



PHSDSBC

Public Health and Social Development
Sectoral Bargaining Council

ARBITRATION AWARD

Case No: **PSHS118-23/24**

Commissioner: **Kelvin Kayster**

Date of award: **25 April 2024**

In the matter between:

PSA obo Nokuphumla Tsitsi

Applicant

and

Department of Health – Eastern Cape & 1 Other (Mzoxolo Funani)

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing in this dispute took place on 19 February and 04 April 2024 in Gqeberha.
2. The applicant, Ms. Nokuphumla Tsitsi was represented by Mr. Anthony Killian of the PSA.
3. The 1st respondent is the Department of Health, Eastern Cape, and was represented by Mr. Xola Peyi. The 2nd respondent, Mr. Mzoxolo Funani elected not to participate in the proceedings.
4. The arbitration hearing was finalized, and the parties submitted written closing arguments.

ISSUE TO BE DECIDED

5. I am called upon to determine whether or not the respondent's failure to promote the applicant to the position of Logistics Support Officer constituted an unfair labour practice related to promotion.

BACKGROUND

6. The applicant has been an Admin Clerk Supply Chain at salary level 5 in the respondent's employ since March 2017. She works at the Eastern Cape College of Emergency Care. On 30 November 2022 she applied for the advertised position of Logistics Support Officer salary level 7 at the Dora Nginza Hospital. It was advertised externally. She was invited to an interview in March 2023. When she did not receive any feedback, she made enquiries and learned that the post was filled on 01 April 2023. She requested further information, and eventually lodged a grievance.
7. The applicant contends that during the grievance process she learned that the incumbent's qualifications are not relevant to the position. She accordingly submits that he should not have been shortlisted. She also argues that she was placed first and was recommended for appointment, but that the respondent intervened and decided that an internal candidate (at Dora Nginza Hospital) should be appointed for reasons of "development within the institution". She considers it to be unfair because the post was advertised externally. The applicant considers the respondent's failure to promote her to be an unfair labour practice. She referred this unfair labour practice dispute to the PHSDSBC and seeks an award that she be promoted to the contested position.

SUMMARY OF EVIDENCE AND ARGUMENT

8. The parties submitted a combined bundle of documents. The oral evidence is a matter of record and will not be repeated here. Here follows a brief summary of the parties' respective cases.

Applicant's case

9. The applicant explained that the incumbent has a qualification in Public Management (page 41), which is not relevant to the requirements for the post. She further has relevant experience in the functions of the post. Also, the interview panel recommended her for appointment to the post (page 52). The Acting CEO of the Dora Nginza Hospital however opted to appoint the second respondent. He explained in the memo that it was for internal developmental considerations, and that the incumbent had to "develop in the areas of deficiency and for stability in the hospital". She argued that the incumbent did not even work in the relevant section, and that the advertisement did not indicate that it would give preference to internal candidates.

10. In cross-examination, the applicant conceded that she declined the 1st respondent's settlement offer of compensation, because she wants to be promoted to the contested post. She also conceded that the incumbent has more experience in public service, but argued that it was in Assets administration, which is an unrelated division. The advertisement requires relevant experience in the field. She conceded that the CEO makes the final decision, but it has to be done fairly. She argued that the explanation of internal developmental reasons is unfair, because as public servant she is also entitled to development.

1st respondent's case

11. Mr. Skumbuzo Malkumese is Assistant Director for Supply Chain Management at the Dora Nginza Hospital. He testified that the unit has 3 female staff members and 1 male member on salary level 7.

12. Ms. Busiswa Bomela is Assistant Director for Human Resource Management at the Dora Nginza Hospital. She explained the recruitment process and emphasized that only the CEO or his/her delegated authority has the right to appoint a particular candidate. She explained that in view of the large volume of applications, the shortlisting panel has the right to amend the requirements when deciding on the final shortlisted candidates. She however conceded that the essence of the requirements may not be amended, and the basic requirements should be retained.

13. The 2nd respondent, Mr. Mzoxolo Funani elected not to participate in the proceedings.

ANALYSIS

14. The applicant contends that the 1st respondent's omission to promote her to the post of Logistics Support Officer constituted an unfair labour practice related to promotion. It is common cause that she applied for the position, and obtained by far the highest score in the interview process. She was also recommended for appointment, but the Acting CEO opted to appoint the second placed candidate. The reasons he advanced were for "development within the institution" and for the incumbent to "develop in the areas of deficiency and for stability in the hospital."

15. The applicant took issue with this reasoning, because the position was advertised externally, and this requirement/consideration of internal development was not highlighted in the advertisement. Ms. Bomela confirmed that the panel may amend the requirements, but also conceded that it may not change the essence of the post. Excluding the applicant as an outside candidate, despite her superior performance in the interviews, is certainly a deviation that appears arbitrary and unjustifiable. There was no evidence presented to justify the consideration of institutional stability and the need to develop an internal candidate.

The applicant is also employed by the respondent, and is entitled to a fair and equal chance to compete for an advertised position.

16. The applicant also took issue with the fact that the incumbent does not have relevant experience for the post. The position requires a National Senior Certificate, a National Diploma (NQF level 6) in Transport Management/Logistics/Public Management coupled with 1 to 2 years' experience in fleet management/transport services. It is common cause that the incumbent has a National Diploma in Public Management. Mr. Malkumese explained that asset administration where the incumbent works, is a subdivision of supply chain management and is therefore viewed as relevant experience. This submission was undisputed. I therefore accept that the incumbent met the requirement of relevant experience.
17. The 1st respondent took issue with the applicant's perceived misrepresentation of her years' experience in her application. The confusion seems to stem from the fact that she included the period that she worked as an intern. This was never an issue during the shortlisting process, and she was not disqualified because of it. Moreover, she has in any event met the requirement of 1 to 2 years' relevant experience in the field. This aspect therefore has no bearing on this dispute.
18. The 1st respondent also introduced evidence to the effect that the unit has 3 female and one male employees on level 7. The 1st respondent argued that appointing the applicant would cause an imbalance in equity targets. However, the requirement of equity was not mentioned in the entire process. The reason given by the acting CEO for appointing the incumbent is also not related to equity considerations. This argument is therefore irrelevant.
19. The sole reason given for preferring the 2nd respondent was for "development within the institution" and for the incumbent to "develop in the areas of deficiency and for stability in the hospital." As stated, no evidence was presented to corroborate or explain this reasoning. I therefore find it to be arbitrary, especially in view thereof that the applicant outscored the second respondent by a very large margin. She scored 278, the second respondent scored 198, and the third placed candidate scored 148. It demonstrates that the applicant was by far the most suitable candidate for the position. I accordingly find that the 1st respondent's omission to promote the applicant to the post of Logistics Support Officer was unfair.
20. The applicant requested to be promoted to the post of Logistics Support Officer if it is found that an unfair labour practice had been committed. I was not given any reason why her request could not be granted. In addition, the applicant would be entitled to be paid the difference in salary between her current post and that

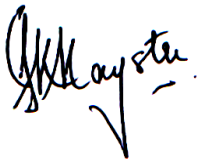
of the contested position, backdated to 01 April 2023. The applicant earned R207915-00 at the time when the unfair labour practice occurred. It was exactly 12 months ago. Had she been promoted on 01 April 2023 she would have earned R294321-00. The difference amounts to R86406-00.

AWARD

21. The failure of the 1st respondent to promote the applicant to the post of Logistics Support Officer constituted an unfair labour practice involving promotion.

22. The 1st respondent is directed to promote Ms. Nokuphumla Tsitsi to the post of Logistics Support Officer with effect from 01 April 2023, and to adjust her salary accordingly to R294321.00 per annum.

23. The 1st respondent is further directed to pay her by not later than 31 May 2024 the amount of R86406-00, being the difference in remuneration she would have earned for the period 01 April 2023 to 31 March 2024.



Kelvin Kayster