



# ARBITRATION AWARD

Panellist/s: Bhekinlanhla Stanley Mthethwa  
Case No.: PSHS400-11/12  
Date of Award: 24-Jul-2012

In the ARBITRATION between:

HOSPERSA obo Mohube ,K.F

(Union / Applicant)

and

Department of Health and Social Development: NW

(Respondent)

Union/Applicant's representative: N. Motshabi.

Union/Applicant's address: Mafikeng

Telephone: (018) 462-3692

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Respondent's representative: M. Adoons

Respondent's address: Private Bag X 2064

Mmabatho

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Telephone: 018 388 2040

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### **Details of hearing and representation:**

1. The matter was scheduled for arbitration hearing on 31 May 2012 at Thusong Hospital in Itsoseng. Mr. N. Motshabi, a trade union official from Hospersa represented Ms. KF. Mohube (hereinafter referred to as the Applicant) and Mr. M. Adoons represented Department of Health and Social Development (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. At the commencement of the arbitration proceedings parties agreed that no oral evidence would be adduced during the arbitration, therefore, I had to peruse the record of what transpired at different times before this arbitration hearing to familiarise myself.
3. Parties further agreed to submit written arguments by 6 June 2012 and the respondent requested extension of the period due to the ill health of its representative.

### **Issues to be decided:**

4. I have to decide whether or not the respondent committed “unfair act or omission... involving unfair conduct...relating to the appointment/promotion “of the applicant, as contemplated in section 186, (2), (a) of the Labour Relations Act 66 of 1995, (“the Act”), as amended. In the event that it does, I have to determine the appropriate relief.

### **Background to the issue:**

5. The applicant was employed as a Cleaner Grade I in Thusong Hospital in 1993; on 1 August 2003 she was directed by the respondent to perform clerical duties. She was made to understand that when the clerical posts become vacant she would be given preference and appointed in the clerical post.
6. However, when the clerical posts became vacant the applicant was overlooked. There was no satisfactory explanation.
7. The applicant was felt aggrieved and referred an alleged unfair labour practice dispute related to promotion to the Council in terms of section 186 (2) (a) of the Act.
8. The applicant’s case was that she was unfairly overlooked since she has been performing duties of Administration Clerk for 9 years. She was of the view that there was no fair and valid reason why she was not offered the post when it became vacant.

9. The applicant sought, as a remedy, protective promotion from cleaning post to Admission Clerk Grade II as well as compensation as provided for in section 193 read with section 194 of the Act.
10. The respondent, on the other hand, contended that the applicant had entered into unlawful arrangement with the respondent; as such the respondent should not be compelled to appoint the applicant without the requisite qualifications to the clerical post.
11. It was further contended that the applicant was expected to obtain a senior matriculation certificate to be eligible for appointment in the clerical post. The applicant failed to do so.
12. Therefore, the respondent could not be forced to appoint the applicant without meeting requirements of the post and without a vacant and funded post.
13. The respondent, sought, as a remedy, that the matter be dismissed.

**Summary of evidence and argument:**

14. Hereunder is a summary of submissions and arguments of both parties and it reflects all the relevant submissions and arguments made. Their submissions may be summarised as follows:

**Applicant's case:**

15. It was contended that the applicant was appointed as a General Cleaner at Grade I in 1993. On 1 August 2003 the applicant was instructed to perform clerical duties. She was told that when the clerical posts become vacant and funded she would be given preference together with other four cleaners that were performing clerical duties. However, when the clerical posts became vacant they were invited to interviews; it was only Ms. Agnes Molete that was given preference and appointed as an Administration Clerk. The other posts were filled by external candidates. Ms. Molete does not have matriculation or grade 12 certificate.
16. It was further contended that both the applicant and Ms. Molete were issued with similar letters that were instructing them to commence duties of Admission Clerks. Both did not have grade 12 certificates but Ms. Molete was given preferential treatment and appointed as an Admission Clerk.

17. Therefore, the applicant is entitled to be appointed to the Admission Clerk position without grade 12 certificate; as Ms. Molete.

**Respondent's case:**

18. It was submitted that the applicant had agreed to perform clerical duties and that was the exposure given to all other cleaners. The applicant had also agreed to perform clerical duties without any remuneration. All cleaners were informed that they should possess the relevant qualifications in order to be eligible for appointments when the posts become vacant. The applicant has failed to acquire matriculation certificate to date; and that militates against her appointment. It was general accepted that in order to be appointed in a clerical post in the public service a person should have a matriculation certificate.
19. The arrangements to perform clerical duties while the applicant was appointed as a cleaner were unlawful; therefore, it was unenforceable. In the public service a person could only be appointed in an existing post; and in this instance; there was no existing post.
20. It was not clear why Ms. Molete deposed an affidavit confirming that she was appointed in a clerical position without matriculation certificate.

**Analysis of evidence and arguments:**

21. The point of departure in this case must be the definition of unfair labour practice in the Act. Section 186 (2) of the Act sets out the meaning of unfair labour practice as follows:
22. (2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving –  
  
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."
23. In this instance it is common cause that the applicant was appointed as a General Cleaner in 1993. On 24 July 2003 she was instructed to commence performing clerical duties with effect from 1 August 2003 as an Admission Clerk. It is also common cause that when the applicant was moved from the cleaning post to a clerical post she did not have matriculation certificate. It is common cause that the same instruction was issued to Ms. Molete who was eventually appointed to the clerical post without

matriculation certificate. In my view, the very foregoing sentence negates the respondent's case completely. It also makes a mockery of the respondent's defence that in order to be appointed in a clerical post in the public service you must have matriculation certificate.

24. It is so because the respondent failed dismally to advance any reasonable explanation why Molete was appointed to the clerical post without meeting the requirements of the post. Secondly, why the applicant could not be appointed without matriculation certificate since they (Molete and the applicant) both commence clerical duties on 1 August 2003. Thirdly, why only Molete deserves special treatment and not the applicant? In the absence of any reasonable answer to these questions, the respondent's action shall be regarded as grossly unfair.
25. Furthermore, it would be incorrect to suggest that the applicant was not entitled to be appointed to the clerical post. In my view it irrational that the respondent blessed the unlawful arrangement in August 2003 and only turns around almost 10 years later and augur that it was unenforceable at law. Surely, the applicant cannot be blamed for entering into unlawful arrangement; instead it is the respondent that must shoulder the entire blame. It was the respondent that decided to put the applicant in a clerical post without all the job requirements for almost 10 years; and turn around and augur that she does not have matriculation certificate.
26. I concur with the applicant's contention that the respondent's conduct was arbitrary, capricious and inconsistent. Although it is a fact that the selection, promotion or demotion of employees fall squarely in the domain of management's prerogative and for that reason arbitrators in such disputes should be hesitant to interfere with the management prerogative. The employer is best placed to make such decisions in its business. Interference is warranted only when the outcome of the exercise of that discretion is grossly unfair. It is for this reason that I feel compelled to interfere with the discretion of the respondent, and to come to the aid of the applicant. In light of the evidence before me, the decision by the respondent not to promote the applicant was unfair and the reasons thereto were manifestly unjustifiable. The respondent's conduct in not promoting the applicant to the position of Admission Clerk, constitutes an unfair labour practice as envisaged in section 186(2)(a) of the Act.

**Relief:**

28. Having applied my mind to the merits of this matter I am of the view that the directives in respect of "protective promotion" as outlined in *Imatu obo Xamleko v Makan Municipality [2003] 1 BALR 4 (BC)* and also confirmed in *Willemse v Patelia NO & others (2007) 28 ILJ 428 (LC)* should be the most

appropriate relief in addressing this matter. Where it was held that this form of promotion entails that the beneficiary be placed on an appropriate higher salary scale. This is the method often used by employers to resolve anomalies that arise from time to time in the grading of positions. It does not; however, complete relief as only the financial component of the unfair labour practice would be addressed. The person is denied the higher status which would have accompanied a pure promotion and the concomitant further opportunity to advance his career more expeditiously.

29. In the circumstances I make the following award:

**Award:**

30. The failure of the Department of Health and Social Development, to appoint and/or promote Ms. KF Mohube, to the position of Admission Clerk constitutes an unfair labour practice as envisaged in section 186(2)(a) of the Act.

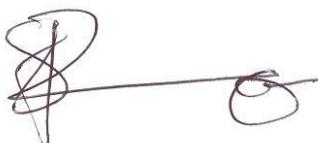
31. I order the applicant's "protective promotion" retrospectively to 31 May 2011. From this date onwards, the applicant shall be retrospectively remunerated at entry level of salary level of Admission Clerk Grade II.

32. I order Department of Health and Social Development to compensate Ms. KF Mohube, in an amount equivalent to the difference in the quantum of salary which she actually received in the period 31 May 2011 to the date of this award, and the quantum of salary that she would have received had she been promoted to the post of Admission Clerk on 31 May 2011.

33. The above compensation is payable within 30 days of issuance of this award.

34. No order as to costs is made.

**DONE AND SIGNED IN JOHANNESBURG ON THIS 17<sup>TH</sup> DAY OF JULY 2012.**



**Arbitrator: Bhekinhlanhla Stanley Mthethwa**