

ARBITRATION AWARD

Case No: **PSHS888-19/20**

Commissioner: **T Erasmus**

Date of award: **17 March 2020**

In the matter between:

PSA obo PAUL JEKELS

Union/ Applicant

and

DEPARTMENT OF HEALTH- WESTERN CAPE

Respondent

Details of hearing and representation

1. This matter was set down for arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the offices of the 1st Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone, Cape Town on 26 February 2020. The applicant was represented by Mr. A Fisher from PSA, whilst the respondent was represented by Mr. A Solomon, Labour Relations Officer at Respondent.

Issue to be decided

2. I must decide whether the applicant was subjected to an unfair labour practice with regards to promotion.

The applicant's case**Opening statement**

3. The applicant applied for a post of assistant director at the Red Cross Hospital on the 21st of June 2019. The reference of the post was G23/2019/post 3. The applicant is currently employed as organizational development practitioner at the Department of the Premier. The applicant made various enquiries about the post after his application, without any success. The applicant was however informed on the morning of the 25th of July 2019 by one of his colleagues that the interviews were to be conducted on the 26th of July 2019, to which the applicant was not invited.
4. The applicant lodged a grievance on the 7th of August 2019, where after the respondent informed him about the reason for his exclusion, namely:
 1. His curriculum vitae indicates that he is employed at two (2) institutions at the same time, and
 2. They questioned his honesty.
5. The applicant challenges both procedural and substantial fairness. The applicant seeks compensation for the lack of career progression and loss of salary. The salary for the advertised post was R376 596.00 as per page 18(a) of bundle A.

PAUL JEKELS testified in support of his own case (hereinafter referred to as “the applicant”)

6. Jekels testified that he had been employed in the public service, excluding 6 years at Groote Schuur Hospital, for the past 26 years. He applied for the position as ASSISTANT DIRECTOR: SUPPORT SERVICES, RED CROSS WAR MEMORIAL CHILDREN'S HOSPITAL. He met all the requirements for the position, due to his experience at Vanguard. He has a Public Registration Degree which he obtained in 2005. He applied for the position on page 18A on 25 June 2019. He lodged a grievance as per page 20 of bundle A. He followed up on the interviews on numerous occasions and was informed by Tambisa that the panel had been selected and that the short listing has not been done.
7. One of his colleagues who works at Human Resources, Tahira Orie, told him that one of her colleagues informed her that the interviews would take place on the Friday, 25 July 2019. He at first thought that Tahira was mistaken, where after he telephoned Tambisa to establish whether the interviews have been scheduled yet. Tambisa told him that the process is still underway and that she would phone him the following week. He met all the requirements of the position advertised on page 18 of bundle R, all his relevant experience is outlined in his curriculum vitae, even more than what is required for the position. The applicant denies that he was dishonest as found by the panel, as no person can work at two places at the same time. He admitted it was an oversight in his curriculum vitae. He disagrees that he was dishonest.
8. The applicant believes that he could have been appointed if the panel had phoned him to establish the correct position, as he met all the other requirements of the post. The applicant seeks compensation for an unfair labour practice to which he was subjected.
9. I questioned the applicant as to whether he believes that he the right to be appointed. The applicant responded that he feels that he would have been appointed if he was given the opportunity to be interviewed for the post.

10. Reference was made to page 20 of bundle A, being the applicant's referral, more specifically paragraph 1 on page 21, where the following is stated by the applicant:

"After the closing date I made enquiries on numerous occasions asked Ms Tembisa Nqola to the status of the recruitment process. On 23 July 2019, I phoned again and spoke to Ms Tembisa Nqola, who informed me that the shortlisting process has not been finalised yet, hence no interview date has been determined. On the same day Ms Nqola confirmed what she told me to an employee at Red Cross Hospital. This employee was asked to convey a message to me that I should phone Ms Nqola again on 1 August 2019, she (Ms Nqola) would by then be able to provide me with more information regarding the interview date."

11. According to the applicant, an appointment had not been made at the time when he lodged his grievance and with reference to point 2:

"I would like the following solutions to my grievance:

2. *That a disciplinary action be instituted against Ms Tembisa Nqola for given inaccurate information in terms of the interview date for the post in question. Would also like to be part of the hearing in this regard."*

12. He went to the union, as labour relations failed to respond to his queries.

The following ensued from cross-examination:

13. It was put to the applicant that his curriculum vitae indicates that he was working at two places at the same time. With reference to page 20 of bundle R, containing the applicant's curriculum vitae, more specifically page 24 thereof, under "*Human Resources & Admin support Services*", according to that, the applicant had been working at Khayelitsha CHC from 1 January 2006 to 31 July 2007. In terms of page 26 he had been working at Vanguard where it is stated "*Currently employed*",

although he did not put the period, although he listed his duties at Vanguard, as according to the applicant the duties were the same as that at Khayelitsha. He was transferred to Vanguard. According to page 28 the applicant had been working at the Department of the Premier from 1 July 2008 to present, therefore this would imply that the applicant had been working at both Vanguard and the Department of the Premier at the same time which could not be the case.

14. Reference was made to page 43 of bundle R, where the following is stated in paragraph 12.2.4, which is part of the Recruitment and Selection Policy of the respondent:

"12.2.4 Only relevant, objective and verified information, contained in the application form, CV and proof of employment in the form of service records and other attached documentation may be taken into account during the shortlisting process."

12.2.5 Undue credit should not be given to qualifications not needed for the position nor should higher scores be allocated to qualifications that exceed the minimum requirements.

12.2.6 In order to ensure that the shortlisting has been done in an objective, non-discriminating and equitable manner, the screening procedure should adopt the following approach:

- (i) *Firstly, identify the candidates who comply with the **minimum post requirements**, with regard to the qualifications and experience as advertised, by means of scrutiny of the application documentation. (Item 12.2.4 should be kept in mind in this regard). Applications from persons who do not meet the minimum requirements must not be considered."*

15. Reference was also made to paragraph 12.2.2 on page 42, where the following is stated:

"The information obtained during the screening process should play an important role in the categorising of candidates in terms of knowledge and expertise of the pre-determined minimum and inherent requirements of the job as advertised. This process will assist in determining the final shortlist of candidates to be interviewed."

16. Paragraph 12.2.3:

"The shortlisting process should be the responsibility of the members of the selection panel. All panel members should have the opportunity to view the applications. If this is not possible, the chairperson of the selection panel shall appoint a sub-panel, consisting of at least 50% of the members of the selection panel and, where possible, a human resource advisor for shortlisting purposes."

17. Reference was made to page 12 of bundle R, where it is stated that 71 candidates applied for the position. Therefore, it means that if the panel phones one candidate, they must phone all 71 candidates in order to treat all candidates fairly and it would have been a problem as it is not practical. It was conceded that the applicant met the minimum requirements. What however is in question, is the number of years of experience that cannot be quantified from the information on the curriculum vitae, as the applicant did not put a start and end date of his employment at Vanguard.

18. The applicant's curriculum vitae has been worked through and highlighted and that specific period could not be quantified, therefore he was not shortlisted. Reference was made to page 40, the Recruitment and Selection Policy, more specifically paragraph 5.14 thereof, where the following is stated:

"No candidate, including serving officials may be short listed or invited to an interview through goodwill."

19. Therefore, phoning the applicant to verify the correct information on the curriculum vitae, would amount to goodwill, but the applicant disagreed with this statement. It was put to the applicant that the Policy also deals with privacy and confidentiality of candidates, therefore the Human Resources presentative, Tembisa Nqola, could not inform the applicant that shortlisting had already been done and that interviews were underway, as this would compromise the confidentiality of the candidates.
20. Reference was made to paragraphs 6.5 to 6.7 on page 41, where the following is stated:
- “6.5 Confidentiality is to be maintained throughout the entire recruitment and selection process.*
- 6.6 Under no circumstances may information be provided which may lead to the creation of an expectation with the candidate.*
- 6.7 Any breaching of confidentiality will lead to disciplinary action.”*
21. Therefore, if Tembisa had informed the applicant that the short listing had been done, it would have breached the confidentiality which would then lead to disciplinary action against her. The applicant disagreed with this and stated that Tembisa should have told him that she was not in a position to give him information.

The following ensued from re-examination:

22. Reference was made to page 43, more specifically paragraph 12.2.4 thereof, where the following is stated:
- “Only relevant, objective and verified information, contained in the application form, CV and proof of employment in the form of service records and other attached documentation may be taken into account during the shortlisting process.”*

23. According to the applicant this clause may not exclude the respondent calling him to establish his period of service at Vanguard.

The respondent's case

Opening statement

24. The respondent stated that the applicant applied for post number 3 in the bulletin, but was not short listed, because the selection panel picked up that he pointed out that his work experience, that his current job is at Vanguard CHC and also the Department of the Premier as organizational development practitioner at the same time, but the job at Vanguard had all the key areas of the job that he applied for.
25. The applicant did not indicate the period for which he was working at Vanguard, he only stated "current employer" and the starting date at the Department of Premier was July 2008. The panel could not determine when the applicant started and finished working at Vanguard and they could not quantify the length of the period he was working at Vanguard. They were under the impression that he was still working at Vanguard.

NOMAXABISO MALIE testified on behalf of the respondent (hereinafter referred to as "Malie")

26. Malie testified that she is the Deputy Director: Support Services: Human Resources Department at the Red Cross Hospital and the Head of the Human Resources Department. She confirmed that the post evidenced on page 8 of bundle R was advertised. She was the chairperson of the recruitment and selection panel. The correct process that was followed when they dealt with the short listing was that they look at the requirements and experience, where after they looked at all the curriculum vitae submitted. She remembers the applicant's curriculum vitae in general.

27. Reference was made to page 17, being the applicant's application for the position. She confirmed that they looked at all his requirements. The applicant complied with all the requirements of the advertisement. Under experience he stated that he is currently employed at Vanguard and also stated that he is currently employed at the Department of the Premier. They could not figure out how long he was working at either. No person can work at two places at the same time, the panel therefore found that his curriculum vitae was not credible.
28. With reference to pages 26, 28 and 29: According to page 28, the applicant's starting date at the Department of the Premier was listed as 1 July 2008, with no end date. On page 29 under "*Professional experience (2013 to date)*" he listed the Department of the Premier, Chief Directorate: Organisation Development. It was put to Malie that the applicant testified that he made a mistake on his curriculum vitae and that the panel should have called him to establish the correct position. Malie responded that the panel works on what is in front of them, the panel is under no obligation to phone any candidate. It is a high-level post and the panel found the information from the applicant's curriculum vitae was not credible.
29. The Recruitment and Selection Policy is evidenced on page 38 of bundle R. Malie confirmed that she answered the applicant's grievance. It would be procedurally unfair if the Policy was not followed. The procedure is clearly set out on page 42 of bundle R. The short listing of applications took place in terms of the information the panel received during the screening, which should play an important role. Only relevant and verified information received in the application form and on what was on the curriculum vitae may be taken into consideration. The panel followed the process as set out in paragraph 12.2.6. The applicant adhered to the minimum requirements and as far as the key result area/outputs are concerned, there were markings on his curriculum vitae, they checked the experience in line with 12.2.6. They scored the applicant, but there was a problem with the number of years of experience and if the panel had called the applicant, the process would have been unfair towards the other 70 candidates. The panel only communicates with people they are going to shortlist, therefore there was no duty on the panel to communicate

with the applicant. He was not shortlisted. No information of confidentiality may be communicated until the process has been finalized.

30. If someone enquires about the recruitment or the shortlisting process, they would tell the candidate that the process had not been finalized yet and that they would be informed once the process has been finalized. Confidentiality has to be maintained throughout the entire recruitment and selection process. If this Policy was not adhered to, the official would be disciplined. It was put to Malie that the applicant testified that he was told by the scribe that the interviews had not taken place yet by the scribe. Malie confirmed that she maintained the information as confidential, because the process has not yet been finalized.

The following ensued from cross-examination:

31. It was put to Malie that telling somebody that interviews have not taken place as opposed to saying the short listing has not taken place yet, is dishonest. Malie responded that she would have to know when the person phoned and whether the interviews had already taken place. She would need to know on which date the call was made. According to Malie, Nqola told her that when the applicant called her to ask her if the shortlisting had been done, she told him that the process is not finalized yet, only short listed. It was however put to Malie that it is the applicant's case, that he called Nqola to find out when the interviews would take place and she said no date has been established yet. Malie responded that this was new information to her.
32. Reference was made to page 21 of bundle A, being the applicant's grievance. The applicant stated: "*After the closing date I made enquiries on numerous occasions asked Ms Tembisa Nqola to the status of the recruitment process.*" It was put to Malie that the date for the interviews was set before the actual interviews took place, which Malie confirmed. It was put to Malie that the Recruitment and Selection Policy is a guideline only and that the panel could have deviated from the policy and could have called the applicant to clarify his curriculum vitae. Malie responded that the process would then be unfair towards the other candidates if

they called one candidate only and then they should have called all the other candidates.

The applicant's closing argument

33. There is a reasonable expectation of the applicant, the policy is not a Law. The respondent could have made contact with the applicant. Failure to do so has a financial implication on the applicant. The respondent selectively chose when the Recruitment and Selection Policy has to be implemented by the book. Regarding "dishonesty": none of the witnesses could testify about this. Incorrect information was submitted, that is where the unfairness comes in.

The respondent's closing argument

34. There was nothing untoward towards the applicant. The Recruitment and Selection Policy was followed. The applicant's curriculum vitae contained incorrect information. The panel could not establish what information was correct. It is not the panel's duty to verify the correctness of the information by phoning the candidates, of which there were 71 candidates. If they phone one candidate, they must phone all 71 candidates. It is the candidate's responsibility to ensure the correctness of the information in the curriculum vitae.
35. The respondent could not just ignore the recruitment and selection process. The information given to the applicant over the phone was in accordance with the Recruitment and Selection Policy. Nothing was done outside of the Recruitment and Selection Policy. The applicant admitted himself that he made a mistake on his curriculum vitae. The respondent believes the process was followed correctly. The unfair labour practice must be dismissed.

Analysis of the evidence and argument

36. The applicant is currently employed as organizational development practitioner at the Department of the Premier. The applicant applied for the position of assistant-director at the Red Cross Hospital. The applicant was not short listed for this position.
37. According to the applicant he met all the requirements for the advertised position, especially in the light of the experience which he gained at Vanguard. He also holds a degree in Public Administration. The applicant filed a grievance, because Tembisa Nqola at the Human Resources Department informed him that although the panel had been selected, the short listing has not been finalized yet. The applicant subsequently learnt that the interviews were scheduled two days after his enquiries, but Tembisa failed to disclose this to him.
38. The panel did not short list the applicant as it appeared from his Curriculum Vitae that he was employed at both Vanguard and The Department of the Premier simultaneously. The panel found that the applicant's CV was not credible. The applicant believes that the panel should have called him to establish the correct position. The applicant argued that he would have been appointed to the advertised position, had the panel verified his work experience with him telephonically, as he met all the requirements for the position. According to the applicant is was merely an oversight on his part in his CV and he was not dishonest.
39. The applicant referred an unfair labour practice dispute to the Council, as he believes that he should have been appointed to the position and he was deprived from career progression. The applicant seeks compensation in respect of the alleged unfair labour practice dispute. The respondent had not appointed a candidate to the position at the time when the applicant lodged his grievance.
40. The applicant clearly stated in his CV that he worked at Khayelitsha CHC from 1 January 2006 until 31 July 2007, whilst he stated the following next to the period

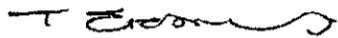
worked at Vanguard: "Currently employed". The applicant was transferred from Khayelitsha to Vanguard.

41. The applicant furthermore indicated on page 28 of his CV that he had been working at the Department of The Premier from 1 July 2008 with no end date. The panel deducted from the above information that the applicant's CV indicated that he worked at both Vanguard and the Department of The Premier at the same time, something that is not possible.
42. In terms of paragraph 12.2.4 of the recruitment and selection policy, the panel may only take relevant, objective and verified information, contained in the application form, CV and proof of employment in the form of service records and other attached documentation into account.
43. The applicant failed to provide the panel with supporting certificates of his employment records. The applicant did not clarify his employment records, during his testimony. Instead the applicant testified that it was an oversight on his part and that the recruitment and selection policy is not cast in stone and that the panel should have called him to establish the correct position. The panel however explained that there were 71 candidates and that they would have treated the other candidates unfairly, if they called only the applicant to verify his employment records.
44. The applicant testified that his qualifications exceeded the job requirements for the advertised position. In terms of paragraph 12.2.5 of the recruitment and selection policy, the panel may not give undue credit to qualifications not required for the position as a pre-determined requirement and inherent requirement of the advertised position.
45. In terms of paragraph 12.2.6 of the recruitment and selection policy applications from candidates who do not meet the minimum requirements, must not be considered. The applicant did not meet the requirements for the position, more specifically related to his experience listed on his CV.

46. Paragraph 12.2.2 places a further responsibility on the panel, in that the panel must be guided by information obtained, during the screening process, whereby candidates should be categorised in terms of knowledge and expertise. This process will assist in determining the final shortlisting of candidates for interviews.
47. The applicant met the minimum requirements for the position at first glance, but he lacked the number of years' of experience required. The panel could not establish from the applicant's CV how long he worked at Vanguard, where he obtained the relevant experience required for the position.
48. In terms of paragraph 5.14 of the recruitment and selection policy – no candidate may be short listed or invited to an interview through goodwill. If the panel chose to call the applicant to establish the number of years which he worked at Vanguard, this would amount to the panel displaying goodwill to him, not shown to other candidates.
49. The confidentiality of other candidates would also have been challenged, had Tembisa disclosed to the applicant that the short listing had already been completed.
50. It remains the applicant's responsibility to ensure that his Curriculum Vitae reflects his experience and qualifications correctly. It is not be the panel's responsibility to phone candidates to clarify uncertainties and/or omissions in their CV's. Therefore the applicant did not meet the requirements for the position in terms of his Curriculum Vitae, which he submitted to the panel, forming the basis of the recruitment and selection process.
51. I therefore find that the applicant was not subjected to an unfair labour practice.

Award

52. The applicant was not subjected to an unfair labour practice and the applicant is not entitled to any relief.



COMMISSIONER: T ERASMUS