Plan. It appeared as common cause that the respondent promoted the applicant to Orthopedic Specialist Grade 1 post in January 2020.
10. The applicant argued that she was the only applicant and met the necessary requirements for the position. I reject the applicant's argument to be less probable than that of the respondent. In *Department of Justice v CCMA and Others* [2004] 4 BLLR 297 (LAC) the court said that "an employee who complains that the employer's decision or conduct in not promoting him or her constitute an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. In this case I do not understand why the

applicant would claim that she overlooked when no promotion was made took place for the position she applied for. The applicant's argument that she was overlooked for promotion is baseless. In my view, the respondent has prerogative to decide when to advertise positions, commence with recruitment process and when to withdraw job adverts. I find that the applicant failed to prove that the respondent committed an unfair labour practice relating to promotion.

11. I accept that the respondent's argument that no promotion was made into the position as the post targeted the African Male who did not apply.
12. In light of the above, the respondent did not commit an unfair labour practice of failing to promote the applicant.

AWARD

13. Accordingly, I make the following award:
14. The respondent did not commit an unfair labour practice.
15. The application is hereby dismissed.
16. There is no order as to costs.



COMMISSIONER: KHEHLA KHANYILE