



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS418-18/19 & PSHS161-19/20

Commissioner: Suria van Wyk

Date of award: 24 June 2019

In the matter between:

Carolina Frederika Arnold

Applicant

and

Department of Health – Free State

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened and concluded on 4 June 2019 at Bophelo House in Bloemfontein.
2. The applicant was represented by Mr L Companie, an attorney from Phatshoane Henney Attorneys and Mr LP Senokoane appeared on behalf of the respondent.
3. A recording was made of the hearing.

CASE HISTORY

4. The matter was referred as a section 186(2), unfair labour practice dispute relating to promotion to the Council in July 2018 and a jurisdictional ruling was issued in October 2018 confirming that the PHSDSBC has jurisdiction to entertain the dispute. Thereafter, the matter was not set down for conciliation and as the 30 days period expired a certificate was issued and the matter was scheduled for arbitration.
5. On 5 March 2019, the matter was postponed due to an error in communication between the parties that there was an agreement to postpone the arbitration.
6. The hearing scheduled for 2 May 2019 was then postponed as parties were in agreement that the determination of the dispute about the interpretation and application of the collective agreement, was a key element to the dispute about the unfair labour practice dispute referred. Subsequently a section 24 dispute was also referred.

CONSOLIDATION OF DISPUTES

7. The disputes under PSHS418-18/19 and PSHS161-19/20 are hereby consolidated and by agreement between the parties, both disputes were dealt with simultaneously on 4 June 2019.

ISSUE TO BE DECIDED

8. Firstly, the issue to be decided is the correct interpretation of Annexure A2, clause of 1.3 of Resolution 3 of 2009 and whether the clause finds application to the applicant.
9. Secondly, it must be decided whether the respondent committed an unfair labour practice relating to promotion in not promoting / translating the applicant to the position of Pharmacist Assistant (Post Basic) Grade 2, as was done with her peers.

10. The applicant sought to be “promoted / translated” to position of Pharmacist Assistant (Post Basic) Grade 2 with retrospective effect from July 2011 with no loss of benefits.

BACKGROUND TO THE ISSUE

11. The following facts were common cause between the parties:

- a. Applicant commenced employment in 1996 as an admin clerk with the Respondent. She enrolled for the pharmacies assistant course in 2009.
- b. She was placed at Universitas Hospital and commenced with training and registered with SAPC together with Mr Thabo Chake (Household Aid from Occupational Health), Mr M D Baleni (started as volunteer in 2004 and was appointed as a Senior Auxiliary Officer in the pharmacy store) and Mr T W Monnye (started as a general worker in pharmacy at Universitas in 2005).
- c. The Applicant completed her Basic Pharmacist Assistant course in January 2010.
- d. The Applicant completed her training as Post Basic Pharmacist Assistant in December 2010 and received registration certificate from SAPC in July 2011.¹ Mr Chake and Monnye qualified with Applicant, whilst Mr Baleni qualified in October 2011.
- e. Mr Chake, Monnye and Baleni were all translated to Pharmacist Assistant Post Basic upon qualification in 2011. Their positions were automatically translated to that of Pharmacist Assistant (Post Basic) Grade 1. Applicant remained on Pharmacist Assistant (Basic) Grade 3 in 2011.
- f. The Applicant was currently on Pharmacist Assistant (Basic) Grade 3 Notch / Level 11 and had remained on it 2 years and has now reached the “ceiling”. Subsequently, the Applicant could not get the same Performance Management System Bonuses (as having reached her ceiling) as her peers.

¹ Bundle A, page 76.

- g. Mr Chake, Monnye and Baleni were now on Pharmacist Assistant (Post Basic) Grade 2 Notch / Level 11:
- i. The Applicant's salary was R227 856 per annum.
 - ii. Mr Monnye, Baleni and Chake were on salary scale of R241 889 per annum, Level 1.
 - iii. The Applicant lodged a grievance and the Respondent confirmed that reason for non-promotion was that Applicant must apply for vacant post.²
 - iv. Mr Monnye, Baleni and Chake did not apply for vacant positions and were automatically translated to Pharmacist Assistant Post Basic.
 - v. The Respondent relied on Resolution 3 of 2009 Annexure A2 for non-promotion of Applicant.³
 - vi. This application of Resolution 3 of 2009 Annexure A2 was not applied to Monnye, Baleni and Chake.
 - vii. The Applicant was performing the duties and functions as Pharmacist Assistant (Post Basic) for the past 8 years, but not paid accordingly.
 - viii. The Applicant accepts that par. 1.3 of p.62 under heading "Grade Progression" stated "Appointment to an advertised vacant post of Pharmacist Assistant (Post Basic) Grade 1.
 - ix. Parties agree to the differences in salary, duties and responsibilities between Pharmacist Assistant (Basic) and Pharmacist Assistant (Post Basic) as set out on p.28 – 31 of the bundle.

² Bundle A, page 36 – 37, 59 – 73.

³ Bundle A, page 62 – 73.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case:

12. **Carolina Frederika Arnold** testified under oath and explained the difference between the job descriptions of a Pharmacists Assistant Basic and Post Basic. She was appointed on the level of Basic Pharmacists Assistant Grade 3 and that time she had worked for the respondent for 13 years. When she was transferred her salary remained the same. She confirmed that she was grade progressed, but has reached the top level (level 11). It was her testimony that in her view the Resolution requires that there must be a post vacant for translation into the Post Basic position, but that her colleagues (Monnye, Baleni and Chake) that qualified with her, was automatically translated into the Post Basic Positions – they were not required to apply for vacant positions. Even if that was wrong, she was still prejudiced as they were treated differently. She has lodged two grievances in this regard and the reason for non-promotion provided to her by the respondent was that the Resolution requires her to apply for a vacant position. The latter was unfair as the same criteria was not applied when her colleagues (Monnye, Baleni and Chake) were translated into the Post Basic positions. She sought to be treated equally as she was performing the same duties as them. The conduct of the respondent was unfair and it has impacted on her financially and in relations to the benefits she could have become entitled to. Since she qualified, there were five positions that became vacant but the first post was only advertised in 2019 and she applied. She was never instructed in writing to start performing Post Basic – duties, but Me Loots was aware that she was qualified and performing the functions.

Respondent's case:

13. Subsequent to the presentation of the evidence bundle by the applicants. The respondent elected not to dispute any of the documents and not to call any witnesses.

ANALYSIS OF EVIDENCE AND ARGUMENT

14. The applicant referred an unfair labour practice dispute relating to promotion in terms of section 186(2) of the Labour Relations Act, 1995 coupled with a section 24 dispute (interpretation and application of the collective agreement). The applicant claimed that the respondent's failure to promote / translate her – as it did with her colleagues - amounted to an unfair labour practice.

15. I will firstly deal with the section 24 dispute relating to Annexure A2, clause 1.3 of Resolution 3 of 2009. The Resolution states:

Appointment to an advertised vacant post of Pharmacist Assistant (Post-Basic) Grade 1
Appointment to an advertised vacant post of Pharmacist Assistant (Post Basic), as per set requirements.

16. The crux of the dispute about the interpretation of Annexure A2, initially pivoted around the question whether it was required that a *vacant advertised post* existed before an employee could be translated into the position. During the arbitration, it however became clear that both the parties were in agreement that same is to be understood under the said clause and that the clause finds application to the applicant. The true issue was that the said requirement was / is enforced on her, but not on her colleagues who were automatically translated to the higher positions in 2011.

17. I find the clause to be clear and unambiguous and that it should be interpreted, as conceded to by the parties, to mean that a vacant and advertised post must be available before an employee would be eligible for promotion / translation into the position of Pharmacist Assistant (Post-Basic) Grade 1. There is indeed no dispute between the parties as to the interpretation or application of the clause.

18. 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.

The employee must therefore be able to lay the evidentiary foundation for his or her claim of an unfair labour practice.

19. It should be understood that an unfair labour practice as envisaged in the LRA has specific parameters and does not include all forms of unfairness that arises from the employment relationship.

20. The Constitution of the Republic guarantees everyone the right to fair labour practices, which right is further given effect through the provisions of section 186(2) of the LRA and the Employment Equity Act (EEA). Despite the guarantees, it has been held that the LRA does not create a right or entitlement to be promoted, unless there is some agreement or law assuring the employee that right. This, bearing in mind that in accordance with the principles established in *Apollo Tyres South Africa (Pty) v CCMA and Others*, an employee who alleges a case of unfair labour practice relating to a promotion need not to prove that he has a right to promotion.

21. In *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester and Others (2013) 34 ILJ 1156 (LC)*, 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.

22. With respect to the discretion to be exercised, the court in *Aries v CCMA & Others (2006) 27 ILJ 2324 (LC)* the Court held that there are limited grounds on which an

arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner.

23. Resolution 3 of 2009 has the status of a collective agreement and a collective agreement is binding on all parties to the agreement. In terms of the Resolution an employee can only become entitled / eligible to be promoted / translated when there is a vacant advertised position. The unintended consequence of finding that the respondent's breach of the collective agreement creates a right for the applicant, would be that a breach of the collective agreement by any party to the agreement alters the terms that were negotiated between the parties, the latter undermines the principles of collective bargaining.

24. This dispute is not about a normal promotional dispute where an employee applied for a position and was subsequently not promoted, but stems around the faulty promotion of others which did not comply with the requirements set out in the Resolution and the claim that such *ultra vires* conduct of the respondent now creates a right or an expectation to the applicant also to be promoted *ultra vires*.

25. As unfair, arbitrary and capricious the conduct of the respondent may seem, the respondent's non compliance to the requirements set in the Resolution cannot and does not create a right for the applicant to be promoted, nor is there any discretion that was exercised by the respondent as compliance to the Resolution is not discretionary but compulsory. The promotion of the other employees were not compliant with the Resolution and as such the promotions are reviewable.

26. As an arbitrator I have no power to make an order that contravenes the requirements set out in the Resolution.
27. The applicant argued that the principle of estoppel should be applied to estop the respondent from relying on the Resolution in their defense. In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) the requirements for establishing estoppel were enunciated as follows: '*Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so.*'
28. In this matter the applicant was not misled by any representation of the respondent and subsequently acted to her detriment, instead she attempts to create a right for herself from an act that constitutes a breach of a collective agreement.
29. The Court in *Bester NO and Others v Schmidt Bou Ontwikkelings CC34* said: '*Broadly stated, the concept of estoppel, borrowed from English law as applied by our courts, amounts to this: when a person (the representor) has by words or conduct made a representation to another (the representee) and the latter acted upon the representation to his or her detriment, the representor is estopped, that is precluded, from denying the truth of the representation.*'
30. It is a fundamental principle that where it comes to any consideration of estoppel by the Court, it must be specifically pleaded by one of the parties. This was dealt with in *Absa Bank Limited v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) as follows: '*Plainly a party wishing to rely on estoppel must plead it and prove its essentials*' and in *Maluti Transport Corporation Ltd v MRTAWU and Others* [1999] 9 BLLR 887 (LAC) it was said: '*It is trite that an estoppel must be pleaded. At the very least it must be debated in cross-examination.*'
31. I therefore find that the applicant has failed to discharged the onus, on a balance of probabilities, that the conduct of the respondent amounts to an unfair labour

practice relating to promotion as envisaged within the parameters of section 186(2) of the LRA. This does not mean that the conduct of the respondent may not be challenged in an alternative dispute.

AWARD

32. There is no live dispute in relation to the section 24 referral (PSHS161-19/20) as both parties are in agreement as to the interpretation of clause 1.2 in Annexure A2 and that it applies to the applicant.

33. The respondent, Department of Health Free State, has not committed an unfair labour practice (PSHS418-18/19) as envisaged within the parameters of section 186(2) of the LRA.

34. The applicant's claim for relief is hereby dismissed.

35. There is no order as to costs.

Signature:



Commissioner: **Suria van Wyk**

Sector: