



**REPUBLIC OF SOUTH AFRICA**  
**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**  
**JUDGMENT**

**Not Reportable**

C25/14

In the matter between:

**FERIAL ABDURAHMAN**

Applicant

And

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT**

**BARGAINING COUNCIL**

First Respondent

**GAIL McEWAN**

Second Respondent

**DEPARTMENT OF DEFENCE**

Third Respondent

**Date heard: February 4 2015**

**Delivered: 30 April 2015**

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**JUDGMENT**

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**RABKIN-NAICKER J**

- [1] This is an opposed application to review an arbitration award under case number PSHS600-11/12. The second respondent (the Commissioner) found that the applicant had failed to establish that the third respondent (the department) had committed an unfair labour practice by not promoting her to the position of Head: Clinical unit.
- [2] The applicant graduated with a medical degree from the University of Cape Town in 1989. She was employed by the Western Cape Department of Health

at Groote Schuur Hospital from January 1999 until July 2001. She occupied the position of Principal Medical Officer in the Department of Obstetrics and Gynecology. She transferred to 2 Military Hospital in Wynberg Cape Town and was appointed to the position of Chief Medical Officer at the same level post as she had been at Groote Schuur, a level 12 post, on 1 August 2001.

- [3] In May 2003, applicant was admitted as a Fellow of the College of Obstetricians and Gynecologists of South Africa and on 4 May 2004 was registered as a Specialist: Obstetrics and Gynaecology with the Health Professions Council of South Africa. Following her registration, she was with effect from 5 May 2004 appointed as a Senior Specialist by the Department – which occurred in terms of a “functional promotion” in that she did not have to make application for it.
- [4] Three years later on 4 May 2007 she applied for the position of Principal Specialist. She applied by virtue of having served three years as a Senior Specialist. She was not so promoted.
- [5] With effect from 1 July 2009, after she had spent a further two years working in the post of Senior Specialist, the OSD was introduced in the public service nationally. The OSD process translated a Senior Specialist to the position of Medical Specialist Grade 3 in the new dispensation, and the post of Principal Specialist to Head: Clinical Unit.
- [6] Applicant’s complaint at arbitration was that she should have been promoted to the post of Principal Specialist by the time of the OSD coming into operation, during 2007. Had she been promoted to a salary level 13 prior to 1 July 2009 when the OSD took effect, then she would have been translated to the position of Head: Clinical Unit in terms of the OSD.
- [7] On the 11 April 2011, applicant submitted a formal grievance regarding the failure of the Department to promote her. Her promotion was proposed and supported by among others the Surgeon General in a letter dated on 11 April 2011. However, on 23 May 2011 she was officially informed that her request for promotion had not been approved. She then referred a dispute to the Bargaining Council.

- [8] The letter from the Department giving reasons for the refusal for promotion read *inter alia* as follows:

“Take note that DoD cannot comply with your request for the occupation class transfer of Dr Abdurahman from medical specialist Grade 3 (MSP4) to Head Clinical Unit Grade 1 (MSP8).

According to the Department of Public Service Administration (DPSA) Circular No. 4 of 2009, par 18, (including promotion of an existing employee) to a higher post is dependent on the availability of a funded vacancy and such vacancy shall be advertised and filled through open competition.”

- [9] The applicant explains the Department’s stance as the following: “because I was acting in and/or held against the post of Head: Clinical Unit, in the Obstetrics and Gynaecology Department in 2 Military Hospital, the DOD viewed the post as not being vacant.” At the arbitration proceedings she asked that she be promoted, failing which that she would like the post advertised so that she could apply for it.
- [10] The Department argued at arbitration that as a public service employee applicant has no right to functional promotion applicable to militarized posts for medical specialists. This was never mentioned prior to arbitration as a reason for her non- promotion. In addition, it was only at arbitration that the Department testified that, two weeks previously, it had found that it had made an error in translating the applicant when the OSD came into effect- in that she did not have the requisite years of registration at a specialist at that time. The Department has now told the applicant she must pay back an alleged overpayment of R739 000 given its view that applicant should in fact have been demoted from level 12 to level 11 when the OSD translations were done.

- [11] In her award the arbitrator found as follows:

“(21) A communication was sent out by the Surgeon General dated 10 September 2004 which specifically refers to the South African Military Health Specialists (SAMHS) and although working at a military hospital Abdurahman was never part of the military, did not wear a uniform nor hold any rank. It is in

terms of this communication that Abdurahman believed she had the requisite four (later changed to three years' experience) and should therefore have been promoted to the position of principal specialist at level13. However automatic promotions had been abolished since July 2001 for public service appointees and Abdurahman was not entitled to be automatically promoted to the post of principal specialist. Then the OSD was implemented with effect from 1 July 2008. Abdurahman was translated in terms of part 13 which was intended for those medical specialists who had more than 10 years' experience. The trigger for experience is the registration with the Health Professions Council with whom Abdurahman registered in 2004. She clearly did not have sufficient experience and by admission from the employer was incorrectly translated. The error meant that Abdurahman benefitted financially from the OSD translation. As a public servant Abdurahman was not entitled to the promotion to principal specialist before the implementation of OSD and therefore it follows that after OSD she was not entitled to be translated to Head:Clinical Unit.

(22) In terms of the automatic promotion to Head:Clinical unit I find on a balance of probabilities that Abdurahman has failed to establish that she was entitled to this promotion.

(23) Looking holistically at the situation it is indeed unfortunate that the employer never properly explained to Abdurahman that which has now been clarified at arbitration. I find on a balance of probabilities that Abdurahman has failed to establish that the employer committed an unfair labour practice by not promoting Abdurahman to the position of Head:Clinical unit."

[12] If regard is had to the record of the arbitration, it is put to the applicant by counsel for the Department at the end of her cross examination, that in order for applicant to get the post of Head: Clinical Unit:

"I put it to you there are two possible options, you either militarise your position and the head of military will then approve it, as my instructions are that its within his or her prerogative to do so, but the post won't have to be advertised. Your other option is that you apply in a process of open

competition for the post of head clinical unit once it is advertised here at the hospital.”

- [13] These are extraordinary propositions given that the power to exercise either option lies with the Department as employer. The findings made by the arbitrator, in light of these possible remedies relied on by the Department itself, are those that a reasonable arbitrator could not make. I must agree with Mr Stelzner that the fundamental question before the arbitrator was whether an unfair labour practice (i.e. unfair conduct by the employer) had been committed in relation to promotion in the specific circumstances of the case. The applicant had been employed as the de facto head of the unit in which she rendered services at the level of a level 13 employee, without due remuneration, and had been doing so to the satisfaction of all concerned for more than a decade without being promoted.
- [14] The Department’s stated reason for declining her promotion pursuant to her grievance defies logic i.e. that because she was “held against” the post it was not vacant in order for her to apply to be appointed to it. It is patently unfair to expect someone to do the work required of a post but prevent their promotion to it by virtue of it not being considered vacant on the establishment.
- [15] I would thus agree that the arbitrator in this matter misconceived the nature of the enquiry before her, which should have been into the fairness of the employer’s conduct relating to applicant’s promotion. Instead she got embroiled into trying to decide which prescripts were applicable to the applicant. It is unclear to me on the papers as to whether once someone has joined the Department ‘from outside’ as a medical specialist, that their subsequent promotions are subject to different prescripts from their colleagues doing the same job, but who are in uniform.
- [16] The record contains a memorandum dated 16 April 2003, sent out by the Surgeon General on 10 September 2004, (two years after applicant joined the hospital) the aim of which was to spell out the career management imperatives for medical officers and specialists in the SAMHS. It states that if a medical officer is appointed ‘from outside’ on level 12 there must be a funded post that was advertised. It also states that if a medical specialist is

appointed 'from outside' on level 12 or 13 they must be appointed with the rank of major. This letter was interpreted by the arbitrator to be one applying only to military posts and not to personnel employed in terms of the PSA. This begs the question of who appointees to the SAMHS 'from outside' are if not someone in the position of applicant?

- [17] The applicant's letter of appointment dated 11 July 2002 contained in the Department's bundle at arbitration, refers to the mission of the SAMHS. It provides as one of the aims of the post to promote a favorable, positive image of the SAMHS and to promote high morale by the establishment of a unique SAMHS culture. In the performance agreement entered into by the applicant and the acting head of the department, her job details include a force number and it is recorded that her division is the SAMHS. No clearer representation than this could have been made to the applicant that she was part of the SAMHS. Why would a medical officer or specialist join the SAMHS from "outside" if unlike their colleagues in uniform they could not be afforded the same promotion opportunities? Unfortunately answers to the questions I pose have not been dealt with in the papers. The inference I draw from the documents in the record, including those I have specifically mentioned above, is that the arbitrator was incorrect in her understanding of the prescripts governing promotion of somebody in applicant's position. However, even if I am wrong, the award still stands to be set aside given the arbitrators failure to deal with the issue of fairness and to come to the conclusion that an unfair labour practice had been perpetrated against the applicant.
- [18] In her submissions before me Counsel for the Department, Ms Golden, argued that the applicant was not acting in the post of Head: Clinical Unit but that she was 'carried against that post', it being the only vacancy that 2 Military Hospital had at the time that applicant was transferred from Groote Schuur. She repeats in her heads of argument that the applicant has the option of applying to have her post converted to a military post in terms of the Defence Act. She submits that the Department ought also to have informed the applicant that she was not entitled to a functional or automatic promotion and that: "It is correct that this evidence was only proffered by the Department

in the arbitration but nevertheless remains a legitimate reason why she does not qualify to be promoted automatically.”

- [19] In view of all of the above, the award stands to be set aside and substituted, there being no reason to remit the matter. The unfair conduct against the applicant is patent and in my judgment an appropriate equitable remedy derived from the remedial powers afforded to an arbitrator when making an award under section 193(4) of the LRA<sup>1</sup> must include protected promotion in this case. In all the circumstances of this case, I make the following order:

Order:

1. The Award under case number PSHS600 is hereby reviewed and set aside and substituted as follows:
  - 1.1 The Applicant has been subject to an unfair labour practice concerning promotion in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995;
  - 1.2 The Third Respondent is ordered to advertise the post of Head: Clinical Unit Department of Gynaecology: Two Military Hospital within a period of six weeks from the date hereof and to consider any application received from the Applicant in this regard in the process of filling this post;
  - 1.3 The Applicant is protectively promoted to a salary level 13 for the period from 4 May 2007 up until the completion of the process of filling the post as provided for in clause 1.2 above;
  - 1.4 The Third Respondent is ordered to compensate the Applicant with an amount equivalent to the difference in pay between a Medical Specialist Grade 3 and a Principal Specialist/Head: Clinical Unit for the period of the protected promotion;
  - 1.5 The Third Respondent is to prepare a calculation of the compensation payable for presentation to the Applicant within

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<sup>1</sup> Minister of Safety & Security v Sectoral Bargaining Council & others (2010) 31 ILJ 2680 (LC) at paragraphs 22 - 24

four weeks hereof and if the parties cannot reach agreement on this calculation, the matter shall be re-enrolled for further determination of the sum to be paid before the Labour Court.

2. The Third Respondent is to pay the costs of the review application.

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H. Rabkin-Naicker  
Judge of the Labour Court

Appearances:

Applicant: RGL Stelzner SC instructed by Bernadt Vukic & Potash

Third Respondent: T. Golden instructed by the State Attorney