



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Mr Martin Sambo _____
Case No.: GPBC1340/2021 _____
Date of Award: 02 February 2023 _____

In the ARBITRATION between:

PSA obo AM HENDRICKS

(Union / Applicant)

AND

DEPARTMENT OF WOMEN, JUSTICE AND CONSTITUTIONAL DEVELOPMENT

(Respondent)

Union/Applicant's representative: Mr Henry G. Hall _____

Union/Applicant's address: PSA _____

Union Official _____

Telephone: _____

Telefax: _____

Respondent's representative: Advocate Nkanyiso Sithole _____

Respondent's address: Department of Justice and Constitutional Development _____

Telephone: _____
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for physical hearing at 9h00am on the 13 and 14 October 2022 at the Respondent premises, Department of justice & Constitutional Development, 8th Floor Schreiner Chambers in Johannesburg. Both parties were present. The dispute concerns unfair labour practice: promotion.

The employee party, Mr AM Hendricks (hereinafter referred to as the Applicant), was represented by his union representative of PSA Mr Henry Hall. The employer party, Department of Justice & Constitutional Development (hereinafter referred to as the Respondent), was represented by its legal representative Advocate Nkanyiso Sithole.

At the commencement of the sitting the parties gave opening statements and outlined common cause issues. From that exercise the parties decided to deal with this matter through exchange of written submissions since there was no need to call for oral testimony.

ISSUE TO BE DECIDED

Whether, in the circumstances detailed hereunder, the Respondent has committed an unfair labour practice as set out in section 186(2) of the Labour relations Act 66 of 1995 ('the LRA') by failing to shortlist the Applicant to the position of Deputy Master.

BACKGROUND TO THE ISSUES

The Applicant Mr AM Hendricks is employed by the Respondent since 01 May 2011. At the time of this sitting he was employed by the Respondent as Assistant Master and is earning R27 714.57 per month. The Respondent is the government Department of responsible for justice and constitutional development.

The Applicant applied for the advertised the positions of Deputy Master on March 2021. The Respondent did not shortlist the Applicant for the said position. The Respondent responded to the Applicant's enquiry that the Applicant did not provide copy of the matric certificate. As a result of his non-shortlisting the Applicant lodged a grievance, was dissatisfied with the outcome and then referred the dispute to Council, but could not be resolved through conciliation. The Applicant indicated that he seeks, as a remedy, 12 months compensation for the unfair conduct.

The parties submitted bundles A (for Applicant) and B(for Respondent) of documents. The parties indicated that they had no point in limine to raise. The parties opted to deal with the matter through exchange of written submissions.

COMMON CAUSE ISSUES

The parties submitted the following as common cause:

- The Applicant did not attach his matric certificate
- The Applicant attached a B.Proc certificate and a certificate of admission as attorney and calculation of aggregate: Senior Certificate from the Eastern Cape Education Department
- The Respondent did not shortlist the Applicant

- The basis for the non-shortlisting is the recruitment and selection policy as well as the recruitment procedure manual
- The Applicant has served in shortlisting panels before

SUMMARY OF THE APPLICANT'S EVIDENCE

The advertisement, inter alia, required an LLB degree or a four year legal qualifications and 8- year appropriate post qualification legal experience. The Applicant's application was merely subjected to a checklist exercise and not considered as required by section 11 of the Public Service Act of 1994. Section 11(2)(a) states that "*all persons who qualify for the appointment shall be considered*".

The Applicant argues that a reasonable person in the shoes of the Shortlisting panel cannot simply ignore the fact that a candidate in possession of a post matriculation qualification must in fact possess a matriculation qualification i.e. grade 12/ matric. The Applicant argues that submission of a higher certificate such as B.Proc will supersede the requirement to submit a lower grade certificate.

The Applicant submits that even though he did not attach his matric certificate, he attached his statement of results as he was not successful in obtaining a copy of his lost certificate from the Eastern Cape Education Department.

The Applicant submits that he has previously applied for the Assistant Master position without a matric certificate and used his B.Proc results and was shortlisted and interviewed by the Respondent. The Applicant argues that the Respondent is thus not consistent in dealing with the shortlisting of applications. The Applicant submits that clause 3.5 of the Recruitment and Selection Policy stipulates that "*Selection criteria shall be objective, related to the inherent requirement of the job and consistently applied*". The inherent requirement for the advertised position was LLB or four year recognized legal qualifications. The Applicant met the inherent requirement of the position when he submitted his B.Proc degree.

The Shortlisting Panel by rejecting the glaringly obvious prima facie evidence (Applicant's matric statement of result), they are no longer objective but acting on a whim of one or more of the panelists; as none of the panelists would have the authority to question a person's qualifications without legal grounds to do so.

The Applicant submits that rejecting his application for promotion on the grounds advanced by the Respondent is tantamount to impugning the dignity of the Applicant as educational qualifications are attached to his dignity. The Applicant argues that in a constitutional dispensation, no employment or recruitment policy or manual or guideline can be interpreted to intend such consequence.

The Applicant submits that the Shortlisting Panel failed to study and consider the application properly when they drafted the shortlist and in doing so prejudiced the Applicant and unfairly prevented him from competing for the advertised position.

SUMMARY OF THE RESPONDENT'S SUBMISSION

Around about March 2021, the Respondent advertised posts of Masters of the various High Courts and the adverts thereto contained requirements and directives to the applicants and central to the requirements specified therein was that Applicant must include completed and signed new Z83 form; CV; copy of identity document; senior certificate and the highest required qualification and a driver's license, where necessary. Then, on 11th March 2021, the Applicant submitted his application via electronic means (page 7 of the Applicant's bundle and page 37 of the Respondent's bundle) and the Respondent, through its designated panel(s) did not shortlist the Applicant because he had not complied with a directions contained in the advert in that, he did not include a copy of his senior certificate, but a copy of the statement of results for his matric.

The Applicant's statement of results is subject to changes by the same authority that issued it and also a further confirmation by another authority. Accepting that in the absence of a copy of the senior certificate but some document about the Applicant's aggregate during matric just because he was in possession of a B.Proc degree, he should have matric would be negating the advert. If this leniency was to be afforded to the Applicant, then all candidates who were in similar situations had to be given the same courtesy. That conduct on the part of the panel would have made them susceptible to a misconduct liability because they would have deviated from the recruitment and selection policy and the recruitment procedure manual.

Clause 6.7.1 of the recruitment and selection policy states that *"the shortlist shall include only those applicants assessed as having met the minimum post requirement and also having completed and submitted all the required documents"*. In the Applicant's documents there was one short and that was a copy of his senior certificate. The Applicant cannot in 2021 use the statement of results which was issued to him some time in 2012 and in his own admission, he has been without a copy of his matric certificate for many years. It is clear he has not taken any reasonable steps to be issued by a relevant authority with a matric certificate. Shortlisting the Applicant would be tantamount to such unfairness and irregularity and the Applicant ought to know that since he also serves as a panel member in similar processes.

Deviation from the advert requirements would not have been warranted because paragraph 3.5 of the policy requires that the selection criteria shall be objective. Being subjective would have compromised the integrity of the Respondent's recruitment and selection processes where operating from a veil of ignorance is supposed to be the case. In fact, by lifting the veil of ignorance, the panels are no longer objective but acting on biasness that only candidates known to them would make it through at the expense of those unknown to them and that can never be said to be objectivity but subjectivity.

A statement of results submitted by the Applicant is not a reliable document to proof the existence of his senior certificate. The subjects passed are not clear due to the certificate stamp that blocks those subjects. Further, at the bottom there is a disclaimer that the said document is subject to approval of Umalusi and also that the department of education reserves the right to effect changes to the said documents. The Respondent is not aware if those disclaimers were applied since the Applicant has not submitted a matric certificate to the department and as to how he was considered for employment in the first place, escapes one's understanding and is beyond the scope of this paper, save to indicate that such was an error and it cannot continue as a norm.

ANALYSIS OF EVIDENCE AND ARGUMENTS

I am required to determine whether, in the circumstances detailed hereunder, the Respondent has committed an unfair labour practice as set out in section 186(2) of the Labour relations Act 66 of 1995 ('the LRA') by failing to shortlist the Applicant to the positions of Deputy Master.

"The unfair labour practice definition includes unfair conduct by an employer relating to promotion of an employee...Employees may, amongst others, claim that the employer failed to follow agreed promotion policies and procedures or failed to adhere to advertised criteria...it is possible that in the absence of a satisfactory explanation from the employer an arbitrator will assume that the employer had acted in bad faith and therefore unfairly." (Grogan; Workplace law; 9th edition).

The onus to prove the facts on which an allegation of such an unfair labour practice falls on the Applicant. The essence of the Applicant's case is that he has lost his matric certificate and he presented to the Respondent his statement of result which he sourced from Eastern Cape Education Department as evidence that he has a matric certificate. The Respondent has however failed to shortlist him despite the evidence. The question is whether the Respondent has, in this conduct, committed an unfair labour practice?

I have considered the submissions, arguments and case law from the parties. If one follows the submission of the Respondent, it seems like its panel is not given much option or discretion to exercise when shortlisting in circumstances such as those presented by the Applicant. It seems from the Respondent's submissions that the panel only has to tick a checklist box whether a document is submitted or not. I do not believe that such is what the policy intended. It is trite that the selection/shortlisting panel has discretion to even change or improve the criteria in instances where there shortlisted candidates are more than people needed to be interviewed to accommodate the correct number needed. For instance if a 100 candidates applies for a position and all meets the shortlisting requirements in the advert, the panel may exercise its discretion to change or improve the requirements so that it can have a few people shortlisted. Further the panel has powers to verify candidates qualification documents and criminal records. It cannot be that in other instances the panel has discretion but in other instances the panel would be susceptible to discipline if they exercise their discretion. However, this discretion must be exercised fairly.

The Respondent in its submissions seem to suggest that in instances where a candidate's certificate is lost, then such person should be denied an opportunity to compete for advertised position. In the case of the Applicant, it is common cause that he has a B.Proc degree and an admission as an attorney. This on its own is sufficient to suggest he has a matric certificate. Secondly he is the employee of the Respondent in the public service. The minimum requirement to enter public service is a matric. Thirdly, the Applicant has been appointed and promoted by the Respondent without a copy of the matric certificate. Fourthly, the Applicant has submitted a matric statement of results as proof that he has the certificate. Lastly the Applicant is an Assistant Master employed by the Respondent applying for a Deputy Master position. This, I believe, is an instant that the Respondent should have considered and gave the Applicant an opportunity to compete.

The panel has the discretion or power to verify candidate's qualification documents and criminal records which they do before a candidate is appointed. In this case of its employee, the Applicant, it seems the Respondent opted not consider the obvious case and documentary evidence before it and thereby denied the Applicant an opportunity to compete for an advertised position.

From the circumstances outlined above, I find on a balance of probabilities that the Respondent has committed an unfair labour practice by failing to shortlist the Applicant.

AWARD

The Respondent has denied the Applicant an opportunity to progress in his career.

1. The Respondent is ordered to pay the Applicant compensation equals to 2 months of his salary calculated as follows: $(R27\ 714.57 \times 2 \text{ months} = R55\ 429.14)$.
2. The Respondent is ordered to effect payment in clause 1 above on or before 28 February 2023
3. I make no order as to costs.



MARTIN SAMBO
PANELLIST
02 February 2023

