

ARBITRATION

AWARD

Case No: **PSHS994-19/20**

Commissioner: **T Erasmus**

Date of award: **6 March 2020**

In the matter between:

PSA obo JOHN PATRICK GOUWS

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 TC Newman Community Health Centre, Paarl on 24 February 2020. The applicant was represented by Mr. C Appels from PSA, whilst the respondent was represented by Mr. A Mniki, Labour Relations Officer at Respondent.

Issue to be decided

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

The applicant's case

3. The applicant seeks to be placed on the correct level, it will not influence the successful candidate.

JOHN PATRICK GOUWS testified in support of his own case (hereinafter referred to as "the applicant")

4. The applicant testified that he is a forensic pathology officer and has been employed as such by the respondent for the past 12 years. He was previously based at Stellenbosch Forensic Pathology between 8 and 9 years. He acted in a senior capacity as facility manager and chief forensic officer whilst employed in Stellenbosch.
5. With reference to page 8 of bundle A: the applicant was appointed as acting chief forensic officer at the Stellenbosch facility on 7 July 2015 until 31 December 2015. In terms of page 9 of bundle A: the applicant was appointed as acting chief forensic officer at Stellenbosch facility from 1 January 2016 to 31 March 2016 and as per pages 13 and 14 of bundle A, the applicant was appointed as acting facility manager at Paarl from 20 July 2017 with full delegation, and on page 14 acting facility manager in Paarl from 14 April 2017 to 17 April 2017, with full delegation.
6. The applicant learnt that he was not shortlisted from his colleague at Tygerberg. He then phoned head office and spoke to Mrs Machelm, who confirmed that the interviews were scheduled for the following day for the post, but he was not invited to the interviews. The applicant then immediately registered a grievance. According to the applicant, he performed most of the duties of the post during his acting and also the work that he is currently doing, which requires the management of personnel, training of personnel, verify overtime of junior staff, as well as the other functions performed as acting manager, such as budgeting.
7. The applicant applied for the position by compiling his Curriculum Vitae and gave it to one of his colleagues to hand it in on his behalf before the closing date. When

he made the phone call to Ms Machelm, she confirmed that his Curriculum Vitae was there, but she said she could not give him an explanation beforehand. He could hear on the telephone that she was paging through the documents and confirmed that his Curriculum Vitae had indeed been received. He applied for a similar post in the past as evidenced on page 6. He was invited to that interview and it was on the same post level. The applicant was shortlisted.

8. Reference was made to page 3, which confirms that they were called out by the police as they were investigating a crime scene. They note the information and bring it to the pathologist. He had to ensure that the post-mortem process is attended to. The applicant is computer literate and is competent in both Excel and outlook.

The following ensued from cross-examination:

9. It was put to the applicant that the position for which he previously applied evidenced on page 17 of bundle A, is different from the previous position in question evidenced on page 3 of bundle R. These are two (2) different posts with different requirements, specifically ranked to experience and duties. Labour relations experience is not a requirement in the position listed on page 17 of bundle A. It was put to the applicant that the chairperson will testify that the panel could not find labour relations knowledge on the applicant's curriculum vitae. According to the applicant, he mentioned this in his curriculum vitae, that in his capacity as acting chief facility manager, it included the management of junior staff, inclusive of labour relations. According to the applicant, this was listed in his curriculum vitae as evidenced on page 8 of his curriculum vitae in bundle A, which includes handling of sick leave and leave applications.
10. Reference was made to Page 4 of bundle R, being the short-listing grid. It was put to the applicant that he did not list specific knowledge of labour relations and experience in his curriculum vitae, because the panel could only consider what is on his curriculum vitae. The applicant conceded that on page 10 on the curriculum vitae that was handed in, he did not mention labour relations although it is in his

curriculum vitae in bundle A. It is specifically marked next to the applicant's name under the heading "*Human Resources and Labour Relations knowledge and experience*" "no".

11. The applicant conceded that it is the panel's duty to consider what is on the curriculum vitae and nothing else. The applicant conceded that the panel was guided by the applicant's curriculum vitae and they were not unfair towards him.

The following ensued from re-examination:

12. The applicant stated that there was a discrepancy in his curriculum vitae, namely there were two (2) different curriculum vitae in bundle A and bundle R, as bundle A makes specific reference to acting positions where he handled all labour related issues. The applicant believes that the curriculum vitae might have been mixed up due to a previous position that he applied for at a different time. It was put to the applicant that there is a difference between the two posts and the previous one was that of chief forensic officer in Paarl, whilst the present post is a post at Tygerberg. The Paarl job will consist of everything with regards to chief forensic officer, whilst the Tygerberg position is in the dissecting area.

RICARDO JAMES PHILANDER in support of the applicant's case (hereinafter referred to as "Philander")

13. Philander testified that he is a grade 1 forensic pathology officer at Paarl. He confirmed that the applicant requested him to drop off his curriculum vitae on his way from Paarl at the Karl Bremer Hospital, which he did. The applicant was still busy compiling the curriculum vitae when he got there, and he waited for him to finish. He then asked for Mrs Owies, but she was out of office and only her clerk was there and he informed the clerk that he was dropping off a curriculum vitae for the position at Tygerberg on behalf of the applicant and the clerk pointed him to the box in which he had to drop the curriculum vitae, which he did.

There were no questions under cross-examination.

The respondent's case

14. The successful candidate was not joined. There is no vacant post at the moment. The respondent no longer has the ruling whereby a person just gets put on the required salary level.

WAYNE MITTEN testified on behalf of the respondent (hereinafter referred to as "Mitten")

15. Mitten testified that he was the chairperson of the panel for the position for which the applicant applied at the Tygerberg mortuary. The position is evidenced on page 3 of bundle R: "*CHIEF FORENSIC PATHOLOGY OFFICER (Dissection)*" department. Mitten confirmed that he was not involved in the position advertised on page 17 of bundle A, namely "*CHIEF FORENSIC OFFICER*" at Paarl. The curriculum vitae lodged by the applicant for short-listing which was perused by the panel for the position CHIEF FORENSIC PATHOLOGY OFFICER (Dissection) is evidenced on page 5 of bundle R. The applicant lacked human resources and labour relations experience, the panel could not find any labour experience in his curriculum vitae. It was the applicant's case that this was not the curriculum vitae that he handed in in support of the post. Mitten confirmed that this was the curriculum vitae that was perused for the short listing.
16. Reference was made to page 2 of bundle A, being the applicant's curriculum vitae and completed that of page 6 of bundle R. Mitten denied that there was a possibility that they could have dealt with the curriculum vitae that was handed in in support of the Paarl post, as he was not involved in the Paarl position. Tygerberg had various issues with staff and it is very labour intensive. Labour relations was an inherent requirement for the post. They report to the NPA and not to the Department of Health. Human Resources and labour relations were a very important aspect, as people have to be disciplined. He was aware of the applicant's grievance. The applicant did not indicate that the incorrect curriculum vitae was perused by the panel. The first that he heard about this, was at the arbitration hearing.

The following ensued from cross-examination:

17. The *curriculum vitae* received by the panel were delivered to them in a sealed box by the Human Resources Department. He confirmed that there is a difference between the two *curriculum vitae*. The *curriculum vitae* perused and considered by the panel, is that in bundle R evidenced on page 5 onwards. The advertisement placed was specifically for dissection, handling of staff and reporting to the NPA. Page 8 of bundle A refers to the applicant's acting position as Chief Forensic Officer at Stellenbosch facility. Mitten confirmed that they had to look at the *curriculum vitae*, otherwise it would be unfair towards other candidates and all candidates submit external documentation. The functions at different facilities vary. Stellenbosch does have dissection, but not a chief forensic officer that runs dissection. There is no dissection facility at Paarl Hospital, therefore if he takes the applicant's acting positions into consideration, that are not listed in the short-listing process it would be unfair towards other candidates.

The applicant's closing argument

18. The applicant made application for a particular post in the department. The correct *curriculum vitae* was not used. The applicant was done an injustice by the panel not having the correct *curriculum vitae* in their possession, although handed in. The applicant is not entitled to appointment to the position, but he was not given a fair chance.
19. It is recommended that the executive authority can correct the irregular appointment. It was an irregular appointment. The applicant cannot prove it, but he has a strong suspicion that the incorrect *curriculum vitae* was used. The applicant has no control over the process after the *curriculum vitae* was handed in.

The respondent's closing argument

20. Regarding the curriculum vitae: When the respondent submitted its bundle, the curriculum vitae in the bundle was not challenged. It remains an authentic document. The onus of proof that the document is not authentic, rests on the applicant. Even the applicant's witness supported the respondent's case, he said that he received the curriculum vitae from the applicant in a sealed envelope. The applicant admitted the requirements for the post. Labour relations is not indicated in the curriculum vitae in bundle R. The curriculum vitae perused by the panel, did not include labour relations. The applicant did not prove any unfair labour practice. The process was done fairly.

Analysis of the evidence and argument

21. The fact that the applicant was previously short listed for the post of CHIEF FORENSIC OFFICER at Paarl, does not automatically qualify him for the position, which is the subject of the present dispute before me. It is common cause that the present position differs from the previous position for which the applicant applied and that the requirements are different too. It is common cause that the CV perused by the panel, did not include "*labour relations*" as part of the applicant's experience.
22. In his capacity as acting facility manager, management of junior staff, sick leave and leave applications, as well as labour relations formed part of his experience. According to the applicant this was listed in his CV contained on page 8 of bundle A. It is however common cause that the CV on page 8 of bundle A differed from the CV on page 2 of bundle R, being the CV that was perused by the panel for short listing purposes.
23. According to the short-listing grid compiled by the panel, evidenced on page 4 of bundle R, the applicant lacked the following minimum experience: "*Human Resources and Labour Relations knowledge and experience.*"

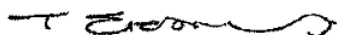
24. The panel was guided by the applicant's CV, therefore there was no unfairness towards the applicant. Applicant previously applied for the position of Chief Forensic Officer in Paarl, whilst the present post is that of Chief Forensic Pathology Officer (Dissection). The Paarl position refers to everything relating to Chief Forensic Officer, whilst the Tygerberg position refers to the dissecting area.
25. Philander testified that the applicant was still busy completing his CV, when he was asked by the applicant to drop his CV off on his behalf at Karl Bremer Hospital for the Tygerberg position. On arrival at Ms Owies office, he found that she was out of office at the time. He was directed by her assistant to the box where he had to drop the CV for the Tygerberg position. Therefore, it is clear that there could not possibly have been a confusion of the CV for the two different posts, especially since the applicant was still busy completing his CV and that Philander had to wait for the CV, before he could leave.
26. Mitten was not involved in the position of Chief Forensic Officer, Paarl. He was only involved in the position of Chief Forensic Pathology Officer (Dissection) at Tygerberg. The CV handed in by the applicant, which was perused by the panel, is evidenced on page 5 of bundle R. The applicant lacked experience in labour relations and human resources according to the contents of this CV. Labour relations was an inherent requirement for the position, as Tygerberg experienced extensive staff problems and is a labour-intensive facility. The applicant did not indicate in his grievance that the incorrect CV was perused by the panel, this allegation was only raised for the first time, during the arbitration hearing. Mitten's evidence that the panel received the CV's for the advertised position in a sealed box, was not challenged under cross-examination. The advertisement was specifically directed at dissection, handling of staff and reporting to the NPA. Mitten testified that the panel could not consider external evidence that did not form part of the short listing such as the applicant's experience in acting positions, as this would amount to unfairness towards the other candidates.
27. I find that the panel was bound by the information submitted by the applicant in his application, which included the CV on page 5 of bundle R, on which document

labour relations experience was not listed. It remains the applicant's responsibility to ensure that his correct information serves before the panel, responsible for the short listing. It cannot be expected of an interviewing panel to consider documentation other than that handed in for short listing purposes.

28. I can therefore not find that the applicant was subjected to an unfair labour practice.

Award

29. The applicant was not subjected to an unfair labour practice; therefore the applicant is not entitled to any relief.



COMMISSIONER: T ERASMUS