



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: N.Bantwini
Case No.: PSHS868-13/14
Date of Award: 29 September 2014

In the ARBITRATION between:

SASAWU obo Michael Mkhusele Godana

Applicant

and

Department of Health: Eastern Cape

1st Respondent

and

Fundile Gebremedhin

2nd Respondent

Union/Applicant's representative: Mr M.S. Batha
Union/Applicant's address: P.O. Box 448
Bhisho
5606
Telephone: (040) 635 1305
Telefax: (040) 635 1651

Respondent's representative: Mr B. Lose
Respondent's address: Private Bag X0038
Bhisho
5606
Telephone: (040) 608 1912
Telefax: (086) 2162 705/060 611 6127

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was part heard on 09 July 2014, 06 August 2014 and was finalized on 09 September 2014. It came before the PHSDSBC in terms of Section 191 (1) (5) (a) read with section 186(2)(a) of the Labour Relations Act 66 of 1995 (the LRA). It was heard in the offices of the 1st respondent in Bhisho.
2. Parties agreed to submit written closing arguments on 17 September 2014. Both arguments have been considered in the preparation of this award.
3. Mr M.S. Batha an official from SASAWU appeared for the applicant while Mr B.P. Lose appeared for the 1st respondent, the Department of Health- Eastern Cape. The second respondent, Mr Fundile Gebremedhin appeared in person and represented himself.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the 1st respondent's conduct of not appointing the applicant to the position of Director Health Technology constitutes unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended or not.

BACKGROUND TO THE DISPUTE

5. The applicant referred a dispute to the PHSDSBC through his union, SASAWU regarding an alleged refusal by the respondent to appoint him to a position of Director Health Technology. When the dispute could not be resolved at conciliation level, the applicant filed a request for arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

6. According to Mr Batha's opening statement, the dispute relates to unfair labour practice based on promotion. The applicant contends that the decision not to appoint him to a position of a Director Health Technology was unfair. The first respondent's conduct was unfair as the applicant contends that he was the best candidate for the position.

7. The applicant seeks to be appointed to the position of a Director of Health Technology as a remedy.
8. The applicant, **Mr Mkhuseleli Michael Godana** testified under oath as follows:
9. He works for the respondent as a Deputy Director Healthcare Technology from February 2008. His experience is in Clinical Engineering and Electrical Engineering. He is one of the 80 students who were awarded a bursary to study at Tshwane University in 2003. He qualified as a Technician in 2004. He worked in Mthatha and was responsible for 3 hospitals. He supervised 3 technicians of which he allocated one in each institution until he left for a Deputy Director's position in Health Revitalization programme in 2008.
10. When a position of a Director Health Technology was advertised, he knew that he was the suitable candidate. He lodged a complaint after he heard that the position had been filled. The internal candidates were not considered.
11. He meets the requirements of the position as he had 3 years' experience as a manager when the position was advertised. Five years' experience as a senior manager, which he does not have is not a fair requirement. Even the appointed candidate does not possess 5 years' experience and he does not understand why he was side-lined.
12. Under cross-examination, the applicant testified as follows:
13. He should have been shortlisted as he meets the requirements for the position as stipulated in the advert. An individual with 5 years senior managerial experience does not exist. Although he had not been appointed as a senior manager both in the private and government sector, he acted on higher positions and was performing duties of a senior manager.
14. The respondent should not have deviated from the recruitment policy. He should have been given an opportunity to compete with other candidates. The respondent headhunted and authorized an external agency to do the recruitment.
15. The applicant conceded that the 2nd respondent has worked for Net care and he was a member of executive at Net care and the CV reflects Technical Services Manager
16. The applicant further testified that he is in the field of clinical engineering and was a member of EXCO when he was in Mthatha
17. He agreed that a senior manager would have employees reporting to him or her. The applicant conceded that he never worked in Net care environment.

18. Under re-examination, the applicant stated that he used to participate in EXCO meetings when he was in Mthatha. He was COSASA member and he appointed Clinical Technicians who acted as chairpersons in COSASA meetings.
19. In closing **Mr. Batha** argued as follows:
20. The applicant believes that he meets the requirements of the position and the respondent committed a gross unfair labour practice by failing to shortlist him and therefore depriving him a chance to compete with other candidates. It is the applicant's representative's argument that the applicant's application was set aside when the boxes of the applications were sent to Doctor Pillay' s place of residence. Mr Tuswa must be declared as an unreliable witness as he failed to verify if the appointed candidate was managing 10 employees in his previous position. The second respondent was made to submit 2 sets of CVs in order to suit the arbitration process. This evidence was not tested at the arbitration process.
21. Mr Batha made reference of a case between Christiansen v University of KwaZulu-Natal, case No KND B1 5135-05 wherein Commissioner Hauch Fenger held that although promotion of staff is a managerial prerogative, interference is warranted when the process or decision is grossly unfair.
22. The headhunting was not in line with the respondent's policy as it was not used as a last resort.
23. The applicant seeks placement to an equivalent position (level 13) with effect from 03 June 2013 and be back paid accordingly.

Respondent's case

24. According to Mr. Lose's opening statement, the applicant applied for the position of Director Health Technology but he was not shortlisted because he did not have the requisite 5 years senior managerial experience as required in terms of the advert. The undue interference with the recruitment process by the former Superintendent General compelled the Executing authority (MEC) to issue a directive for the process to be abandoned.
25. The external recruitment agencies were appointed and the process was conducted wherein a suitable candidate was appointed.
26. The respondent conducted the process fairly and the applicant was not prejudiced. The respondent exercised its prerogative fairly in appointing the second respondent.

27. **Mr. Mlamli Tuswa** the first respondent's witness testified under oath as follows:
28. He works for the respondent as the Head of infrastructure since July 2011 and is familiar with the advert. In 2012 the respondent through the National office and Treasury established a new organogram. He was part of the panel for the appointment of the position of Director of Health Technology. Doctor Pillay requested that applications to be directed to his house in King Williamstown. This created discomfort to the panellists. This was based on the fact that his business partner had applied for the position in question. While the panel was going through the applications, a directive by the MEC was issued to stop the process. Three recruitment agencies were engaged. Based on the information received from the agencies, the panel made a recommendation which was approved by the MEC.
29. The applicant was not shortlisted. Notwithstanding the fact that the applicant is working for the respondent, it transpired that he did not have sufficient clinical and managerial experience. The applicant is holding a middle managerial position and although he is in the health technology, his duties and experience is more biased towards administration and broad policy. He is based at the head office where there is not much of clinical engineering environment e.g. clinic or hospital.
30. Other candidates had 90% experience in clinical engineering sector e.g. in private hospital. The hospitals which the applicant was looking after, in Mthatha have not gone through fully blown engineering as they are still under construction.
31. The second respondent has senior managerial experience and was an EXCO member having about 10 employees directly reporting to him.
32. Before the process was referred to the private agencies, the applicant was shortlisted but the panel felt that he does not have the required experience. When the external recruitment agencies took over the process, the applicant together with other candidates who were initially shortlisted was not shortlisted by the agencies. He was not disqualified by the headhunting process. The agencies submitted the list of candidates and shortlisting was conducted based on the list from the agencies. The recruitment process involved Provincial Treasury as well as the human resources section of the respondent.
33. Under cross examination, the witness testified as follows;

34. He worked for the Department of Treasury before joining the respondent in 2011; the applicant was already working for the respondent and was based in Bhisho. The advertisement for the position in question was in terms of the respondent's recruitment policy.
35. It is the responsibility of the respondent to appoint a candidate who meets the job requirements and who will be able to discharge the duties as required by the position. The applicant did not meet the requirements of the position.
36. The second respondent was appointed based on his qualifications and experience. There was no basis to do the verification, as the respondent's decision was based on his CV, qualifications, experience and presentation during the interview.
37. The second respondent's elaborated CV appears from page 47 to page 49 while the summarized version of the CV appears from page 99 to 107. The second respondent was selected from a pool of headhunted candidates.
38. Reference to the memo that was addressed to the MEC was made. Paragraph 3 reads;
39. *"Recruitment agencies were, as a result consulted and responded with the closing date being 07 December 2012. Mention must be made that the previous applicants were again invited to apply as the initial process was never finalized"*.
40. This memo was written by the chairperson of the selection committee, Mr. B. Kroukamp.
41. None of the recruitment agencies shortlisted the applicant hence he was not interviewed. The panel reported the issue of interference by Doctor Pillay to the MEC and the process was abandoned. It is the prerogative of the MEC to appoint SMS members. The applicant and Feleza applied although it is stated in the schedule appearing on page 105 of the bundle that there were no suitable candidates. When Mr. G Mc Menamin who was the preferred candidate could not secure a permit from London, where he was based, Mr F. Gebremedhin as the second rated candidate was appointed.
42. The summary of scores appears on page 77 of the bundle. When the applicant's representative put to the witness that the applicant was managing 4 hospitals in Mthatha and as such he should have been given an opportunity to compete, the witness stated that for the past 3 years, the issue of health technology has not been managed properly by the respondent, making reference of some hospital

whom the applicant was handling in Mthatha having dysfunctional casualty, OPD, X-Ray being closed and under-utilized theatre.

43. When a question as to why was the headhunting process not used as the last resort was posed, the witness made reference of a letter that was written by the chairperson of the selection panel, Mr. Gxilishe to the MEC. The letter appears from 104 to 108 of the bundle. Paragraph 1.2 reads;
44. “ *REQUEST FOR AUTHORITY TO HEAD HUNT IN RESPECT OF CERTAIN INFRASTRUCTURE VACANT POSITIONS*
- 1.2 *To propose engagement of services of a professional recruitment agency in facilitating headhunting of suitable candidates with respect to those posts in which no successful candidates could be found”*
45. In closing, Mr. Lose argued as follows;
46. During arbitration the applicant argued that the respondent’s decision not to shortlist him was unfair, because, according to him, he met the minimum requirements of the post. In Department of Justice v CCMA & others (2004) 13 LAC 1.11.6 the Court found that the Labour Relations Act does not create a right to be promoted. It was however said that the employer has an obligation in terms of section 186(2) to act fairly towards the employee in the selection and promotion process.
47. In South African Police Service v Safety and Security Bargaining Council and others (P54/09 [2010] ZALC58 (13 April 2010) Judge Basson ruled that the decision to promote or not to promote falls within the managerial prerogative of the employer. It is the prerogative of the respondent to outsource the selection process when necessary.
48. Mr. Tuswa, who was called by the responded, was the member of the shortlisting panel, testified that the applicant lacked extensive clinical engineering experience and that he had never worked at an executive management level. This, according to Mr. Tuswa, was the reason the applicant was not shortlisted for the post.
49. Mr. Tuswa’s testimony as above was not contradicted or challenged in anyway during cross examination.

50. It is common cause that the selection process was eventually outsourced to external recruitment agencies. At this point the respondent did not have a say as to who gets shortlisted or not. The recruitment agencies shortlisted four names and all four candidates were interviewed.
51. It is not clear why the applicant believes that he was treated unfairly by the respondent and further submitted that his application must be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

52. The issues of common cause that relates to this matter are as follows:
 - That the applicant applied for an advertised position of Director Health Technology
 - That although the applicant was initially shortlisted by the interviewing panel, the process was abandoned and 3 external agencies advertised the position and submitted their list of shortlisted candidates to the respondent.
 - The first respondent opted to headhunting process which was approved by the MEC after it could not find a suitable candidate. The previous candidates were also invited to apply as the initial process was never finalized.
 - It is furthermore common cause that none of the agencies shortlisted the applicant and this list included other candidates who were initially shortlisted by the panel of interview.
53. It is the respondent's evidence that the applicant could not be interviewed due to the fact that he was not shortlisted. It is also the evidence of the respondent that the applicant lacked extensive clinical engineering experience. Mr. Tuswa, the respondent's witness also stated that the applicant's experience is more biased towards administration.
54. Mr. Tuswa further testified that the respondent opted for headhunting, engaging external recruitment agencies due to the fact that no suitable candidates could be found.
55. It is also important to note that Mr. Tuswa's evidence was not disputed under cross-examination; this then means that he cannot be regarded as an unreliable witness. I am unable to address other allegations which are reflected in the applicant's closing statement as they were not tested during arbitration process.

56. It is undisputed evidence that Mr. Fundile Gebremedhin, the second respondent was appointed to the position based on the fact he was rated as the second best candidate for the position. The decision to appoint him (the second respondent) was based on the fact that the preferred candidate, Mr. Mc Menamin could secure a passport from London, which is his base.
57. It is evident from both party's evidence that the first respondent did not exercise its prerogative in appointing the second respondent in a biased, unfair, capricious and unjust manner.
58. The applicant has failed to discharge the onus to prove the claim of unfair labour practice based on promotion by the first respondent.

AWARD

59. **I therefore make the following award:**

60. The 1st respondent, **the Department of Health – Eastern Cape** cannot be compelled to appoint the applicant, **Mr. Michael Mkhuseleli Godana** to the position of Director Health Technology.
61. The 1st respondent, **the Department of Health-Eastern Cape** cannot be compelled also, to nullify the appointment of the 2nd respondent, **Mr. Fundile Gebremedhin**, to the position of Director Health Technology.
62. Furthermore, the 1st respondent, the **Department of Health-Eastern Cape**, cannot be compelled to place the applicant, **Mr. Michael Mkhuseleli Godana** to an equivalent position of a Director: Health Technology (level 13).
63. The application is dismissed.
64. There is no order as to costs

Signature

Ncumisa Bantwini
PHSDSBC Panelist