

ARBITRATION AWARD



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

CASE NO: **PSHS670-17/18**

PANELIST: **P DHLODHLO**

DATE OF AWARD: **09 JULY 2018**

In the matter between:

NEHAWU obo MASIKO NL

APPLICANT

and

DEPARTMENT OF SOCIAL DEVELOPMENT- EASTERN CAPE

RESPONDENT

DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration between the applicant, Ms Nokuthula Lorraine Masiko and the respondent, Department of Social Development- Eastern Cape was scheduled on 28 June 2018.
2. Ms Nokuthula Lorraine Masiko, the applicant was represented by Mr N Mkutukana, a NEHAWU official. On the other hand, the respondent was represented by its Assistant Director: Labour Relations, Mr S Bunguzana.
3. These proceedings were digitally recorded and finalised on the same day. The respondent's closing arguments were presented orally, whilst the applicant complied with its undertaking to file its closing arguments to the Council on or before 06 July 2018.

ISSUE IN DISPUTE

4. I am required to establish whether or not the respondent committed an unfair labour practice, in relation to its failure to offer and compensate the applicant with benefits attached to her promotion as a Centre Manager, and if not so, to determine an appropriate remedy.

BACKGROUND

5. Ms N L Masiko is currently in a position of a Social Work Supervisor: Centre Manager (salary level 9) at the respondent's Meltons Gardens Youth Care Centre.
6. It is her contention that although her position was advertised as Social Work Supervisor Grade I (Centre Manager) for the abovementioned respondent's Place of Safety, her performance standards and responsibilities are similar to other Youth Centre managers in charge of Maluti, Erica, Qumbu, Gali Tembani and Protea Centres. However, these managers are remunerated at salary level 12.
7. Despite a number of grievances, the respondent failed to address her plight.
8. She is seeking proper placement at salary level 12 and/or that she be promoted accordingly.
9. The respondent dismissed the applicant's claim, arguing that it appointed the applicant in the advertised specific position.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's version

10. Ms Nokuthula Lorraine Masiko testified that she is currently employed at salary level 9 as a Social Work Supervisor: Grade 1 at the respondent's Meltons Gardens Youth Centre. She stated that she has been treated unfairly because her counterparts in other respondent's youth centres are enjoying salary level 12 benefits, notwithstanding similar performance standards and responsibilities.
11. Despite numerous complaints, her plight has not been addressed properly. It was the Human Resources' (HR) response that they had no knowledge of what happened in the advert because her position was supposed to be at salary level 12. The District Office could not resolve her grievance, instead stated that it was beyond it. She then approached her union to intervene in the grievance in 2017, but her efforts did not yield positive outcome. Page 3 of Bundle A was presented as proof of the grievance lodged

with the respondent. The Chief Director Institutional Support Services (page 4 Bundle A) in response to the grievance, recommended on 8 February 2017 that Human Resources should provide guidance to the applicant's concerns and the Deputy Director (Employee Relations) input on 9 February 2017 was that the grievance be dealt with in an Occupational Specific Dispensation (OSD) context.

12. Another correspondence from the Deputy Director: Employee Relations dated 1 March 2017 addressed to the applicant reiterated that her grievance was an OSD matter, salary upgrades required the approval of the Superintendent General and that Employee Relations will deal with the matter through the grievance procedure.
13. The applicant compared her position with the one in the advert (page 8 Bundle A) for a Social Work Manager Grade I position (Gail Thembanani Centre) placed at salary level 12. She was adamant that the said salary level 12 position required similar competencies and responsibilities, she was expected to execute. Further, she met the minimum requirements for the position (page 8 Bundle A).
14. In cross-examination she conceded that she applied and was appointed to the position she is currently in, namely: Social Work Supervisor: Grade I. The position is at salary level 9. She was adamant that her responsibilities were similar to the salary level 12 Centre Managers and that she should be promoted to salary level 12.
15. It was her version that the respondent discriminated against her and that OSD would not offer her the promotion she is seeking.
16. In re-examination she averred that she did not get clarity on the OSD and the respondent created an impression that it will address her concerns.

Respondent's version

17. Mr Sindile Bunguzana testified that the applicant applied for the position Social work Supervisor: Grade I as advertised. He stated that the applicant was appointed in line with the respondent's recruitment procedure. Further, he reiterated that unfair labour practice would be committed if the respondent failed to appoint the applicant to an advertised position, she applied for, if she met its requirements.
18. In cross-examination he reiterated that the applicant was properly appointed, disputing unfair labour practice claims.

ANALYSIS OF EVIDENCE AND ARGUMENT

19. It is the applicant's main contention that the respondent actions constituted an unfair labour practice in that she earned less than her counterparts and did not receive the benefits they were entitled to, despite similar responsibilities.
20. The respondent submitted in closing arguments that the applicant was not deprived of any benefits but was appointed to a position she applied for. She failed to discharge onus on her part and did not convince me that unfair labour practice was committed by the respondent.
21. Furthermore, I find that the applicant's salary upgrade claims fell outside the ambit of unfair labour practice.
22. On the other hand, the applicant argued in closing that her responsibilities were equal to her colleagues, that were enjoying salary level 12 benefits. Her classification as a supervisor was an error that should have been rectified, as soon as she brought her plight to the attention of the relevant authorities. The respondent did absolutely nothing to address the applicant's plight and such amounted to unfair labour practice.
23. Lastly the applicant argued that she should be promoted from level 9 to 12 level retrospectively.
24. 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.
25. From the applicant's version there is no credible evidence that her claim fell within s186(2) of the Act, as one of those advantages or privileges offered in terms of a policy or practice. Furthermore, the 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.
26. In these proceedings the respondent argued in closing that the applicant was not unfairly deprived of any benefit because the respondent acted in line with its

recruitment policy. The applicant also conceded that she was appointed for the position she applied for. Throughout the applicant's testimony I was not furnished with credible evidence supporting her claim that she is entitled to grade 12 benefits and that she was unfairly deprived of it. I further concur with the respondent in that a salary upgrade claim does not amount to unfair labour practice and/or that it had discretion to decide if the claimed salary level 12 benefits should accrue to the applicant.

27. The applicant's unfair labour practice claims could not be sustained in the light of the position she applied for and was appointed to. Her claims that she was eligible for salary level 12 benefits lacked merit in the circumstances.

28. Lastly, I do not have jurisdiction to deal with unfair discrimination averments presented by the applicant in these proceedings. However, the applicant is at liberty to refer an unfair discrimination dispute in terms of section 6 of the Employment Equity Act of 1998 at the CCMA, if she so wishes.

29. I therefore conclude that the applicant failed to establish on a balance of probabilities that the respondent committed an unfair labour practice.

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

AWARD

31. The respondent's conduct did not constitute an unfair labour practice.

32. The applicant's application is dismissed.

33. No order as to costs is made.


