

PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panelist: LINDIWE MAKHANYA

Case No: PSHS273-16/17

Date of award: 5 December 2017

In the matter between:

PSA obo Zitha, B.A

(Applicant)

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

(First Respondent)

and

Z.G. HLELA

(Second Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was scheduled for arbitration before me on 21 September 2017 and 27 November 2017 at the first Respondent's premises, Natalia Building in Pietermaritzburg. It was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the Council") in terms of section 191(5) (a) of the Labour Relations Act No.66 of 1995, as amended ("the Act").

2. The hearing concerned a dispute relating to the alleged unfair labour practice against the Applicant in terms of section 186(2) (b)- unfair conduct based on promotion as per the LRA.
3. The applicant, Mr. Zitha, was represented by Mr. S.N. Ndlovu, a Union Official from PSA and the first Respondent, was represented by Mrs. N.C. Dimba, an Assistant Director, Labour Relations. The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

4. The first Respondent is the Department of Health which is one of South African Government's executive department that is assigned to health matters located in Pietermaritzburg, Kwazulu Natal. The Applicant is employed by the first Respondent and is based at Grey's hospital. He commenced his employment on 1 May 2008 as an Assistant Electrician. His monthly salary is R9830.50.
5. This is an unfair labour practice dispute relating to promotion. Grey's hospital placed an advert for the position of an Artisan (Production) - Electrician in 2015. The Applicant applied for this post, but was never shortlisted or invited to an interview. He believes that he was overlooked for promotion and should have been appointed to this position. The Applicant sought promotion to salary level 5 from 1 December 2015 as a remedy.
6. The Applicant referred a dispute based on s186 (2) (a) of the LRA to the Council on 3 June 2017.

PRELIMINARY ISSUES, JURISDICTION and ISSUES TO BE DECIDED

7. No preliminary or jurisdictional issues were raised and the Council has jurisdiction to hear the matter.
8. The Applicant declared a dispute citing allegations of unfair labour practices, alleging that the first Respondent acted wrongly in failing to appoint and promote

him. The Applicant seeks to be promoted into this post. Should I find in the affirmative, I am required to determine the appropriate relief and provide brief reasons

SURVEY OF EVIDENCE AND ARGUMENT

9. The Applicant presented a bundle of documents which was marked "A" and the first Respondent presented bundle "B". I was enjoined by both parties to accept the documents for what they purport to be and consider them to the extent that it may be required for purposes of this award. I will deal with these documents as they were dealt with by the parties.
10. The following is a brief summary of the relevant evidence led by the parties. It is not intended to be exhaustive, however, I have considered all the evidence led and arguments submitted in reaching my decision. Both parties submitted their closing arguments orally.

THE APPLICANT'S CASE

11. Mr. Zitha testified under oath that he was initially appointed as an Assistant Electrician and was later promoted to Handyman Electrician in 2015. He applied for an Artisan (Production) – Electrician position in 2015 after he saw a job advert placed by Grey's hospital.
12. He referred to page 1 of bundle "A", paragraph 1 which states that the filing of entry grade posts was for in-service employees and he believes that he fell under this category because he was employed in 2008. He also pointed to page 3 of bundle "A" for the advert of an Artisan (Production) - Electrician where it indicated that the minimum requirements were a Trade test certificate and a valid driver's license which he possessed, including three year's electrical experience in a hospital environment.

13. He also testified that he was not shortlisted nor interviewed for this position. He decided to lodge a grievance with the first Respondent where he was informed that there was a directive from Head Office to withdraw the job advert, but was not given any more information in this regard. He believed that he was overlooked for the Artisan position and that the first Respondent subjected him to unfair labour practice based on promotion.
14. Under cross-examination, when asked if there were any shortlisting or interviews done for the Artisan position, he said no, but believed that he was subjected to an unfair labour practice which was the reason why he decided to lodge a dispute and was still not satisfied with the response.
15. He stated that although he received a letter regarding the withdrawal of the job advert, he was not convinced that the advert was withdrawn as he was never shown any correspondence from the Head Office giving a directive to Grey's hospital to do so.
16. During re-examination, he maintained that he was never shown any correspondence by the Respondent indicating that the job advert had been withdrawn from the Head Office.

THE RESPONDENT'S CASE

17. Ms. Dimba testified under oath that the position of an Artisan (Production) - Electrician was advertised in 2012 by their Head Office and a delay occurred in the selection process which resulted to Grey's hospital having to advertise the same position by itself in 2015. However, when the Head Office became aware of this advert, it gave a directive to Grey's hospital to withdraw it stating that somebody had already been appointed to the position advertised in 2012. According to her, the delay was caused by the security checks during the recruitment process at their Head Office.

18. She referred to page 9 of bundle "B" being the submission sent to various districts reflecting a list of the names of the successful candidates, this included Mr. Z. G. Hlela (second Respondent) for Grey's hospital. The job reference number for the second Respondent is MAINT/2012. She further pointed out that even the contract of employment for the second Respondent was from the Head Office - page 8 of bundle "B" where the same reference number is reflected as that of the submission on page 9 of the said bundle.
19. She further referred to page 2 of bundle "B" where a circular was issued to all employees who had applied for positions in February 2012, this shows that there was one position in Grey's hospital for an Artisan (Production) – Electrician under Maintenance department and that the advert with Reference no.GS97/15, for which the Applicant applied, was withdrawn. She stated that what the Applicant is claiming regarding promotion is contrary to the policy of the Respondent, because for a promotion to take place a recruitment process must first take place.
20. During cross-examination, she reiterated that the position advertised on February 2012 was the same position that was finalized in October 2014 with Reference no. MAINT/2012 and that the appointment letters were issued in 2016. She did not dispute that Grey's hospital advertised the Artisan position and used a Reference number GS97/15 which was later withdrawn, but reiterated that no one was appointed in this position.
21. When asked to show a document from Head Office stating that the job advert GS97/15 was withdrawn, she replied by saying that although the Applicant was not informed earlier that the job advert had been withdrawn there was never any interviews nor the placement of any candidate for this job advert and that the second Respondent was appointed to another job advertised in 2012.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. I have taken note of section 186(2) (a) of the Act, which states that "unfair labour practice" means any unfair act or omission that arises between an employer and employee involving-

(a) Unfair conduct by the employer relating to the promotion of an employee”.

23. The onus of providing the facts on which allegations rest is on the Applicant.

24. It is common cause that the Applicant duly applied for the position, but he was not short listed nor interviewed and he was not promoted to post SG97/15. It is also common cause that advert with reference number: MAINT/2012 was advertised in 2012. The Applicant has mounted a claim of unfair labour practice, alleging that the first Respondent acted unfair in failing to promote him. The first Respondent argued that its policy regarding promotion is that there must be a recruitment process, shortlisting of candidates and final placement of a suitable candidate. In this instance none of the above took place as the job advert SG97/15 was withdrawn.

25. The evidence of the first Respondent's representative revealed that the same position that the Applicant is contesting was previously advertised by the Head Office with the reference number: MAINT/2012 in February 2012. She claimed that due to the delays at the Head Office regarding placement of an Artisan, Grey's hospital decided to put its own advert using its own reference number SG97/15, but was later advised by the Head Office that the job advert had to be withdrawn because their recruitment process had already been finalised and that the suitable candidate had been found. There was no evidence before me to suggest that the appointment for the post SG97/15 was made at any stage, also the Applicant conceded that he was never invited in an interview and that there was no shortlisting that took place. He also did not dispute that the job advert SG97/15 was withdrawn. In a matter between *Department of Justice v CCMA and others*, [2004] 4 BLLR 297 (LAC) the Court said that "An employee who complains that the employer's decision or conduct in not appointing him constitute an unfair labour practice must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was fair can then follow."

26. The Applicant further claimed that he is qualified for the Artisan position and should have been promoted. He referred to the job requirements as per the job advert stating that he possessed all the requirements mentioned in the advert and that there was no reason for the Respondent not to promote him. In *Ndlovu v CCMA & others* (2000) 21 ILJ 1653 (LC) at page 1655j- 1656A-B, Wallis AJ said; "It can never suffice in relation to any such question or the complainant to say that he is qualified by experience, ability and technical qualifications such as University degrees and the like, for the post. That is merely the first hurdle. Obviously, a person who is not so qualified cannot complain if they are not appointed. The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates."
27. The Applicant joined the second Respondent, an appointee for the Artisan post reference number MAINT/2012 in this proceeding. Even if the second Respondent and the Applicant had contested the same job there was no evidence led by the Applicant to suggest that he was more qualified than the second Respondent. What was more obvious is that even the second Respondent's appointment letter indicates that the reference number for the post he was appointed for is MAINT/2012.
28. The Applicant did not lead any evidence that suggest that the post reference number SG97/15 was the similar post as MAINT/2012. His main argument was that he was not furnished with any correspondence from Head Office that directs the first Respondent to withdraw the dispute. The first Respondent argued that it has a prerogative as an employer to advertise jobs and withdraw them if there is a need. A letter was furnished to the Applicant advising him that the post had been withdrawn. No appointment was made into this position. I fail to understand why the Applicant would claim that he was overlooked for promotion when no recruitment took place for the position he applied for.
29. Clearly, the Applicant's contention that he was overlooked for promotion is baseless. Although the first Respondent took long to complete its recruitment process, it is my view that the employer has the prerogative to decide when to

advertise for positions, commence with recruitment process and when to withdraw job adverts. The Applicant was later informed that the position had been withdrawn, but was not convinced that this was an instruction from the Head Office because he did not receive any correspondence from Head Office. The Applicant responded to a position that was advertised by Grey's Hospital not the Head Office. There was no need for him to receive communication from Head Office when he responded to the advert placed by Grey's Hospital.

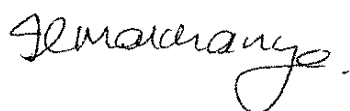
30. On the basis of the above findings, it is accordingly my determination that the first Respondent did not commit any unfair labour practice of failing to promote the Applicant to the post SG97/15. The Applicant failed to prove that there was any shortlisting or interviews conducted in respect of the Artisan position that he applied for.

31. The Applicant failed to prove that he was subjected to an unfair labour practice relating to promotion.

AWARD

32. The first Respondent did not subject an Applicant to unfair labour practice relating to promotion.

33. The Applicant's claim is dismissed and he is not afforded any relief.



LINDIWE MAKHANYA
PANELLIST