



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **Minette van der Merwe**

Case No: **PSHS249-19/20**

Date of award: **15 July 2020**

In the matter between:

NEHAWU obo Kgomotso Viskop

(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 Kgomotso Viskop (the Applicant) and the Department of Social Development Free State (the Respondent), which matter was scheduled for arbitration on 25 June 2020 to commence at 10h00 at the Respondent's office in Bloemfontein.
- [2] I was ill, and had duly informed parties thereof. Parties had elected not to have the matter postponed, but to dispense with it by way of arguments in writing.
- [3] Proceedings were not recorded, save for e-mail correspondence.

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 an 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:
- Pre-arb minutes and statement of case submitted on 1 July 2020
 - The Applicant to file its written arguments on 7 July 2020
 - The Respondent to file its written arguments on 10 July 2020
 - The Applicant to file its final written arguments on 14 July 2020 (none was received)

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:
- i. The Applicant held the position of Assistant Director: Internal Audit
 - ii. She had applied for the vacancy of Deputy Director: Internal Audit
 - iii. The vacancy was advertised and she had applied

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).

- iv. The Applicant's *curriculum vitae* ("CV") was not disputed, and her qualifications were also not disputed
- v. The Applicant was not shortlisted
- vi. 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 managerial experience
- vii. She was in possession of a suitable B.Tech Degree
- viii. She had filed a grievance as a result of decision not to shortlist her
- 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] None was submitted for consideration, save for the advertisements in question, which was common cause.

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 was prejudiced by not having been shortlisted for the position. The Respondent had not shortlisted her for reasons based on the requirement of a minimum of 3 (three) years' managerial or supervisory experience. At the time the Applicant had applied for the vacancy, she had been an Assistant Director: Internal Audit for 2 years and 8 months. Her disqualification from being shortlisted was discriminatory in terms of section 20(3) of the Employment Equity Act.

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 requirements set out in the advertisement, due to the fact that she lacked the requisite minimum 3 (three) years' managerial or supervisory experience, as she had only 2 years and 6 months' experience. She further lacked the requisite experience of 5 (five) years' internal auditing as she had only 3 years and 8 months' internal auditing experience. An unfair labour practice was not committed by the Respondent.

ANALYSIS OF EVIDENCE AND ARGUMENT

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

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 Paper (only an excerpt thereof):

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 the requirements of a B.Tech Degree, but had failed to meet the requirements in terms of managerial or supervisory experience. The Respondent had added that she had also lacked the requisite internal auditing experience, which submission was not challenged by the Applicant.
- [17] The argument that the Applicant was discriminated against, cannot be sustained. The Respondent had advertised the position, and had set the minimum requirements. The Applicant had applied for the vacancy, whilst fully knowing that she did not possess the required minimum experience of 3 (three) years in a managerial or supervisory role. Management experience of 2 years and 8 months, does not amount to three years.
- [18] 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 to identify 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. Candidates that do not meet such requirements cannot argue that they had a legitimate expectation to be able to compete for the position.
- [19] 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*”.
- [20] 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).

[21] In order to succeed with a claim of unfair labour practice related to promotion, the Employee must prove that the Employer have 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)*).

[22] 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. The Applicant had failed to meet the minimum requirements, as advertised, related to managerial or supervisory experience. I have no reason to interfere with the decision of the Respondent not to shortlist the Applicant.

[23] It then follows that the claim for unfair labour practice related to promotion, stands to be dismissed.

AWARD:

[24] The Applicant, **Kgomotso Viskop**, 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.

[25] There is no order as to cost.

Signature:



Minette van der Merwe