



ARBITRATION AWARD

Panellist: Silas Ramushwana
Case No.: PSHS 523 11/12
Date of Ruling: 20 July 2012

In the matter between:

RAPHAKULA SG

(Applicant)

and

DEPARTMENT OF HEALTH & SOCIAL DEVELOPMENT-LIMPOPO

(Respondent)

Union/Applicant's representative: S G Maake-Attorney
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Respondent's representative: V Ngoasheng- Labour Relations
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DETAILS OF HEARING AND REPRESENTATION:

1. This matter was scheduled for arbitration heard on the 5th of July 2012 at the offices of the Department of Health, Polokwane. Mr. S Maake, attorney appeared on behalf of the employee (hereinafter referred to as the Applicant) and Mr. V Ngoasheng from Labour Relations represented the Department of Health (hereinafter referred to as the Respondent). The proceedings were not electronically recorded. Parties agreed that they submit arguments as there were a lot of common cause issues in the dispute.

ISSUE TO BE DECIDED:

2. I am to determine whether or not the respondent committed an unfair labour practice by failing to appoint the applicant to a position of a Senior Manager (Supply Chain Compliance).

BACKGROUND TO THE ISSUE

3. The applicant applied for a vacancy of Senior Manager (Supply Chain) Compliance during November 2010. The interviews were held on 17 December 2010. The applicant was recommended as a candidate. The vacancy was again advertised on 29 March 2010. The applicant was not appointed. The relief sought by the applicant is to be compensated for 12 months' salary, alternatively, be appointed for the position applied for..

SURVEY OF ARGUMENT

APPLICANT'S ARGUMENT

4. It is argued that the applicant was employed as a Manager Supply Chain whilst it was called Health Provisioning and Contract Management since 2004. In 2009

the Procurement unit was divided into two units. Supply Chain Council was formed. The applicant was appointed as Manager Supply Chain Compliance. During 2010, the applicant was appointed as Acting Senior Manager of Hospital Revitalization Program. Despite the fact that the applicant possesses a Diploma in Education, the applicant possesses a Diploma in Educational Management as well as 8 years' experience in Supply Chain Management. The applicant performed exceptionally well at the interviews.

RESPONDENTS' ARGUMENT

5. It is the respondent's case that the position which the applicant applied for was not filled and the Department had cancelled all vacant posts. The positions requirements were that a candidate should have an appropriate recognized Bachelor's degree or a three year National Diploma or equivalent qualification, Experience in Supply Chain Management and Extensive knowledge in middle management level.

6. It is argued that the applicant had a Diploma in Education and it was not related to Supply Chain Management. The applicant acted in the position for a month. The respondent informed him the reasons for non-appointment as required by the Constitution. The applicant had no right to be appointed as the panel made recommendations to the Executive Authority which has the power to approve or not to approve recommendations. The MEC has the authority to appoint or not to appoint SMS member on level 13 and above.

ANALYSIS OF EVIDENCE AND ARGUMENT

7. In unfair labour practice disputes the employee (applicant) must prove not only the existence of the disputed practice but also that it is unfair. The court

defined 'promotion' as being elevated or appointed to a position that carries greater authority and status than the current position an employee is in. The CCMA in the case of **SA Municipal Workers Union obo Damon v Cape Metropolitan Council (1999) 20 ILJ 714 (CCMA)**, held that the employer has the right to appoint or promote an employee whom it considers the best or most suitable and the arbitrators will only interfere with that decision if it is shown to be unfair or the appointing authority is shown to have not applied its mind.

8. Relating to the appointment of the best candidate, Ngcamu AJ, in the case of **PSA of SA obo Helberg v Minister of Safety & Security & another (2005) 2 BLLR 153 (LC)** had the following to say:

"What is always expected is that the best candidate be appointed. The CCMA expanded further saying: an employee can only succeed in having the exercise of a discretion of an employer in appointing someone 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 manner¹ as well as that the candidate would have been promoted, but for that unfair conduct²".

9. Wallis AJ, said: *"In my view, the questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed. The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of two candidates: Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.*
10. The commissioner, in **Ndlovu v CCMA & others (2000) 21 ILJ 1653 (LC)** held that: *"An employer may attach more weight to one selection criteria than to others. Promoting a candidate with a lower evaluation mark than other candidates, is not necessarily fatal provided the employer had a good reason for doing so".*

11. It is common cause that the employee obtained the highest score and the panel recommended him for the post. The applicant was not appointed and the reasons were given by the Executive Authority, MEC, as it is the only body which may appoint or not appoint SMS member on level 13 and above.

12. The requirements of the post were set as follows: *-An appropriate recognized Bachelor's degree or a three year National Diploma or equivalent qualification-Experience in Supply Chain Management and Extensive knowledge in middle management level.* The applicant possesses a Diploma in Education and although the applicant had some experience in the Supply Chain Management, the qualification is not related to the field. **Section 10 of the Public Service Act of 1993**, requires that a person to be appointed need to meet the requirements as prescribed by the post.

13. It is indeed accepted that the panel had recommended the applicant and it should be noted that a recommendation is not a final decision. The final decision is with the Executive Authority as prescribed by The Public Service Regulations. It is provided that when the executive authority does not approve a recommendation of a selection committee, she or he shall record the reason for his or her decision in writing. It was further demonstrated that reasons for non-appointment were issued or given to the applicant and that no one was appointed as the position was subsequently phased out

14. Accordingly, I am persuaded that the applicant did not establish any unfair labour practice committed by the respondent, I therefore make the following award;

AWARD:

15. I am persuaded that the respondent regarded the applicant correctly as per the guidelines.

16. Accordingly, this application is dismissed.

17. No order as to costs is made.

THUS DONE AND SIGNED AT POLOKWANE ON THIS 20TH DAY OF JULY 2012.

Silas Ramushwana



Signature