

IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

Case number: GPBC1303-2024

PSA obo Mvumelwano Sikhotha

Applicant

and

Department of Education

Respondent

Date of hearing: 9 July 2026

Date of submission of heads of argument: 20 July 2026

Date of the Award: 24 August 2026

Name of the Commissioner: Solomzi Mpiko

ARBITRATION AWARD

1. Details of hearing and representation

- 1.1 This is an arbitration award in the alleged unfair labour practice dispute between **Mvumelwano Sikhotha**, the Applicant, and **Department of Education**, the Respondent. The matter was set down for arbitration and proceeded before me, on 9 December 2024 and was concluded on 9 July 2026.
- 1.2 Both parties were present. The Applicant was represented by **Malebo Sethlodi**, a union official from **PSA**. The Respondent was represented by **Khwezi Dalasile the Respondent's Labour Relations Assistant Director**.
- 1.3 The proceedings were conducted in English and were manually and electronically recorded. Both the Applicant and the Respondent submitted bundles of documents which I admitted on record and marked them Annexure A and Annexure R, respectively.

2. Background information

2.1 Common cause issues

- 2.1.1 The Respondent advertised a post for a Deputy Director (Human Resources: Administration and Planning). On 30 August 2023, the Applicant applied and was shortlisted and interviewed. The interview panel recommended him as the second-best candidate for the post. On 1 December 2023, he was not appointed but Ndileka Benya, the Second Respondent. The Second Respondent's unopposed application to be excused was granted on the basis that the relief the Applicant sought, was not to set aside her appointment but a protected promotion, or compensation.
- 2.1.2 The academic minimum requirements of the post as per the advert were: an NQF level 7 qualification in: Personnel Management/ Human Resource Management/ Public Management. The successful candidate had a Batchelor of Commerce. The Applicant had a Batchelor of Technology in Public Management.
- 2.1.3 Both the Applicant and the successful candidate, at the time they applied for the post, had more than the five years managerial experience that was required. The Applicant was employed by the Department of Treasury as an Assistant Director, and the successful candidate was also employed by the Respondent as an Assistant Director and had also acted in the very position of a Deputy Director that was contested for.
- 2.1.4 At the time the interviews were conducted the successful candidate had not signed the declaration on the Z83 form (the form that one fills in when applying for a position) as she was so required.

2.2 Issues in dispute

- 2.2.1 It was disputed that successful candidate possessed the minimum requirements of the post.
- 2.2.2 It was disputed that the appointment of the successful candidate was decided upon as a way of complying with the employment equity requirements.
- 2.2.3 It was disputed that the Applicant, equally, failed to sign the z83 form as he was so required.

3. Issues to be determined

- 3.1 I have to decide whether or not the Respondent's conduct in not appointing the Applicant amounted to unfair labour practice, in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995.

4. Preliminary matters

- 4.1 There were no preliminary issues.

5. Analysis of evidence and argument

- 5.1 Both parties were given an opportunity to present their cases. The Applicant testified and called one other witness (Thabisa Mapundu) who also testified in support of his case. The Respondent called one witness (Qaphela Luthuli), the chairperson of the interview committee. I also considered the parties' written heads of arguments in deciding this dispute.
- 5.2 The Respondent did not dispute that the successful candidate did not sign her Z83 form and it remained without her signature at the time the interviews were conducted. It submitted that the Applicant could not make that an issue as he also failed to sign his. I noted in this regard that the Respondent did not dispute that the Applicant's Z83 remained unsigned only up to the stage of the selection process but was signed by the time the interviews were conducted.
- 5.3 The Respondent did not dispute Applicant's explanation that he completed his Z83 form online, which did not provide a way for the Z83 to be signed and that a signature on the Z83 was compulsory only before the interviews were conducted. His evidence that an HR official phoned him as it was always done that the selected candidates were phoned to bring a signed Z83 form to submit to the interview panel, was not disputed as the Respondent's witness submitted that only HR officials would be able to respond to that. I find no reason not to believe that the Respondent flouted its recruitment policy by allowing the successful candidate to proceed to interview even though her Z83 was not signed, after I considered the Applicant referred to the Respondent's policies that:
- DPSA Employment Management Circular 40 of 2020, paragraph 4, requires that all fields of the new Z83 form must be completed in full and signed for the application to be considered; and that:
 - DPSA Circular 19 of 2022, section 2.1.6, expressly requires that the declaration on the Z83 employment application form must be completed and signed.
- 5.4 By accepting and processing an incomplete application, the Respondent treated the successful candidate favourably than the Applicant and the other candidates who complied with the mandatory requirements. The Respondent's conduct constituted unfairness.
- 5.5 It was not disputed that the academic minimum requirements of the post as per the advert were: an NQF level 7 qualification in: Personnel Management/ Human Resource Management/ Public Management. I am certainly not convinced by the Respondent's attempts to prove that the successful candidate possessed one of these qualifications as she had a B Com degree with Economics and Industrial Psychology majors.

5.6 The successful candidate, in her curriculum, did a single module in Human Resources. Certainly, it cannot be said that she had a qualification in Human Resources on the basis of that one module. She majored in Industrial Psychology and Economics. The Respondent's argument that Industrial Psychology was *part* of Human Resources does not change Industrial Psychology to be a Human Resource qualification. This is compounded by what the Applicant's submission as he quoted from the selection committee minutes that: *"The chairperson asked the secretary to check the major subjects on her CV, unfortunately she was unable to do that. The chairperson suggested that applicant 99 must be shortlisted given a benefit of doubt that she has done modules that are related to HR in her degree"*.

5.7 I noted from the minutes cited in paragraph 5.3 here above that, the Respondent acknowledged that the successful candidate did not have the required qualification but was given "a benefit of doubt" on the basis of a module, not modules (as it transpired from the evidence lead), she did in her B Com degree.

5.8 The Respondent also attempted to justify the appointment of the successful candidate by submitting that it did so in order to meet the Employment Equity target as there were fewer female employees employed at the managerial positions in the district. The Applicant disputed this contention as an after thought as it never came to be a point of consideration from the advert through the selection and the interview processes to the time of the appointment of the successful candidate. The advert stated that women and people with disabilities would be highly considered. The words "highly considered" were inserted to encourage them to apply and never meant that they would be given preference irrespective of the applicable procedure.

5.9 Having considered that the Respondent had plenty opportunity but failed to provide proof from the interview minutes or anywhere else that employment equity was considered. I noted that employment equity is to be applied in accordance with the employer's approved EE plan, including its numerical goals and targets. No evidence was lead that:

- there was an EE Plan and that it was presented to the selection panel;
- the relevant employment equity goals and targets for the post were identified;
- the committee considered whether the appointment was necessary to achieve those targets; and
- there were records of any discussion linking the appointment to the approved EE Plan.

5.10 Without evidence tendered in addressing the points listed in paragraph 5.9 here above, I am of the opinion that employment equity should not be used to appoint a candidate who does not meet the minimum advertised requirements. Equity considerations should arise and be effected to candidates who are eligible for appointment. A candidate who lacks the prescribed qualification and who has not submitted an application that meets the required standard of the employer should not be elevated above those who are eligible for appointment, under the guise of employment equity.

5.11 In *Cullen v Distell (Pty) Ltd [2001] 8 BALR 834 (CCMA)*, the labour appeal court has made it clear that it will not interfere with an employer's decision to promote or appoint a particular candidate if the employer considers another to be superior, unless when so doing the employer was influenced by considerations that are expressly prohibited by the legislature or are akin thereto. *In casu*, I am satisfied that the Applicant demonstrated that the Respondent was influenced by considerations that were expressly prohibited by the legislature or other considerations that are akin thereto.

5.12 In *Woolworths (Pty) Ltd v Whitehead [2000] 6 BLLR 640 (LAC)*, the court held that the legislature did not intend that the commissioners, when deciding disputes related to promotion, should concern themselves with the reason why the employer declined to promote the employee but, with the process which led to the decision not to promote the employee, rather. From the evidence lead, I can conclude that the Respondent unfairly came to the decision not to appoint the Applicant.

5.13 I considered the undisputed evidence that the Applicant was the second recommended candidate after the successful candidate and note that had it not been for the unfair conduct of the Respondent, the Applicant qualified to be appointed to the post in question.

5.14 The Respondent submitted that protected promotion that was desired by the Applicant was not practical in terms of its policy as it would require that the Applicant is placed to a non-existing post. I do not intend to interfere with the Respondent's policies and therefore consider compensation as an appropriate relief in the given circumstances. In calculating the amount of compensation, I considered the submissions the Applicant made that he suffered substantial and continual prejudice, both financially and professionally which extended beyond the mere loss of a promotional opportunity and had an adverse impact on his career progression, and earning capacity. He was deprived of a higher salary, salary progression, annual notch increases, pension contributions, and all other remuneration and benefits that were attached to the position she was deprived of. The said prejudice was not for a moment but had a lasting duration.

5.15 The Applicant has a duty to prove that she would have been promoted but, for the employer's unfair conduct. I am satisfied that the Applicant has discharged that onus and proved her case on the balance of probabilities.

6. Award

6.1 I find that the conduct of the Respondent, **Department of Education**, amounts to unfair labour practice in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995.

6.2 I order that the Respondent, **Department of Education**, compensate the Applicant, **Mvumelwano Sikhotha**, with an amount of R455 535.00 (four hundred and fifty five thousand five hundred and thirty five rand) which is equivalent to his twelve months salary, calculated as R37 961.25 (thirty seven thousand nine hundred and sixty one rand twenty five cents) per month, times twelve months. The Respondent, **Department of Education**, is to pay the said amount into the Applicant's bank account on or before 30 September 2026.

Commissioner: Solomzi Mpiko

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Signature: