ARBITRATION AWARD

PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

CASE NO: **PSHS627-17/18**

PANELIST: **P DHLODHLO**

DATE OF AWARD: **12 DECEMBER 2017**

In the matter between:

DENOSA obo N NDELENI APPLICANT

and

DEPARTMENT OF HEALTH- EASTERN CAPE RESPONDENT

DETAILS OF THE HEARING AND REPRESENTATION

1. This arbitration was originally between Denosa on behalf of the others (Ms Khanyisa Matoti, Ms Sindiswa Nobevu & Nandipha Ndeleni) and the Department of Health, the respondent.
2. At the commencement of the proceedings the respondent settled with the two applicants namely: Ms K Matoti and S Nobevu.
3. The proceedings were scheduled at the respondent's Cofimvaba hospital boardroom on 6 December 2017.
4. Mr A Pampila, a DENOSA official represented the applicants.
5. The respondent was represented by its Assistant Director (Labour Relations), Mr T Moni.

6. These proceedings were digitally recorded and finalised on the above –mentioned date.
7. Closing arguments were filed as agreed on 8 December 2017.

ISSUE IN DISPUTE

8. I am required to establish whether or not the respondent committed an unfair labour practice, in relation to the granting of study benefits to the applicants, and if so, to determine an appropriate remedy.

BACKGROUND

9. Ms N Ndleni's (enrolled nurse) proceeded with the arbitration as hers could not be resolved.
10. Her main contention emanated from respondent's failure to grant her the study leave in line with its policy.
11. The respondent argued that it could not accommodate the applicant beyond its permissible 10% quota, since it had already granted its three (3) eligible employees study leave out of thirty-two (32) workforce.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's version

12. Ms Nandipha Ndeleni testified that she is the respondent's enrolled nurse with an unbroken service since 2009.
13. She applied for the special study leave because she met the requirements, but was not recommended.
14. To her surprise, she learnt that another employee (Mflatelwa NE) from the Local Service Area (LSA) was granted the special leave and counted as a hospital employee.
15. In cross- examination he conceded that she was advised by the hospital CEO that Mflatelwa is a hospital employee, although posted in the LSA. The applicant reiterated that Mflatelwa did not meet the selection requirements and not in the hospital employees' database (Bundle D). Secondly, she commenced duties in 2011 (two years later than the applicant) contrary to the FIFO (Fist in first out) criteria.

Respondent's version

16. Mr Vukile Rini testified that he is the Assistant Director (Admin) in the respondent's hospital.
17. He stated that the selection process was performed by the hospital's skills development committee (SDC). Only three employees (10% of the workforce), including Mflatelwa qualified for the study leave benefit in line with the respondent's policy.
18. The policy (Bundle 1) stated that 10% maximum of each category can be granted study leave including those on study leave. Further, study leave will be recommended subject to organisational needs, this policy may override all other policies including other clauses of this policy. Mflatelwa is a hospital employee seconded to the LSA (health clinic). Mflatelwa applied for study leave, whilst placed at the LSA. Therefore, the respondent could not reverse her selection by the LSA committee. On her return (Mflatelwa) will be expected to serve at the hospital.
19. Rini submitted that granting the applicant the leave would exceed the respondent's quota in her category.
20. During cross-examination he stated that each selection committee (hospital and/or LSA) selects eligible candidates within each category. He disputed list of hospital employees without Mflatelwa (Bundle D) arguing that it was not generated from his office. Rini maintained the list was authored by Ngaleka (Acting Deputy Manager: Nursing Services). Regarding FIFO principle Rini argued that when the hospital's selection committee meeting convened, Mflatelwa was already granted leave by the LSA committee (where she was posted). Further, they could not disadvantage Mflatelwa, already furthering her studies by calling her back to accommodate the applicant.
21. The two committees (LSA and hospital) selected candidates from different data base(s). Rini could not comment on the reasons for omitting Mflatelwa in the study leave list (Bunde D). He could also not comment on the impact of the FIFO principle in relation to the applicant.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. It is the applicant's main contention that the respondent actions constituted an unfair labour practice in that she was eligible for the study leave by virtue of her service. The other candidate (Mflatelwa) was currently serving in the LSA, selected by the LSA and did not appear in the hospital data base.
23. Rini submitted that he was not part of the LSA selection committee, insisting that the hospital could not afford to grant study leave above its quota. In closing argument, the respondent reiterated that it could not recall the candidate selected.
24. On the other hand, the respondent did not dispute the applicant's claims that it failed to comply with the FIFO principle and that Mflatelwa was not in the establishment at the time of the selection. The applicant argued in closing that she commenced employment in 2009, whilst the candidate in question was employed in 2011.
25. The evidence presented before me states that Mflatelwa was granted study leave by the LSA committee, operating independently from the hospital's committee. I am not convinced by the respondent's argument that if it granted the applicant study leave, it would exceed its quota in the absence of a clear directive on how seconded employees should be dealt with.
26. Further, its study leave policy does not detail the procedure relating to seconded candidates, etc. **Paragraph 2.2.2 of the circular Minute 1/2007 from the Superintendent General dated 2 May 2017 (Bundle 1) stipulates that Training Committees must agree on a criterion that will be used to evaluate the applications, the criterion can include the quota i.e 10% of the category which includes those on study leave already, date of appointment in the institution(FIFO) , 4 year diploma has 45 years limit, those who received approval letters in the previous year (2016) but could not get a space at Lilitha must be given preference, performance at work, etc. These criteria must be clearly minuted. Reasons for not recommending must also be clearly minuted for in case there in a dispute.**
27. In the minutes of the selection committee held on 02 May 2017(Bundle 3), the comments on the reasons for not recommending the applicant for the two-year bridging course are: **'Not recommended she was rejected because the institution has priorities to release two so that the service delivery won't be affected.**

28. It is my view that the above reasons contradict Rini's evidence on the 10% quota and Mflatelwa's secondment argument. Again, the recommendation did not define the institution's priorities and their impact on the applicant's eligibility. The study leave policy also contained the following clause: **Further, study leave will be recommended subject to organisational needs, this policy may override all other policies including other clauses of this policy.**
29. The respondent's insistence on 10% quota version, in the absence of considerations of other factors stipulated in the Superintendent General circular lacks merit. I find that the reasons for not recommending the applicant were not clearly documented in line with the circular. Again, the respondent selection committee's mandate had been extended to recommend study leave subject organisational needs.
30. In **Apollo Tyres South Africa (Pty) v CCMA & OTHERS (2013) 34 ILJ 1120 (LAC)** the Labour Appeal Court held that the definition of benefit as contemplated in s186(2) as of the Labour Relations Act (LRA) as amended was not confined to rights arising *ex contractu or ex lege, but* included rights judicially created as well as advantage or privileges employees have been offered or granted in terms of a policy or practice subject to the employer's discretion.
31. From the applicant's version there is no doubt that her claim fell within s186(2) of the Act, since it was one of those advantages or privileges offered in terms of a policy or practice. Lastly, court in **Aucamp v South African Revenue Service (2014) 2 BLLR 152 (LC) held** that even if the benefit is not a guaranteed contractual right per se, the employee could still claim the same on the basis of an unfair labour practice, if the employee can show that the employee was unfairly deprived of the same. An example would be where an employer must exercise the discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly.
32. In these proceedings the applicant stated that she was unfairly deprived of the benefit, due to the respondent's failure to act in line with the policy.
33. I therefore conclude that the applicant established on a balance of probabilities that she was eligible for the study leave and that the respondent's discretion not to grant her was unfairly exercised. The selection committee did not consider the organisational needs and /or take into account its decision on the FIFO principle in relation to the applicant.

34. Again, the reasons advanced by Rini (10% quota and Mflatelwa's name) were not mentioned in the documents presented in these proceedings. I conclude that there was no transparency and consistency in the selection process. The selection committee arbitrarily exercised its discretion to disadvantage the applicant, without just cause.

35. I therefore deem it appropriate to make the following award:

AWARD

36. The respondent is ordered to grant the applicant, Ms N Ndeleni, study leave in line with its policy.
37. No order as to costs is made.

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PHSDSBC PANELLIST