

PHSDSBC

ARBITRATION AWARD

Case Number: **PSHS476-11/12**

Commissioner: **Mangisi Mrwebi**

Date of Award: **13 October 2012**

In the **ARBITRATION** between

NEHAWU obo Khayaletu Mfecane

(Applicant)

And

Department of Health, Eastern Cape

(Respondent)

Union/Applicant's representative: Ms. T Twalingca from NEHAWU

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Respondent's representative: Mr. M Mapisa

Respondent's address: **Private Bag 0038**

Bhisho

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DETAILS OF THE HEARING AND REPRESENTATION

1. This arbitration was held at SS Gida Hospital in Keiskamahoek on 13 July 2012 and 26 September 2012 in terms of section 191(5) of the Labour Relations Act No 66 of 1995, as amended (the Act).
2. The employee party, Khayaletu Mfecane (the applicant) attended in person and was represented by Ms. T Twalingca from NEHAWU trade union.
3. The employer party, the Department of Health, Eastern Cape (the respondent) was represented by Mr. M Mapisa, from its Labour Relations Directorate.
4. The parties agreed to submit their supplementary written closing arguments on 3 October 2012.

PRELIMINARY ISSUES

5. No preliminary issues were raised by the parties.

ISSUE TO BE DECIDED

6. I am required to determine whether or not the non-appointment or promotion of the applicant (and subsequent non-remuneration at the requisite level) was unfair and constituted an unfair labour practice as contemplated in section 186 (2)(a) of the Act, and if so, I must determine the appropriate relief in terms of the Act.

BACKGROUND TO THE ISSUE

7. The applicant joined the respondent on 1 February 2007 as a general worker.
8. On 1 November 2007 he received a letter that he should resume duties as a driver.
9. While performing his duties as a driver, this post (of driver) was advertized and he applied.
10. The post of driver was at level 3, a level senior to his post of general worker which was at level 2.
11. He states that he was promised that he would be promoted to this post but this never happened.
12. He now challenges that the failure by the respondent to appoint him to this post constituted an unfair labour practice.

SURVEY OF ARGUMENT AND EVIDENCE

Submissions by the Applicant

In support of his case the applicant submitted a bundle of documents marked as “Employee Bundle A” and called two witnesses.

The Applicant

13. The applicant testified that on 1 November 2007 he received a letter from Ms. Sothenjwa to the effect that he was transferred to the Transport section as a driver.
14. He referred to the letter attached to his bundle and the letter reads as follows:

RE: TRANSFER YOURSELF FROM OPD SERVICES TO TRANSPORT AS A DRIVER: SS GIDA HOSPITAL

The hospital management together with the internal transformation unit recommended that you be transferred from OPD Services to Transport to assist the institution as a Driver, without any changes in your salary structure.”
15. The letter then went on to deal with his reporting structure and his duties as a driver.
16. The applicant further testified that subsequently a post of driver was advertized and he applied. This post was advertized at level 3 whereas his general worker post was a level 2 post.
17. He stated that he approached Ms. Sothenjwa that he be elevated to level 3 as he was already performing the duties as a driver.
18. Ms. Sothenjwa promised him that there was a driver who was about to retire (Mr. Nokhele) she was going to motivate that the applicant be appointed in that vacant post.
19. The applicant testified that this did not happen until Ms. Sothenjwa was transferred to the respondent’s Head Office in Bisho.
20. He further testified that in terms of SS Gida Hospital’s organogram there are two posts of drivers at level 3. As at present there were two drivers: one at level 3 and himself at level 2.
21. He further stated that he has been performing the duties of a driver ever since he was transferred in November 2007.
22. Ever since he applied for the driver post on or about 10 September 2009 he has not received any feedback from the respondent.
23. He testified that in terms of Resolution 1 of 2007 advertized posts should be filled within six months, and this has not been the case with this post.

24. Under cross examination the applicant conceded that in the letter of transfer there was nothing that said he would be absorbed in the driver post.

25. The applicant also conceded during cross examination that Ms. Sothenjwa's promise was made orally.

Mr. Andile Churchill Jantjies

26. The witness is employed as a Pharmacy Assistant at SS Gida Hospital. He has been at this hospital ever since 1992. He is a shop steward at the hospital.

27. He testified that he attended a meeting about a grievance by the applicant. The latter filed a grievance complaining about being at level 2 as a driver while the other driver(s) was at level 3.

28. He testified that in that meeting Ms. Sothenjwa advised the applicant not to worry as she was going to motivate his case (that is, the applicant be elevated to level 3).

29. He further testified that Ms. Sothenjwa also promised that as Mr. Nokhele was retiring (on or about December 2011) the applicant would be absorbed in Mr. Nokhele's post.

30. Under cross examination the witness could not provide the minutes of the meeting where Ms. Sothenjwa made the promise to the applicant.

Submissions by the Respondent

31. There was no evidence tendered on behalf of the respondent.

ANALYSIS OF EVIDENCE AND ARGUMENT

32. The applicant's evidence which was not disputed by the respondent was that he was still performing the duties as a driver at SS Gida Hospital ever since November 2007.

33. Furthermore it was not disputed that the organogram of the hospital has two posts of drivers at level 3.

34. Even though Ms. Sothenjwa was not called by the applicant to corroborate the promise she made to the applicant, the evidence of Mr. Jantjies, a shop steward, was that he attended the meeting where the applicant's grievance was discussed wherein Ms. Sothenjwa promised that the applicant would be elevated to driver post at level 3.

35. It was also not disputed by the respondent that the driver posts at the hospital were at level 3.

36. The applicant's evidence was that ever since he was transferred to the Transport section in November 2007 up until today he continued to be paid as a level 2 employee.

37. There was no evidence tendered on behalf of the respondent, except the cross examination of the applicant and his witness by the respondent's representative.
38. From the applicant's evidence it is clear that an expectation was created by Ms. Sothenjwa that he would be promoted to the post of driver at level 3 when Mr. Nokhele retired in December 2011.
39. The applicant felt that he was performing the driver's duties diligently and there was no reason why he should be differently from the other driver at the hospital.
40. As I have indicated above there was no evidence tendered on behalf of the respondent and therefore the evidence and argument of the applicant is therefore not disputed.
41. Section 186 (b) of the Act states that every employee has the right not to be subjected to an unfair labour practice.
42. Based on the undisputed evidence and argument by the applicant, I find that the failure of the respondent to appoint or promote the applicant to the position of driver at level 3 as from 1 January 2012 was unfair and constituted an unfair labour practice as contemplated by section 186 (2) (b) of the Act.
43. In the circumstances, I make the following award:

AWARD

44. The respondent is ordered to appoint or promote the applicant to the position of driver at level 3 retrospectively with effect from 1 January 2012.
45. The respondent is further ordered to pay back pay to the applicant being the difference in the salary between the applicant's current salary (level 2) and salary level 3.
46. The applicant should occupy the said position as from 1 January 2013 and the said back pay will be paid to the applicant on or before 1 March 2013.
47. There is no order on costs.

Signature: _____

Commissioner: *Mangisi Mrwebi*