



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: GPBC1987/2018

Panellist: P. P. Ndabambi

Date of Award: 9 September 2019

In the matter between

PSA obo NDLELA, A.

(Applicant)

And

INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE (IPD)

First Respondent

NIKHO LUSANDA BOOI

Second Respondent

Union/Applicant's representative:

Mr Anton Saayman – PSA Office Bearer _____

Union/Applicant's address:

Telephone:

Telefax:

First Respondent's representative:

No appearance – c/o Adv Namedi Ntsoane _____

Respondent's address:

Telephone:

Telefax:

Second Respondent's representative:

Mr Zamikhaya Skade – POPCRU Official _____

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This matter was referred to the General Public Service Sectoral Bargaining Council (GPSSBC) for arbitration in terms of section 191(5)(a) of the Labour Relations Act No. 66 of 1995, as amended, (the LRA). It was set down for arbitration on 26 – 27 August 2019 at the offices of the First Respondent (IPID) in East London. The Applicant, Ms Akhona Ndlela, was represented by Mr Anton Saayman, an office bearer of PSA. There was no appearance for or on behalf of the First Respondent, IPID and the Second Respondent, Nikho Lusanda Boo, was represented by Mr Zamikhaya Skade, an official of POPCRU.
2. I proceeded in the absence of the First Respondent, having satisfied myself that the First Respondent was notified of the date, time and venue of the proceedings.
3. Both parties agreed to submit written closing arguments on 27 August 2019, and both parties complied.
4. The proceedings were electronically recorded.

ISSUE TO BE DECIDED:

5. I am required to determine whether or not the conduct of the First Respondent of not promoting the Applicant to the position of Deputy Director: Investigations, amounts to an unfair labour practice.

BACKGROUND TO THE DISPUTE

6. The Applicant responded to an advert of a vacancy within the component of Investigations. She was shortlisted and interviewed for the position and the panel recommended her appointment as she was in first place in terms of interview scores. The recommendation further stated that

should the Applicant not accept the offer then the Second Respondent be appointed in the same position.

7. It is this outcome that is placed in dispute by the Applicant and is seeking promotion to the position as a remedy.

SURVEY OF EVIDENCE AND ARGUMENT

8. Ms Akhona Ndlela testified that she responded to an advert in the same component of Investigations. She filled in the required Z83 forms and voluntarily disclosed that she had traffic violation. She further attached a security clearance certificate to substantiate to the panel to show that she is security competent for the position. She had a conviction on 18 February 2013 and paid an admission of guilt. She was shortlisted and invited for interviews held in May 2018.
9. The Applicant met the requirements of the job. The panel consisted of senior management who would know if there would be a problem with her criminal record. She also declared to the panel that she had a criminal record due to a traffic violation. The panel's response was that every driver has exceeded speed she should not worry about it. She went on to explain the circumstances of the traffic transgression. The Provincial Head became aware of this fact the day the incident happened.
10. After the interviews the Applicant went back to her office. About 15h25 on the day of the interviews she received an e-mail from Mr Mshumpela in which he was telling her they decided to trace Mr Simon, who is the Applicant's ex-supervisor. On Monday 2 July 2018 she was summoned to Ms Tukela's office by Mr Mshumpela who was in a somber mood. Ms Tukela stood up and hugged the Applicant and said she was sorry.
11. They informed her that the submissions came back and the National Authority decided to appoint the second best candidate. She brought up the fact that they noted that she was nominated for upward mobility. The Applicant stated that she was not surprised because she was aware of the upward mobility issue as Provincial Heads were tasked to identify officials who must be prioritized for promotions.

12. When the position was advertised Mr Tukela informed the Applicant of the task they were given to identify officials that are ready for promotions and told the Applicant that she identified her for such purposes. She said that the Applicant has changed and is not the same person she used to be. She has another arbitration for a similar case and Ms Tukela was aware of the adversities she faced as she was previously overlooked for promotion.
13. The Applicant lodged a grievance on 6 July 2018. It was acknowledged on the same day but took a long time to be heard which added to her suffering. The Labour Relations Officer told her the case is of a peculiar nature and that they are seeking advice from Legal Services. The Applicant explained that the purpose of getting a security clearance is to establish if one is not a threat to state assets and if one is security competent. The Applicant confirmed that she is security competent. After three months the Applicant received a negative outcome due to her criminal record. She remained with questions and felt prejudiced.
14. The recommendations brought irrelevant information that was never subject of the interviews. The appointment submission was prepared by the chairperson and members of the panel should be unanimous in agreeing. It should have all their signatures and dates. There was also an issue of her anger raised which she believes the employer should have done something about it. Interpersonal skills are soft skills that one cannot determine in 45 minutes of an interview. She does not understand why would one use that in an outcome of an interview. The Applicant felt that there was no objectivity in the submission.
15. The Applicant went on to state that the First Respondent acted inconsistently in that a certain Mr Matthew Sesoko who is a National Head of Investigations was employed with a criminal record since 1997 and has progresses in all ranks. He had a record of public violence.
16. Another employee, Ntombi Xhegwana resigned from the Public Protector, earning three times than what the First Respondent pays and no due diligence was conducted against her. When she was betted in 2014 it transpired that she had judgements, one about R900 000. 00. The State Security Agency (SSA) raised a red flag in relation to the judgements and the threat she posed. The office of the First Respondent wrote a motivation to say she would be monitored. She committed misconduct of taking a vehicle without authorization, denied it and resigned.

17. Mr Mandla Mngomana had a criminal record of assault but his record was not an issue. There was no mention of any risk or damage the Applicant would pose and she never presented any reason to doubt her integrity. Mr McBride's comment of having the record expunged was an insult as such a process takes ten years according to legislation.
18. The outcome of the interviews was that the Applicant scored 86 points and the Second Respondent 82. The recommendation was appointment of the Applicant and that in the event that she declines the offer then the Second Respondent to be appointed.
19. The Applicant was conferred policing powers through a process that is signed off by the Minister. The process includes screening, one makes an application and the Provincial Head must also write a motivation, to be signed off by Legal Services and go to the Minister. The Applicant was granted policing powers by the Minister, and such powers were relevant for the position she applied for as well as the security clearance.
20. The Applicant has been appointed in acting positions like the one of the Provincial Head and Deputy Provincial Head. It can therefore not be correct to say that the Applicant is a risk to the department when she has been appointed to act in positions of trust and authority. The Applicant was appointed in these acting positions even after she was not appointed. She was once appointed to chair the recruitment and selection process and a panel member.
21. The Applicant stated that her current position and the position applied for talk to her suitability because both positions expose them to state information. The First Respondent therefore failed to apply their minds. The current position she is holding and the position applied for is a decision-making position which she is currently doing with the record being there from 2013.
22. The First Respondent has legislation and policy to guide its operations. The recruitment and selection policy provides guidelines to identify the most suitable candidate. The inherent requirements of the position did not state that a criminal record is a determinant. A security clearance is a requirement.
23. Both candidates' qualifications were verified. The Second Respondent's qualification was not found but they applied their discretion to appoint her. The policy states that selection is to be

based on scores, qualifications, etc. There is no record of a follow up on this issue. The submissions were clear with recommendations.

24. The Constitution in section 23 gives the right to fair labour practices. The Public Service Act talks to fit and proper persons. That is the same statement used by the First Respondent when they applied for the Applicant's policing powers.
25. Under cross-examination the Applicant confirmed that they both scored above 80 and that Sesoko and Xhegwana were mentioned to show inconsistency in appointments by the First Respondent. She also agreed that appointments are the employer's prerogative.
26. Ms Nikho Lusanda Booi (the Second Respondent) testified that she holds a position of Deputy Director: Investigations, which is contested. She responded to an advert in the DPISA circular and received a call that she had been shortlisted. She met the requirements of the position and was invited for interviews on 3 May 2018. She holds the relevant bachelors degree and also has experience in investigations since 2011. She followed the processes and met all requirements. She was informed that she was successful.
27. There were no questions for cross-examination.

ANALYSIS OF EVIDENCE AND ARGUMENT

28. Section 23 of the Constitution states that every employee has a right to fair labour practices. Such right is confirmed by section 185 of the LRA. In this unfair labour practice dispute, the Applicant bears the onus to prove that the conduct of the employer, in not promoting her, amounts to an unfair labour practice.
29. It is the uncontested evidence of the Applicant that she applied for a position and believes that she met the requirements, hence she was shortlisted, interviewed and recommended for appointment by the panel. The National Authority changed the recommendation and appointed the second best candidate, based on the fact that the Applicant had a criminal record.
30. The First Respondent motivated for the Applicant to get a security clearance as well as be conferred policing powers based on the fact that she was fit and proper for the position she

holds with them. The panel dismissed the Applicant's traffic violation as something that is not material in the application before them.

31. The First Respondent also acted inconsistently in appointments as they have appointed people with criminal records before, who happened to hold senior positions within the department. The Applicant was further identified for upward mobility by the same employer who changed their minds when such an opportunity arose.
32. It has further been stated that the Applicant has been appointed to act in leadership positions like that of the Provincial Head, in which trust and authority is vested, with the same criminal record. She has a security clearance and has been conferred policing powers, which the employer motivated for. It therefore is a contradiction that the First Respondent sees the Applicant as fit to act in higher positions but fail to appoint her when the opportunity arises.
33. The Applicant met all the requirements of the position and performed higher than all candidates that were interviewed. The recommendations stated that in the event she declines the position then the second best candidate would be appointed. The Applicant was not offered the position as there was no offer declined.
34. The Applicant argued that the First Respondent did not apply its mind in the appointment. The panel that made the recommendation was well aware of the Applicant's record as it was disclosed by the Applicant and they had no issues with it. There is further an issue of the Second Respondent's qualification which could not be verified, by the relevant authorities but the First Respondent did not have issues with that. There is therefore clear uncontested evidence that the Applicant was the suitable candidate for the position in question as required in ***Buffalo City Public Fet College v CCMA & Others (P372/12) [2016] ZALCPE 18***.
35. In ***Arries 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. It further held 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.

36. In ***City of Cape Town v SA Municipal Workers Union obo Sylvester & Others (2013) 34 ILJ 1156 (LC)*** it was held that the overall test is one of fairness. It was held that following factors need to be considered:

- a. Whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious consideration on the part of the employer; or
- b. Whether the employer's decision was arbitrary, or capricious or unfair; or
- c. Whether the employer failed to apply its mind to the promotion of the employee; or
- d. Whether the employer's decision not to promote was motivated by bad faith;
- e. Whether the employer's decision not to promote was discriminatory;
- f. Whether there were insubstantial reasons for the employer's decision not to promote;
- g. 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.

37. The Applicant argued that the ***IPID Act 1, 2011*** provides that in order for one to be eligible for appointment as an Investigator, one has to conform to the security clearance prescripts. It is the Applicant's uncontested evidence that the screening process was done and she obtained a positive security clearance and was conferred with Policing Powers, a process that the First Respondent also participated in motivating for the Applicant.

38. The panel found the Applicant as the suitable candidate, having met the requirements of the job and was also identified for upward mobility by her employer. The panel was aware of the criminal record, it cannot be said therefore that there was an omission. In my view both authorities, national and provincial would have had to apply the same principle, if the issue of the criminal record was inherent. The different outcomes from different authorities shows that there was no rule relating to the issue of the criminal record. Legislation regulating the First Respondent requires a security clearance which the Applicant had.

39. The First Respondent has a Recruitment and Selection Policy, based on which the Applicant's appointment was made. There was no finding by the National Authority that the Provincial Authority misapplied any of the principles. Evidence by the Applicant that there are other senior employees of the First Respondent in senior positions with criminal records, some more serious than her traffic violation shows the inconsistency in applying this issue.

40. The requirements of the job also made no mention of 'no criminal record', which would by what led to the Applicant being shortlisted in the first place. I find that the inconsistency in applying this issue is unfair. Secondly the fact the First Respondent was not concerned with the second best candidate's qualification that could not be verified is also of concern as qualifications directly talk to suitability and meeting of the requirements. That issue is material in deciding suitability of a job applicant. I find that by failing to consider this fact the First Respondent acted in a biased manner.
41. Whilst it was not disputed that an employer has prerogative to appoint, I find that the First Respondent's failure to promote the Applicant, based on the above-mentioned reasons amounts to an unfair labour practice and that the Applicant has discharged the onus to prove that she was the suitable candidate for the position.
42. Coming to the remedy, the Applicant prayed for promotion to the position of Deputy Director: Investigations. I do not have evidence that supports a different outcome, in the absence of the First Respondent, as well as arguments presented by the Applicant which provide proof that the Applicant was the suitable candidate for the position. Having found that there was inconsistency and that there was bias, I must make an order that the Applicant be afforded the relief sought.
43. The applicable remuneration package as per the advertisement of the position is R657 558. 00 per annum, translating to a monthly salary of R54 796. 50. The appointment was made with effect from 1 July 2018 and at the end of August 2018 the applicable period for backpay is fourteen (14) months.
44. In the circumstances, I make the following award:

AWARD

45. The conduct of the First Respondent, IPID, of not promoting the Applicant, Akhona Ndlela, amounts to an unfair labour practice.
46. The First Respondent, IPID, is ordered to promote the Applicant, Akhona Ndlela, to the position of Deputy Director: Investigations with effect from 1 July 2018, at a salary scale of R657 558.00 per annum.

47. The First Respondent, IPID, is directed to pay backpay to the Applicant, Akhona Ndlela, from the date of appointment, 1 July 2018 to 31 August 2019, amounting to R767 151.00, calculated as follows: $R54\,796.50 \times 14 \text{ months} = R767\,151.00$.

48. The amount in paragraph 47 above, must be paid by the First Respondent, IPID, to the Applicant, Akhona Ndlela, by no later than 30 September 2019.

Signed and dated in Port Elizabeth this 10th day of September 2019.



PUMEZA NDABAMBI
GPSSBC ARBITRATOR