



ARBITRATION AWARD

Case Number: FSBF3020-14
 Commissioner: Jana Burger
 Date of Award: 12 August 2014

In the ARBITRATION between

PSA obo k Sekhoto

(Applicant)

And

The Head: Department of Education

(Respondent)

Union/Applicant's Representative: Mr. Fandje

Union/Applicant's address: P.O. Box 7673
Bloemfontein
9300

Telephone: 051 - 403 1300

Telefax: 051 - 403 1315 / 051 - 403 1319

E-mail: psabloem@mweb.co.za

Respondent's Representative: Absent

Respondent's address: Private Bag X20565
Bloemfontein
9300

Telephone: 051 - 404 8430

Telefax: 051 - 404 8269, 086 619 8717

E-mail: Unknown

DETAILS OF HEARING AND REPRESENTATION:

- [1] The Arbitration proceedings in the above matter were scheduled for the 8th of August 2014 at the CCMA Offices, Elizabeth Street, Bloemfontein.
- [2] The Applicant, P.S.A obo K Sekhoto, was represented by Mr. Fandie, an official of PSA. The Respondent, The Head: Department of Education, failed to attend the proceedings. Notice of the hearing was sent to them by fax, to fax number 086 619 8717 on 17 July 2014.
- [3] I am satisfied that they received sufficient notice and we proceeded in the Respondent's absence.
- [4] The Arbitration proceedings were digitally recorded.

ISSUE TO BE DECIDED:

- [5] The Applicant referred a disclosure of information dispute in terms of Section 16 of the Labour Relations Act. The Commissioner is required to determine whether the information required is relevant and whether the information required is information contemplated in subsection 5 (c) or (d). The Commissioner is further required to determine whether the requested documents should be disclosed to the Applicant by the Respondent.

BACKGROUND TO THE ISSUE:

- [6] The Applicant, K Sekhoto, was employed by the Respondent on a temporary basis as a Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School. This position of Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School was advertised by the Respondent and the applicant applied for the position.
- [7] The Applicant was shortlisted for the position and invited to interviews, but was not the successful candidate and was not appointed in the position.

- [8] The Applicant requested information and documentation from the Respondent to enable the union to perform their functions and to represent the Applicant. The Respondent failed to provide the Applicant with the requested information and the Applicant referred this dispute to the CCMA. The Applicant requested that the Respondent be ordered to disclose the information requested.
- [9] The Applicant submitted a bundle of documents which was marked bundle A with page 1.

SURVEY OF EVIDENCE AND ARGUMENT:

SUBMISSIONS ON BEHALF OF THE APPLICANT:

- [10] I wish to state from the outset that not all evidence presented will be set out hereunder. Only a summary of the evidence is contained herein.
- [11] The following witness was called to testify on behalf of the Applicant:
- o Clement Fandle
- [12] Mr. Fandle testified under oath that he was representing the Applicant in the matter relating to a possible unfair labour practice. The Applicant, K Sekhoto, was employed by the Respondent on a temporary basis as a Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School. This position of Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School was advertised by the Respondent and the Applicant applied for the position.
- [13] The Applicant was shortlisted for the position and the Respondent invited him to interviews. The Applicant was later informed that he was not the successful candidate. The Applicant approached the union and requested them to investigate the possible unfair labour practice.
- [14] The union wrote a letter to the Respondent (Bundle A, page10) where they requested the following documents to enable them to advise the applicant on her rights with regards to a claim of unfair labour practice:
- 14.1 *The shortlisted candidates;*
 - 14.2 *Score sheets and assessment forms of each candidate;*
 - 14.3 *Recommendation of the panel;*

14.4 Reason(s) why the preferred candidate is more suitable for the post than our member."

[15] He submitted that the Respondent failed to reply to their request. The information required was needed in order for PSA to give effect to section 14 and 16 of the Labour Relations Act.

[16] He stated that the information required was not:

- (a) legally privileged;
- (b) information that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
- (c) confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
- (d) private personal information relating to an employee.

[17] The Respondent failed to notify the Applicant whether the information was confidential and submitted that the information was public record. He requested disclosure of the said information by the Respondent.

SUBMISSIONS ON BEHALF OF THE EMPLOYER PARTY:

[18] None submitted.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[19] Section 16 of the Labour Relations Act stipulates the following:

- "(2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).
- (3)
- (4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.
- (5) An employer is not required to disclose information-
 - (a) that is legally privileged;
 - (b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
 - (c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) *that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.*

(6)-(9).....

(10) *In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.*

(11) *If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.*

(12) *If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer. "*

[20] The information required in order for PSA to give effect to section 14 and 16 of the Labour Relations Act was the following:

- 20.1 The shortlisted candidates;
- 20.2 Score sheets and assessment forms of each candidate;
- 20.3 Recommendation of the panel;
- 20.4 Reason(s) why the preferred candidate was more suitable for the post than the Applicant.

[21] The union needs the above information to advise the Applicant with regards to an alleged unfair labour practice and the possible institution of a dispute at the ELRC. I am satisfied that the information required is indeed relevant to enable the union to perform their functions and to represent and advise the Applicant as contemplated in section 16 of the Labour Relations Act.

[22] The information requested is not confidential and will not cause substantial harm to an employee or the employer. I must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.

[23] If the information requested is not disclosed, the trade union would not be able to advise the Applicant and to possibly present the Applicant's case in the Council. I therefore find that the balance of harm indeed favors the disclosure of the information.

AWARD:

[24] The Respondent, The Head: Department of Education, is ordered to disclose the following information to the Applicant on/or before 29 August 2014 in order for the trade union to give effect to section 14 and 16 of the Labour Relations Act:

- 24.1 The shortlisted candidates for the position of Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School;
- 24.2 Score sheets and assessment forms of each candidate who applied for the position of Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School;
- 24.3 Recommendation of the panel;
- 24.4 Reason(s) why the preferred candidate is more suitable for the post of Senior Housekeeping Supervisor at Kgotso Falo Farm Primary School other than the Applicant.

[25] No order as to costs is made.

Signature:

Commissioner: Jana Burger
Sector: Public Service (General)
