



ARBITRATION AWARD

Panelist/s: ADV. W, BLUNDIN

Case No.: GPBC2055/19

Date of Award: 25 July 2020

In the Arbitration between:

LULAMA HLAELA

(Union / Applicant)

And

DEPARTMENT OF CORRECTIONAL SERVICES

(First Respondent)

T. MOLOGWENI

(Second Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter in front of the Council is a dispute about unfair labour practice on promotion in terms of section 186 (2)(b) of the LRA as amended.
2. This arbitration award has been made after hearing the parties during an arbitration hearing on the 7 July 2020 at the offices of the Respondent in East London.
3. The Applicant was represented by Ms. B. Masiso an Attorney and the First Respondent was represented by Mr. Mani an official of the Respondent and the Second Respondent was represented by Mr. A. Gabelana an official of the Union. The parties have agreed to file their written heads of arguments on the 15 July 2020.

ISSUE TO BE DECIDED

4. I am required to decide as to whether the Respondent has committed unfair labour practice when the Respondent did not short and appoint the Applicant.

EVIDENCE AND ARGUMENTS OF PARTIES

Applicant's evidence

5. The Applicant was the only one who testify in this arbitration proceedings on behalf of himself.
6. According to the Applicant he was appointed as legal administrative officer at Kirkwood Management area since October 2010. He applied for the position of Senior Legal Administration Officer: Eastern Cape Region as advertised. See page 48 bundle B.

7. According to the Applicant his current functions include legal administration for the area, received summonses, respond to legal documents.
8. According to the applicant he met all requirements inter alia, he has a B degree or equivalent qualifications. He has 9 years' experience, valid driver's licenses, and Computer literacy.
9. According to him he was not short listed, and he started a process of a grievance. According to the outcome of the grievance he was not shortlisted because he did not meet the additional requirement in that he is not an admitted attorney or advocate. See page 16 bundle A.
10. According to the Applicant the second Respondent do not meet the requirement in relation to years of experience in that he was employed in 2012 at the legal department of the Respondent. Further the Applicant requested that I must review and set aside the appointment of the Second Respondent.

First Respondent's evidence and arguments

11. The First Respondent called Mr. Sydney Vuyisele Twani to testify on behalf of the First Respondent. According to Mr. Twani he was a member of the panel who have done the short listing and interview of the candidates for the position of Senior Legal Administration Officer.
12. According to him the selection panel consist of 3 persons. According to him the signature on page 25 of bundle B is his signature and that the words DNQ 6 means "do not qualify". According to him the Applicant did not meet the additional requirement that was decided upon by the panel due to the fact that many of the candidates meet the requirements and it was not reasonable to short listed more than a limited candidates. See pages 38 and 97 bundle B.

13. According to Mr. Twani the Second Respondent meet the requirements for the position as advertised that is why he was short listed interviewed and appointed into the position. According to Mr. Twani the Applicant don't have an LLB as required by the advert.

ANALYSIS OF EVIDENCE AND ARGUMENTS

14. It is common cause that the Applicant apply for the position of Senior legal Administration Officer and was not short listed because he was not admitted as either an Attorney or Advocate. It is further common cause that all the candidates were subjected to the same criteria or requirement and that the Second Respondent was short listed and after an interview process he was appointed.
15. In *Noonan v Safety and Security Sectoral Bargaining Council and others* [2012] 33 ILJ 2597 (LAC), where 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 am satisfied that the Applicant was given the opportunity to be short listed, but due to not meeting one criteria or requirement the Applicant was not short listed.
16. For the Applicant to succeed in this matter he is required to show that the First Respondent has acted unfairly in that the panel has failed to provide the Applicant the opportunity to compete for the post.
17. In *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:
- 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.

Whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer

18. According to the evidence of the First Respondent, one hundred and eight teen (118) candidates apply for the position. According to Mr. Twani, the panel decided to add an additional requirement to minimize the number of candidates to be short listed and interviewed. The additional requirement was as to whether the candidates was registered as an advocate or attorney.
19. When the panel again assess the candidates including the Applicant it was found that the Applicant does not meet that the additional requirement. I am therefore satisfied that all candidates including the Applicant was subjected to the same requirements and that the panel acted consistently and only on this ground the First Respondent did not commit any unfair labour practice.
20. Further according to 7.3 of the Policy on Recruitment and Selection of the First Respondent the panel must not interview more than 8 candidates. Therefore, it is required from the First Respondent to minimize the number of candidates to a total of 8 candidates if they could justify as to why a candidate was not short listed as it is in this case.

Whether the employer's decision was arbitrary, or capricious or unfair

21. No evidence was adduced to show that the First Respondent's decision was arbitrary, capricious or unfair, therefore on this principle I could not find that the First Respondent could have committed unfair labour practice.

Whether the employer's decision not to promote was discriminatory

22. .The Applicant did not either challenge or provide evidence that to show that the decision not to promote him was on the basis of discrimination, because the person promoted or appointed is from the disadvantage group as the Applicant.

Whether there were unsubstantial reasons for the employer's decision not to promote

23. According to the First Respondent the only reason why the Applicant was not shortlisted was on the basis that he did not meet the additional requirement. I find this reason to be substantial in the First Respondent's decision not to promote the Applicant.

24. Having considered the evidence of both the witnesses of the First Respondent and the Applicant I am satisfied that the Applicant has failed to make out a case that his non promotion was unfair.

25. I therefore make the following appropriate award.

Award

26. That the First Respondent did not commit any unfair labour practice relating to promotion by not promoting the Applicant. Further the Applicant is not entitled to any relief.

27. No Order as to cost.



ADV. W. BLUNDIN

Adv. W. Blundin