



ARBITRATION AWARD

Case No: **PSHS200-20/21**

Commissioner: **Mr. Anand Dorasamy**

Date of award: **15 December 2020**

In the matter between:

PSA OBO MBUYAZI MANDLAKAYISE BHEKINKOSI

(Union/ Applicant)

and

DEPARTMENT OF HEALTH-KWAZULU NATAL

(1st Respondent)

THABISILE GLADYS MTHEMBU

(2nd Respondent)

SPHEPHILE NOZIPHO HAPPYNESS MPOTSHANE

(3rd Respondent)

NOMUSA ANGELINA GINA

(4th Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter commenced on the 3 December 2020 at the Jozini Sub-District office Boardroom in Jozini. Mr Jabulani Richmond Bukhosini of the PSA represented the applicant and Mr Mzovukile Moffat Lembethe represented the first respondent the employer and the second to the fourth respondents (appointees) attended in person and did not make submissions but abided by the submissions of the 1st respondent/ employer. The parties were to submit written closing arguments by the 10 December 2020. The parties's submissions and the applicable provisions relating to promotions were considered when I arrived at my decision.

THE ISSUE IN DISPUTE

2. I am required to determine whether the 1st respondent committed any unfair labour practice relating to the non-promotion of the applicant, and dependent thereon the appropriate relief may be determined.

BACKGROUND TO THE DISPUTE

3. The applicant declared a dispute alleging that the 1st respondent perpetrated an act of unfair labour practice against him (s 186(2) (a) in not appointing him for the post of Malaria Surveillance Supervisor (level 6). He seeks promotion to the post in place of one of the appointees.
4. The 1st respondent contends that it did not perpetrated an act of unfair labour practice against the applicant and that the application must fail and be dismissed.

SUMMARY OF EVIDENCE AND ARGUMENT

EVIDENCE ON BEHALF OF THE APPLICANT

MANDLAKAYISE BHEKINKOSI MBUYAZI

5. He works in the malaria control programme and has been working for the Department for 21 years. Presently he is a finance clerk.
6. In 2019 he applied for the post of malaria surveillance supervisor and there were 8 posts and four were appointed.
7. He was found suitable and the appointed candidates were found to be unsuitable. On page 12 bundle B number 55 Mr M B Mbyazi scored 67 %. On page 11 number 36 Ms S N H Mponshane The committee found her not suitable ... appointed.
8. On page 10 number 25 Ms T G Mthembu The committee found her not suitable, appointed. She scored 64%.
9. On page 12 number 51 Ms N A Gina ... The committee found her not suitable, appointed. She scored 58%.
10. He lodged a grievance and then declared a dispute with the Council.
11. The minimum percentage for suitability was placed at 50%. The Employment Equity target is African females as per attached spread sheet. African females were encouraged to apply.

12. The committee minutes are signed except by Ms. Z Ntshangase the HR person. The minutes must be signed by all the committee members of the panel. The chairperson signed on the 7 February 2020 and the interviews were held on the 21 November 2019. The minutes were not signed in terms of the policy. The others signed on 17 February 2020. It was signed after the prescribed time.
13. Under cross-examination by the 1st Respondent he stated as follows:
14. He does not know what was altered in the minutes. Ms Ntshangase did not sign the minutes because she picked up typographical errors. She picked up the “not suitable” recordings.
15. He does not understand the Employment of Equity. The appointees were suitable because they scored more than 50%.

EVIDENCE ON BEHALF OF THE FIRST RESPONDENT

NOMPUMELELO CYNETH MDLETSHE

16. She is employed by the Department and was part of the selection committee for the post. The percentage for suitable candidates was 50%. All who scored 50% upwards were suitable and below not suitable.
17. The recordingnot suitable was an error or mistake. Those who met the requirements were recommended. There was a typing error recorded not suitable.
18. The applicant scored more than those who were appointed and he was not recommended. The panel was advised by the HR manager that the post needed females to be appointed. The plan was given to them. There were candidates who scored higher but were not appointed.
19. Ms Ntshangase did not sign the minutes because she was the HR practitioner and she retired in December 2019.
20. Under cross examination she stated as follows:
21. The minutes are correct except for the errors.

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22. When the post was advertised females were encouraged to apply. The targets were given to the panel at the short-listing stage. The institution was short of females and excess in males. Five females scored over 50% and the panel selected females.
23. Under cross examination she stated as follows.

24. African females were encouraged to apply. She was not part of the interview panel.

CLOSING ARGUMENTS

25. The parties submitted written closing arguments on the 10 December 2020 that were considered in arriving at my decision.

ANALYSIS OF EVIDENCE AND ARGUMENT

THE RELEVANT LEGAL PRINCIPLES

26. In *Noonan v Safety and Sectorial Bargaining Council and Others* [2012] 33 ILJ 2597 (LAC) it was held that there is no right to promotion in the ordinary course, only a 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 a post then the only justification for scrutinizing 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.

27. It is trite law that the courts will only interfere with the employer's decision if it is grossly unreasonable.

28. I have taken note of the Labour Court Judgement under case number JR 350/16 delivered on the 9 January 2018 in the matter *Seile Edwin Letsogo vs Department of Economy & Enterprise Development, GPSSBC* (Pretoria, P Roopa N.O. and Ruth Dzanibe in arriving at my determination.

29. The following is recorded from the judgment:

"[27] In the case of *Ga-Segonyana Local Municipality v Venter N.O. and others: Tlhothalemaje, J* approved of the following:

"[20] In *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others*; 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 employer's decision not to promote; whether the employer's 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.

[32] In *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others* the court expressly rejected the notion that the employer has the prerogative to decide who to appoint and that it should not be questioned when it exercises that discretion. The court stated that the proper yardstick was "fairness to both parties"

APPLICATION OF THE LAW TO THE FACTS

30. The applicant competed for the post. He was interviewed but the selection committee was guided by the respondent's Employment of Equity targets that required African females to be appointed. The minimum suitability score was 50% and all the appointed candidates scored more than the minimum score. The recording "not suitable" was a typographical error.
31. As a consequence of the above it cannot be said that the decision of the 1st Respondent cannot be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to appoint.
32. The applicant was short listed and interviewed and it cannot be said that the employer was amiss in the overall test 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 employer's decision not to promote; whether the employer's 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 applicant was a suitable candidate because he scored over 50% but the 1st Respondent required to affirm females to satisfy the Employment of Equity targets.
33. As a consequence of the above I now hand down the following award:

AWARD

34. The applicant failed to discharge the onus that the 1st Respondent perpetrated an act of unfair labour practice against him.
35. The applicant's claim is dismissed.
36. The appointment of Ms. Thabisile Gladys Mthembu, Ms. Sphephile Nozipho Happyness Mpontshane and Ms. Nomusa Angelina Gina is hereby confirmed.

A handwritten signature in black ink that reads "AS Dorasamy". The signature is written in a cursive style with a large, looped 'y' at the end.

AS DORASAMY