



# ARBITRATION AWARD

Commissioner: **Thuthuzela Ndzombane**

Case No: **PSHS495-20/21**

Date of award: **16 March 2021**

In the matter between:

**NUPSAW OBO THABISO DANIEL MALEKE**

Applicant

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

1<sup>st</sup> Respondent

and

**LEESTIN JACOBS**

2<sup>nd</sup> Respondent

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was scheduled for and heard on 01 December 2020, 17 February 2021, and 10 March 2021 under the auspices of the Public Health and Social Development Sectoral Bargaining Council at Caledon Hospital. The applicant, Mr. Thabiso Daniel Maleke, was represented by a Union Official, Mr. Zama Sonjica from NUPSAW. The 1<sup>st</sup> respondent, Department of Health- Western Cape, was represented by a Senior Labour Relations Officer, Mr. Mvuzo Ngqame. The 2<sup>nd</sup> respondent, Mr. Leestin Jacobs, represented himself. I proceeded with the matter in terms of Section 138(5)(b)(i) of the Labour Relations Act 66 of 1995, as amended ("the Act"). The proceedings were digitally recorded, and hand notes were taken. The parties submitted

bundles of documents which were accepted and admitted as they purport to be except page 2 and 5 of the applicant's bundle. The parties agreed to submit their closing arguments by no later than 15 March 2021.

## **BACKGROUND**

2. An administrative officer's post was advertised with a closing date of 21 February 2020 at Finance Directorate. The post is at Level 7 with a salary range of R257 508 and with a service benefits of 13th Cheque, employer's contribution to the pension fund, housing, and medical aid allowance. It requires the minimum educational qualification of a senior certificate (or equivalent) with mathematics and accountancy as passed subjects and/or senior certificate (or equivalent) with experience/competencies that focuses on the Key Performance Areas (KRA's). It requires an appropriate experience in a debt and revenue management/hospital accounting environment. The inherent requirements of the job are a valid d (code B/EB) driver's licence. The competencies (knowledge/skills) are as follows: knowledge of Uniform patient fees schedule (UPFS), hospital fees memorandum Chapter 18 and hospital information system (accounts receivable system, clinicom, JAC); knowledge of budgeting, PFMA, Treasury and Finance instructions; ability to work under pressure, independently and meet timeframes; good communication skills (written or verbal) in at least two of the three languages of the Western Cape. Duties are financial management administration via instructions and systems( HIS, BAS, Cash Management, Credit Balances and JAC); debt management of patient fees (irrecoverable debt and debt relief delegations); revenue patient fees (EDI, follow -up of medical aid and non-medical aid invoices, RAF, foreign patients, research patients and state departments); management of patient folder/-recordkeeping systems; management personnel within the component; liaison with other departments and management team.
3. The applicant applied for the post and was invited to write a preliminary assessment. He was not shortlisted because he was told he had failed two questions. However, he believes that he passed all the questions that were asked. According to him the 2<sup>nd</sup> respondent was invited to attend the interview process along with other candidates. The 2<sup>nd</sup> respondent is the successful candidate.
4. The 2<sup>nd</sup> respondent does not have the necessary experience for the job. He also stated that Ms Alicia Gremah Julies did not have a matric certificate at the time she applied but she was shortlisted. He is of the view that there is a concerted effort to prevent him to

progress to a higher position. There are several representatives of the respondent who have grudges against him because he reported irregularities. If he succeeds with his dispute, he requested that the whole process of selection and recruitment for the post of administrative officer at finance should be redone, or instead he should be promoted to the post.

5. The 1<sup>st</sup> respondent stated that candidates were required to answer all questions correctly. The rule is that a candidate should be passed by 100%. Failure to do so a candidate will be eliminated for the process onwards. The applicant failed two questions hence he did not progress to the next phase of the recruitment process. The 1<sup>st</sup> respondent denies that it was involved in an act of unfair labour practice when the applicant was not invited to attend the interview process. Ms. Julies does have a senior certificate. The 2<sup>nd</sup> respondent did have an appropriate experience, hence he was shortlisted.
6. At the last sitting of the arbitration hearing the applicant abandoned the allegations that Ms. Julies did not have a matric certificate when she applied for this post after the 1<sup>st</sup> respondent produced the said certificate. I note that the applicant in his closing arguments has introduced new evidence that was not led at arbitration proceedings. I therefore will not consider this evidence. If the applicant has an information that the 2<sup>nd</sup> respondent lied in his curriculum vitae he may exercise his right to report such to the 1<sup>st</sup> respondent for investigation and determination.

### **ISSUE TO BE DECIDED**

7. I am required to determine whether the 1<sup>st</sup> respondent has committed an act of unfair labour practice by failing to promote the applicant to the post of Administrative Officer: Finance Directorate.

### **THE APPLICANT'S CASE**

8. Mr. Thabiso Daniel Maleke stated that he is the applicant in the matter, and he presented the following evidence. On 1 October 2006 he was employed by the 1<sup>st</sup> respondent as a Finance Clerk at Administration Revenue Fees. His duties are to generate income for the hospital, to make sure the statistics is correct; to follow up on outstanding accounts, to liaise with Accident Road Fund and Correctional Services. He has fourteen years of

experience at Finance Directorate. For the past ten years he was requested to act as the administrative officer in order to advance his knowledge.

9. From February 2020 to March 2020, he was asked to act with the promise that this time around he would be paid the acting allowance. However, he was not paid despite the assurance. There are no issues regarding his performance. He reports to Mr. Glen Bucchianeri who is the Assistant Director. Prior to this his reporting line was Ms. Zelda Boshoffs and she has since resigned. He had a very excellent relationship with her.

10. The 1<sup>st</sup> respondent provided him questions as follows:

a. On an income statement, expenditure will be indicated as a credit (yes or no).

b. UPPFS is a Hospital Fees Tariff Structure (yes or no).

c. As the AO- Finance, you will have the delegation to approve write-offs to the amount of R30 000 (yes or no).

d. At the end of the month, the intra-responsibility/account and the Medscheme control account should have a zero balance (yes or no).

e. The Account Receivable System currently used at provincial institutions is BAS (yes or no).

11. It was said that he got the answers at C and E incorrect. According to him the answer by 1<sup>st</sup> respondent on question C is incorrect because as the Administrative Officer, one will have the delegation to approve write offs to the amount of R30 000. His yes answer is the correct one. "In accordance with the powers delegated to him, article 76(1) (e) and (4) (a) of Public Finance Act 99 of 1999 states that; I hereby certified that the stipulations have been adhered to and authorized the writing offs; further cannot refused to approve the following write offs with different categories which are within his consistency. Category H1: R3700.00; Category H2:R4000.00; H3: R4000.00; PAF: R4000.00; IOD: R4000.00, PDF: R4000.0, PPD: R4000.00 and PPT: R2300.00". These categories are completed on the annexure SS. When one adds up all these amounts it gives a total amount of R30,000.00.

12. Regarding question E "the account receivable system currently used at provincial institutions is BAS". His answer yes is correct because BAS is used by all institutions in the province. Account Receivable System is only used in hospitals. He believes

therefore that the respondent's answer is incorrect. When a debtor comes to pay the account, they used a manual BAS receipt book, and there is also a computerized system on BAS. There is no other provincial institution that uses AR except the Department of Health. There is also another system which is called Clinicom and is used in the Western Cape. Ms Julies did not have a matric certificate at the time of this selection and recruitment process but she was shortlisted. According to him this is irregularity that was committed by the respondent. The second respondent does not have practical experience within admission and fees, and billings at hospital. The second respondent worked at the district office not in the hospital. He believes that he was not promoted because he had reported several irregularities which were investigated against the management of the hospital.

### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

13. Mr. Glen Bucchianeri stated that he is employed by the 1<sup>st</sup> respondent as the Assistant Director at Finance and Supply Chain Directorate, and he presented the following evidence under oath. The answer on question C is no because one can approve write offs of more than 30,000.00 in a batch. The threshold for individual invoice is 4000.00. Administrative Officer does not have authority to approve individual invoice of more than 4000.00. However, if it is a batch an administrative officer can approve an amount (write offs) when added can be more than 30,000.00. The applicant's answer is therefore incorrect. The question deals with individuals' invoices. There were seventeen candidates that answered the question correctly.
14. Regarding question E, the correct answer is no because hospitals use Account Receivable system known as AR or Clinicom system. BAS is the basic accounting system, and it is not a billing system. Hospitals utilize the AR system in the Western Cape. The second respondent's duties talk to the advertisement and he has appropriate experience in debt and revenue management and the hospital accounting environment. District office is the support structure for Overberg. If an employee is absent at a hospital the district will send an employee to come and perform those duties. The 2<sup>nd</sup> respondent did these duties at Swellendam Hospital as per his curriculum vitae. At the time of the advertisement the 2<sup>nd</sup> respondent had four years appropriate experience.
15. I will refer to closing arguments and cross examination where necessary in my analysis.

## ANALYSIS OF EVIDENCE AND ARGUMENT

16. In *National Education Health and Allied Workers Union v University of Cape Town & Others* (2003) ILJ 95 (CC) at page 110 the Constitutional Court referred to the constitutional right to fair labour practices entrenched in section 23(1) of the constitution and the absence of a definition of “unfair labour practice” in the constitution and remarked as follows “The concept of labour practice is incapable of precise definition. This problem is compounded by the tension between the interest of the workers and the interests of the employees that is inherent in labour relations. Indeed, what is fair depends on the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept”. Section 186 (2) (b) of the Labour Relations Act No. 66 of 1995 as amended (“LRA”), states that “unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provisions of benefits to an employer”.
17. It is trite law that it is the prerogative and a cardinal function of an employer to appoint or promote an employee. It stands to reason therefore that an employer is best placed to make such a decision. Labour forums should be slow to interfere with such decisions unless the discretion exercised by the employer was done unfairly, arbitrarily, or is grossly unreasonably. 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 reasons 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”.
18. It is not disputed that for a candidate to progress to the next level of recruitment and selection process she or he needed get all answers correct. Failure to get 100% marks that would automatically lead to the elimination of a candidate. This strict approach

should be understood in the context that a candidate will work with finances which are governed by the Public Finance Management Act.

19. It is common cause that an administrative officer has a threshold to write an amount up to R4 000.00 which are debts owing to the State. This relates to an individual invoice debt. It means therefore an administrative officer does not have authority to write off an individual invoice that is more than R4000.00. However, individual amounts that are less than R4 000.00 in a schedule which can be added to the total that is more than R30 000.00; an administrative officer has authority to approve it. Both parties are in agreement in this distinction. It stands to reason therefore that there is no threshold when a group of invoices which are less than R4 000.00 are added in one schedule. I then refer to the question: “as the AO- Finance, you will have the delegation to approve write-offs to the amount of R30 000 (yes or no)”. Based on the conclusion that, there are no threshold on the write offs in a schedule that are less than R4000.00, the answer is therefore no. The applicant’s answer that an administrative officer can approve write offs to the amount of R30 000.00 is incorrect.

20. The second question reads as follows: “the Account Receivable System currently used at provincial institutions is BAS (yes or no)”. Evidence shows that hospitals in the Western Cape use both Account Receivable System (AR) and Clinicom however at provincial level the Basic Accounting System known as BAS is used. The answer which was expected from the candidates was the Account Receivable System. It stands to reason therefore that the applicant’s answer yes to the question is incorrect.

21. I then turn to the issue whether Ms Leestin Jacobs has the appropriate experience for the post as advertised. I note that the second respondent has the following educational qualifications: Standard 10, Bachelor of Commerce in Financial Management, Advanced Diploma, Post Graduate Certificate and Btech. Evidence shows that he worked as a financial clerk for Overberg District from 01 March 2016 to 01 July 2020. I also note that prior to this experience he had worked for various institutions in finance departments.

22. The advertisement indicates the experience which is required from the candidates to qualify for the shortlisting. It requires “an appropriate experience in a Debt and Revenue Management/Hospital accounting environment”. In understanding the requirements as reflected in the advertisement, one must have an experience in debt and revenue

management or hospital accounting environment. The applicant appears to subject that only hospital experience is required. This reasoning is flawed because the advertisement is broad to accommodate either an appropriate experience in debt and revenue management or hospital accounting environment.

23. The 2<sup>nd</sup> respondent has demonstrated that he has an appropriate experience in debt and revenue management. It was not disputed that Overberg district personnel do provide a supporting role to hospitals. Evidence also shows that at one stage he provided support to Swellendam hospital in finance section. For the above reasons I find on balance of probabilities that the 2<sup>nd</sup> respondent met the requirements of the advertisement of the administrative officer and it was within the purview of the 1<sup>st</sup> respondent to consider him in the recruitment and selection process. Having considered the evidence before me I find on balance of probabilities that the applicant has failed to discharge the onus that the 1<sup>st</sup> respondent was involved in an act of unfair labour practice by failing to shortlist him for the post of administrative officer.

#### **AWARD**

24. I find that the applicant has failed to prove that the 1<sup>st</sup> respondent was involved in unfair labour practice by failing to shortlist him for the post of administrative officer in finance. Consequently, the applicant's claim is dismissed.



**Thuthuzela Ndzombane**