



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Minette van der Merwe**

Case No: **PSHS248-19/20**

Date of award: **13 July 2020**

In the matter between:

NEHAWU obo Palesa Mosa Setlai

(Union/ Applicant)

and

Department of Social Development- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] This is the arbitration award in the matter between NEHAWU on behalf of Ms. Palesa Mosa Setlai (the Applicant) and the Department of Social Development Free State (the Respondent), which matter was scheduled for arbitration on 24 June 2020 to commence at 10h00 at the Respondent's office in Bloemfontein, and which was finalized on the same day.
- [2] Parties were at all times present, and represented as per the cover page of this award.
- [3] Proceedings were mechanically recorded and copious handwritten notes were kept. Interpretation was not required.

BACKGROUND TO THE DISPUTE

- [4] The matter was scheduled for arbitration in terms of section 186(2)(a) in respect of a claim of unfair labour practice related to promotion.
- [5] The Applicant is employed as the Assistant Director: Internal Audit, and had applied for the position of Deputy Director: Internal Audit.
- [6] Parties agreed to argue the merits of the dispute by way of written arguments as there were no factual disputes, but only disputes of law that needed determination. Therefore, parties were required to conduct a pre-arbitration and conclude a statement of case. The statement of case had to contain a written statement of facts which were common cause so as to put me in a position to answer the legal question put before me.¹
- [7] Parties agreed to submit written arguments on the following dates, and had fully complied:
- The Applicant to file its written arguments on 30 June 2020
 - The Respondent to file its written arguments on 6 July 2020
 - The Applicant to file its final written arguments on 9 July 2020

ISSUE TO BE DECIDED

- [8] I was called upon to decide whether the Respondent had exercised its discretion fairly by not shortlisting the Applicant.
- [9] Parties had agreed on the following facts to be common cause, and as such no evidence needed to be led on same:
- i. The Applicant held the position of Assistant Director: Internal Audit

¹ Such a statement of case is important in matters where parties elect to argue the dispute by way of written arguments, as was held in *Arends and Others v South African Local Government Bargaining Council and Others* (2015) 36 ILJ 1200 (LAC). The principle was again confirmed in *Public Servants Association and others v Minister of Correctional Service and others* [2017] 4 BLLR 371 (LAC).

- ii. She had applied for the vacancy of Deputy Director: Internal Audit
- iii. The vacancy was advertised
- iv. The Applicant's *curriculum vitae* ("CV") was not disputed, and her qualifications were also not disputed
- v. The Applicant had met the requirements of the advertisement in terms of experience
- vi. The Applicant was not shortlisted
- vii. The reason proffered by the Respondent for the Applicant not being shortlisted was that she did not meet the requirements of the advertisement in terms of qualifications
- viii. She had not received a response to her grievance filed
- ix. All the shortlisted candidates met the requirements of the advertisement

[10] The Applicant sought maximum compensation in the event that I find in her favour. Due to the remedy sought by the Applicant, there was not need to join the successful incumbent, as the successful incumbent had no substantial interest in the outcome of this matter.

SURVEY OF EVIDENCE AND ARGUMENTS

Documentary Evidence:

[11] Bundles "A1" and "A2" was submitted into evidence on behalf of the Applicant, whereas bundle "B" was submitted by the Respondent. These bundles were submitted on 24 June 2020.

Written Arguments:

Applicant's Arguments:

(Below is only a short summary of the arguments submitted. The full arguments have been filed with the PHSDSBC)

[12] The argument of the Applicant is, in essence, that she holds a National Diploma: Cost and Management Accounting (NQF 6) and specifically an Advanced Diploma: Technician Internal Auditing (NQF 7), which is on the same NQF level as the required

qualification, being a B.Tech Degree in Internal Auditing or a B.Com Degree in either Accounting, Auditing or Risk Management. The submission is that the Applicant should have been shortlisted, as the Applicant's qualification is equivalent, and the failure to shortlist the Applicant was prejudicial to her.

Respondent's Arguments:

(Below is only a short summary of the arguments submitted. The full arguments have been filed with the PHSDSBC)

[13] The argument of the Respondent is, in essence, that the Applicant was not shortlisted because she did not meet the minimum or equivalent qualification required. The Applicant's qualifications are not equivalent as it does not have the same credits (hours required to complete the qualification). The qualification of Internal Audit Technician, which the Applicant possesses, was a recommendation, and not a requirement. Had the shortlist been longer and the requirements been relaxed, the Applicant might have been shortlisted.

ANALYSIS OF EVIDENCE AND ARGUMENT

[14] The advertisement as follows (only an excerpt thereof)²:

Post: Deputy Director: Internal Audit Reference No: FS04/18

Salary: An all-inclusive package R 657 558 per annum (Level 11), structured in terms of the applicable remuneration rules.

Centre: Provincial Office (Bloemfontein)

Requirements: B. Tech Degree in Internal Auditing, B. Com (Accounting, Auditing, Risk Management). At least 5 years' experience in internal audit services; risk management; governance and internal controls. Minimum 3 years' supervisory/managerial experience. Computer Literacy. Member of the Institute of Internal Auditors (SA).

[15] The advertisement as advertised in the News Paper³ (only an excerpt thereof):

² Page 2 of "B"

Salary: An all-inclusive package R 657 558 per annum (Level 11), structured in terms of the applicable remuneration rules.

Centre: Provincial Office (Bloemfontein)

Requirements: B. Tech Degree in Internal Auditing, B.Com (Accounting, Auditing, Risk Management) or equivalent qualification. At least 5 years' experience in internal audit services; risk management; governance and internal controls. Minimum 3 years' supervisory/managerial experience. Computer literacy. Member of the Institute of Internal Auditors (SA).

- [16] It was common cause that the Applicant had met all the requirements, but that she was not shortlisted because the Respondent did not consider her qualifications as equivalent to the required qualifications.
- [17] It is common cause that the Applicant's qualification Advanced Diploma: Technician Internal Auditing was on NQF level 7, which is the same NQF level as the qualifications required by the Respondent, as advertised. It is on this basis that the Applicant argues she should have been shortlisted.
- [18] It is important to note that not all NQF 7 level qualifications carries the same credits required to obtain such a qualification, and as such does not necessarily carry the same weight. SAQA⁴ uses a credit system based on the idea that one credit equals 10 notional hours of learning, motivated in context in each case. 'Notional hours of learning' refers to the learning time that it would take an average learner to meet the outcomes defined.
- [19] The Higher Education Qualifications Sub-Framework⁵ confirms the aforementioned and states that *"It is also important to emphasis that while credits at a particular NQF level represent learning of the relevant cognitive difficulty, credits are not necessarily directly exchangeable within a particular level, as they are also related to the purpose of a particular qualification. Thus, for example, credits for a Higher Certificate at Level 5 are not necessarily interchangeable with Level 5 credits in a degree program."*

³ Page 4 of "B"

⁴ South African Qualifications Authority

⁵ Bundle "A2", page 10

- [20] It then follows that the argument by the Applicant that the Advanced Diploma on NQF 7 is the same as a B.Tech or B.Com degree on NQF 7, is not sound.
- [21] Turning to the argument that the Applicant's qualification is equivalent to the qualifications required by the Respondent in the advertisement of the vacancy, the same document⁶ is quoted as follows:
- “Each NQF level has a level descriptor. Level descriptors provide guidelines for differentiating the varying levels of complexity of qualifications on the framework. The level descriptors are the outermost layer of qualification specification. At each level they describe the generic nature of learning achievements and their complexity. Level descriptors are thus broad qualitative statements against which more specific learning outcomes can be compared and located. The positioning of two or more qualifications on the same NQF level indicates only that the qualifications are broadly comparable in terms of the general level of learning achievements. It does not indicate that they have the same purpose, content or outcomes, nor does it necessarily demonstrate equivalence of qualifications or credits.”* (my emphasis)
- [22] It is further clear from the abovementioned, that the qualification on which the Applicant relies to argue that it is equivalent to the required qualifications, are not necessarily equivalent just because it is on the same NQF level.
- [23] No evidence was adduced to establish that the screening process utilized by the Respondent in order to reduce the number of applications to a more manageable number, sacrificed the principles of fairness and equity.
- [24] The purpose of shortlisting is to identify a pool of applicants who are best suited to fill the position successfully. The purpose of shortlisting is not to identify all the applicants that meet the requirements, but rather the applicants that meet the requirements most and/or best. Advertisements specify only the minimum appointment requirements in respect of qualifications and competencies. Candidates that meet such minimum requirements, have a legitimate expectation to fairly compete for the vacancy. That expectation does not, however, prohibit an Employer from giving a more favourable consideration to applicants that surpass the minimum requirements, as long as it is in line with the job content.

⁶ The Higher Education Qualifications Sub-Framework, on page 13

- [25] The LRA defines an unfair labour practice, in section 186(2)(a), as “*an unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to the promotion.....of an employee*”.
- [26] In *Noonan v Safety and Security Sectoral 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 with the post. As long as the decision taken by the Employer can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference with the decision to promote. (my emphasis).
- [27] In order to succeed with a claim of unfair labour practice related to promotion, the Employee must prove that the Employer has exercised its discretion capriciously, for unsubstantiated reasons, or that the decision was taken on a wrong principle or in a biased manner (*Msobo and Independent Municipal & Allied Trade Union* (2008) 29 ILJ 459 (CCMA) as well as *Aries v CCMA & Others* (2006) 27 ILJ 2324 (LC)).
- [28] In light of the analysis above, it cannot be held that the Respondent's decision to not shortlist the Applicant was due to it exercising its discretion capriciously, that it was based on unsubstantiated reasons or taken on a wrong manner, or on a biased manner. It was common cause that all the shortlisted applicants had met the minimum requirements of the vacancy, as it has been advertised. The decision of the Respondent not to accept the Advanced Diploma of the Applicant as an equivalent qualification to the required B.Tech or B.Com degree, cannot be faulted. The Applicant was given a fair opportunity to compete for the position. I have no reason to interfere with the decision of the Respondent not to shortlist the Applicant.
- [29] It then follows that the claim for unfair labour practice related to promotion, stands to be dismissed.

AWARD:

[30] The Applicant, **Palesa Mosa Setlai**, was unable to prove that the Respondent, **Department of Social Development- Free State**, had committed an unfair labour practice by deciding not to shortlist her.

[31] The Applicant's claim is dismissed and she is not entitled to any relief.

[32] There is no order as to cost.

Signature:

A handwritten signature in black ink, appearing to read 'M. van der Merwe', is written on a light green rectangular background.

Minette van der Merwe