



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **C. OAKES**

Case No: **PSHS566-16/17**

Date of award: **11 July 2017**

In the matter between:

PSA obo L Mhlongo

Applicant

and

Department of Health- Kwazulu Natal

1st Respondent

and

Thembelihle Maureen Khoza

2nd Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This is an award of an arbitration held on the 27 June 2017. The Applicant was represented by Mr Charles Ngubane, an official from the Public Service Association. The 1st Respondent did not participate in the arbitration except that Mrs M.P. Zulu represented the 1st Respondent in respect of an application for postponement request. The 2nd Respondent did not attend the arbitration. She was duly notified at the agreed address and fax number.

BACKGROUND TO DISPUTE

2. Prior to proceeding with the arbitration, the 1st Respondent through Mrs M.P. Zulu applied for a postponement of the arbitration hearing.

3. The reasons proffered for the postponement were:
 - That the Respondent's representative, Mr Langa is not available as he is on leave. Also on leave is the other senior who could attend to the arbitration, that is, Mr Shezi, the District Human Resources Manager.
 - Lastly, the Chief Executive Officer of the institution is unable to attend the arbitration on behalf of the institution as he is attending to patients.
4. The application was opposed by the Applicant. The main reason for doing so is that the 1st Respondent has failed to comply with Council's rules in respect of postponements. The 1st Respondent according to Mr Ngubane failed to apply for a consensual postponement within seven days of the hearing as required by Council Rules. In addition, he stressed that the 1st Respondent was notified of the date of the arbitration on the 17 May 2017, a full month and a week before the hearing. It was argued that they should have utilized the time to seek a postponement.
5. I after consideration of the submissions refused the application for postponement for the following reasons:
6. The arbitration was previously adjourned for some reason or the other and it is now pertinently clear that the matter is unnecessary been delayed.
7. Whilst on leave, the representative should have been diligent in dealing with the postponement. He should have pursued the postponement diligently and when realizing that he was not obtaining agreement in respect of his consensual request, should have attended to the arbitration. The fact that he was on leave is no bar to him attending to the arbitration. The issue of leave is an arrangement between himself and his employer and has no bearing on the arbitration.
8. However most importantly the rules stipulate what should be done in respect of requests for postponement.
9. This was not adhered to by the Respondent.

SURVEY OF EVIDENCE

10. The only witness to testify was the Applicant, Lulama Mhlongo who testified under oath as follows:
11. She is employed as Operational Manager of Primary Health Care, Mobile. She earns R499 000-00 per annum. In December 2015, the Respondent advertised the post of an Assistant Manager, Primary Health Care. The Applicant applied for the post and was shortlisted. She attended an interview and obtained the highest score in the interview.

12. Reference was made to the interview minutes on page 12 of bundle 'B'. She testified that there were ten candidates interviewed. She was found to be suitable for the post and read into the record the finding of the interview committee which states:
- "The candidate met the minimum requirements of the post. At the interview she displayed good knowledge, skills and competencies required for the post. Therefore the committee found her suitable for the post."*
13. Reference was made to the outcomes of the remaining seven candidates where the findings in respect the remaining barring two who withdrew from the interview was the following:
- "The candidate met the minimum requirements of the post. At the interview she displayed poor knowledge, skills and competencies required for the post. Therefore the committee found her not suitable for the post."*
14. The candidate who was appointed after the post was re-advertised, that is Thembelihle Khoza, was part of this interview and was also found not to be suitable for appointment to the post.
15. She was recommended for appointment as is evidenced from the recommendations where it states:
16. *"The committee, in coming to conclusion with its final selection of the most suitable candidate, looked at the final scores. Therefore the committee recommended the appointment of Ms. L. Mhlongo should she decline the post, the post will be re-advertised."*
17. To emphasize this, she testified that she was congratulated and following the interview in April 2016 she received communication where she was included on a list of managers invited to a meeting of Primary Health Care managers. She was also invited to a meeting which was in Ladysmith for primary health care managers for capacity building for managers to support the Operational Managers.
18. However, she was never appointed formally and instead the post was advertised again and was not given a reason for the non-confirmation of her appointment.
19. She did not apply when the post was re-advertised and instead filed a grievance as she believed she should have been appointed the first time around. Her grievance was not resolved and in the meantime the interviews in respect of the second interview proceeded and Thembelihle Khoza was appointed to the post, the same candidate who was found not to be suitable at the first interviews.
20. She feels this was unfair and she should be appointed as per the recommendation after the first interviews.

21. The chairperson of the interview committee of her interviews was a Ms. SV. Khoza. She does not know if she is a relative of the appointed candidate, Ms. Thembelihle Khoza, who has the same surname as the chairperson of the interview committee. She, however suspects nepotism.

ANALYSIS OF EVIDENCE

22. In determining whether an employer has committed an unfair labour practice regard must be had for Section 186(2) of the Labour Relations Act No:66 of 1995.

23. The case at hand is that the 1st Respondent committed an Unfair Labour Practice in not promoting the Applicant.

24. The word *promotion* is defined in the New Choice Concise dictionary as *an elevation in position or rank*.

25. Section 186 (2) (a) states the following:

*“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 to an employee”*

26. The facts speak for themselves in the present matter. The uncontested evidence shows that the Applicant attended an interview and obtained the highest score in the interviews. All other candidates were found not to be suitable.

27. She stood out from all the candidates and this was emphasized by the recommendation of the panel where they stated their recommendation as follows:

28. *“The committee, in coming to conclusion with its final selection of the most suitable candidate, looked at the final scores. Therefore the committee recommended the appointment of Ms. L. Mhlongo should she decline the post, the post will be re-advertised.”*

29. I must pause here to point out that it is clearly stated that the only time the post would be re-advertised would be where the Applicant declines the post. This did not happen and the decision to re-advertise is puzzling and in direct conflict with their recommendation and the norm when posts are re-advertised.

30. It cannot be that it was because there was no suitable candidate, as the Applicant was the recommended candidate. It certainly was not because of funding, otherwise, it would not have been re-advertised. In fact, no reason has been given for re-advertising the post.

31. At very least the 1st Respondent was enjoined to explain to the Applicant as the successful candidate why she was not appointed in the face of the poor performance of the other candidates at the interviews.
32. The decision not to appoint the Applicant is arbitrary and capricious and smacks of unfairness and possible interference in the appointment of the Applicant.
33. It arouses suspicion as to whether there were some sought of shenanigans involved in the process. I can understand the Applicant's suspicion of possible undue interference, given the suspicious manner in which her appointment was handled.
34. Legally the conduct of the 1st Respondent was unfair and even if the 1st Respondent participated in the hearing, I see no way in which they could explain their way around the non-appointment of the Applicant, even if the head of department suggests that he/she exercised their right to veto.
35. There does not seem to be a reasonable basis for doing so, in light of the one-sided interview where the Applicant outscored every candidate present.
36. I see no reason why the Applicant should have had to be re-interviewed for the post. It makes no sense if the same candidates were interviewed and to add insult to injury a candidate who had failed dismally in the initial interview was appointed heightening suspicion of possible interference.
37. There was no reason why Ms Khoza a candidate who was found not to be suitable is appointed the second time around. This defeats the object of appointing the most suitable candidate. In the absence of any explanation given for re-advertising the post the failure to promote the Applicant is found to be unfair.
38. Hence, I make the following order

Award

39. The 1st Respondent, The Department of Health-Kwazulu Natal, is ordered to, with effect from the date of this award, promote the Applicant, Lulama Mhlongo, to the post of Assistant Manager: Primary Health Care and to pay her remuneration and benefits applicable to the post.
40. The promotion referred to in paragraph 39 shall operate retrospectively to 1 March 2016.
41. The respondent must pay the Applicant, by no later than 31 August 2017, the difference in remuneration between her current position and post of Assistant Manager: Primary Health Care that she would have earned from 1 March 2016 to the date of this award.

C. Oakes

**C.OAKES
COMMISSIONER**