



ARBITRATION

AWARD

Panellist/s: Orlando Moses

Case No.: GPBC 942/2020

Date of Award: 23 March 2022

In the ARBITRATION between:

NEHAWU obo P Wyngaard

Union / Applicant

and

Department of Economic Development and Tourism

First Respondent

Mrs Crystal Le Born

Second Respondent

Union/Applicant's representative: I Makwetu (NEHAWU)

First Respondent's representative: R Johaardien (Department of the Premier)

Second Respondent Representative N Adams (PSA)



AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was first set down for 09 June 2021 for an on-camera hearing and after numerous postponements and adjournments, the hearings concluded on 03 March 2022. The Applicant, Mrs P Wyngaard, was represented by NEHAWU official, Mr I Makwetu, the First Respondent was represented by the Respondent's Employment Relations Officer, Mrs R Johaardien, and the Second Respondent, Mrs Crystal Le Bron, was represented by PSA Union official, Mrs N Adams. The Parties submitted their closing Arguments on 14 March 2022
2. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

3. I have to determine whether the Applicant was subjected to an unfair Labour Practice when she was not shortlisted for the position of Deputy Director: Office of the HOD.

BACKGROUND TO THE ISSUE IN DISPUTE

4. The Applicant is employed at the Department of Economic Development and Tourism, Provincial Government Western Cape as an Assistant Director: Strategic and Operational Support, Office of the Head of Department. She applied for the position of Deputy Director: Office of the HOD. The Applicant was not shortlisted for the position and the Applicant submitted an Unfair Labour Practice dispute based on promotion. The Applicant alleged that the decision not to shortlist her amounted to an Unfair Labour Practice and she requests compensation for being subjected to an Unfair Labour Practice and further requests appointment in a similar post, on the third notch of pay progression due to the period that elapsed from the date grievance was lodged.
5. The parties submitted their closing statements on 14 March 2022, which submissions were considered, in the drafting of the award.

SURVEY OF SUBMISSIONS AND ARGUMENT

6. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and determinations.



Applicant's Witnesses Testimony

Mrs. Patricia Wyngaard

7. She is currently employed as an Assistant Director: Office of Strategic and Operational Support and she applied for the position of Deputy Director: Office of the HOD. She has been employed in a support services position for the last 23 years of employment and she previously applied for the same position during 2010 and she was shortlisted. When she was shortlisted she had less experience. She referred to the correspondence which stated that she was unsuccessful wherein she was informed; based on the information provided in her CV that she did not meet the minimum requirements of having three years of management experience within the office of a senior executive of an economic department or similar environment, and she was not shortlisted to be invited for an interview.
8. She referred to her CV and the positions and work experience is summarised as follows: 1 April 2016 to date: Assistant Director: Strategic and Operational Support in the Directorate and operational Support: Department of Economic Development and Tourism; 14 January 2014 - 31 March 2016: Office Manager Director: Economic Enablement in the Chief Directorate Economic Enablement: Department of Economic Development and Tourism; 01 October 2012 – 31 December 2013: Assistant Director: Appointment and Compensation: Department of the Premier; 01 April 2011 – 30 September 2012: Assistant Director: Management Support in the Directorate: Human Resource Practices and Administration: Department of the Premier; 01 November 2010 – 31 March 2011: Service Manager (Division Corporate Relations Management Unit): Department of Economic Development and Tourism; 01 March 2008 – 1 October 2010: Office Manager to Director HRM and Support Services in the Directorate Human Resource Management: Department of Economic Development and Tourism; 01 September 2004 – 29 February 2008: Assistant Director: Employee Services in the Directorate Human Resource Management and Support Services: Department of Economic Development and Tourism; 01 April 2004 – 31 August 2004: Office Manager in the Office of the Head of Department: Department of Economic Development and Tourism. June 2001 – March 2004: Human Resource Practitioner: Employee Services in the Directorate Human Resources: Provincial Treasury; September 1999 – May 2001: Administrative Officer: Auxiliary Services in the Directorate Support Services: Provincial Treasury; January 1998 – August 1999: Secretary in the office of the Head of Treasury: Provincial Treasury Western Cape Government; October 1996 – December 1997: Administrative Assistant at Woodline Timber Industries.



9. She applied for the position which indicated that the minimum requirements were an appropriate three-year tertiary qualification (National Diploma/ B- degree or higher) in Tourism, Economics or related field of study; a minimum of 3 years management experience in the office of a senior executive of an economic department or a similar environment and a valid code B drivers licence.
10. The posts she applied for forms part of the support services portfolio if cognizance is taken of the job description. The occupational class falls within the line of the support portfolio as a position is a management post. She testified that the requirement of management experience in the office of a senior executive of an economic department is an unfair limitation. This requirement excludes her and others from being shortlisted. She believes that she met the necessary three years management requirements as she was a Personal Assistant for a year in the Provincial Treasury Department whereafter she moved to the Department of Economic Development. She was appointed as Office Manager in the Office of the Head of Department where she was responsible for staff members including a personal assistant, an intern and an administrative clerk. She performed the functions for five months. She performed the functions of Office Manager in the Department of Economic Development for three years and before this, she was the Office Manager for the Director Human Resources for 2 years and 6 months. She was responsible for managing the personal assistant and the graduate intern and she was responsible for staff members which contributed to another one year and five months of management experience. She referred to a previous advertisement during 2017 which she did not apply for; which showed the minimum management experience required was 6 years, which requirements differed from the current post in dispute. The post function for the position of Deputy Director is the same for managing the office and she meets the requirements with her years of management experience. She is currently reporting to the Office of the Head of Department and she cannot accept that she does not qualify for the position. She defines SMS (Senior Management Services) employees as public service employees appointed on salary level 13 or higher as defined as per appendix 2 of resolution 9 of 2002. And if she looks at the SMS handbook she considers working directly with the Director of a department as meeting the experience requirements of working with a senior executive.
11. Under cross-examination, she testified that previous advertisements of the same posts may have different requirements but the job remains the same and the department must still comply with fair recruitment and selection procedures. She agreed that the process needed to be followed when a post is advertised and she agrees with the version that the Department may request validation from the Directorate Organisational Design (OD), who would give specific job requirements for a vacant post. She confirms the contents of the job brief stating the requirements of the three-year degree and the minimum qualifications needed. She agreed that the minimum requirements were



in line with the brief of OD, however, she testified that the requirements for the position she applied for changed. She agreed that the advertisement was in line with the OD requirements. She agreed that the advertisement set specific minimum requirements, but is of the view that she met the requirements on 25 July 2019. She sees the requirements as a manipulation of the process to attract the person they wanted to appoint. She did not dispute that the advertisement, concerning the contract position for Deputy Director advertised earlier, was in line with the OD requirements for advertising the post. She cannot understand the need for the requirement relating to 'senior executive', as she understood management experience as experience relating to the management of staff and processes. She has management experience and participated in people management, recruitment and selection processes and disputes that she has a shortage of experience. She views the positions of director upwards as senior executives. She did not understand why the level of the person should have any bearing upon the functions as the position she applied for is an office manager post and no specialised knowledge is needed. She referred to her CV and stated using the words "*top and senior management*" was merely a choice of words. She testified that her experience as Office Manager to the Chief Director from 14 January 2014 to 31 March 2016, the position of Office Manager for the Head of Department from 01 April 20, 2004 – 31 August 2004, the position of Office Manager to Director HRM and Support Services from 01 November – 31 March 2008 should be considered, which experience fulfils the three-year requirement. She disagrees with the version that only the positions of Office Manager to Chief Director: Economic Development and Office Manager: Head of Department falls within the required experience gained and this only amounted to two years and seven months experience. She disagrees that the successful candidate has more experience and she sees the issue as an issue of interpretation. She confirmed that the applicants shortlisted were lucky enough to work in offices to meet the criteria to be shortlisted, however, she is not challenging the successful Applicant's experience she is only questioning the shortlisting criteria in questions whether it was free or not.

Respondent Witnesses Testimony

Mr Shannon Pietersen

12. He is employed as Assistant Director in the Department of the Premier in the Directorate: Recruitment Selection, coordinating vacancy advertising for the 11 client departments. To start advertising a client department must request the post to be advertised and a document requesting the post to be advertised must be completed. The advertising and filing of a post must be authorised. Where a vacancy exists and the department must request from OD the minimum requirements for the post. A job brief must be submitted. The advertisement for the position must comply with the generic requirements of OD. OD's role is to ensure that the job is evaluated, to determine the appropriate post level, identify the level of the vacancy and determine the criteria needed for the post. OD will provide the Department with a certificate to determine the post level. Where discrepancies exist OD would engage with the



client department to ensure that they do not deviate from the requirements. The department must ensure that information received is used to advertise the post. OD does not prescribe the specifics of the educational requirements and the client department will decide on the specific qualification. E.g. Degree in Economics, based on the needs of the department. The department decides on the type of qualification that would be appropriate for the role and decide on the experience required.

13. Under cross-examination he testified in his role after receiving the request to advertise the vacant position was to coordinate the advertisement of the vacant post for the client department. He ensures that the vacancy conforms to OD minimum requirements for the post. The job brief give details of the job and his function is to ensure that the requirements meet the level of the post. He checks whether the requirements for the post meet the inherent requirements. In the current case, it was a three-year qualification and three years of management experience in the office of a senior executive. The post was previously advertised and he is guided by the OD certificate and requirements. He cannot comment whether the previous requirements changed he can only testify about his functions. When put to him that the previous advertisement required six years' experience and the latter post advertisement required three years' experience; he testified that they treat each post on the level required and he cannot testify on process OD followed setting the requirements. OD is responsible for the evaluation of the post and he has no influence on how the post requirements are set. Where post was evaluated and three years experience is required. He follows the recommendation and he cannot comment on anything else. A client department will request assistance and to ensure consistency they can only look at information OD provided. He testified the requirement of 'senior executive' or similar environment is one requirement, although the generic requirement is three years experience. If the department wants to target a specific pool of external or internal candidates it can do so. When asked about defining 'senior executive' he testified that he could not refer to government levels for external candidates however he testified that 'senior executive' would be a post above the position of director which would indicate Chief Director and upwards. The shortlisting function lies with the selection committee and he cannot speak to what the shortlisting committee considered when shortlisting. Where a person did not meet the minimum requirements that person would not be shortlisted. He testified that the 2016 advert which indicated six years of management experience was for a contract position, whilst the 2019 advertised position was for a permanent position and the requirement was three years of management experience in a specific environment. The 2019 advertisement was specifically targeted to an appointment in a permanent position.



Mrs Melissa Parker

14. She is employed as Director: Skills Development and Innovation in the Department and she was part of the shortlisting committee. The role of the shortlisting panel is to evaluate the applicants against the minimum criteria to decide whether they should be invited to the interview. The shortlisting panel evaluated the candidates against the minimum requirements, as advertised, and had to meet a 70% score to be invited for an interview. The minimum criteria were a three-year qualification in Economics and three years of management experience in the office of a senior executive. The 30 candidates were evaluated against the minimum requirements criterion and were scored to determine whether they would be shortlisted. If a candidate complied with the minimum requirements he or she was shortlisted. When the panel looked at the experience requirements they looked at experience in either junior, middle or senior management in the office of a Chief Director/HOD or higher position. In the private sector, they were looking at management experience in an economic department or an environment of an economic nature. The Applicant received a score for her tertiary qualification however she did not receive a score for management experience as the applicant's CV did not align with the minimum requirements. The shortlisting panel considered the Applicant's CV and found that appointment in the position of Office Manager Director: Economic Enablement, held by the Applicant from 14 January 2014 - 31 March 2016, in the Chief Directorate Economic Enablement: Department of Economic Development and Tourism contributed to relevant work experience. This amounted to 2 years and 3 months' experience. The position held by the Applicant from 01 April 2004 – 31 August 2004 as Office Manager in the office of the Head of Department: Department of Economic Development and Tourism, was deemed relevant and it amounted to 5 months' experience. The other positions held by the Applicant in her CV were not considered as it did not meet the minimum criteria of the advertisement. All the Applicants were evaluated against the same criteria and five candidates were invited for interviews.
15. Under cross-examination, she testified that the Applicant met the other criteria except for the experience requirement where she fell four months short of the target experience. She reiterated that the shortlisting panel considered experience in a junior, middle or senior management capacity in the office of the Chief Director and upwards in the public service. The advertisement required three years of management experience in the senior office of top management which would include a Chief Director, Head of Department or Director-General. Experience in the office of an SMS member (Senior Management Service), experience starting from the office of Director was not considered. Directors are not considered members of the senior executive. Upon it being put to that Resolution 9 of 2000 defines senior management from level 13 upwards, she testified that the requirements are not for senior management, but the advertisement referred to '*senior executive*' which was considered to be from the position of Chief Director upwards. When the shortlisting criteria were considered they looked at top



management and shortlisting was done accordingly. This criterion was used for all the candidates shortlisted. She cannot testify to the difference in the job functions of a Director and Chief Director and can only testify to the considerations that the shortlisting panel applied to all 30 applicants. Each applicant was treated similarly. The experience of the applicant as Office Manager to Director HRM and Support Services in the directorate Human Resource Management: Department of Economic Development and Tourism for one year and 6 months was not considered as this was not in the office of a senior executive. For the public service, the requirements were very specific with regards to experience in the office of a senior executive however in the private sector she could not define a senior executive. It is at the discretion of the panel to define the experience needed in line with the minimum criteria of the post.

ANALYSIS OF EVIDENCE AND ARGUMENT

16. The Applicant bears the onus to prove that the respondent acted unfairly. The applicant has to discharge the onus, however, the respondent bears an evidentiary burden to show that its conduct was not unfair and thus did not constitute an unfair labour practice. The Labour Court in *Pamplin v Western Cape Education Department (C 1034/2015) [2015] ZALCCT* held that: "The onus to establish that conduct complained of constitutes an unfair labour practice within the meaning of section 186(2) of the LRA rests on the employee. The employee must therefore be able to lay the evidentiary foundation for his or her claim of unfair labour practice. Mere dissatisfaction with the outcome of a recruitment or selection process is not sufficient to sustain that claim."
17. The Applicant's case is that she was unfairly excluded from the interview process by not being shortlisted for the position advertised because she did not meet the experience requirements of the advertisement. The Applicant argued that setting the criteria of "the minimum of three years experience within the office of a Senior Executive" was arbitrary and unfair, specifically in defining 'senior executive' as a Chief Director and higher.
18. In *City of Cape Town v SA Municipal Workers Union obo Sylvester and others* (2013) 34 ILJ 1156 (LC), the court held that in deciding whether the employer acted fairly in failing or refusing to promote the employee, it is relevant to consider whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer; whether the employer's decision was arbitrary, or capricious or unfair; whether the employer's decision not to promote was discriminatory; whether there were unsubstantial reasons for the employer's decision not to promote; and whether the employer's decision not to promote was based upon a wrong principle.



19. The Applicant argued that she complied with the necessary experience and that the definition of Senior Executive was arbitrary. Evidence was tendered that before advertising the post, the Directorate Organizational Design (OD) would ensure that the advertisement of the post meet the requirements of a position at the post level at which it was advertised, which evidence was not disputed by the Applicant. Evidence was tendered that as long as the advertisement meets OD's minimum recommended requirements a department can set its parameters of specific formal qualifications and specific needs for the requirements of experience. The advertisement of the post met the criteria OD set and the Department determined the specific criteria for experience which was indicated as "*three years management experience in the office of a senior executive*". Evidence was tendered, which evidence was accepted by the Applicant, that the requirements for the same post, may differ, however, the Applicant testified that this may be manipulated, which is why a Deputy Director post advertised during 2017 for a contract position required six years' experience. The 2019 advertisement required a shorter period of experience however the experience needed was of a specialised nature requiring experience. The Applicant testified that she had experience managing staff members, however, the manner in which staff are managed at higher levels may differ from how staff are managed on the lower levels depending on the level of autonomy expected from employees and the weight attached to a function may be rated differently depending on the level of employee that needs to be managed.
20. I must consider in the current case whether the Applicant was treated unfairly in terms of the Requirements set for the 2019 advertisement for the post Deputy Director: Office of the HOD. The Applicant argued that the criteria excluded many other job applicants. Potential job applicants must meet the requirements needed to perform the core duties of the post and the intention of any job advertisement, is aimed at getting someone with the specific skills and competencies, and needed by the employer to perform the functions. I agree with the principle espoused by the Applicant that to meet the requirements, the job candidate must be lucky to have worked in the specific environment; however, this is the basis upon which vacant posts are advertised. A job applicant must have specific qualifications have experience in a general/specific field or the advertising employer may require a specific set of skills to be considered for shortlisting, which based on the requirements, may exclude numerous job seekers because they either do not have a degree, or experience or does not have the set of skills and competencies required by the prospective employer. Throughout the many job vacancy advertisement, there would always be job seekers excluded from meeting the minimum requirements of the job because they never worked and gained experience in a specific environment.



21. The Labour Court in *Arries v CCMA and Others* (2006) 27 ILJ 2324 (LC) held that there are limited grounds on which the commissioner or court may interfere with the discretion that has been exercised by a party competent to exercise that discretion. The court further held that the discretion of the Employer can only be interfered with if it is found to have been exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner. In order for me to determine whether the Respondent acted unfairly, I have to determine whether the shortlisting panel treated the Applicant unfairly when it failed to shortlist the Applicant. The Applicant will have to prove that the shortlisting panel deviated from minimum requirements when it failed to shortlist her or that it acted inconsistently by shortlisting another job applicant with comparable experience. The Applicant did not present any evidence showing that another candidate with similar work experience was shortlisted, but it was argued that the shortlisting panel incorrectly determined that "senior executive" referred to the position of Chief Director and higher in the public service. It was argued that PSCBC Resolution 9 of 2000 under the heading 'senior management services' defines a "member of the Senior Management Service" (SMS) as an employee on salary level 13 or higher. The minimum requirements for the position state "three years experience within the office of a senior executive". I perused resolution 9 of 2000 which resolution refers to senior management and professionals, however, it does not make reference to "senior executive" nor does it define any such term. The oxford languages website at (<https://languages.oup.com/google-dictionary-en/>) defines the word "Management" as "the process of dealing with or controlling things or people." The same website defines the word "executive" as "relating to or having the power to put plans or actions into effect." "Management" and "executive" does not have the same meaning and in absence of resolution 9 of 2000 defining an "executive employee" I cannot automatically assume that a Director, who is employed on Level 13, is defined as an executive. Evidence was tendered that the Shortlisting committee considered "executive" to mean someone on the level of Chief Director. The Respondent witness, Melissa Parker, remained consistent with her definition of 'senior executive' and the considerations of the shortlisting panel. She testified to the process of considering whether the Applicant met the requirements for experience, which testimony I could not find any fault with. No evidence was presented that showed that any of the five shortlisted candidates had similar experience to that of the Applicant and I cannot find that the Applicant was unfairly excluded from being shortlisted. The Respondent witness, Mrs Melissa Parker, could not clearly define what the equivalent of "executive" in the private sector was, however, the evidence of the Applicant's work experience, in her CV, are all obtained within the public service and no evidence was brought by the Applicant of experience relating to working for an "senior executive" in the private sector and in absence of the Applicant submitting such evidence I cannot speculate whether the Applicant obtained relevant experience in the private sector.



22. I considered the evidence and did not find that the failure to shortlist the Applicant was capricious, biased or malicious and cannot find that the evidence given by the Respondent witnesses amounted to irrelevant considerations when shortlisting was completed.
23. The Applicant failed to meet the inherent requirement relating to the specific experience required and the failure to meet this requirement and exclude the Applicant from being shortlisted was reasonable. Furthermore, evidence was tendered that the relevant experience that the Employer considered as part of inherent requirements related to the advertised position. I cannot find the shortlisting panel erred or acted unfairly when it considered the experience of the Applicant. The Applicant is required to place evidence showing that the shortlisting panel acted unfairly and outside the bounds of what they were required to do when they failed to shortlist her. The Applicant failed to show any unfairness in the manner that the process was handled and it is my finding that the Applicant failed to make a case for unfair labour practice and interference with the decision not to shortlist her is not warranted. The Applicant's evidence and contention were that she was unfairly excluded from being shortlisted; it is my finding that his exclusion was not unfair.

Award

24. The Applicant was not subjected to an unfair labour practice related to Promotion in terms section 186 (2) (a) of the LRA when she was not shortlisted.



Orlando Moses

GPSSBC Panellist