



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: Pieter Venter

Case No: PSHS318-18/19

Date of award: 14 March 2019

In the matter between:

NEHAWU obo NE BOTUANA

Applicant

and

DEPARTMENT OF HEALTH- FREE STATE

Respondent

DETAILS OF HEARING:

- 1 The matter was scheduled for arbitration on **01 March 2019** at the offices of the Respondent in Bothaville (Nala Hospital). The Applicant had to serve written arguments on 07 March 2019 and the Respondent had to answer by 13 March 2019.
- 2 The Applicant was represented by Mr. Mofokeng, an official from NEHAWU, whilst the Respondent was represented by a Labour Relations Officer, Mr. Nhlapo.
- 3 The matter was mechanically recorded although no evidence was led. Mr. Mpitsi assisted as Interpreter.

BACKGROUND TO THE MATTER:

- 4 The matter was referred to the Bargaining Council in terms of Section 186(2)(a) of the Labour Relations Act, 96 of 1995 (hereinafter referred to as “the LRA”).
- 5 On 16 November 2018, I issued a jurisdictional ruling after the Respondent attacked the jurisdiction of the Bargaining Council.
- 6 During the proceedings it was mentioned that the Applicant’s member (the “member”) was employed as a Cleaner but she works as an Administration Clerk. She seeks an order in terms of which the Respondent translate her rank/promotes her to the rank of an Administration Clerk and to be paid the benefits in terms of the higher post.
- 7 The material facts were common cause between the parties and they chose not to lead evidence. I assisted them to determine whether the matter could in fact be determined by means of written/stated cases only and also sensitized them about possible factual disputes that might arise at a later stage.
- 8 The member was appointed as a Cleaner during 2011, but started performing duties as an Administration Clerk shortly thereafter. The position of an Administration Clerk existed, but was never advertised. No selection process took place as the post was never advertised.
- 9 The member performed the duties of an Administration Clerk successfully.

ISSUE TO BE DETERMINED:

- 10 I am called upon to decide whether the Respondent committed an unfair labour practice in not appointing/promoting the Applicant’s member and not paying her the accompanying benefits.

SURVEY OF ARGUMENTS:

11 Mr. Mofokeng submitted written arguments that were, verbatim, as follows:

[1] The Commissioner is called upon to determine whether the respondent has in fact committed an unfair labour practice as contemplated by Sec 186.2(a) of the LRA as amended and what recourse does the Applicant has under the circumstances.

[2] It's not in dispute that the Applicant was appointed around 2011 as a Cleaner GR1 but performed the duties of Admin. Clerk since then without being remunerated as such. Even during the course of this dispute she still performed these functions.

*[3] The Applicant has submitted pages **13 – 19; 21 – 23; 27 – 32 of Bundle A** to prove her case. It must be appreciated that in all the referred to documents, most Senior Officials of the Respondent were all agreeing on the status of the Applicant. It cannot therefore be said that there was a 'work arrangement' in the institution as the Applicant's Representative will like us to believe without any evidence to prove same.*

*[4] Specifically on 18 September 2015 the then MEC approved a document called **Nala District Hospital HR Plan – pgs 28 – 32 of Bundle A**. In this document at page 30 under HR Section, the Applicant appears as **HR Officer (L5)**. The Applicant's case is that she must be remunerated at salary level 5 like all other employees who perform functions of L5 in the department.*

*[5] Around December 2012, DPISA issued a directive to All National and Provincial Departments relating to Bench Marking of Admin. Clerks where the functions of Admin. Clerks were upgraded to salary level 5. In pursuance of this instruction the Respondent approved its own Job Evaluation on 6/12/2016 (see page 9-11 of **Bundle A**).*

*[6] The dispute is coined as that of 'benefits' in the referral. From the facts before the Commissioner it can also be inferred as 'promotional dispute'. We submit that the judgements of **Apollo Tyres South Africa (PTY) LTD v CCMA – DA1/11** and **Thiso & 6 others v T. Moodley NO – JR2209/13** be followed in resolving this dispute.*

[7] It must be pointed out that this anomaly of letting employees perform duties that are not consistent with their appointment is rife in the Public Service Departments in total contravention of Labour Laws. Unfortunately, nothing is being done to arrest this situation, particularly the Respondent in this case is a culprit of this conduct. This (Arbitration process) can go a long way in curbing such malpractices in departments.

*[8] It is our submission that the Commissioner rules in the Applicants favour in relation to her being retrospectively **(at least from April 2016 as the year on which All Admin. Clerks were upgraded by the Applicant)** placed at salary level five (L5) as envisaged by the Minister of DPSA in the directive 16/P dated 12 September 2011 coupled with what the Applicant is doing since 2011.*

12 Mr. Nhlapo submitted written arguments that were (verbatim) as follows:

1. *Me. N.E Botuana was employed as a cleaner not as an Administrative Clerk **Annexure A.***
2. *Based on the verbal agreement/arrangement with the supervisor, Me. Botuana agreed with the arrangement that she will assist her supervisor as an admin clerk. There was no appointment letter which indicates that, she is appointed to act on the higher post of an admin clerk and she will be compensated as a result of that.*
3. *Only the posts of employees who were employed/or appointed as Administrative Clerks were Job Evaluated.*
4. *It was a mistake that Me. Botuana appeared as HR Officer L5 and this was rectified, the persal printout is attached as **Annexure B.***
5. *Presently, there is no vacant and funded post of an Administrative Officer at Nala District Hospital.*
6. *According to the referred papers, the applicant (Ms. Botuana) declared a dispute of Unfair Labour Practice which relates to Benefits but she failed to highlight how she was prejudiced and which benefits she forfeited because according to the employer's*

records, she is receiving all her benefits as stipulated in her contract of employment, so the dispute itself is misplaced.

7. *It must further be brought to your attention that, when her performance is or was assessed, she was assessed as a cleaner and she signed, which indicates that, she was in agreement with the performance assessment. **Annexure C***
8. *Ms. Botuana cannot be placed on Level 05 as admin clerk because, that would mean promotion and for one to be promoted the recruitment process must take place. For example, the post must be vacant and funded, the post must be advertised, selection committee must be appointed, selection committee must shortlist the candidates for the interviews, interviews must take place and the best candidates will be appointed. It must further be brought to your attention that, the requirements for the post of an administrative clerk is Senior Certificate of which Ms. Botuana does not have.*

ANALYSIS OF ARGUMENTS:

- 13 The obligation in terms of section 186(2) of the LRA is to act fairly towards the employee in the selection and promotion process but taking into account that it is the prerogative of the employer to make appointments (see *Justice v CCMA & others* (2004) 25 ILJ 248 (LAC)). The exercise of that prerogative is nonetheless not immune from scrutiny, as instances of gross unreasonableness in its exercise may lead to drawing of inferences of bad faith. To that end, it is trite that central to disputes pertaining to appointments or promotion of employees is the principle that that courts and commissioners alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions (See *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC); *De Nysschen v General Public Service Sectoral Bargaining Council & Others* [2007] 5 BLLR 461 (LC)). Any form of interference should be with the objective of dispensing fairness to both parties.
- 14 The onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on the employee, see *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others* (2013) 34 ILJ 1156 (LC). The employee must therefore be able to lay the evidentiary foundation for

his or her claim of an unfair labour practice. Mere dissatisfaction with the outcome of a recruitment or selection process is not sufficient to sustain that claim. In order to succeed with claim related to promotions or failure to appoint, an employee must *inter alia*, demonstrate that as against the successful candidate;

- i. the/she met all inherent requirements of the position;
- ii. he/she was the best candidate for the position;
- iii. that not being promoted caused unfair prejudice to him/her;
- iv. and that there is a causal connection between the unfairness complained of and the prejudice suffered.

15 The mere fact that the employee has the required experience, ability and technical qualifications for the post is however not sufficient, nor is it sufficient for the employee to merely assert that he or she scored higher in the interview process or some other criterion linked to the selection process. There is still a burden on him/her to demonstrate that the decision to appoint someone else to the post in preference to him or her was unfair. Provided the decision by the employer to appoint one in preference to the other was rational, no question of unfairness can arise.

16 In *City of Cape Town v SA Municipal Workers Union obo Sylvester and Others supra* it was also emphasised 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 motivated 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.

- 17 The matter on hand is somewhat different as the member is performing the duties as an Administration Clerk. It is common cause that she is performing duties on a higher level for a protracted period. It is also common cause that the position was never advertised and no selection process was instituted.
- 18 In *Member of the Executive Council, Department of Sport, Recreation, Arts & Culture, Eastern Cape v General Public Service Sectoral Bargaining Council & Others* (2015) 36 ILJ 2893 (LC) the third respondent employee had been employed by the applicant employer on salary level 3. It appeared that there had been a number of attempts to adjust the employee's salary level to a level that was commensurate with the position the employee held and the duties he performed. Frustrated with the failure to adjust his salary, the employee referred an unfair labour practice dispute relating to promotion to the bargaining council. The arbitrator ordered that the employer adjust the employee's salary level from level 3 to level 5 and conduct an evaluation of the post held by the employee. The employer applied to review the decision of the arbitrator.
- 19 The court noted that the employer challenged the jurisdiction of the bargaining council on two grounds, namely that the dispute had been referred out of time and no application for condonation had been made or granted; and secondly that the dispute was one of mutual interest that could not be arbitrated.
- 20 After finding it prudent to deal with the merits of the application for review, the court proceeded to consider whether the dispute could be arbitrated. The court noted the relevant provisions of the Public Service Act, 103 of 1994, and the Public Service Regulations, and found that a dispute relating to 'promotion' is a dispute involving a vacant, advertised position to which the employee seeks promotion. Promotion is different from job grading where the salary of the post is increased to accord with the job weight after a job evaluation process has been conducted. In this matter, there were a number of difficulties with the arbitrator's award. First, the arbitrator never made a finding in respect of the unfair labour practice dispute relating to promotion, which he had to determine and which was a dispute that he could arbitrate. Secondly, the arbitrator disregarded the provisions of the PSA and the principles set out in decided cases when he treated a claim for the adjustment of the employee's salary as an unfair labour practice dispute in respect of promotion.

- 21 The court distinguished the present matter from *Mathibeli v Minister of Labour* (2015) 36 ILJ 1215 (LAC) on the basis that there was no evidence that a job evaluation of the employee's post had in fact been done, that approval had been granted for the upgrading of his post and that he was being incorrectly paid at a lower salary level in an upgraded position. The employee was simply seeking to upgrade his salary level. The court was of the view that in the absence of a job evaluation, the issue of job grading remained a matter of mutual interest. Thirdly, not a shred of evidence was adduced that a higher post existed for which the employee was a contender and that the employer refused or failed to promote the employee to the post for an unfair reason; the arbitrator based his findings on nothing but the statements made by the representatives of the parties. There was, furthermore, no evidence to show that the employee's post was evaluated and that approval for an upgrade was granted. Fourthly, the award by the arbitrator was in conflict with the provisions of the PSA and s 186(2)(a) of the LRA 1995.
- 22 The court, having considered the well-established test for review of arbitration awards, concluded that the findings made by the arbitrator were disconnected from the issue he had to determine and reflected not only the arbitrator's failure to address the issue he had to determine, but also that he made a decision which no reasonable decision maker could have made. The arbitrator misconstrued the nature of the enquiry before him and his duties in connection therewith. The arbitration award was accordingly reviewed and set aside.
- 23 Aforementioned *dicta* obviously do not favour the Applicant's case. I am therefore not convinced that the Respondent is acting unfair within the statutory definition of an unfair labour practice. The Applicant carries the onus in this matter and the application should therefore fail in as far as she claims promotion.
- 24 The Applicant also claims benefits associated with the higher position, but has not referred to any specific benefit that there is any entitlement to. The claim for higher or better benefit should there also fail.
- 25 The Applicant has failed to demonstrate that the Respondent committed an unfair labour practice.

AWARD:

26 The Respondent committed no unfair labour practice and the application is dismissed.



Signature:

PM Venter