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ARBITRATION AWARD

Panellist/s: ADV. W. BLUNDIN

Case No.: GPBC535/2020

Date of Award: 15 December 2020

In the ARBITRATION between:

PSA OBO NM MAFUNDA

(Union / Applicant)

and

DEPARTMENT OF SPORT RECREATION ARTS AND CULTURE

(Respondent)

Union/Applicant's representative : Mr. G. SEAKAMELA (PSA)

Union/Applicant's address :

TELEPHONE NO :

FAX NO :

Cell no :

Respondent's representative **:**DEPARTMENT OF SPORT RECREATION ARTS &CULTURE

Respondent's address :

AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This award came after an arbitration hearing that was set down 24 November 2020 at the offices of the Respondent in Mthatha.

2. The Applicant was in attendance and represented Mr. G. Seakamela a union official, the Respondent was represented by Mr. Aldrin Maythem an official of the Respondent.

3. The parties agreed to submit their heads of arguments by the 1 December 2020. Subsequently thereafter Mr. Seakamela request time for him to submit his heads of argument. At the time when I send the award, I am still awaiting his heads.

ISSUE TO BE DECIDED:

4. I am required to determine.

    a. Whether the Applicant's dismissal was for fair reason.

    b. If I find that the dismissal was unfair, the Applicant seek reinstatement retrospectively in the position she had at the time of her dismissal..

INTRODUCTION

5. The Applicant was employed at the Respondent as District Director for the Respondent, before she was charged and found guilty which led to her dismissal.

6. The Applicant was served on the 18 February 2020 with a notice to attend a disciplinary hearing which was held on the 27 and 28 February 2020. The charges include the following.

    a. ***Charge 1. Abuse of delegated authority: In that***

    You abused your delegated power as the appointing authority in that you deviated from the recruitment and selection committee's recommendation to appoint Ms Madyibi to the post of Principal Museum Human Scientist without any compelling reasoning thereby causing the department financial strain.

    b. ***Charge 2: Bringing the department in disrepute in that***

    Your actions of appointing Ms Madyibi instead of Mr. Ngcai to the post of Principal Museum Human Scientist has disgraced the department in that your malpractice has been reported to the office of the Pubic Service Commission to intervention of the Head Of Department.

    c. ***Charge 3: Favouring of colleague in that***

    You favoured Ms Madyibi to the post of Principal Museum Human Scientist based on your personal knowledge of her even though she was scored 3rd by the recruitment and selection committee.

7. The Applicant was found guilty on the charges and dismissed. The Applicant then subsequently thereafter refers an unfair dismissal case to the Council which is now in front of me.

SURVEY OF EVIDENCE AND ARGUMENTS

8. The Respondent called three witnesses inter alia, Mr. C. Buhlungu, Mr. Silinga, Mr. M. Ngcai and Ms V. Bonela to testify on its behalf.

9. **Mr. Christopher Buhlungu testifies** that he was the chairperson of the disciplinary enquiry in the Applicant's case. According to him the Respondent did serve the Applicant with the notice on pages 1 to 2 to attend a disciplinary enquiry on the 27 and 28 February 2020. He further confirms that the Applicant has signed the notice on the 18 February 2020, and it was more than the required 5 days to prepare for a case. See bundle A page 1.to 2.

10. He further testifies that the Applicant was given the opportunity to state her case in the disciplinary enquiry on the 27 and 28 February 2020, on page 4 of bundle A is prove that she has called a witness inter alia, Ms Mayiyibi to testify on her behalf. According to him if you calculate the time when the Applicant have received the notice until the date of the hearing more than 5 days were granted to the Applicant to prepare for her case and to call witnesses.

11. He testifies that he explains the procedure to the representative of the Applicant and the Respondent at the first day of the hearing when the Applicant's representative request postponement because the applicant has given a notice to him at the day of the hearing and he was waiting for documents that was outstanding.

12. Under cross examination the witness confirms that he will not grant postponement if there are not concrete evidence.

13. **Mr. Silinga testifies** that he was the chairperson of the shortlisting and interview panel who was appointed by Ms Mafunda. He further testifies that he was employed at the Respondent as Manager: Arts and Culture.

14. Page 22 bundle A is the minutes of the shortlisting for the position of Principal Museum Human Scientists which was approved by Ms Mafunda. Page 23 of bundle A provide a summary of criteria used for shortlisting. Further according to him he was not aware of the decision of the Applicant.

15. **Mr. Monwabisi Ngcai testifies** that she was the complainant in this matter. According to him he was shortlisted and went to the interview. He further testified that according to him it was unfair that he was not appointed by the appointing authority. He referred me to pages 4.5, 5 to 11 and 12 to 14 to show that he meets the requirement. He further confirms that he has more than 3 years' experience and that the Applicant has appointed the person based on personal knowledge. He further testifies that he did not refer an unfair labour practice on promotion to the CCMA or Labour Court because when he approaches the legal aid board they did not want to help him.

16. According to him the Applicant has abuse her power by taking candidate number 3 and not him.

17. **Ms Vuyokazi Bonela testifies** that she was present when they consulted with Mr. Silinga.

Applicant's witness and arguments

18. **Mr. Leon Bulelani Nqeketo testifies** that on the 27 February 2018 he requested to chairperson for postponement of the hearig because he have only received the notice from the Applicant on the same day.

According to him the Chairperson was adamant that the hearing will go ahead. The applicant and the employer representative agreed to adjourn the meeting to the 28 February 2020.

19. The **Applicant has testified** that she received the recommendation from the selection panel and when she consider it she find many inconsistencies with regard to the scoring to the interview candidates. According to her HR has failed the department to assist in the implementation of correct procedures. According to her the inconsistencies came about when the chairperson scored the complainant higher for experience while Ms Madyidi has more experience in the subject matter then the complainant. According to her that Ms Madiydi has more than 13 years relevant experience, while the complainant has no experience in a museum setup.

20. According to her all information about the candidates she obtained from their CV's and not because of personal knowledge. According to her she discussed the matter with the Chairperson of the panel. According to her when she attends a meeting on the 1 April 2018 in King Williams Town, she consulted with Mr. Silinga.

21. According to the Applicant she could not send the recommendation back because the Department could have loosed the filling of this post.

22. According to the applicant the HOD did not provide her with a copy of the PSC report. But subsequently thereafter she received a letter from the HOD to revoke her authority to appoint. Further according to the Applicant, she has acted according to the powers that was given to her. Further the recruitment and selection policy are silence about the issue of handling recommendations. (See pages 18 and 19 bundle A)

23. According to the Applicant she had the power or authority to appoint posts below post level 9 and 10, level 12 she will be the scribe.

ANALYSIS OF EVIDENCE AND ARGUMENTS

Did the employee break a workplace rule or standard of conduct?

24. I agree with the Applicant that her dismissal was procedurally fair and substantively unfair and will set out reasons hereunder.

25. For me to determine as to whether the dismissal was substantively fair or unfair, I must determine as to whether the Applicant has broken a workplace rule or standard in relation to the charges or allegations made against the Applicant. reasons for dismissal were procedurally and substantively fair. I will firstly deal with the substantive fairness of the dismissal in relation to the charges levelled against the Applicant.

26. It is common cause that the Applicant was one of the Senior Management in the service of the Respondent and that she had delegated powers to make appointment of employees in salary level 9 to 10.

    a. ***Charge 1. Abuse of delegated authority: In that***

       You abused your delegated power as the appointing authority in that <u>you deviated</u> (my emphasis) from the recruitment and selection committee's recommendation to appoint Ms Madyibi to the post of Principal Museum Human Scientist without any <u>compelling reasoning</u> (my emphasis) thereby causing the <u>department financial strain</u> (my emphasis).

27. I will deal with the above charge in the following context by first determining as to whether the Applicant was the appointing authority? It is common cause that the Applicant does have the power to appoint. The Respondent has failed to provide otherwise that the Applicant does not have power or authority to make an appointment. Mr. Silinga testified that the Applicant has amend the recommendation and in so doing deviate from the original recommendation. I am not sure that the Applicant has deviate from the recommendation. The panel has recommended 4 candidates in the order of preference as Mr. Ngcai.

28. Any submission that the Panel recommend Mr. Ngcai is wrong and for ease of reference the recommendation reads as follows.

"The panel hereby submit the 4 candidates in order of merit and feel strongly that Mr. Ngcai has the ability to perform the duties."

29. Further the Respondent has failed to provide this hearing with evidence that according to the recruitment and selection policy the appointing authority cannot deviate from the recommendations made. In the absence of such evidence I can only conclude that the Applicant does have the authority to deviate from the recommendations made by the panel.

30. Further according to the Respondent's representative, the Applicant did not provide compelling reasons to appoint the 3rd candidate. I must make it clear that the onus of prove is upon the Respondent, but it has failed to provide any evidence to show that according the policy of the Respondent the Applicant must provide compelling reasons for deviate from the panel's recommendation.

31. Respondent did not provide any evidence that the Applicant has break a rule or standard as laydown in the recruitment policy of the Respondent. It is common cause that the four candidates according to the shortlisting

panel meets the requirements. Further the panel does not have any appointing power and were appointed only to make recommendations to the appointing authority which lies in the hands of the Applicant.

32. Further the Respondent allege that Within her powers she decided not to accept the recommendation and make appoint of the 3rd preferred candidate. She provide the following reasons; " *I approve the appointment of the candidate no:3. She worked for the department and took the museums to higher level* ……I find that the Applicant could never have been found guilty on charge 1.

33. I will now deal with charge 2. Firstly, it was on the employer or Respondent to show that the Applicant has brought its reputation in disrepute or has cause reputational damages to the reputation of the Respondent. The main reason for this charge was that Mr. Ngcai has refer a complaint for his non appointment to the Public Service Commission. The PSC cannot change an administrative decision made by the Applicant. Further this matter did not have any effect on the reputation of the Respondent. If Ngcai strongly felt that he does have a good case, why didn't he refer a dispute to the CCMA. It does not mean that if you are recommended that you must be appointed into a position. The suggestion or evidence of Mr. Ngcai that the Applicant has abuse her power is wrong because she has provided reasons as to why she prefers the 3rd candidate. It was not disputed when she testified that she has consider the CV 's of the recommended candidates when she approved the appointment of Ms. Madiydi and not Mr. Ngcai.

34. The Respondent relied on the fact that a candidate who apply for a position and was recommended but not appointed and that a complaint was lodged at the Public Service Commission. This is not enough or sufficient prove that the Applicant in executing her authority to appoint has in any way impacted negatively on the reputation of the Respondent. I find it difficult to apprehend that if a person or candidate complaint to the Public Service Commission because he was not appointed could in any way cause any damages to the

reputation of the Respondent. The PSC is an internal organisation to ensure accountability of the state officials. Further no evidence was preferred or adduced to show that the Respondent's reputation has taken a knock. It is for this reason that I cannot find any reason as to why the Applicant could have been found guilty on charge 2.

35. The argument of the Respondent that suggest that there must be an agreement between, Mr. Silinga and the Applicant is wrong. Mr. Silinga was chairperson of the shortlisting and selection panel and the Applicant had the right to make appointments under her delegated authority. The Respondent has failed to provide evidence that the Applicant was in breach of the policies of the Respondent in making an appointment other then what was preferred by the panel.

36. Let me deal with the argument of the Respondent that the appointment made by the Applicant was irrational. This contention is wrong in law, for reason the Applicant does have the power to appoint, both the persons (Ngcai and Madiybi) was recommended, both candidates meets the requirements and, in this case, Madiybi has experience of working in museums. It is for this reasons that I consider the decision of the Applicant as rational within the context of administrative law. It is trite law that if a person is recommended for a vacancy it does not mean that the person must be appointed.

37. It is further alleged that the Applicant's "malpractice" has caused something. The Respondent has failed to show that the Applicant has acted negligently and therefore to allege that the authority of the Applicant to appoint was "malpractice" is incorrect and does not hold any water. I believe that I have sufficiently deal with these issues and will now deal with charge 3.

38. Charge 3 which refer thereto that the Applicant has favour Ms Madiyibi because she has knowledge about her. Is it unlawful to appoint a candidate that you knew? It will be nepotism to appoint a friend who don't even meet the requirements for the position, and you prefer him/her over a person who meet the requirements. According to the evidence of the Applicant she knew Ms Madiyibi as she worked for the department and that the Applicant came through the ranks and must have meet Ms Madiyibi who worked for the department. In this case the Respondent did not show that the person appointed by the Applicant was favoured in that she was placed on the shortlist while she did not meet the requirements. Further the Respondent has failed to show that Ms. Madiyibi was a friend of the Applicant. It is for this reason that I find that the Applicant did not break any rule.

Was the rule or standard valid or reasonable?

39. I will not deal with the above because I have already decided that the Applicant did not break any rule when executing her power to appoint.

40. I understand that according to the LRA as amended schedule 8 the Respondent must show there is a rule, but equally the onus is on the Respondent to show that the Applicant has misconducted himself/herself. It is not sufficient, only to refer to the existence of a rule, but one is unable to show that the Applicant has breach such rule.

41. I will also deal with the argument that the Applicant deviate without compelling reasons and that such reasons include that the MEC did not confirm the post to be required for the department, the post was not job evaluated, post not funded and other. I find this argument is far fetch and not serve the purpose as compelling.

It is my respectful views that the Applicant has execute her right to appoint and advance reasons as to why she preferred candidate 3 over the 1 and second candidate. Further she was not charge that she has failed to provide compelling reasons. Therefore, this argument must be rejected.

42. Further scoring of candidates in interviews is not science and prove that the applicant was found guilty on charge 2 because she has breached a specific rule. The only reason for preferring this charge is because a complaint was referred to the Public Service Commission. The Public Service Commission is an organisation to investigate any complains about incidence that happened in the Public Service. This allegation is not enough to show that the Applicant has breach a rule.

Was the Applicant aware of the rule

43. As a senior official it is likely that she was aware, but only to be aware and the lack of facts that she not guilty, I don't find it necessary to handle this question.

Was the rule consistently handled

44. Its neither here or there as to whether the rule was handled consistent or not.

Was the sanction appropriate

45. I find that the sanction could not have been appropriate if the Respondent could not provide evidence in relation to the allegations made by the Respondent. The sanction of dismissal is set aside and replace by reinstatement.

Procedural fairness/unfairness

46. I will now also deal with the next challenge of the Applicant inter alia the procedural fairness of the hearing. The applicant called a witness who represent her during the disciplinary hearing that has testified that he received the charge sheet from the applicant the morning of the hearing. He then made a request from the Chairperson of the hearing to postpone the hearing to allow him to prepare for the hearing and to call witnesses.

47. According to him the Chairperson of the hearing did not want the hearing to be postponed and decided that the hearing be adjourned to the 28 February 2020.

48. The Chairperson of the disciplinary enquiry testify that sufficient time was given to the Applicant to be represented. Further Respondent testifies that According to the applicant's representative in the disciplinary hearing.

49. I therefore confirm that the dismissal was not procedurally unfair.

50. This brings me to the question of relief. The employee seeks retrospective reinstate.

51. There is no evidence before that the trust relationship had been destroyed or that the circumstances surrounding the dismissal would make continued employment relationship intolerable. It is also not reasonably impracticable for the employee to be reinstated. See Section 193 of the LRA.

52. Given the fact that the employee's dismissal was substantively unfair, the evidence that the employee has not had meaningful income during the period of his dismissal, amongst other aspects, I consider

it just an equitable to award full back pay. Calculation of the back pay is R74578.09 x 8 months = R596624.72.

53. In fact, I would view an order not catering for full back as being unfairly punitive to the employee in respect of the relief seek by the Applicant

54. I therefore make the following appropriate award.

AWARD

55. That the Applicant's dismissal was procedurally fair but substantively unfair.
56. The Respondent is ordered to reinstate the Applicant as from the 1 February 2021, without the loss of any benefits.
57. The Applicant is ordered to report for duty on the 1 February 2021.
58. The Respondent is ordered to payback the amount R596624.72 less statutory deductions to the Applicant by not later than the 26 February 2021.
59. No order as to cost.

ADV. W. BLUNDIN

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