



GENERAL PUBLIC SERVICE
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ARBITRATION AWARD

Panellist/s: Motseki A. Mokoena
Case No.: GPBC 1719/2022
Date of Award: 15 March 2023

In the ARBITRATION between:

PSA obo CWAYI B.C.

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Union/Applicant's representative: Mr. M.W. ODENDAAL

Respondent's representative: Mr. S.A. FINGER

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- 1) The arbitration process was scheduled on 22 February 2023 and it was held at Goedemoed Correctional Centre near Aliwal North.
- 2) The applicant, PSA was represented by Mr. M.W. Odendaal and the affected member, Ms. Cwayi B.C. was in attendance. The respondent, Department of Correctional Services was represented by Mr. S.A. Finger an official from its Labour Relations and the proceedings were digitally recorded.

ISSUE TO BE DECIDED

- 3) I must decide whether or not the alleged conduct of the respondent amounts to unfair labour practice.

BACKGROUND TO THE MATTER

- 4) The applicant applied for the position of Deputy Director: Area Coordinator: Development and Care and the respondent acknowledged that it received the C.V. of the applicant.
- 5) The applicant qualified in terms of the criteria required for the filling of the post. She acted in the position for twelve months.
- 6) The applicant was not invited for the interviews of the above position (ie Deputy Director) and as a result declared unfair labour practice relating to failure to promote.
- 7) The relief sought is twelve months compensation calculated at the applicant's current salary. The applicant's current salary is R43 040.75c per month.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE OF THE APPLICANT

The 1st witness: Buyiswa Catherine Cwayi testified under oath as follows: -

- 8) She is an Assistant Director: Social work supervisor at Goedemoed and has been in that position from 01 January 2008. She has twenty-two (22) years of experience as a social worker.
- 9) Her application was submitted via an email which was provided by the respondent and she received an email to the effect that her application was received. It is unacceptable that she was not shortlisted whilst she met the requirements of the post.
- 10) She testified under cross examination that she started working for the respondent from 01 June 2004.
- 11) The reason for applications to be submitted via an email was due to Corvid-19 pandemic. The server of the department is centralized and is at the national office.

12) The response that there was an IT Technical challenge which resulted in her not being shortlisted is not plausible as she had followed it up with Ms. Ndlovu in September 2020 who confirmed that it was received, but later in December 2020 she said it was not received and thus she cannot agree that her application was not received due to technical problem which was experienced by the respondent.

13) She further testified that she submitted a hard copy at Bloemfontein regional offices on 29 September 2020.

14) Failure to shortlist her amount to unfair labour practice. The email she used is the one which appeared on the advertisement and the person for enquiries is Ms. Ndlovu.

EVIDENCE OF THE RESPONDENT

The respondent did not call a witness to testify.

ANALYSIS OF EVIDENCE AND ARGUMENT:

15) The dispute of the applicant is that failure by the respondent to shortlist her for an interview of an advertised post amounted to unfair labour practice relating to promotion. It is trite law that he/she who alleges must prove, thus the Applicant has a duty to convince the Council that he is entitled to succeed with her claim.

16) Section 186(2) of the Labour Relations Act 66, 1995 ("the LRA") defines **Unfair Labour Practice** as "any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals of probationers) or training of an employee or relating to the provision of benefits to an employee);

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 on account of the employee having made a protected disclosure defined in that Act."

17) I need to point out that appointment of employees to vacant positions is the prerogative of the employer and they exercise their own discretion, however that should be exercised fairly.

18) The only moment where the Commissioner may interfere with the decision of the employer with regard to appointments is when there is glaring disregard of fairness.

19) In the present instance the applicant followed the procedure or standard set by the respondent to submit application forms. The respondent's system acknowledged receipt of her application and the

applicant legitimately believed that she stands a chance to be considered for interviews with the possibility to be promoted, more so in that she acted in that position for twelve months.

20) The system (IT technical challenge/failure) remained within the powers of the respondent to put it in order to enable all the applicants of the post to join the race of being considered. The reason for the applicant not to be shortlisted was a reckless decision by the respondent.

21) The applicant did not have the opportunity to be considered for shortlisting and that has affected her chances of promotion. The respondent's conduct was thus unfair towards the applicant.

22) The respondent argued that it is the prerogative of the employer to fill in the post, I agree with him that it is the employer's prerogative to fill in the posts but it is important to know that such, should be exercised with caution in that in the event of such prerogative being unfairly exercised, as is the case in this matter the Commissioner is empowered to interfere with the decision.

23) If the employers are allowed to exercise the prerogative unjustly, the working environment will be very frustrating to employees.

24) The applicant has therefore succeeded to discharge the onus on its part that the conduct of the respondent amounted to unfair labour practice.

25) The applicant prays for twelve months compensation. It is difficult to arrive at twelve months in that the applicant only missed the opportunity to be considered or shortlisted for interview.

26) There is no actual financial loss on the part of the applicant and thus in awarding compensation one has to be mindful of that. In **SAPO Ltd v Jansen Van Vuuren No & others [2008] 8 BLLR 798 (LC)**; The court held that the award of more than R100 000 was excessive as the employee has suffered no actual financial loss.

27) Despite the fact that the applicant acted for twelve months in the position which raised this dispute, it is not guaranteed that she was going to be appointed and thus I compensate her for the unfair labour practice committed for her to ease the emotional pain caused by the respondent.

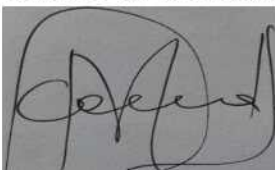
AWARD

The respondent's conduct amount to unfair labour practice.

The respondent is ordered to pay the applicant compensation of R172 163.00c (**One hundred and seventy-two thousand, one hundred and sixty-three rands only**) which is equivalent to four months' salary of the applicant.

The amount mentioned in the above paragraph is to be paid on or before 30 April 2023.

There is no cost order.



Motseki A. Mokoena (GPSSBC) Commissioner