



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Michael Marawu
Case No.: GPBC 1381/2022
Date of Award: 11-August-2023

In the MATTER between:

PSA obo Matshyolo-Halu, NC and 01 Other
(Union / Applicant)

and

Department of Home affairs (DHA)
(Respondent)

Union/Applicant's representative: Ms N Adams (PSA Representative) _____
Union/Applicant's address: _____
Telephone: _____
Fax/Email: _____

Respondent's representative: Mr L Mokgoro (Attorney) _____
Respondent's address: _____
Tel: _____
Fax/Email: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the premises of the Department of Home Affairs in Cape Town on 26 June 2023. In accordance with the parties' own agreement, the Applicants' were directed to submit written arguments on 10 July 2023; the Respondent to respond by no later than 24 July 2023 and final reply from the Applicant on 31 July 2023.
2. The Applicant was represented by a trade union (PSA) official Mr Natalie Adams and the Department by Mr Lesley Mokgoro (Attorney). The parties submitted separate bundles of documents and the arbitration proceedings were digitally recorded.

ISSUE TO BE DECIDED:

3. I am required to determine fairness in respect of the employer's conduct relating to the promotion/appointment process for the Civil Services Officer position at Western Cape's Department of Home Affairs' Wynberg Office.

BACKGROUND

4. Both Applicants (Mrs NC Mathyolo-Halu and Mrs S Bali-Botya) are currently employed with the Respondent as Administrative Clerks; they applied for a Civic Services Officer position that became vacant at the Respondent's Western Cape Wynberg Office prior to 03 June 2022 (closing date). The position was subsequently filled in 2022 without the Applicant's participation in the selection process; Mr Sihle Mapukata was the successful candidate.
5. The Applicants have since challenged the Respondent's conduct relating to the alleged irregular process and selection outcome thereof.

SURVEY OF SUBMISSIONS AND ARGUMENTS

THE APPLICANT'S CASE

6. **The Applicant's** submissions stated that they both applied for the same Civic Services Officer position prior to the 3rd June 2022 at the Respondent's Wynberg Office, as advertised. They duly responded to the position's advertisement as they believed that they were well suited for the post. They were of the belief that they had the requisite skills and were among the best suited candidates for the position.
7. Although they possessed all the necessary credentials required for the position, they were both not shortlisted or even afforded an opportunity to appear for interviews. When they enquired about the lack of feedback/response to their application, the Respondent's official explanation merely recorded *"[their respective] applications fell short of EE requirements"*.
8. They became aware that the department's selector(s) appointed a black African male candidate (Mr S Mapukata), who occupied the position for a brief period before resigning for unexplained reasons. The Applicants have also discovered that the shortlisting and interview panels were composed with different panellists, who did not necessarily meet the requirements of the Department's ***Employee Acquisition and Mobility Policy V.1***.
9. The reliance by the Respondent on only national demographics and not taking the regional demographics into account, was unlawful and prejudicial to the Applicants' cause as well as that of women in general. The situation has affected the employees negatively and caused them severe harm professionally.
10. They could not understand why the department denied them an opportunity to present themselves for an interview, even though they met all the necessary requirements (criteria). They are specifically challenging the selection process as far as they were excluded from the interview process and the failure by the department's selectors to conduct fair interviews consistent with a standard selection process, as provided for in the department's recruitment policy.
11. It was further submitted on behalf of the Applicants that the Respondent's conduct in respect of its arbitrary exclusion of the Applicants from the selection process amounts to an unfair labour practice; therefore a just and equitable compensation should follow, in the circumstances.

12. A case law authority cited in furtherance of the Applicants' application referred primarily on the Supreme Court judgement of ***Magistrates Commissioner and Other v Lawrence (388/2020)[2021] ZASCA 165***, wherein the unlawful implementation of the Employment Equity requirements was discussed at great length.

THE RESPONDENT'S CASE

13. **The Respondent's** statement of response stated that the Civic Services Officer position in Wyberg's Legal Office was advertised in May 2022 and its closing date was the 3rd June 2022.
14. It is not necessarily disputed that both the Applicants the attendant requirements that were listed in the position advertisement circular. The Respondent's case is that the Applicant's did not satisfy its internal Employment Equity requirements as prescribed in the Employee Acquisition and Mobility Policy, due to the apparent overrepresentation of females in the DHA, which the selection panel sought to address by selecting only suitably qualified African males.
15. The Respondent's also challenged the Commissioner's jurisdiction to deal with the matter under the auspices of the GPSSBC (the Council), as the Applicant's challenge bore the features of a 'camouflaged' unfair discrimination dispute. As it is an unfair discrimination dispute, the Applicants should have referred the matter to the CCMA (the Commission) and not the Council.
16. Furthermore, it is the Respondent's contention that the proper question to be asked in this particular dispute is *twofold* "[1] *whether the reasons by the Respondent in not shortlisting the Applicants are valid reasons, [2] whether the application of these reasons was, in the circumstances of the current matter, unfair towards the individual applicants*".
17. The Respondent's reliance on Employment Equity consideration in its selection process that necessitated a narrowed focus on black African male candidates should be regarded as a necessary legal proviso and of paramount importance to the Respondent's internal diversity objectives. Therefore, the Applicants' exclusion from the selection process considered in the light of underrepresentation of black African males in the Civic Services positions, was a necessary measure to ensure redress.
18. The national target for male employees in the Department of Home Affairs is set at 40.70% and the actual male employees' representation is at 35.87%, as compared to the female employees' overrepresentation currently standing at 52.80%, which formed the basis for the Department's targeted focus on male employees' recruitment for the position of Civil Services Officer.

19. The Applicant's reliance on the case of ***Magistrates Commissioner and Other v Lawrence (388/2020)[2021] ZASCA 165*** is erroneous as the facts and circumstances before the Supreme Court in that matter are not comparable to that considered in the current dispute.
20. The Applicants ought to have known and should accept that the Respondent's management has the sole prerogative and exclusive discretion in processing employment applications in accordance with its applicable policies as well as necessary statutory requirements.
21. There can be no foreseeable prejudice suffered by the Applicants in the process of the Civic Services Officer position's selection process, as this selection had been driven by the Respondent's necessary Employment Equity considerations that could not be ignored, in the circumstances.

ANALYSIS OF SUBMISSIONS AND ARGUMENTS

22. It is common cause that the Applicants were among the candidates that applied, but were not shortlisted for the Civic Services Officer position at Wynberg office. They were unsuccessful in this application for promotion, but the competing candidate (Mr Sihle Mapukata) was the preferred choice of the Department's selection panel and was ultimately appointed to the position in July 2022.
23. The main challenge in this matter is directed at the Department's panel's decision to exclude the Applicants from the interview process on the basis that they did not meet the Employment Equity requirements. The Respondent's submissions conceded that the Applicants with all the inherent requirements of the position applied, however their exclusion from the selection process was purely based on their gender (female) 'overrepresentation' in the Department's workplace (nationally).
24. Furthermore, it also became apparent from the parties submissions that the post advertisement released in May 2022 that the Applicants responded to, did not specify this intended gender (female) exclusion. Therefore, the Applicants were duly within their rights to apply for the advertised position (Civic Services Officer), after all as the black African females they also belong to a naturally designated group covered in terms of the Employment Equity Act 55 of 1998, as amended (the EEA).
25. The Constitutional Court in ***Solidarity v Department of Correctional Services [2016] ZACC 18*** dealt in a great detail with the EEA compliance assessment principles located in Section 42 of the EEA, as follows:

"[74] One of the factors that section 42 required to be taken into account in determining whether a designated employer was implementing employment equity in compliance with the EE Act was the extent to which suitably qualified people from and amongst the different designated groups were equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population.

"The equitable representation must be equitable representation "in relation to the demographic profile of the national and regional economically active population... If they were not, that meant that the employer was not implementing employment equity in compliance with the EE Act in regard to the factor in section 42(a)"

"...[80] The effect of the above conclusion is that, when the Department refused to appoint the Coloured and female individual applicants on the basis that they belonged to groups that were already overrepresented within the occupational levels to which they wanted to be appointed, the overrepresentation of those groups had been determined on a wrong benchmark...

"[81] Once it has been found that the overrepresentation relied upon by the Department to refuse to appoint the Coloured and female individual applicants lacked a proper basis, what remains is that the Department is not able to justify the use of race and gender in not appointing them.

[82] ...Since the Department's understanding that Coloured people and women were overrepresented in the relevant occupational levels had no lawful basis, the Department has failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion is inescapable that the Department's decisions in refusing to appoint the Coloured and female individual applicants constituted acts of unfair discrimination. Those decisions also constituted unfair labour practices."

26. It became evident from the parties submissions that the manner in which the applicants' application was excluded at the interview stage of the selection process for the reasons relating to alleged overrepresentation of female employees based on the Respondent's national statistical considerations, cannot be deemed to be consistent with Section 42(a) of the EEA as well as fair labour practices necessary for governing such selection processes.
27. As a result the Respondent's selection process for the Civic Services Officer position in its Wynberg office did not adhere to the set standards as prescribed in Section 42(a) of the EEA, and the Applicants are justified in challenging the employer's alleged unfair conduct, in the circumstances. On this basis alone, without further interrogation of other possible defects in the Respondent's procedural approach, this omission on its own sustains the process challenge in the circumstances.

28. Based on the evidence presented before me, I am persuaded that the irregularities detected in the shortlisting stage, renders the selection process defective. Having said that, for one to prove substantive unfairness in such unfair labour practice disputes, he has to also show that had it not been for the proven unfair conduct, he would have been a successful candidate for promotion/appointment. However, the Applicants did not seek to pursue this aspect of the dispute but sought to only to challenge procedural fairness of the selection process thereof.

29. This would require causal connection to be properly demonstrated, in order to justify substantive unfairness finding. When dealing with similar circumstances where there was proven procedural irregularities in *KwaDukuza Municipality vs SALGBC* [2008] 11 BLLR 1057 (LC), Pillemer, AJ held:

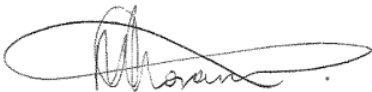
"It is only a most exceptional kind of case where there is a certainty that the complainant would have been appointed if considered that actual damages can be proven (as was the case in Willemse v Patelia NO and others [2007] 2 BLLR 164 (LC). This is not one of those cases. Accordingly apart from out of pocket expenses, if any, compensation in a case like this can only be for a solatium to redress the injuria. I consider that one of the purposes of the award of compensation for an unfair labour practice in an appropriate case will be to compensate for the injuria of being treated unfairly (compare Reckitt & Coleman (SA) (Pty) Ltd v Bales [1994] 8 BLLR 32 (LAC) at 48; Harmony Furnishers (Pty) Ltd v Prisloo [1993] 14 ILJ 1466 (LAC)) and, in this instance, of unfairly being denied an opportunity to compete."

30. In this particular matter, I could not establish from the information presented in the arbitration proceedings that the Applicants would have been certainly successful if they were not excluded from the interview process due to the Respondent's national Employment Equity statistical requirements.

31. It follows therefore that suitable remedy to be considered in such a case, would be appropriate compensation amount to be awarded as reasonable *solatium* to redress the *injuria* of being treated unfairly in respect of the selection process.

AWARD

32. The Applicants' unfair labour practice claim has been proven in respect of procedural unfairness, but substantive unfairness could not be established.
33. The Applicants must be compensated with an amount of R25000.00 each (**twenty five thousand**) for the *injuria* suffered due to the unfair process.
34. The above amount must be paid to the Applicant by no later than 07 September 2023.



Michael Marawu

Name:

GPSSBC Arbitrator