



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **THUTHUZELA NDZOMBANE**

Case No: **PSHS956-16/17**

Date of award: **27 June 2017**

In the arbitration between:

PSA OBO RONALD ETSON

(Applicant)

and

DEPARTMENT OF HEALTH –WESTERN CAPE

(Respondent)

and

MR DONAVAN PFEIFFER AD MR DEAAALD GELDENHUYS

(Interested parties)

DETAILS OF HEARING AND REPRESENTATION

1. An arbitration hearing was scheduled for and heard on 21 June 2017, under the auspices of the Public Health and Social Development Sectoral Bargaining Council at Western Cape College of Nursing in Athlone. The applicant, Mr Ronald Etson, was represented by a Union Official, Mr Jacobs from PSA. The respondent, the Department of Health, was presented by a Labour Relations officer, Mr Mniki.
2. It was communicated that Mr Geldenhuys is aware that he has a right to be here but he has not requested for the postponement of this matter although he is absent. However, Mr Minki contacted Mr Geldenhuys who indicated that he was booked off-sick for

bronchitis but he averred the proceedings should go ahead in his absence as he will accept the decision. The parties submitted bundles of documents which were accepted and admitted as they purport to be.

BACK GROUND

3. A post of Handyman was advertised with a closing date of 1 August 2014.

i. **Requirements: minimum basic literacy and numeracy.**

1. Remuneration: R103 494 (Level 4) per annum

ii. **Service benefits:**

1. 13th cheque, employer's contribution to the pension fund, housing and medical and allowance.

iii. **Experience :**

1. Appropriate handyman experience with a health environment:

iv. **Inherent requirements:**

1. Must be prepared to work overtime and do standby duties.

2. Capability to do strenuous physical labour.

3. A valid (Code B/EB) driver's licence and willingness to travel within the District.

v. **Competencies (knowledge/skills):**

1. Ability to handle conflict and problem-solving situations.

2. Ability to plan ahead (pro-active) and work independently as well as in a team.

3. Ability to communicate in at least two of the three official languages of the Western Cape.

4. Knowledge of Occupational Health and Safety Act.

vi. **Duties (key result areas /outputs):**

1. Maintain and repair equipment, including after hours and leave work areas in clean and safe conditions.

2. Maintain and repair plant equipment, furniture, fixtures and fittings mechanical.

3. Able to do minor electrical and plumbing repairs to clinics and hospitals.

4. Assist in preventative maintenance procedures, including stand-by general.
5. Obtain quotations on material needed to complete requisitions, order and control of materials.
6. Strict adherence of Occupational Health and Safety Act.
7. Assist with repairs and installation projects, supervise and in-service training of co-workers.

4. Although only one post was advertised a week prior to the interviews he was informed that two posts for handymen were available and they would be interviewed for them. According to him the respondent did not follow its processes in appointing Mr Geldenhuys. The sifting of the candidates' applications was done by one person. There was no panel in screening of candidates which led to nepotism and favouritism. He has been in this institution for a very long period but he was not appointed to the post. If, he succeeds with his dispute he requests to be appointed to position of a handyman or be compensated.
5. The respondent stated that the applicant was shortlisted for a post of a handy man and he was subsequently interviewed. The candidates who were appointed were also interviewed. The mere fact that the applicant was shortlisted and such could not have prejudiced him. During the interview he was found to be unsuitable as he did not get a 50% to qualify for consideration. The respondent however admits that if, there was no candidate who has experience as a handyman in health environment, and the post should have been re-advertised with lesser requirements. Mr Geldenhuys did not have experience in health environment. The applicant did not have an experience of handy man as he was not performing those duties. The sifting of candidates was done by one person but such had no negative material to the interview process.
6. The two appointees have been on the posts for a period of two years and they have performed very well. The respondent has invested training on them through in house training programmes. It is a practice that if the same post becomes vacant within three or six months after the interview process, the department has option to take from the candidates who have already been interviewed. This is meant to save costs and expenditures by not re-advertising the post. The applicant does not challenge the process and the appointment of Mr Pfeiffer.

ISSUE TO BE DECIDED

7. I am required to determine whether or not the respondent has committed an act of unfair labour practice by failure to promote the applicant to the Post no: 18 of a Handyman.

APPLICANT'S CASE

8. **Mr Etson** stated that he is the applicant in the matter and he presented the following evidence. He applied for the position of a Handyman and he feels he had met the requirements of the posts. Mr Peter Neil told him to take the applications into his vehicle as he would do the shortlisting at his house. This concerned him because the process ought to be confidential and if, applications are taken out of office, applications could be exposed to third parties.
9. During the interview process he felt that the questions imposed to him were very simple and any person could have easily answered them. He does not know as to why then he was scored lower marks during that process. Mr Geldenhuys is dating the daughter of Sister Cilliers who is in charge of training. The Sister Cilliers and Mr Peter Neil are friends at work. According to him he suspects that the two might have discussed the candidates hence Mr Geldenhuys was shortlisted and appointed, even though, he did not have experience in health environment. This was a requirement but the department chose to ignore it.
10. Even though he was called to attend an interview he was scored lower marks. Two employees were appointed Messrs Pfeiffer and Geldenhuys. He submitted a grievance because he has been working for sixteen years for the department and he could not understand as to how they could have beaten him. As a result of this process he felt aggrieved about the process followed. He lodged a grievance in this regard but he was not successful. The response was that indeed if candidates did not meet the requirements the post has been re-advertised., if he succeeds with his dispute he requested to be appointed to a position of handyman or to be offered something that is similar to it and justice should be done.
11. The process of appointing Mr Geldenhuys was flawed and wrong and it was not justified. He disagrees with the scoring as questions were simple. He was asked about electrical, plumbing and welding. His answer was that the workshop does little welding. Mr Geldenhuys has a criminal record but he was appointed.

RESPONDENT'S CASE

12. **Ms Beverly Klue** stated that she is employed by the respondent as Assistant Director and she presented the following evidence under oath. The practice is that if a post is advertised and within three months another post becomes vacant there is no need to advertise the post instead both posts can be filled through one interview process. This is to avoid wasteful expenditure and time.
13. As a result of this process there were two posts available and this placed candidates to an advantage because two posts could be filled. The candidates scored as follows:
- a. Mr Geldenhuys scored 390;
 - b. Mr Pfeiffer scored 320;
 - c. The applicant scored on 210.
14. The applicant's score was below the bench mark of 50% and he could not have been considered for appointment. In the past they would use an average score to determine which candidate scored most. Presently, they allow the panel to score and thereafter discuss the score which lead to them to have a consensus score. In this case the panel reached a consensus score. If, one panelist scores a candidate higher they would debate the score and influence each other to arrive at a consensus score.
15. The sifting process is when one peruses and sorts out the curriculum vitae and applications to identify which ones are incomplete and who did not meet the requirements of the advertisement. The person also checks criminal records, previous dismissals, documents certified within six months and driver's licence. There is no necessity to do the sifting it always depends on the volume of work. She normally does sifting but in this matter it was done by Mr Nel. She might have been busy hence she gave it to him.
16. If, a candidate does not meet minimum requirements such a candidate will not be shortlisted. Those applications which meet the minimum requirements would be sent for shortlisting. The applicant and other candidates were shortlisted and interviewed. This process did not prejudice him. Candidates were asked same and structured questions and a memorandum of modern answers was available for the panel. The candidates were scored from 1 to 5 and if, a candidate does not know an answer such candidate would be given 1. The applicant generally scored lower marks and he partly answered them hence he scored less than 50%.

17. For example the applicant's answer was insufficient with regard to the question dealing with welding. The process was fair, transparent and competitive. None of the scores were high for any of the candidates. After the interview the applicant scored 210 which is 42%. If, none of the candidates scored 50% they would have advertised. The questions were basic, simple and not job specific.
18. The reason they took candidates who have no experience in health environment was because there were few people who had such direct experience in health environment but most candidates did have handyman experience but not in health environment hence they took a decision to shortlist and interview those candidates. Some candidates who have experience in health environment did not indicate such on their curriculum vitae.
19. **I will refer to closing arguments and cross examination where necessary in my analysis.**

ANALYSIS OF EVIDENCE AND ARGUMENT

20. In **National Education Health and Allied Workers Union v University of Cape Town & Others (2003) ILJ 95 (CC)** at page 110 *the Constitutional Court referred to the constitutional right to fair labour practices entrenched in section 23(1) of the constitution and the absence of a definition of "unfair labour practice" in the constitution and remarked as follows "The concept of labour practice is incapable of precise definition. This problem is compounded by the tension between the interest of the workers and the interests of the employees that is inherent in labour relations. Indeed, what is fair depends on the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept".*
21. Section 186 (2) (b) of the Labour Relations Act No. 66 of 1995 as amended ("LRA"), states that *"unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provisions of benefits to an employer".*

22. It is trite law that an employee has a duty to prove that an employer has embarked on unfair conduct relating to unfair labour practice.

23. The following facts are common cause:

- a. that both the successful candidates and the applicant applied for the post of Handyman in 2014;
- b. that they were shortlisted and subsequently interviewed;
- c. that Mr Geldenhuys scored 390
- d. that Mr Pfeiffer scored 320
- e. the applicant scored 210.

24. It is trite law that it is the prerogative and a cardinal function of the employer to appoint or promote an employee. It stands to reason therefore that an employer is best placed to make such a decision. Labour forums should be slow to interfere with such decisions unless the discretion exercised by the employer was unfairly or grossly unreasonably done.

25. In **Aries v CCMA & Others (2006) 27 ILJ 2324(LC)** the court held that there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion. The reasons for this is clearly that the ambit of the decision-making powers inherent in the exercising of a discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed.

It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner”.

26. Evidence shows that the applicant’s overall score was very low marks during the interviews. It is not disputed that the bench mark for a candidate to be appointed is 50%. As the matter stands the applicant scored 42% overall. The difficulty about the applicant’s case is the fact that he scored below the bench mark. Although, he tried to find some

discrepancies on the scores that itself does not assist his case because the respondent followed its policy.

27. Recruitment and Selection Policy at clause 12.3.8 states that *“the sum of the score will represent in individual panel member’s evaluation of the core competency/functional terrain. These individual scores should not be combined and averaged as the final assessment of the panel, but should be discussed and a final assessment should be negotiated in favour of the consensus/majority rule recommendation by the panel members”*.

28. It is clear that the respondent applied its policy when it dealt with the interview. Even if there were discrepancies in scoring of candidates I consider them as minors because if, I were to add what the applicant insinuates as discrepancy still he would not achieve the bench mark. In my view, generally, there is no expectation that discrepancies may not occur during the interview process but what remain important such discrepancies should not be material and fundamental to such an extent that they are able to influence negatively the outcome of the interview.

29. The second challenge is based on the fact that Mr Geldenhuys did not have handyman experience in health environment. According to the applicant he should not have been shortlisted to be considered for this post. The mere fact that the successful candidate does not have handyman experience in health environment that alone does not necessarily means that he should not have been shortlisted.

30. It is not disputed that Mr Geldenhuys has extensive experience as handyman but apparently this experience is not in health environment. Consideration was made by the respondent in that only two candidates were having handyman experience in the health environment and that they did not want to further put financial burden to the respondent by re-advertising the post. In my view the experience in the health environment is not inherent what was needed is a handyman who has necessary experience.

31. I must say that if such a handyman has experience in the health environment that should have been used as added advantage. I find that the deviation was not material and did

not have any potential to prejudice anyone. I have also taken into account that Mr Geldenhuys has gone on with his life, continued in his employment, presumably adapted his expenses accordingly, and invested two years of his career in his path. Even if Mr Geldenhuys 's promotion is found to have been unlawful, on the facts he bears no responsibility for it but for having the boldness to apply for a position for which he possibly did not qualify. The burden on the public administration and cost to the public purse to recommence the appointment process would be further prejudice to consider [**see Nkosinathi Lawrence Khumalo and Krish Ritchie v Member of the Executive Council for Education: Kwazulu Natal] CCT10/13 [2013] ZACC 49**].

32. Having considered the evidence before me it is clear to me that Mr Geldenhuys would suffer prejudice severely as opposed to the applicant who has a job and did not do well during the interview process. I have also taken into account that the respondent has employed resources to equip Mr Geldenhuys which it would be unfair to reserve the appointment.

33. The applicant made speculation and assumptions about Mr Nel and Sister Cilliers who he alleged might have conspired to make sure that Mr Geldenhuys was shortlisted. The basis of this assertion is premised on the fact that Mr Nel and Sister Cilliers are friends whilst Mr Geldenhuys is dating the daughter of Sister Cilliers. I agree with the applicant that possibility does exist but the difficulty about this assertion is not based on facts or evidence to that effect. Under cross-examination the applicant conceded that he assumed this to be the case.

34. I have also taken into account that candidates that did not have experience in health environment were seven and were shortlisted. It is clear to me that Mr Geldenehuys was not given preferential treatment or favoured as a result of having a relationship with Sister Cilliers who was not even part of the interview process.

35. Having considered the evidence before me I find on balance of probabilities that the applicant has failed to discharge the onus that the respondent was involved in an act of unfair labour practice by failing to promote him to the position of handyman in 2014.

AWARD

36. I find that the applicant has failed to prove that the respondent was involved in unfair labour practice by failing to promote him. Consequently, the application is hereby dismissed.

A handwritten signature in black ink, enclosed in a hand-drawn oval border. The signature is stylized and appears to read 'Thuthuzela Ndzombane'.

Panelist: Thuthuzela Ndzombane

Sector: Public Health