



ARBITRATION AWARD

Panellist/s: Thuthuzela Ndzombane
Case No.: PSHS599-11/12
Date of Award: 4-Apr-2012

In the ARBITRATION between:

DR. LAUREN JADE BROWN _____
(Applicant)

and

DEPARTMENT OF HEALTH: WESTERN CAPE _____
(Respondent)

Union/Applicant's representative: Mr. Leon Bell [C&A Friedlander Attorneys]

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DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was scheduled for and heard on 15 March 2012, under the auspices of the Public Health & Social Development Sectoral Bargaining Council at Western Cape College of Nursing in Athlone. The applicant, Ms Brown, was represented by Mr Bell, an attorney from C&A Friedlander Attorneys. The respondent, Department of Health –Western Cape, was represented by its Deputy Director, Advocate Rodriques.
2. 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 handwritten notes were taken. Parties agreed to submit their heads of arguments by no later than 23 March 2012.

BACKGROUND

3. The applicant was employed by the respondent on 07 April 2011, as Dentist Grade 1. She earned R442266.00 [four hundred and forty two thousand two hundred and sixty six rand] per annum prior to her alleged dismissal dispute. She stated that the respondent has committed an act of unfair labour practice by failing to promote her. She argued that she was promised that she would be shortlisted and that process of short listing was changed.
4. She also argued that the respondent has created an expectation that her contract would be renewed on a month to month basis. She stated that she is a qualified dentist and did a community service at Kraaifontein Community Centre in 2009. She had built up a good relationship with the CEO, employees and the community. After she had

completed the community service she worked at Tygerberg hospital for a period of six months.

5. She heard that there was a position which became available at Kraaifontein Community Centre and she proceeded by approaching Sister Steyn. She worked there for a half-day for a period of nine months. Whilst, she worked there she was approached by Sister Steyn with regard to a vacant contract post. Steyn encouraged her to apply for the post which she did. However, she was employed on a three month contract although being informed that she does well she took a good chance to be appointed.
6. Steyn informed her that her post has become vacant on permanent basis. The post was advertised as Dentist Grade 1 to 3. She then applied for the post. As the time was approaching for the interviews she was informed by Sister Steyn that the criteria to shortlist has changed and she was not shortlisted. She was never invited for the interview.
7. After the interviews have been completed her contract of employment was extended on two occasions. She had written two letters to the department without a response. She was under the impression that the respondent has not made an appointment to the permanent post hence she thought her contract would be renewed. As she was kept on a month to month basis to her surprise there was no information coming forth with from the respondent to update her on the developments.
8. Respondent stated that a permanent post became available in Kraaifontein and to fill the post it takes three months period. As service delivery is important such should not be affected by the process of recruitment. The respondent decided to renew the contract of the applicant. At the begging of the last contract the applicant was informed that she should consider it as a notice period. Respondent denied that the applicant was not given an opportunity to compete as she applied for the post which was

advertised as Grade 1 to 3. The applicant was considered for the position but she could not be shortlisted as best candidates were chosen.

ISSUE TO BE DECIDED

9. I am required to determine whether or not the respondent has created an expectation that the contract will be renewed and whether the respondent has committed unfair labour practice by failing to promote the applicant.

SURVEY OF APPLICANTS EVIDENCE AND ARGUMENTS

10. **Dr. Lauren Brown** stated that she is the applicant in this matter and she presented the following evidence under oath. She stated that she completed her studies of dental surgeon in 1998. She proceeded by doing community service at Kraaifontein Community Service Centre for a period of a year from January 2009 to December 2009. In January 2010 to June 2010, she worked at Tygerberg Hospital Oval Centre.

11. In June 2010, she then started as a locum at Kraaifontein Community Service Centre. Sister Steyn is the facility manager of the centre. Sister Steyn asked her to join an Agency in order to be employed as a locum. She was interviewed for this position whereby Steyn was the chairperson of the panel. Even though the contract was for three months she was told that the position was for a long period.

12. She had developed a good relationship with the role players. There were two dentist needed at the Kraaifontein Community Centre. At that stage it was only a permanent post and contract post. Steyn informed her that she had to compete for the contract post. She was told by Steyn that if she gets the post she had to prove herself. The reason Steyn went for a contract post was to prevent a permanent post to be frozen. She competed for the post by going through the interview process and was successful.

13. A permanent post became available. Steyn then informed the HR department that the permanent post should be advertised as Grade 1 to 3 in order to give the opportunity the applicant to apply.
14. Steyn encouraged her to apply and would be advised of the interview date. After she was appointed on the contract post she enquired from Sister Steyn about the permanent post. Steyn who informed her that she would be automatically invited for the interview. Steyn further told her that she had done well in the previous interview process. It was brought to her attention that the advertisement would be placed in a specific newspaper.
15. In her mind she did well in her position and has a good relationship. She thought that she would be given an opportunity to compete for the permanent post. On numerous occasions Steyn told her that if she had authority she would put her on permanent position. The post was advertised and she applied for it as the duties were the same as what she was doing. She waited and enquired on several times about the interview. Steyn's response was that she did not know what was going one.
16. On 01 June 2011, Steyn told her that Mr Patientin has changed the criteria for the short listing to Grade 2 and 3. She was told then that her application was not considered. The reason for the changed was that they needed a more experience dentist as there was already a community dentist at the centre. She could not understand as in 2006, there were two dentists with no experience at the Centre. In 2009, the permanent dentist was at Grade 1. Steyn informed her that she would continue on one month contract as from July 2011. She was devastated because he did well at the centre.
17. She continued with her work as normal. No one told her as to when the new doctor would start. Steyn informed her that there was a possibility that the contract would be renewed for august month but that would be confirmed at the end of July. The contract was renewed. At the beginning of August she was told that she should consider this

contract as a notice month but Steyn said that if she would stay on in September she would be advised.

18. A day before August month ends Steyn informed her she would find out as to whether her contract would be renewed. At 3:30pm she was told that her contract will not be renewed. September month is oval month she ought that as the new doctor had not started her contract would be renewed. She felt that she was treated unfairly as she believed that she would be invited for interview. She was not working for September and October months.

SURVEY OF RESPONDENT 'S EVIDENCE AND ARGUMENTS

19. **Ms Leona Steyn** stated that she is employed by the respondent as a Facility Manager in Kraaifontein Community Centre and she presented the following evidence under oath. The facility operates 24 hour service. Her core functions are to manage the facility, human resource, finance and supply chain management.

20. The applicant started working at the facility as a Cosmo Dentist for a period of one year. After the completion for the in-service training the applicant left and joined the Tygerberg hospital. On several occasions the applicant phoned her with the regard to vacant post in Kraaifonateein as she indicated that she was interested to work there. Dr. Omar who worked as a permanent dentist at Kraaifontein left for Goodwood. At the time Dr Omar left he was still on the budget of Kraaifontein.

21. They needed two dentists as the patient's load was too much. Applicant indicated to her that she was going to resign at Tygerberg hospital. As the post was not vacant they could not appoint a permanent dentist. She then asked the applicant as to whether she would be interested in the locum post.

22. She gave the details of the service provide for the applicant to be registered. The applicant was employed as a locum and paid by the service provider. Dr Omar then vacated the post and she then asked the applicant whether she was interested to work on a contract.
23. The post was advertised internally and interviews were conducted. She had intention of appointing the applicant but had to follow the due process. If, there were other candidates who were better than the applicant she would have appointed the best candidate for the job.
24. It takes six to eight weeks to advertise a post. The HR draw up the advertisement. The applicant was aware that she was on a permanent post at the time she was employed on contract. Applicant was aware that a permanent person would be appointed. Applicant had applied for the permanent post. She told the applicant that her chances of being considered for the interview and appointment were better as she had experience. She does not have the authority to appoint only the director possesses such authority.
25. The functions of the posts are at a supervisory level and to run the component efficiently. The applicant did the day to day running of the Unit. She assisted the applicant on other areas of work. Applicant needed further training as the post needed a person who would be fully functionary. The post was advertised for the three grades from 1-3 as one post.
26. Dr Spics and Mr Patientin decided to look at the short listing process differently because of the responsibility of the dentist and of voluminous applications received for one post. They considered the amount of experience and supervisory capacity to all candidates. The benching marking was done which gave a score.
27. They could not interview all the 80 candidates. They needed only ten candidates to interview. All the candidates were considered for the short listing process. The applicant

scored below 50%. If, there are two candidates who applied for the post they do not bench mark. However, the applicant was not shortlisted because she did not make a bench mark of 60%.

28. During the process of short listing they used the same criteria contained in the advertisement. Eventually, Dr Stevens was appointed. They do not normally explain the process to candidates before it is completed. She could not have informed any person until the process was completed in August or September. She had informed the applicant about the successful candidate.

29. She felt very sorry for the applicant. She knew how the applicant wanted the post. She told the applicant at the beginning of August that she must consider the contract as a notice month. The appointment process took longer than expected she also told the applicant that was her last contract but if there was any changes she would inform her.

30. **Alfonso Patientin** stated that he is employed as Primary Health Care Manager and he presented the following evidence under oath. At the stage of recruitment they received so many applications. As a result of the bulk of the applications they considered not to consider grade 1. They then contacted the HR who informed them that they need to consider all applications.

31. The applicant was considered for the post. However, the applicant scored 38% which was below the bench mark. All the candidates met the minimum requirements were put on the bench mark list including the applicant. They never changed any criteria but experience and supervisory capacity took preference. No where the institutional manager has power to appoint instead they make recommendations. The final decision lies with the director. No body can give an undertaking without knowing how many candidates would apply.

32. I will refer to cross-examination and closing arguments where necessary in my analysis.

ANALYSIS OF EVIDENCE AND ARGUMENT

33. I raised my reservations as to why the two cases were combined because according to me they are not related even though the merits of the cases may be the same. Be as it may I decided to deal with the two matters as scheduled. I will start with the allegations of unfair labour practice purported to have been committed by the respondent.
34. It should be borne in mind that the onus rests upon the applicant not only just allege but to prove that the respondent has committed of unfair labour practice. According to the evidence before me it is clear that the applicant had a good and cordial relationship with Ms Steyn. This relationship had blossomed to the extent that Ms Steyn had hoped that the applicant would eventually be employed on permanent basis by the respondent.
35. It appears therefore Ms Steyn had thought that they would receive few applications for the permanent position. I also note that Ms Steyn had appreciated that her powers were limited and therefore she could not appoint the applicant on her own. Ms Steyn appears to have uttered this statement "if I had powers I would have appointed the applicant on permanent basis". I will revert back to this issue at a later stage in this award.
36. The question that should be asked is whether or not the respondent has committed an act of unfair labour practice by failing to promote the applicant. Evidence shows that the applicant was employed on a three month contract as a Dentist on Grade 1. She also applied for the permanent post Dentist Grade 1 even though the post showed all the three grades. It should be noted that the applicant qualified to be appointed at Grade 1 hence Steyn made it sure that Grade 1 was reflected on the advertisement. In the light of this I find that the applicant had applied for a lateral position and the only change was that the post would become permanent. Clearly, the applicant applied to be appointed

to the post rather than to be promoted. For this reason alone the applicant cannot claim that an appointment is equivalent to a promotion.

37. Consequently, the applicant cannot prove that the respondent has committed an act of unfair labour practice hence that process could not be regarded as a promotion process.

38. Even if, in my conclusion above I was wrong I would come to the same decision on different grounds. Going back to my earlier observation on the relationship between the applicant and Ms Steyn. I find that Ms Steyn had promised the applicant that at least she would be shortlisted after a due process being followed. One has to take into account the fact that they had a good relationship. The most important element on this promise is the fact that Ms Steyn had indicated that her powers were handicapped since she has no authority to appoint.

39. By implication what ever promised she had made does not have legal standing. I find that the applicant was aware that Ms Steyn has no power to accomplish the promise she would make. To be precise it was the desire of Ms Steyn to have the applicant on board on permanent basis.

40. In **De Nysschen v General Public Services Sectoral Bargaining Council & Others (2007) 28 ILJ 375 (LC)** the following criteria was used in assessing a dispute of promotion which are:

- a) The advertisement must contain accurate information about both minimum requirements and preferred experience/competencies and these must be necessary for the job.
- b) The assessment of the candidates at the interview must relate only to the competencies required for the job.
- c) The necessary qualifications or inherent requirements for the job may not be changed after the advertisement.

- d) The successful candidate should ordinarily be the person who not only meet the minimum requirements, but who scores the highest in the assessment.
- e) If, there is a deviation from the highest scoring candidate, there must be a sound reason, either operationally or for employment equity, to justify this.
- f) If, there is a deviation from the highest scoring candidate, the successful candidate must possess the competencies needed for the job.
- g) The employer must be able to articulate why a particular candidate was successful.

41. Evidence shows that applicant responded to an advertisement which was structured to capture three grades at once. It appears that the applicant is of the view that the way the advertisement was structured disadvantaged her. Whether or not the respondent is correct to structure an advertisement in such a fashion does not necessary render the process unfair.

42. At the time the applicant made an application knew that if those who qualified for grade 2 & 3 applied in numbers, she had relative low chances that she would be shortlisted. Even though she was aware of this predicament she decided to enter the race with the hope that she would make it. In the light of the above I find no evidence that the process followed by the respondent was unfair.

43. The only assertion the applicant relied upon is that she was informed by Ms Steyn that the process has changed. There is no way that the process changed in view of the applications received by the respondent. I agree with the applicant's representative that

the grade 1 candidates stood fewer prospects that they would be shortlisted in such circumstances.

44. Obviously, this kind of process always depend as to in which grades the most applications were received for. I am convinced that if the respondent had received only grade 1 application obviously the applicant would have been shortlisted.
45. The fact that the respondent took into account the experience and supervisory capacity cannot be faulted as it is in line with the advertisement. If, the respondent would have short listed the applicant in the circumstances such process would have been opened up for legal challenge hence it would have been unfair.
46. The second issue is whether or not the respondent has created an expectation to the applicant that her contract would be renewed for September month. Evidence shows that applicant was on a fixed term contract of three months which was renewed on two occasions on monthly basis.
47. It is common cause that at the beginning of the last contract of August month, Ms Steyn, informed the applicant that she should consider this as a notice month period and if there is any changes, Ms Steyn, would advise her of such. For this reason alone there is no evidence that the contract would have been renewed for September month.
48. The applicant had worked a notice month period in August. If, there was any expectation created it would have been a suspensive condition. There is no evidence that Ms Steyn came back to her and informed her that the contract would be renewed. If, such had not occurred the implication is that the notice period stands.
49. In **Bayat v Durban Institute of Technology (2006) 27 ILJ 188**, Munks C reasoned as follows *“in the present matter, as a matter of law, no contract can come into being without the express suspensive condition (that a satisfactory probity check be achieved)*

being fulfilled. The operation of the contract therefore depended upon a future and uncertain event”.

50. It appears that it was always in the mind of the applicant that the contract would be renewed because a permanent person was not yet appointed and September month is the busiest. In my view I find that the applicant is failing to appreciate that the expectation can only be created by the respondent. In the light of the above I find that the applicant has failed to discharge the onus that the respondent has created an expectation that the contract would be renewed for the month of September.

AWARD

1. I find that the applicant, Dr. Brown, has failed to discharge the onus that the respondent, Department of Health, has committed an act of unfair labour practice by failing to promote her. Consequently, there is no evidence of unfair labour practice.
2. I also find that the applicant has failed to prove that the respondent has created an expectation that a contract would be renewed for the month of September hence she was informed that August month was a notice period.

DONE AND SIGNED IN CAPE TOWN ON THIS 04 April 2012.

A handwritten signature in black ink, appearing to be 'Thuthuzela Ndzombane', enclosed within a faint, hand-drawn rectangular border.

Arbitrator: Thuthuzela Ndzombane