



ARBITRATION AWARD

Panellist/s: Caroline Hlongwane
Case No.: GPBC1958/2019
Date of Award: 14 November 2020

In the ARBITRATION between:

POPCRU obo F.G Mammburu (Union / Applicant)

and

Department of Correctional Services (1st Respondent)

Gladys Tshabalala (2nd Respondent)

Union/Applicant's representative: Mr. George Enoch Popane

Union/Applicant's address: POPCRU
Private Bag X060
Vereeniging
1930

Telephone: 016 370 2312

Telefax: 016 370 2294

Respondent's representative: Mr. S.A Finger

Respondent's address: Private Bag X060
Vereeniging
1930

Telephone: 016 370 2237

Telefax: 016 375 1384

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This is an arbitration award in terms of section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA"), as amended. This award is in relation to an alleged unfair suspension dispute in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995 ("LRA") referred by Ms Funanani Girly Mammburu ("the Applicant") to the General Public Service Sector Bargaining Council ("the Council") on 13 November 2019.
2. The matter was scheduled for arbitration on 13 August 2020 before me; unfortunately it did not proceed because the applicant's representative submitted that he sent an application for a subpoena to be issued by the council but did not get any response. Secondly, it came to my attention that the outcome of the arbitration will affect the successful employee of the position that the applicant is contending since the initial relief sought was that of a protected promotion. I therefore made a joinder ruling joining the second respondent to this dispute.
3. The matter was set down again on 23 October 2020 at the premises of the respondent in Vereeniging. The applicant was part of the proceedings and was represented by Mr George Enoch Popane, POPCRU union official. Whilst, Mr. Sello A. Finger, Regional Coordinator (Legal Services) represented the first respondent. The second respondent, Ms Gladys Tshabalala although she had been joined as the second respondent did not attend the proceedings.
4. The parties themselves agreed that the matter be disposed of by way of filing of written heads of arguments setting forth the facts agreed upon, the questions of law in dispute between the parties and their contentions. Therefore the hearing was not digitally recorded. To support their arguments, the parties also submitted bundle of documents and the contents thereof were purported to represent what they were. The applicant's bundle was marked as Bundle A and the first respondent's was marked as Bundle B. The parties also submitted Pre-Arbitration minutes. The agreement was that both parties would submit their written heads of arguments by 31 October 2020, the first respondent duly complied; the applicant however only sent the written heads of arguments on 04 November 2020.

ISSUE TO BE DECIDED:

5. I am required to determine whether or not the first respondent subjected the applicant to an unfair labour practice relating to promotion.
6. In the event that I find in favour of the applicant, the applicant sought compensation.

BACKGROUND TO THE MATTER:

7. The applicant is employed by the first respondent as a Finance Clerk at Groenpunt AC office since July 2017. The first respondent advertised the position of AO: Basic Accounting System FS & NC Region: AC Groenpunt in January 2019. The applicant applied for the position. She was not shortlisted for the post despite meeting the minimum requirements. She heard from fellow colleagues that interviews were conducted and successful incumbent would be announced at the beginning of August 2019. On or about 06 August 2019, the names of all successful incumbents and their respective qualifications were circulated through the first respondent's intranet circular and she became aware that the person appointed for the position she applied for did not have a qualification required in the post advertisement and had lesser experience. This dispute turns on the applicant's non-short listing for the said position and the applicant views the conduct of the first respondent as unfair.

SURVEY OF EVIDENCE AND ARGUMENT:**APPLICANT'S CASE****Mr GE Popane made the following submissions:**

8. On 06 January 2019, the first respondent published an advertisement in City Press for a post of AO: BASIC ACCOUNTING SYSTEM. The applicant had applied for it, but she was not shortlisted. She later learned from the first respondent's intranet circular that a successful candidate, Ms Tshabalala Gladys, had been appointed to the post as of 01 August 2019. However, she also discovered that Ms Tshabalala did not have the required qualification as per the advert and Ms Tshabalala's experience was lesser than hers. As the result, the applicant believed the first respondent did not follow a fair short listing process which denied her an opportunity to compete fairly for the post.
9. The applicant then lodged a grievance on 15 August 2019 which was subsequently referred to the first respondent's Regional Head (RH) Corporate Service in Bloemfontein on 16 August 2019. On 26 August

2019, the applicant sent a follow-up memorandum to the RH Corporate Service raising the same grievances contained in the grievance.

10. According to the feedback from RH Corporate office, the chairperson of the selection committee, one Ms Bula AN, was required to provide reasons as to why the applicant was not shortlisted and to do so not later than 03 September 2019. Ms Bula never complied with this instruction. The applicant then referred the dispute to this council.
11. It is the applicant's case that the first respondent acted unfairly by not short listing her when she met the requirements and short listed the second respondent who did not have the required qualification. According to the advertisement, the required qualification was specifically stated as a recognized Degree/ Diploma Accounting or Financial Management. And if an equivalent qualification was acceptable, such would have been clearly indicated in the advert. Therefore, the issue before the arbitrator is simply whether a diploma in internal auditing is the same as (not equivalent to) degree/diploma in Accounting or Financial Management. And if it is found that they are not the same, whether by not short listing the applicant, the first respondent committed an unfair labour practice in the promotion process. The applicant relied on the Constitutional court case of *Khumalo and Another v MEC for Education, Kwazulu-Natal* 2014 (5) SA 579 (CC) wherein the court condemned the practice of setting requirements for appointment and departing there from when effecting appointment.

RESPONDENT'S CASE

Mr S Finger made the following submissions:

12. The first respondent advertised one vacant and funded post of AO: Basic Accounting System: FS & NC Region: AC Groenpunt (FS/NC 2018/12/94). About 322 applications were received and only seven (7) candidates were shortlisted. The requirements for the advertised post were:
 - 12.1. Recognized degree/Diploma Accounting or Financial Management with at least two years relevant experience in Government Financial systems proven financial and experience.
 - 12.2. Good knowledge of Public Finance
 - 12.3. Ability to perform under pressure
 - 12.4. Computer literacy (knowledge of BAS)
13. Although the first respondent conceded that the applicant was not short listed, they submitted that it was not only the applicant who had not been short listed but many other candidates were also not short listed. They further submitted that it is the prerogative of the employer to decide how many candidates will be short listed and interviewed; the first respondent applied the same set of requirement to all applicants.

14. The selection was made fairly, reasonable and lawfully. There was no reason why the employer would have been obliged to shortlist the applicant. There was no guarantee that the applicant would have scored the highest marks in the interview, had she been short listed. The second respondent had experience and required qualifications for the position hence she was scored the highest by the panel.
15. The first respondent relied on the case of *Monaheng v Westonaria Local Municipality and another* (2006) 27 ILJ 1081 wherein the court held that complaints by disappointed applicants for promotion will not succeed unless the employee is able to prove that the employer acted in bad faith or failed to follow proper procedure. The first respondent did not commit an unfair labour practice and the applicant's case must be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT:

16. Section 138(7) of the LRA provides that the commissioner must issue an award with brief reasons. It is therefore not my intention to provide a detailed record of all the submissions that was placed before me. Even though all submissions were considered, I have only referred to the salient points that I found to be the most pertinent to making a determination in this matter. However, it should not be construed that I overlooked some of the submissions as I have considered all the submissions.
17. Section 185 of the LRA states that every employee has the right not to be subjected to unfair labour practice. Section 186(2) of the LRA goes on further to explain what conduct by the employer constitutes an unfair labour practice.
18. This is an unfair labour practice relating to promotion as envisaged in Section 186(2) (a) of the LRA. The applicant bears the onus to prove the unfair conduct complained of on a balance of probabilities.
19. The dispute was referred as an allegation of an unfair labour practice in relation to promotion/non-short listing. I am therefore required to determine whether the first respondent's conduct in not short listing/promoting the applicant, to succeed in such a claim, the applicant must show that the first respondent's conduct was arbitrary, capricious and therefore unfair.
20. It is common cause that the applicant applied for a position of AO: Basic Accounting System, FS & NC Region: AC Groenpunt (FS/NC 2018/12/94) and although she met the minimum requirements and had relevant experience, she was not shortlisted.

21. The applicant's case is that the second respondent did not meet the minimum for the position advertised but she was shortlisted, interviewed and appointed. The first respondent submitted that she was excluded from the short listing process on the basis of rational grounds, e.g. suitability, skill and or promotion of representativity. Therefore, the applicant's dispute fall squarely within the ambit of section 186(2) (a) of the LRA – promotion.
22. The first respondent submitted that the decision not to shortlist and promote the applicant was not based on arbitrary conduct, which constituted an unfair labour practice towards the applicant. They further submitted that even if the applicant was shortlisted, there was no guarantee that she would have scored the highest marks in the interview and any claim would be baseless.
23. In the case of *City of Cape Town v SA Municipal Workers Union obo Sylvester and others* (2013) 34 ILJ 1156 (LC), where the court held that in deciding whether the employer acted fairly in failing or refusing to promote the employee, it is relevant to consider the following:
- 23.1. whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer;
 - 23.2. whether the employer's decision was arbitrary, or capricious or unfair;
 - 23.3. whether the employer's decision not to promote was discriminatory;
 - 23.4. whether there were unsubstantial reasons for the employer's decision not to promote; and
 - 23.5. whether the employer's decision not to promote was based upon a wrong principle.
24. In the case of *Noonan v Safety and Security Sectoral Bargaining Council & Others* (2012) 33 ILJ 2597 (LAC) the court held that there is no right to promotion, but only a right to be given a fair opportunity to compete for a post. Any conduct that denies an employee such an opportunity constitutes an unfair labour practice. I find that the decision to appoint a person who is of the same race and gender as the excluded applicant and the appointed incumbent having similar or less qualification and experience rendered the decision arbitrary, capricious, unfair and possibility discriminatory and wrong on principle. I further find the first respondent's submission that there was no guarantee that the applicant would have succeeded in the interview to be absurd. I agree with the applicant's submission that the first respondent denied her an opportunity to compete fairly for the post when they failed to shortlist her.
25. The applicant requested that I use my discretion to decide whether or not there is a difference between Diploma Internal auditing and Diploma Accounting. I would like to state that I am not an expert when it comes to identifying differences in degrees and/or diplomas; however, it is clear that the advert was

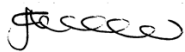
specific and it stated that the potential candidate must have recognized degree and/or Diploma Accounting or Financial Management. I did benchmarking through Google of what a diploma in accounting curriculum entails as compared to diploma internal auditing from the same institution where the second respondent obtained her qualification and I found that both diplomas deals with financial management since most modules are similar. The question which now remains is whether or not the first respondent deviated from the advertisement or diploma internal auditing is covered by financial management. I am satisfied that it is covered under financial management; therefore find that the first respondent did not deviate from the advertisement.

26. A commissioner's function is not to ensure that employers choose the best of most worthy candidates for promotion, but to ensure that, when selecting employees for promotion, employers do not act unfairly towards candidate. However, employees may have a valid complaint if they can show that they have been overlooked for promotion where they possess objective attributes, such as experience or qualifications, which the person who has been promoted does not possess, and their employers cannot explain why they were overlooked.
27. The documents provided showed that although both the applicant and the second respondent met the requirements in terms of relevant experience, the applicant's experience is more than that of the second respondent by six months. In addition, the applicant has a degree while the second respondent has Diploma Internal Auditing; the advertisement stated that the potential candidate must have recognized degree or Diploma Accounting or Financial Management. I am therefore of the view that the first respondent explanation for overlooking the applicant in the short listing process to be unsatisfactory.
28. Whilst it is not my intention to interfere with the prerogative of the first respondent, in view of the above judgments, and the reasons mentioned above, I am inclined to scrutinize the first respondent's conduct and interfere with the decision of the first respondent not to short-list the applicant.
29. Section 193(4) of the Labour Relations Act determines that an arbitrator appointed to determine an unfair labour practice dispute may order reinstatement, re-employment or compensation on terms that the arbitrator deems reasonable. The decision must be that of a reasonable decision-maker and the type of relief granted will depend on the facts of each case that is brought before the commissioner. In this instance I deem it appropriate to award the applicant compensation for the procedural unfairness committed by the first respondent in the promotion process.
30. In the light of the above I am convinced that the decision of the first respondent to exclude the applicant in the short listing process was unfair. I am satisfied that the applicant has shown on a balance of probabilities that the first respondent committed unfair labour practice relating to promotion.

31. I therefore make the following award:

AWARD:

32. The first respondent has committed an unfair labour practice in terms of section 186(2) of the Labour Relations Act 66 of 1995 by not short listing the applicant.
33. The first respondent is ordered to pay the applicant an amount of R60 618, 75 (sixty thousand six hundred and eighteen rand and seventy five cents) as compensation. This amounts to three months compensation at a salary scale of the position for which she applied for.
34. The post of AO: Basic Accounting System, FS & NC Region: AC Groenpunt (FS/NC 2018/12/94) was advertised at a salary of R242 475 per annum as calculated below.
35. Calculation:
- a. $R242\,475-00 \text{ per annum} / 12 = R20\,206, 25 \text{ per month}$
 - b. $R20\,206, 25 \text{ per month} \times 3 = R60\,618, 75$
36. This must be paid within 30 days of receipt of this award and will earn interest in terms of section 143 (2) of the Labour Relations Act, 1995.



Name:

(Council name) Arbitrator