



ARBITRATION AWARD

Case No: PSHS929-15/16

Commissioner: Allan Kayne

Date of award: 6 May 2019

In the matter between:

NEHAWU obo Setsego Maria Lambert

(Applicant/ Union)

and

Department of Health- North West

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The applicant referred a dispute to the Public Health Social Development Sectoral Bargaining Council (“the Council”) in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 (“the LRA”) in regard to alleged unfair conduct by the employer relating to promotion. The arbitration took place on 24 April 2019 at the Ventersdorp Hospital, Grens Street, Ventersdorp.
2. The applicant was represented by Tebogo Mbebe, an official from the National Education Health and Allied Workers Union (“NEHAWU”), and Baby Sefondi represented the respondent.
3. The proceedings were electronically recorded, and the record was filed with the Council’s administration.

4. This award is issued in terms of s138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

BACKGROUND

5. The applicant was employed by the respondent since 01 July 2008 and was based at the Ventersdorp Hospital.
6. The applicant's current position of Enrolled Nurse Assistance (ENA) and her former position of Telecoms Operator were both graded at a level 3.
7. It was common cause that the applicant was selected to study towards the ENA qualification during the period June 2013 to June 2014.

ISSUE/S TO BE DECIDED

8. I must determine whether the respondent's failure to upgrade the applicant's position to a higher level constituted an unfair labour practice relating to promotion and if so, to order the appropriate relief.
9. The applicant seeks to be remunerated for the period June 2013 to September 2014 at level 5.

SURVEY OF EVIDENCE AND ARGUMENT

The following constitutes a summarised version of the respective evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

APPLICANT'S EVIDENCE

Setsego Maria Lambert ("Lambert")

10. The applicant testified under oath that she was employed by the respondent as a Telecoms Operator in 2008, based at the Ventersdorp Hospital, but had never operated as such. Since her first day of employment, she worked as an Administration Clerk until she attended Nursing School in June 2013. She

completed her qualification and returned to the hospital where she was allocated to perform nursing duties, as an ENA, in June 2014.

11. During the period of her training at the Nursing School, she learned that other employees, employed as Telecoms Operators, in the same district, were upgraded from level 3 to level 5 based on a circular issued by the Department of Public Service and Administration (DPSA).
12. She explained that her current position of ENA was still graded at level 3, a grade which she accepted as she intended to pursue a career in nursing. However, she was entitled to the upgrade from level 3 to level 5 in respect of her former position from the time that it was implemented by the respondent until September 2014, when she received written confirmation of her appointment as an ENA.
13. She lodged a grievance in this regard which was not properly attended to by the respondent.
14. Under cross-examination, she confirmed that, prior to embarking on her studies, she had completed a “salary upgrade” form and not a form relating to promotion and, during re-examination, she conceded that the dispute related to a salary upgrade, and not a promotion.

RESPONDENT’S EVIDENCE

Baby Sefondi (“Sefondi”)

15. Sefondi testified under oath that she was a Labour Relations Officer employed by the respondent.
16. She confirmed that, according to the applicant’s file, she was appointed in 2008 as a Telecoms Operator, but there was never any recorded promotion. The position of Telecoms Operator was subject to a job evaluation process and was upgraded from level 3 to level 4, according to the DPSA circular.
17. On this basis, she claimed that the Council lacked jurisdiction to hear this dispute as it did not fall within the definition of an unfair labour practice in terms of section 186(2)(a) of the LRA.

18. During cross-examination, she confirmed that at the time of the applicant commencing her nursing training, she was employed as a Telecoms Operator and retained this job title until her return to work on 01 June 2014, after which time, she was employed as an ENA.

19. Although the DPSA circular was received in 2013, it was only implemented in September 2014, and she was not aware of the implementation being retrospectively backdated by the respondent.

ANALYSIS OF EVIDENCE AND ARGUMENT

Jurisdiction

20. Section 186(2)(a) of the LRA defines an unfair labour practice as, *inter alia*, any unfair act or omission that arises between and an employee involving unfair conduct by the employer relating to the promotion of an employee.

21. The respondent, with reference to two previous matters referred to arbitration under the auspices of the Council (case numbers PSHS605-14/15 and PSHS1057-13/14), submitted that the dispute to hand related not to promotion, but rather to the upgrading of a position, and consequent increase in remuneration. As such the dispute was one of interest, rather than one of right, depriving the Council of jurisdiction to arbitrate it.

22. The applicant, on the other hand, argued that she was denied access to the benefits derived from the promotion and that the respondent simply lacked the appetite to do what was right.

23. Rule 22(1) of the Rules for the Conduct of the Proceedings before the Public Health Social Development Sectoral Bargaining Council provides that:

'If, during the arbitration proceedings, it appears that jurisdictional issues have not been determined, the panellist must require the party that raises the jurisdictional point to prove that the Council does not have jurisdiction to arbitrate the dispute.'

24. The Labour Appeal Court, in ***Mathibeli v Minister of Labour*** (JA25/2013) [2014] ZALAC 72 (25 November 2014) ("Mathibeli"), held that the appellant, *in casu*, referred a dispute of right pursuant to a claim based on him being paid the incorrect

amount as a result of the regrading of the position which he occupied. Sutherland AJA, at paragraph [15], states that:

'The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct 'relating to the promotion' of the employees.'

25. Accordingly, guided by the judgment in Mathibeli, the Council has jurisdiction to arbitrate this dispute as an unfair labour practice relating to the conduct of the respondent in relation to the promotion of the applicant

Merits of the dispute

26. Turning to the merits of the current dispute, it was not disputed that the applicant, whilst already in the service of the respondent, underwent nursing training during the period June 2013 to July 2014 and that, prior to her training, she was employed as a Telecoms Operator (level 3) but functioned as an Administration Clerk. She continued to be remunerated as a Telecoms Operator (level 3) during her nursing training. Upon her return to work, in June 2014, following her training, she was immediately allocated to the role of an ENA (level 3), commensurate with her qualification.

27. The applicant testified that, whilst undergoing the nursing training, she learned that the remuneration of her Telecoms Operator colleagues was increased from level 3 to level 5, in line with a DPSA directive, but noted that her particular salary was not adjusted, despite completing the forms issued to her by the Administration Manager, prior to commencement of her studies. While much reliance was placed on the regrading of the Telecoms Operator position in terms of the DPSA circular, neither party introduced such a document into evidence nor presented a clear indication of its actual content and the implementation date thereof. According to the applicant, it was implemented while she attended Nursing School with the Telecoms Operator position being upgraded to a level 5. The respondent, however, contends that, although published during 2013, the upgrading of the position from level 3 to level 4 was only implemented in September 2014, at which time the

applicant was already employed in the role of an ENA (level 3). The applicant confirmed that, upon her return to work, following her training, she was immediately assigned nursing duties, but only received an amended contract of employment in September 2014.

28. It is important to note that I was not furnished with any supporting documentation by the parties to support their oral evidence. While it is common cause that the position of Telecoms Operator was upgraded at some stage, the applicant testified that it took place during her period of training and that it was upgraded from level 3 to level 5. On the other hand, the respondent contends that the DPSA circular upgrading the position from level 3 to level 4 was only implemented in September 2014, by which time the applicant was no longer employed in that role, and accordingly did not qualify for the upgrade.
29. In order to reach a decision based on 2 disputed issues of fact, the Court in ***Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others*, 2003, (1) SA 11 (SCA)** held that the credibility of the factual witnesses, their reliability and the probabilities, would need to be taken into account. Having done so in the dispute to hand, I am still presented with two credible witnesses, whose evidence was simple and reliable, but uncorroborated, and which are equally probable in the circumstances.
30. As a final step in the process, I am required to determine whether the party burdened with the onus of proof succeeded in discharging it. In this regard, the burden rests with the applicant, and she has failed to do so, presenting vague and uncorroborated evidence regarding the implementation of the DPSA circular on which her case is entirely based.
31. The applicant has, therefore, failed to discharge the onus of proving that she was subject to the unfair conduct of the respondent relating to promotion.

AWARD

32. Accordingly, no unfair labour practice has been perpetrated by the respondent, Department of Health- North West, against the applicant, Setsego Maria Lambert, as contemplated in section 186(2)(a) of the LRA.

33. The matter is accordingly dismissed.

34. There is no order as to costs.

A handwritten signature in black ink, appearing to read 'Allan Kayne', is positioned above the printed name.

Allan Kayne