PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: PSHS 485-21/22

Commissioner: Adv. T.T. Serero

Date of Award: 14 February 2023

In the ARBITRATION between:

NEHAWU obo Adronica Tabane & 5 Others
(Union/Applicant)

And

Department of Health - Gauteng
(Respondent)

Applicant's representative:	**Mr M. Sikhosane**
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DETAILS OF HEARING AND REPRESENTATION

This matter was set down for arbitration on 1 & 2 February 2023. A union official, Mr M. Skhosana represented the applicants, namely, Ms Adronica Tabane, Mr Muluvho Phandelani, Ms Rosina Mathole, Ms Betty Masemola, Ms Lebogang Galetuke and Ms Tisetso Moema.

The respondent was represented by its Industrial Relations Officer, Ms N. Nangammbi.

A joinder ruling was issued to join the following employees namely, Valencia Matshete joined as a second respondent, Funanani Netshivhambe third respondent, Simon Molobi fourth respondent and Levhuwani Ngobeni as the fifth respondent.

Several issues were raised in the parties' evidence but for the sake of brevity, I shall not repeat same verbatim or seriatim in this award.

ISSUE TO BE DECIDED

Whether the first respondent committed an unfair labour practice in relation to promotion as per section 186 (2) (a) of the Labour Relations Act No.66 of 1995 (the Act)

SURVEY OF ARGUMENTS

In their very brief arguments, the parties sought to bolster their respective cases.

The applicants contended that the employer's omission to shortlist and appoint them undermined the multilateral agreement concluded with the union. The said agreement requires the employer to always give employees at the entry level the first preference. The position of an administrative clerk which required 0-2 years' experience provide the employer with such an opportunity.

Whereas., the employer contended that the applicants have failed to present any evidence that points to the fact that it had committed an unfair labour practice in relation to promotion. They have failed the test as some of them did not even possess the required diploma and relevant experience.

ARGUMENT FOR THE APPLICANTS

The applicants mainly contend that met the stipulated requirements on the advertisement for the position. The respondent ought to have considered the fact that the advertisement state that a candidate must possess a Diploma in Public Administration/General Management/Office or grade 12. Given that they possess grade 12 the respondent ought to have shortlisted them for the position.

The applicant's representative, Mr Skhosana argued the first respondent was supposed to implement the multilateral decisions without any bias or favoritism. The position that was advertised was at the entry level. Thus, the first respondent should have considered the employees at the lower level such as cleaners, porters, and operators for promotion. This is also particularly because the required experience was 0 – 2 years.

Therefore, the first respondent must be compelled to consider the applicants' applications.

ARGUMENT FOR THE RESPONDENT

The respondent argued that its decision not to shortlist the applicants did not amount to an unfair labour practice. According to the respondent, the applicants did not meet the minimum requirements and thus they were not shortlisted.

Further, the selection criteria were applied fairly, and all the shortlisted candidates met the criteria. The shortlisting of candidates who do not meet the requirements would render the interview process flawed and irregular.

The respondent's representative, Ms N. Nangammbi argued the applicants' allegations were tested and found to be baseless. They did not meet the minimum requirements; some did not possess the stipulated diploma, and some did not possess the relevant experience. The requirements were clear a candidate must possess a diploma or a grade 12 certificate.

If one can find a candidate with a diploma, the one with a grade 12 certificate may not be considered. Additionally, if there is a high number of candidates with 0 -2 years' experience the panel may inflate the required period of experience to trim down the numbers.

In the matter of Khumalo and Another v Member of the Executive Council CCT 1013, 2013 ZACC par 49, where the employee challenged the shortlisting process, the court held that it was not fair to appoint people who do not meet the requirements of a particular post. The formulation and application of the requirements for a particular post is a minimum prerequisite to ensure

objectivity of the appointment process. It would be generally not be fair for public sector employers to consider persons who fell outside the criteria.

ANALYSIS OF EVIDENCE AND ARGUMENT

The applicants' case is that the respondent's failure to shortlist them for the position of Administrative Clerk amounts to an unfair labour practice in relation to promotion.

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The applicant's representative, Skhosana argued the first respondent was supposed to implement the multilateral decisions without any bias or favoritism. The position that was advertised was at the entry level. Thus, the first respondent should have considered the employees at the lower level such as cleaners, porters, and operators for promotion. This is also particularly because the required experience was 0 – 2 years.

Therefore, the first respondent must be compelled to consider the applicants' applications.

Having considered the parties evidence and arguments, I concur that the applicants did not meet all the requirements as stipulated in the advertisement. For instance, they do not possess the stipulated Diploma in Public Administration/General Management/Office, and some do not possess the computer literacy certificate. This according to the first respondent explains why they fell short of meeting the shortlisting criteria.

Further, the evidence presented during the arbitration points to the fact that out 62 applicants or candidates only 12 were able to meet the 2nd phase of the shortlisting criteria. The applicants did not dispute that these candidates indeed met all the requirements of the advertised position. Therefore, it is not clear why the applicants would argue that the first respondent's decision to shortlist persons who are more qualified than themselves is an unfair conduct that amounts to an unfair labour practice.

It is also worth noting that the applicants did not present any evidence to show that the first respondent has violated its shortlisting policy or the selection or recruitment policy. Neither have the applicants demonstrated that, but for the first respondent's omission, they would have been promoted.

In Ekurhuleni Metropolitan Municipality and another v SALGBC and others (LC) JR 369/15 where an award ordering a protected promotion was set aside.

In Sun International Management (Pty) Ltd v CCMA and others (LC) JR 939 / 2014 where the court applied the "But for test". The court held that there was no evidence that to sustain the argument that "but for" the municipality's unfair conduct in not shortlisting the employee – he would have been appointed to the position of Operations Officer. In the matter of Transnet Limited v Transnet Bargaining Council and others JR 187/2010, the court held the knowledge and skills indicated in the advert also referred to the fields of management required of the successful candidates. Mr Luus fell short in that regard as his knowledge and skills were limited to yard operation, transportation of hazardous material, train operations and operating in the services environment. Thus, the court held that no unfair labour practice was committed, and the commissioner's award was reviewed and set aside.

Even if it is found that I have erred in concluding that the applicants were not shortlisted because they dd not meet the shortlist criteria, the crux of the matter is that the applicants fell short in meeting the overall test of showing that the respondent's conduct constituted an unfair labour practice.

In the case of City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & Others (2013) 34 ILJ 1156 (LC); [2013] 3 BLLR 267 (LC) it was held that the overall test is one of fairness in deciding whether the employer acted fairly in failing or refusing to promote the employee it is relevant to consider the following:

whether the failure or refusal to promote was caused by an unacceptable, irrelevant, or invidious consideration on the part of the employer, or

whether the employer's decision was arbitrary, capricious, or unfair, or

whether the employer failed to apply its mind to the promotion of the employee, or

whether the decision not to promote was motivated by bad faith,

whether the employer's decision not to promote was discriminatory.

whether there were insubstantial reasons for the employer's decision not to promote.

whether the employer's decision not to promote was based upon a wrong principle.

whether the employer's decision not to promote was taken in a biased manner.

It is worth mentioning that the court also indicated that indeed there are limited grounds upon which the arbitrator or court may interfere with the employer's discretion. The employee can only succeed in having the discretion of the employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for unsubstantiated reasons, or based upon any wrong principle or a biased manner.

In the circumstances, I am unable to conclude, that the first respondent's decision not to shortlist the applicants amounts to an unfair labour practice in relation to promotion.

AWARD

The applicants' have failed to prove that the first respondent (Department of Health – Gauteng) has committed an unfair labour practice in relation to promotion as envisaged in terms of section 186 (2) (a) of the Act.

The application is dismissed.

There is no order as to costs.

Signature: _____

Commissioner: **Adv. T. T. Serero.**

Sector: **Health**