



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Jacques Buitendag _____
Case No.: GPBC2231/2019 _____
Date of Award: 13 October 2020 _____

In the ARBITRATION between:

N Y MFENQE _____

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES _____

(Respondent)

Union/Applicant's representative: Mr. D Mulima _____

Union/Applicant's address: _____

Telephone: _____

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Email: dengam@iburst.co.za / Nontembiso.Mfenqe@dcs.gov.za _____

Respondent's representative: Mr. A K Lumphondo _____

Respondent's address: _____

Telephone: _____

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing under the auspices of the GPSSBC was held virtually on 30 September 2020. An attorney, Mr. D Mulima, represented the applicant, Ms. Mfenqe. Mr. A K Lumphondo represented the respondent, the Department of Correctional Services.

ISSUE TO BE DECIDED

2. I must determine whether the conduct of the respondent constitutes an unfair labour practice in relation to promotion, and if so, I must decide on the appropriate relief.

BACKGROUND TO THE MATTER

3. The background to this dispute as gleaned from the pre-arbitration minutes and the joint bundle of documents presented by the parties are as follows:
4. The applicant applied for the position of Senior Correctional Officer (SCO) DH Care at the Goodwood Management Area. The post was advertised on 27 June 2016. The applicant was shortlisted and interviewed for the post on 11 May 2017. On or about 23 June 2017 the interview panel recommended the applicant as the 1st choice candidate.
5. The respondent then received allegations of irregularities during the appointment process which implicated the chairperson of the selection panel and the allegations were referred to the Directorate of Internal Investigations (DIU) for investigation.
6. During September 2018 the applicant filed a grievance in which she requested the findings of the investigation and enquired about the status of the appointment process. She did not receive a satisfactory answer.
7. On or about 7 August 2019 the DIU reported that the allegations were unsubstantiated. The DIU recommended that the Western Cape Deputy Regional Commissioner finalise the process of filling the position, with the applicant as strongly recommended.

8. On or about 5 November 2019 the Personnel Provision Department reported that various positions were abolished during November and December 2017 in the Western Cape Region of which the disputed post was part of. The recommendation was that no appointment be made due to the abolishment of the post.
9. On or about 10 November 2019 the applicant referred an unfair labour practice dispute concerning promotion to the bargaining council.
10. On or about 1 July 2020 the applicant was promoted from salary level 6 to a SCO position on salary level 8, for which she has applied. This is not the disputed post.
11. The applicant claims the respondent committed an unfair labour practice concerning promotion. She seeks as relief protected promotion on salary level 8 from 1 July 2017 (the time of her recommendation for appointment to the SCO DH Care post at the Goodwood Management Area) until her promotion to salary level 8 on 1 July 2020. The respondent claims that no unfair labour practice was committed.

SURVEY OF EVIDENCE AND ARGUMENT

12. I have considered all the evidence and arguments presented during this arbitration, but because section 138(7) of the LRA requires an award to be issued with brief reasons for the findings; I shall, over and above the facts referred to above, briefly refer to the evidence and arguments that I regard as necessary to substantiate my findings in the determination of the dispute.

The applicant's case

13. **Ms. Mfenqe** testified under oath. The applicant testified that she started as a social worker with the respondent on 1 February 2013 on salary level 6. She applied for the SCO position in the Goodwood management area on salary level 8. She was interviewed for the post on 11 May 2017 and recommended for appointment.
14. The applicant referred to a PERSAL printout showing that the disputed post was abolished on 1 January 2018. She said that continued to perform social services in Goodwood until her promotion on 1 July 2020. The applicant explained that even though she had lodged a formal grievance during 2018, the respondent did not inform her that the post was abolished. It was only at this arbitration that she became aware of the abolishment of the post.
15. The applicant agreed that although she was recommended as the preferred candidate that no approval for her appointment was granted by the appointing authority.

16. Mr. Mulima argued that the respondent's conduct in not appointing the applicant is capricious, irrational and unfair. He further argued that the applicant had a legitimate expectation to be appointed and that the respondent could have appointed the applicant. He commented that it appears that the respondent is working in silo's because the DIU recommended that the respondent appoint the applicant but seemingly been unaware that the post was abolished. He submitted that the applicant is entitled to protected promotion.

The Respondent's case

17. The respondent did not call any witnesses. Mr. Lufhondo argued that the interview panel and DIU has only made recommendations. The decision to appoint lies with the appointing authority. Promotion is at the discretion of the respondent and the applicant could not be appointed into a post that was abolished.

ANALYSIS OF EVIDENCE AND ARGUMENTS

18. Section 186(2) of the Labour Relations Act, 66 of 1995, as amended, defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee involving inter alia unfair conduct by the employer relating to promotion. The onus is on the applicant to prove unfair conduct on the part of the Respondent (*eThekweni Municipality vs SA Local Governing Bargaining Council & Others* [2009] JOL 23625 (LC)).
19. I will begin by briefly setting out the principals to be taken into account in dealing with promotion disputes.
20. In *SAPS v SSSBC & Others* (2010)/P426-08 (LC) the Labour Court amply sets out the governing law on promotional disputes and goes on providing the following principles to determine unfair conduct relating to promotions:
- There is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. The exceptions are when there is a contractual or statutory right to promotion
 - Any conduct that denies an employee a fair opportunity to compete for a post constitutes an unfair labour practice.
 - If the employee is not denied the opportunity of competing for a post, the only justification for scrutinising the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason.
 - The corollary of this principle is that as long as the decision can be rationally justified, mistakes in the process of evaluation do not constitute unfairness justifying an interference

with the decision to appoint. See also *PSA obo Department of Home Affairs* (1999) 6 BLLR 577 (CCMA) where it was held that “...it must be stated that an employer cannot be said to have committed an unfair labour practice simply because it makes an unwise choice of candidate...”

21. In *SARS v SSSBC & Others* (2010)/P54-09 (LC) Basson, J held as follows:

- the decision not to promote should be exercised in a manner that does not constitute an unfair labour practice;
- the definition of an unfair labour practice refers to any unfair act or omission that arises between an employer/employee involving unfair conduct relating to promotion in terms of section 186(2)(a)/LRA '95. This definition has been interpreted by the LAC in *Department of Justice v CCMA & Others* (2004) 4 BLLR 297 (LAC) as referring to conduct relating to the actual promotion or non-promotion and conduct relating to promotion;
- the decision to promote or not to promote falls within the managerial prerogative of the employer. In the absence of gross unreasonableness or bad faith or where the decision relating to promote is seriously flawed, the Court and arbitrator should not readily interfere with the exercise of the discretion.
- The role of the commissioner is to oversee that the employer did not act unfairly towards the candidate that was not promoted. Contra: see *Minister of Safety & Security v SSSBC & Others* (2009) 18 LC 1.15.52 where it was held that an employer does not *per se* have an unfettered discretion when deciding whom to promote/the employer is not shielded from blatant forms of unfair labour practices.

22. In casu, the applicant was the best candidate for appointment to the SCO DH Care post at the Goodwood Management Area that was advertised on 27 June 2016. This is evident from the interview panel's recommendation during June 2017.

23. Unfortunately, allegations were made about irregularities during the appointment process which concerned the chairperson of the interview panel. The respondent decided, at that stage, not to make an appointment but to refer the allegations to the DIU for investigation. The decision of the respondent was reasonable. Because if it went ahead and made an appointment in spite of the allegations, and it later turned out that the allegations were true, it could have had serious consequences for the respondent and the person appointed to the post. Disputes could have been lodged by candidates who were not appointed and it could have resulted in the setting aside of the appointment of the successful candidate.

24. Whilst the DIU investigation was ongoing, the respondent abolished various positions in the Western Cape Region. The discretion to abolished posts falls within the prerogative of the respondent. There is not evidence that only the SCO DH Care post was targeted to abolishment.
25. By the time that the DIU reported that the allegations were unsubstantiated, the SCO DH Care post at the Goodwood Management Area were already abolished. The decision of the respondent then to not to continue with the appointment process into an abolished post was not irrational or unfair because the post did not exist anymore.
26. I agree with Mr. Mulima that it appears that the respondent is working in silos. And it is inexplicable why the respondent did not inform the applicant when she lodged her grievance in 2018 that the post was abolished and that no appointment would be made. Had the respondent done so, this matter might not have been referred to the bargaining council. It turned out that the respondent waited until the arbitration to inform the applicant that the post was abolished. How incomprehensible the lack of acceptable communication with the applicant might be, I cannot find that the decision not to appoint the applicant for the reasons I have explained above was grossly unreasonable, irrational or unfair.
27. For the above reasons I find that the applicant has failed to discharge the onus of proving that the respondent committed an unfair labour practice relating to promotion.

AWARD

The applicant has failed to discharge the onus of proving that the respondent committed an unfair labour practice relating to promotion. The application is dismissed.



GPSSBC Panellist: Jacques Buitendag