



ARBITRATION AWARD

Panelist/s: Advocate Ronnie Bracks
Case No.: PSHS302-11/12
Date of Award: 21st November 2011

In the ARBITRATION between:

PSA obo Sithole EM

(Employee)

and

Department of Health & Social Development

(1st Respondent)

Employee Representative: Henry Hall - PSA

Employee's address: P.O. Box 30656
Braamfontein
2017

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Company/Employer representative: Department of Health- Gauteng Province

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DETAILS OF HEARING AND REPRESENTATION

A. The Arbitration was scheduled for hearing at the Respondent's office at Bank of Lisbon Building 14th Floor, cnr Sauer and Market Streets, Johannesburg on the 14th November 2011. The Employee was represented by Mr. Henry Hall a union official. Mr. Modisana Lelaka, the Labour Relations Officer of the Employer represented it. ***The proceedings were recorded both manually and electronically. The process was conducted in English.***

ISSUE TO BE DECIDED

B. Whether or not the Respondent committed an unfair labour practice by not upgrading the Applicant's post from level 11 to level 12.

BACKGROUND TO THE ISSUE

- C The dispute arose as a result of the Applicant having been transferred laterally in 2008 from a post of Deputy Director Finance at the Charlotte Maxeke Hospital to the post of Deputy Director Management Accounting.
- D The transfer transpired at a time when the Applicant was on precautionary suspension and it was a negotiated transfer.
- E The Applicant alleges that at the time the post was advertised at level 12 but was never filled and hence she was of the view that it was at level 12 and despite numerous attempts to persuade the Respondent to upgrade the post she was unsuccessful.
- F The Respondent denies that the post was at level 12 and stated that a job evaluation was done in this respect which showed she was at the correct level. Also that in any event there are no longer automatic promotions to level 12 and that any promotion to that level can only happen on recommendation from a job evaluation. Reference was made to various resolutions.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

G A bundle of documents numbered was submitted.

***** As noted previously the proceedings were digitally recorded therefore that which appears hereunder constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of this arbitration; it is by no means a minute of what transpired in the course of the proceedings.***

Employees' Evidence:

Eunice Sithole after being sworn in testified as follows:

- H In 2008 she was employed at the Charlotte Maxeke hospital and was suspended on the 13th February 2008 after an altercation between her and the Chief Executive officer.
- I While at home she was called by Mr. Kromhout who wanted her to assist him in the position of Deputy Director Managing Accounting. She informed him of her suspension and he requested that she put it to him in writing. After the letter she was told to report to head office where the position was and in March 2008 she was informed by letter that her suspension had been lifted. She was told to continue in her current position. The witness commented that the position she held at Maxeke hospital has since been upgraded to level 12.
- J She went on to explain that at the time she was placed in the current position it was advertised at level 12. She knows this as she was a candidate for the position. However there was never any short listing. In September 2008 she received an appointment letter which stated that she was laterally transferred.
- K The following year during appraisal she raised the issue with Kromhout and he was surprised that the position was at level 11 however because he retired in September 2009 the issue could not be addressed. In between there were many other supervisors who did not stay around long enough for the matter to be addressed.
- L In February 2010 (p33) she lodged a grievance with the Respondent and the outcome was that the job should either be evaluated or she should compete for the post by it being advertised. She applied for the position but was never given an opportunity to compete for it. She was referred to p10 of the bundle and stated it was a document which stated she was properly remunerated.
- M Before she got to the post she was told that it was evaluated and rated at level 12. She did not know what the present evaluation result for the job is. She acknowledged that there were resolutions that proposed that level 12 should no longer exist as posts. She was adamant that when the position was advertised it was at level 12 and during cross-examination stated that the salary proposed was that for a level 12 position.
- N She was referred to the various circulars which were published and stated that the circular came after she had already been in the position and she therefore did not believe that they were applicable to her situation.
- O The Applicant felt that she was unfairly treated because it was only 6 months after she started that the letter was written. In addition she had been performing extra duties but despite that she was still at level 12. She further recognized that the Respondent had given an organogram of the structures of the department stating that the position was at level 11 but this was only updated up to 2006/06. She could not understand how that would affect her present situation.
- P Under cross-examination nothing significant emerged and the major part of the cross-examination turned on the resolutions which suspended authority to rated Deputy Directors at level 10 and 12.

Employer's Evidence

The Respondent called one witness who testified after being duly sworn in:

Prudence Sikakane testified as follows:

- Q She was the Deputy Director Organizational Development. She explained what her functions were. She was referred to p5 of the bundle and explained that promotion meant movement from one level to another; this is normally from a lower to a higher level. However promotions were stopped in 1999 and presently there has to be a job evaluation if there is to be promotion within a post.
- R She explained that any promotion would require the advertising of the position; lateral transfer means that the institution approves the transfer as there are certain financial implications attached to it.
- S She was referred to resolution 61 of 2009 in particular par 4.4.1 and said the circular was derived from circular 3 of 2009 which deals with grade progression. She explained the requirements and said that the National Health abolished levels 10 and 12.
- T There was a moratorium on the positions and this meant that they could not be filled. This however did not prevent the Respondent from transferring employees into those positions. There is normally a moratorium when there are excess people or where there is an absence of funds.
- U She was referred to p51 and said this was the result of job evaluation of the post the Applicant was occupying. The evaluation was done in 2007. She also referred to the organogram and stated that the Applicant's correct position was at level 11. Job evaluations were done where a person needed to move to a higher position. This has to be requested by the incumbent.
- V The fact that an incumbent is in a position does not guarantee that the person would be successful when applying for that position.
- W Under cross-examination no significant evidence emerged except that the witness explained that evaluation normally stood for a period of three years before it would be reconsidered. She explained that the Department received the job evaluation around 27th October 2010. The structure informed the level of the position. She could not explain why a job at level 11 would be advertised at level 12; that should never have happened.

ANALYSIS OF EVIDENCE AND ARGUMENT

1. Section 186(2) provides that;

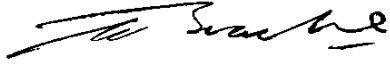
- (i) "unfair labour practice" means an unfair act or omission that arises between an employer and employee involving –

(ii) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

- 2 In circumstances where an Applicant alleges that he or she was unfairly treated the onus lies with them to proof this. In this case the Applicant was adamant that the position was at level 12 and that the position should have been upgraded to that level as it was advertised at that level. In addition the position she had previously occupied had now been upgraded to level 12 without being advertised. I need to state at the outset that no evidence of the latter was in fact presented in corroboration of the Applicant's statement.
- 3 From the undisputed evidence presented by the parties it is common cause that the Applicant was laterally transferred into the position which she is currently occupying. It is further clear that when she was transferred into the position the position she held at the Charlotte Maxeke hospital was a level 11 position. Therefore, because she was laterally transferred she maintained her level 11. It is further evident that at the time of the transfer the position was advertised but never filled. It is my candid view that the Applicant cannot rely on this fact to have the position upgraded as she was not appointed into the position but she was transferred. In any case, from the evidence it was clear that the position could not be filled as there was a moratorium in place.
- 3 Despite having said this, the evidence presented shows that the Applicant had occupied the position from 2008 and the question is whether or not it was a reasonable request from the Applicant for the position to have been upgraded. The evidence show that the Respondent has since done away with promotions to level 12 and that the only manner in which a position can be upgraded was through a process of job evaluation. The documents presented showed that an evaluation of the position was done and that the job was evaluated at level 11. This evidence remains unchallenged and was further corroborated by the fact that that the organogram of the Respondent showed the position to be at level 11. The Respondent's witness said even if the position could be upgraded internally this should have been reflected in the structure and the present structure showed that the job was at grade 11.
- 4 The Applicant who bore the onus was at pains to show that her previous position was upgraded. The only problem with this argument is that she is no longer in that position and in the absence of evidence to show that by doing this the Respondent acted unfairly, that evidence does not take the matter any further. In any case the Applicant was never promoted into her present position but was laterally transferred which meant that she maintained whatever salary and perks she had in her previous position which was undisputedly at level 11.
- 5 The Applicant was at great pains to show that the different resolutions presented by the Respondent were not applicable. While I agree with the Applicant I do not believe that this takes her matter any further as she was laterally transferred and even if there was a moratorium on the position the undisputed evidence was that she could be transferred and the Respondent did so correctly maintaining the status quo of her position.
- 6 For the reasons stated above it is my view that the Applicant failed to discharge the onus of showing that the Respondent had acted unfairly in any way.

AWARD

The case against the Respondent is dismissed.



Adv. RONNIE BRACKS

Panelist/s: **Ronnie Bracks**

Sector: **Public Health & Social Development**