



ARBITRATION AWARD

Panelist: Dialwa Mathala

Case No.: GPBC31/2018

Date of Award: 21 December 2020

In the matter between:

PSA obo Mary Magdalene Nelson

: (Union/Applicant)

And

Department of Transport, Rural and Community Services

: 1st Respondent

Mogomotsi Padi

: 2nd Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This dispute was referred to the General Public Sectoral Services Bargaining Council (Council) as section 186 (2) (a)-(Promotion) of the Labour Relations Act 66 of 1995 (as amended) (LRA). It was scheduled as arbitration for the 14th, 15th and 16th October 2020, held at the Offices of the Employer in Mmabatho. The Applicant was represented by Mr. K Moalosi from PSA while Mr. P Molefe, Labour Relations, appeared for the 1st Respondent. A summary of issues in this case was done by way of oral submissions by both parties and mechanically recorded. Written arguments were submitted later and therefore this dispute was determined based on both written and oral submissions.

BACKGROUND TO THE ISSUE

2. As this was an unfair labour practice dispute, the Applicant had a duty to begin and his case was that she applied for a Deputy Director: Transport Terminals position but was not appointed albeit meeting all the requirements of the post as per the advert. The post required a Grade 12 or equivalent; a Three

years' Tertiary Qualification in Transport Management/Aviation Management; plus, a minimum of three to five years management experience. The Applicant is in possession of a qualification in Diploma Transport Management/Aviation whereas none the candidates possessed same.

3. Incontrovertible version from the Applicant was that 2nd the Respondent only had National Diploma in Public Administration. M Letsholonyane was one of the candidates and only possessed a Master of Business Leadership. Letsholonyane failed to attach copy her identity document and drivers' license when submitting her application but was for some reasons shortlisted and interviewed. During the interviews the panel requested Letsholonyane to submit that missing information. This was post the shortlisting and interview. M Modiko was one of the candidates but qualifications were not even classified.
4. The Applicant ultimately declared a dispute pursuant to her non appointment and the realization that she was the only candidate meeting all the requirements to the post as per the advertisement. She did that after her unsuccessful grievance. Since the 2nd Respondent did not meet the requirements, the Applicant sought retrospective protected promotion, effective from the 01st June 2017, with a back pay amounting to R1 132 013.00 as per her calculations.
5. It was not gainsaid by the 1st Respondent the fact that the Applicant met all the requirements to the post, hence she was shortlisted and interviewed. The 1st Respondent's case hinged upon the outcome of the interview, in that the Applicant did not perform better than the other candidates. It was further not in contention that the incumbent and other candidates did not meet all the requirements as per the advert but the Applicant.

ISSUE TO BE DECIDED

6. I am called upon to determine whether or not the conduct of the 1st Respondent in not appointing the Applicant constituted an unfair labour practice and if so, pronounce on an appropriate relief. Based on the submissions of the parties I hereunder proceed to make my determination.

ANALYSIS OF ARGUMENTS AND EVIDENCE

7. Section 186 (2) (a) of the LRA defines unfair labour practice as any unfair act or omission that arises between an employer and an employee involving- the unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee.
8. The case at hand concerned non appointment to an advertised position and it was the Applicant's duty to prove the unfairness of the 1st Respondent's conduct in not appointing her. It was settled that the Applicant reacted to an advertisement of the post in question. The contentious and inescapable issue from onset was whether or not the Applicant met the requirements to the post as per the advert, which is a fundamental recruitment principle. I am mindful of the fact that the 1st

Respondent opted to steer clear of this principle and grounded its defense only on the recommendations of the interviews panel.

9. The recruitment process remains central to the ultimate appointment or not of the incumbent as same cannot be unjustly circumvented or deviated from. None of the candidates interviewed possessed any qualification in Transport and Aviation but the Applicant. It explains why the 1st Respondent only argued the tail end of a recruitment process. Letsholonyane did not attach all relevant and required documents in her application and as to why she was shortlisted remains questionable. The rest of the candidates failed to meet the minimum requirements to the post and it defies logic why they were even shortlisted save to say same was a blatant and grave violation of the 1st Respondent's recruitment policy.
10. It appears that the Applicant's non appointment was a forgone conclusion and that she stood no chance whatsoever of being appointed albeit being the only candidate meeting the requirements. This inescapable conclusion is occasioned by an apparent dubious and bias conduct of the interview panel in bending too much backward to accommodate Ms. Letsholonyane, a candidate who did not qualify for shortlisting, considering an instructive clause in the advert prohibiting non shortlisting of candidates who fails to submit all relevant information when applying for the post in question. The 2nd Respondent on the other hand did not possess any relevant qualification for the post as opposed to the Applicant for him to be shortlisted, interviewed and resultantly appointed.
11. Based on the above it is my determination that the 1st Respondent acted unfairly in not appointing the Applicant and that its conduct constituted an unfair labour practice.

AWARD

12. The Applicant (Mary Magdalene Nelson) had successfully proven on balance of probabilities that the 1st Respondent's conduct for not appointing her constituted an unfair labour practice as defined in the LRA.
13. The Applicant prayer was that should the award be in her favour, a protected promotion be awarded retrospectively with effect from the 01st June 2017. It must be mentioned that the 2nd Respondent is already appointed permanently in the position of Deputy Director: Transport Terminals.
14. My role as the Commissioner is not to usurp the functions of the appointing authority by appointing the Applicant. In this instance, I find that but for the breach of a recruitment policy occasioned by the 1st Respondent and drawing parallels between the qualifications of the Applicant and those of the 2nd Respondent, who was appointed on the basis of unjustified grounds and in sharp contradiction of the recruitment prescripts, the Applicant would have been possibly appointed.
15. Given these circumstances, and in the absence of any opposing evidence, I find it reasonable to order the 1st Respondent to promote the Applicant to a position of Deputy Director: Transport Terminals, on the same terms and conditions as she would have enjoyed had she been promoted

on the date the 2nd Respondent was; and to adjust her salary accordingly in terms of PERSAL; with retrospective effect or back pay to that date of the 01st June 2017 and to amend her service record accordingly. Retrospective payment should be adjusted and implemented in terms of the applicable PERSAL calculations.

16. The Applicant had submitted her own back pay calculations and unless a different amount is realized upon verification by the 1st Respondent using PERSAL, it is my order that the 1st Respondent pay the Applicant the amount of R1 132 013.00 as retrospective payment.
17. The 1st Respondent is ordered to comply with this award within 30 days upon its receipt

Signature: _____



Panelist/s: Dialwa Mathala