



IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

Held in Polokwane

Panellist: Mr PC Mabitsela

Case No: GPBC 1747/2022

Date of Ruling: 07 September 2023

In the Dispute between:

PSA obo PM Phajane & 03 Others

(Union/Applicant)

And

Department of Agriculture, Land Reform and Rural Development

(Respondent)

Applicant's representative: Ms. D Reynecke

Respondent's representative: Mr LM Makgato

RULING

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This matter was scheduled to proceed as an arbitration process on the following dates; on 03 and 04 August 2023
2. The proceedings were held at Hans van Rensburg Street, Department of Agriculture, Land Reform and Rural Development, Polokwane.
3. The Applicants appeared and were represented by Ms. D Reynecke a representative from Public Servants Association (herein referred as PSA).
4. The Respondent (herein referred as Department of Agriculture, Land Reform and Rural Development) was represented by its representative, Mr M Makgato a Labour Relations Officer.
5. The parties agreed to argue their case in writing and my ruling was in favour of the parties' agreement.
6. It was agreed on that, the process to be used will be a three way process.
7. The applicants submitted their arguments on 04 August 2023 and also submitted the pre-arbitration minutes signed by both parties.
8. The Respondent submitted its argument on 17 August 2023.
9. No replying was received from the Applicants.
10. The parties agreed to use one common bundle, pages 1-88.

ISSUE TO BE DECIDED

11. I am required to decide whether or not the employer's conduct in not shortlisting the applicants for the posts which they applied for was unfair. Whether or not the manner in which the respondent applied the Respondent's Policies and the EE Act in the recruitment and selection process was consistent with applicable legislation.

BACKGROUND TO THE DISPUTE

12. The applicants are employees of the respondent.
13. Three applicants are appointed as Project Coordination at salary level 10, Mr PM Phajane, Mr T Nkuna and Mr ME Shadung. Mr Moila is appointed as Project Coordinator Tenure Reform Implementation System.

14. Three applicants applied for vacant post of Deputy Director Pre-Settlement Management (Two posts). Mr Moila applied the advertised post of Deputy Director: Tenure Reform Implementation System (One post). The applicants were excluded from competing for the advertised post, they were not shortlisted.
15. The applicants were informed in writing that their exclusion was as a result of the respondent's EE Target.

SUMMARY OF EVIDENCE AND ARGUMENT

The applicants' arguments

16. The matter relates to unfair labour practice - promotion. The employers conduct in denying the applicants an opportunity to be shortlisted is unfair and the reason given by the employer that the applicants were not shortlisted "as African males were not part of preferred designated group" it is unfair/arbitrary.
17. The unmandated, unilaterally decision of shortlisting panel to exclude applicants from the designated group based on gender /alternatively because they did not form part of the preferred /target group is unfair.
18. The applicants further argued that the fact that 04 applicants were excluded from being considered for the said posts on the basis of gender is discriminatory and unfair as they have a right to be given a fair opportunity to compete for the post since they meet the requirements in all aspects, and they are part of the designated group. Had the shortlisting committee excluded white males for example it would have been fair.
19. The applicant's relief seeking is maximum compensation of 12 months.

The respondent's arguments

20. The respondent wishes to state that, it subscribe to the rule of law and shall in its processes implement law of this Country without fail.
21. At the heart of this dispute is the implementation of the Employment Equity Act (EEA) which seeks to redress the inequalities that were brought about the past discriminatory law pre democratic error.

22. It is not disputed that the applicants met all four minimum requirements except for the one relating to the EE target leading to their exclusion to compete for the post at issue.
23. All candidates that were shortlisted and interviewed met all five set criteria whilst the applicants only met four of them. Therefore their exclusion cannot be faulted on these aspects alone.
24. The respondent argued that its conduct does not amount to unfair labour practice as the conduct was motivated and influenced by the desire to fulfil a legal obligation as per the dictates of the EEA.
25. The respondent is convinced that the alleged discrimination was also fair given that it was occasioned by the legal imperative that advocates for the redress of the imbalanced in the work place.

ANALYSIS OF EVIDENCE AND ARGUMENT

26. I have considered all the arguments presented by both parties, if I do not refer to a specific argument that, does not mean I did not considered it.
27. The matter was referred in terms of section 186 (2) (a) of the Labour Relations Act, it is the alleged Unfair Labour Practice related to Promotion.
28. In terms of the Act, Section 186(2) 'Unfair Labour Practice' mean any unfair act or omission arises between an employer and an employee involving-
 - (a) Unfair conduct by the employer relating to promotion, demotion, probation (excluding dispute about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.
29. It is common cause that all four applicants applied for the posts in question and they were not shortlisted nor interviewed. It is also common cause that as per the advertisement of the three advertised vacant post in question, the targeted group was indicated as "Coloured, Indian and white males and African, Coloured, Indian and white females and persons with disabilities are encourage to apply".
30. It is also common cause that the Selection Committee adopted the following criteria for short listing;

Deputy Director: Pre-Settlement

- Bachelor's degree /National Diploma in Law/Commerce/Agriculture/Economic or Development Studies
- 3-5 Years' experience in supervisory levels
- Experience within Restitution
- Driver's license
- EE Target as per advert

Deputy Director: Tenure Reform Implementation

- Bachelor degree/Advanced Diploma/ Post qualification in the field of Humanities or Social Sciences
- Minimum of 3 years tenure experience
- Completed and signed Z83
- Valid driver's license
- EE Target as per the advert

31. The applicants' case is that they were unfairly discriminated on the basis of gender in that the respondent failed to shortlist them in order to compete for the said post even though they qualified to be shortlisted. The respondent's case is that, the applicants met only four minimum requirements of the posts and all the candidates that were shortlisted and interviewed met all the 5 set criteria. The fifth requirement being the EE Target as per the advert.
32. In terms of section 10 of the Employment Equity Act, any party to a dispute concerning unfair discrimination may refer such dispute in writing to the CCMA within six months after the act or omission that allegedly constitute unfair discrimination. The CCMA must attempt to resolve the dispute through conciliation if it remains unresolved after conciliation any party may refer it to the Labour Court for adjudication or all the parties to the dispute may consent to arbitration of the dispute.
33. **In the Labour Appeal Court of South Africa, Johannesburg Case no. JA 44/2015**, in summary the Court held that, Unfair discrimination dispute – Commission for Conciliation,

Mediation and Arbitration (CCMA) is the only dispute resolution forum clothed with the power to conciliate unfair discrimination dispute in terms of section 10 of the Employment Equity Act - in *casu* unfair labour practice dispute previously conciliated by a Bargaining could not be construed as conciliation of the unfair discrimination dispute. The Bargaining Council does not have jurisdiction to conciliate or arbitrate dispute of unfair discrimination.

34. After carefully considered the above, my finding is that, the matter at hand relates to Employment Equity and Unfair Discrimination.


35. Even though I was required to issue the award with brief reasons in terms of section 137 of the Labour Relations Act. I am compelled to deviate from issuing an award but rather issue a ruling.

RULING

36. Council lacks jurisdiction to resolve matters of Employment Equity and Unfair Discrimination.

37. The applicants are advised to refer the matter to CCMA for Conciliation. Should the matter remain unresolved during conciliation the CCMA will advise on the process going forward.

38. I make no costs to order.



GPSSBC Arbitrator

PC Mabitsela