



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS659-19/20**

Commissioner: **David Pietersen**

Date of award: **1 July 2020**

The matter between:

DENOSA obo GLORIA MASERAME MOJAMONGWE

APPLICANT

and

DEPARTMENT OF HEALTH- NORTHERN CAPE

RESPONDENT

DETAILS AND REPRESENTATION

1. The dispute between Democratic Nursing Organisation of South Africa (DENOSA) representing its member Mrs Gloria Maserame Mojamongwe, the applicant versus Department of Health- Northern Cape, the respondent was referred to arbitration in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended (the LRA) under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the Council).
2. The arbitration hearing took place on 11 June 2020 at the respondent's Robert Mangaliso Sobukwe Tertiary Hospital in Kimberley. The applicant was present and represented by Mr Vincent Phuroe, the Provincial Organiser of the trade union DENOSA in the Northern Cape. The respondent was represented by Mr. Jack Pudikabekwa, its Labour Relations Officer. The hearing was digitally recorded.

ISSUES TO BE DECIDED

3. I am called upon to determine whether the respondent committed an act of unfair labour practice relating to promotion.

3.1 In so doing, I must decide whether the respondent acted irregular by appointing the applicant in a post which she did not apply for and was also not interviewed for.

3.2 I must also decide whether the incorrect appointment amounted to an act of unfair labour practice.

BACKGROUND

4. It is common cause that the applicant is employed by the respondent since March 1987 as a Professional Nurse and is currently occupying a post of Operational Manager: General at the respondent's West End Specialised Hospital (WESH) in Kimberley since February 2018. The dispute follows a situation on 16 August 2019 when the respondent apparently took its final decision not to appoint the applicant in the correct post of Operational Manager: Speciality, which apparently is the post that the applicant applied- and interviewed for.

5. The applicant lodged an unfair labour practice dispute with the Council on 29 August 2019. A conciliation did not take place and the Council informed the parties on 25 September 2019 to apply for arbitration. The applicant subsequently applied for arbitration on 08 November 2019. The arbitration was scheduled for 03 December 2019 and had to be postponed to 16 April 2020 because of the illness of the respondent's representative.

6. Based on the Covid-19 pandemic and the government's lockdown regulations, the matter had to be postponed again until 11 June 2020, when the arbitration hearing

finally took place. The arbitration hearing was partly concluded as the parties requested to submit closing arguments by 17 June 2020.

7. It is common cause that the applicant applied for the post of Operational Manager: Speciality at salary Grade 1 (R465 939.00 per annum). It is also common cause that the applicant was interviewed for this post and that the interview panel recommended her for the post. The parties also agreed as common cause that the respondent obtained a motivation¹ from the panel regarding the appointment of the applicant in the post.
8. It is also common cause that the applicant assumed duties on 01 February 2018 in an Operational Manager post. The parties agreed that the respondent subsequently decided to change the appointment of the applicant to Operational Manager: General at salary Grade 1 (R367 815.00 per annum). It is common cause that the applicant accepted and signed the offer of employment on 28 March 2018 under protest.

PRELIMINARY ISSUE

9. At the commencement of the hearing, the respondent's representative applied for a postponement because one of its witnesses happens to be working from home and is not available. The witness was apparently suffering from comorbidities which prohibited her from entering areas which might possibly be Covid-19 viruses.
10. The applicant objected to the request and stated that the matter has been dragging on since December 2019 and had to be postponed on account of the illness of the respondent's representative. It stated that the postponement cannot be considered because it will prejudice her further with the delays.
11. Having considered the submissions of the parties together with the fact that the applicant has been in the alleged "incorrect" post since 2018, I deemed it to be in the interest of fairness to decline another postponement application. The

¹ Bundle A page 38

respondent could have in my view made the necessary arrangements to cater for the circumstances of its witness which it failed to do.

THE MAIN DISPUTE

SURVEY OF EVIDENCE AND ARGUMENT

12. This section constitutes a summary of the relevant evidence and arguments put forward by the parties. It is not intended to be exhaustive, but I have taken all the submissions into consideration in arriving at my conclusions.

Documentary Evidence

13. The applicant handed in its bundle of evidence marked Bundle A with annexures A, B, & C. The respondent handed in its bundle of evidence marked Bundle B.

The Applicant's case

14. Mrs Gloria Mojamongwe, the applicant, was sworn in and she testified as the only witness in her case. She testified that she met the requirements of the post as indicated in the advert². She stated that includes the added requirement of a specialisation field and experience. The applicant stated that she was called two days before receiving the confirmation of duty letter that she will not be getting the post she applied for.

15. The applicant stated that based on the many irregularities takings place, she was scared of losing her promotional post and accepted the offer made to her. She stated that she wanted to secure her promotional post. She stated that she immediately approached her Chief Executive Officer (CEO), who promised to take up the matter. The applicant stated that her CEO eventually wrote a letter³ to their superiors.

² Bundle A page A21

³ Bundle A page A13

16. The applicant testified that her clinic is a specialised clinic in accordance with her EPMDS Agreement.⁴ She stated that her first KRA deals with her specialisation duties and is regularly assessed with no negative findings against her. The applicant testified that her unit in her current post even obtained a 90% scoring at national level. She stated that at the interviews it was made clear to her that she is been interviewed for the Operational Manager: Speciality post.
17. In cross-examination, the applicant stood by her version and added that a grandfather clause exists in the OSD that all professional nurses be regarded as having specialities. She denied that her CEO acted contrary to policy in the process of raising her grievance. She stated that she raised her grievance immediately after signing the confirmation letter.
18. Mr Alber Links, the applicant's CEO, was sworn in and testified as the second witness in the applicant's case. He stated that he knows the applicant and she is one of her operational managers at the hospital. He stated that he received a grant to create the post at his hospital and that she possesses the qualifications of the post and met the requirements as well. He stated that he was also the chairperson of the interviewing panel.
19. The witness stated that he wrote the letter in which he questioned the respondent's decision in his capacities as both the CEO of the applicant and chairperson of the interviewing panel. He stated that he questioned the respondent about the qualifications that the applicant should have possessed and why the incorrect appointment was made.
20. In cross-examination, the witness stood by his testimony and acknowledged that the applicant was given a different post which was approved by the respondent's Member of the Executive Council (MEC).

⁴ Bundle A page A51

The Respondent's Case

21. The respondent's representative submitted that his witnesses are not available and that he closes their case. He promised to submit closing arguments in writing, something which never happened.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. This is a dispute which arose at the appointment stage of a successful application to a promotional post. I shall now analyse the facts from this point onwards.

Did the respondent act irregular by appointing the applicant in a post which she did not apply for and was also not interviewed for?

23. It is common cause that a submission for approval was made on 11 December 2017, the purpose of which was to have the applicant appointed as Operational Manager: Speciality Stream Nursing as per the advertisement and interviewing panel's recommendation. However, on 12 December 2017, the respondent's Human Resources Director decided to change the appointment of the applicant to Operational Manager: General, as post which the applicant did not apply for.

24. This decision of the Human Resources Director was accordingly endorsed by the Head of Department on 30 January 2018, after a discussion he had with the Human Resources Director. The MEC subsequently approved the submission on 01 February 2018. It is therefore this turn of events which led to the dispute before this Council.

25. The Human Resources Director provided the following reason in the submission:

Employee is not in possession of a post basic speciality. She can only be remunerated or offered an operational manager general. Ms Ngwenza was not approved as a panel member, although the other three members formed quorum.

[sic]

26. The evidence before me contradicts the averment of the Human Resources Director. The applicant tendered evidence, her Advanced University Diploma⁵ in Nursing Science with specialisation in Community Nursing Science as evidence. This qualification fulfils the requirement which the Human Resources Director used to change the position of the applicant. No evidence was led by the respondent to justify why the decision of the Human Resources Director.

27. The conduct of the Human Resources Director not only misrepresented the truth about the applicant's qualifications to her (HRD) superiors but is also deprived the applicant from a post which was lawfully hers. It is accordingly my finding that this decision and conduct of the Human Resources Director was irregular and unfair towards the applicant.

Does the incorrect appointment amount to an unfair labour practice?

28. It is clear that the applicant would have earned a higher salary had it not been for the conduct of the respondent. This incorrect appointment led to the applicant earning R98 124.00 less per annum. It is with no doubt that any reasonable person can conclude that the unjustified conduct of the respondent amounted to an unfair labour practice relating to a promotion.

29. It is accordingly my finding that the respondent has committed an act of unfair labour practice relating to a promotion.

30. Section 185 of the LRA provides the following:

185 *Right not to be unfairly dismissed or subjected to unfair labour practice*

Every employee has the right not to be-

(a) Unfairly dismissed; and

(b) Subjected to unfair labour practice

⁵ Bundle B page 33

31. It is in conclusion my finding that the respondent violated the applicant's right relating to fair labour practice.

RELIEF

32. Having considered the unfair labour practice committed by the respondent without any justification, I deem it to be in the interest of fair to consider a compensation order against the respondent.

33. Section 193 of the Act provides the following:

193 Remedies for unfair dismissal and unfair labour practice

- (1) *If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-*
- (a) *order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
 - (b) *order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
 - (c) *order the employer to pay compensation to the employee*

34. Section 194 of the Act provides the following:

194 Limits on compensation

- (4) *The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 month's remuneration.*

35. Based on the above legislative provisions, I shall order that the respondent must pay the applicant three month's remuneration of the Operational Manager: Specialty post. This will be the amount of R463 939.00 / 12 = R38 661.58 x 3 = R115 984.75.

36. Section 195 of the Act provides the following:

195 Compensation is in addition to any other amount

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

37. The applicant requested as a form of relief that a correct appointment and payment of her promotion be done with retrospective effect to February 2018. I see no reason on why this prayer of the applicant cannot be granted. I shall as a result order the following:

37.1 That the applicant be appointed in the correct position of Operational Manager: Speciality from February 2018 to date

37.2 That her annual salary be adjusted to R465 939.00 from retrospective effect to February 2018 to date plus the increases which accompanied the post to date.

37.3 37.3 That the difference between the salary of an Operational Manager: General and an Operational Manager: Speciality be paid to her backdated to February 2018.

38. In the premise, I make the following award:

AWARD

39. The respondent, Department of Health- Northern Cape has committed an act of unfair labour practice relating to promotion towards the applicant, Mrs Gloria Maserame Mojamongwe.

40. The respondent is ordered to pay the applicant compensation in the amount of **R115 984.75.**

41. The respondent is ordered to correct the appointment of the applicant from Operational Manager: General to Operational Manager: Specialty with retrospective effect from February 2018 to date.
42. The respondent is ordered to adjust the applicant's salary to R465 939.00 from retrospective effect to February 2018 to date plus the increases which accompanied the post to date.
43. The respondent is further ordered to pay the applicant the difference between the salary of an Operational Manager: General and that of an Operational Manager: Speciality backdated to February 2018 to date plus the accumulated increases between 2018 and now.
44. The payments in paragraphs 40 and 43 must be paid to the applicant by no later than **15 July 2020**.



David Pietersen