



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR 2569/07

In the matter between:

John KEARNS

Applicant

and

V PHATSHOANE N.O.

First Respondent

PHWSBC

Second Respondent

**DEPARTMENT OF SOCIAL
SERVICES AND POPULATION
DEVELOPMENT (NORTHERN
CAPE)**

Third Respondent

JOHAN VAN DEN BERG

Fourth Respondent

Heard: 3 June 2015

Delivered: 30 June 2015

Summary: Review – unfair labour practice – failure to promote.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr John Kearns, works for the third respondent, the Department of Social Services and Population Development of the Northern Cape. He applied for a promotional post. He was unsuccessful. He referred an unfair labour practice dispute to the second respondent, the Public Health and Welfare Sectoral Bargaining Council. Conciliation was unsuccessful. The first respondent, Ms V Phatshoane, sat as arbitrator. She found that the Department had not committed an unfair labour practice. Kearns applies to have that award reviewed and set aside.

Background facts

[2] The applicant is a Deputy Director: Labour Relations and Legal Services. The Department advertised a post as Director: Labour Relations and Legal Services. The applicant applied. The requirements for the post stipulated in the advertisement included the following:¹

“Applicants must be in possession of a relevant Bachelor’s Degree or equivalent tertiary qualification and at least 8 years’ extensive management experience in Legal Services or Labour Relations. Extensive knowledge on [sic] legislation pertaining to Legislative Compliance is a prerequisite. A valid driver’s license is essential. Knowledge of legislation governing the Public Service is an added advantage”.

[3] The applicant was shortlisted and interviewed. At his interview, he was told that the advertised post would be split into two, viz Director: Labour Relations and Director: Legal Services respectively. He was interviewed for both posts. He was unsuccessful. The fourth respondent, Mr Johan van den Berg, was appointed as Director: Labour Relations. The applicant lodged a grievance. It was unresolved. He referred an unfair labour practice dispute relating to promotion to the Bargaining Council. Conciliation was unsuccessful and he referred it to arbitration.

¹ Unnecessary capitalization as in original.

[4] The applicant argued that the failure to promote him to the position of Director: Labour Relations was an unfair labour practice for the following reasons:

- 4.1 The successful candidate, Van den Berg, did not have a Bachelor's degree "or equivalent tertiary qualification".
- 4.2 Van den Berg did not have "at least 8 years' extensive management experience in labour relations".
- 4.3 The Department's decision to split the two posts was unfair and in breach of public service regulations.
- 4.4 The selection panel did not properly apply its mind to Van den Berg's appointment.
- 4.5 Van den Berg had been promised the post beforehand; and
- 4.6 Van den Berg had been dismissed by his previous employer, the trade union HOSPERSA, and had not disclosed it.

The award

[5] The arbitrator, quite correctly, commenced her analysis by referring to John Grogan's *Workplace Law*² :

"Employers are guilty of unfair conduct relating to promotion if they give employees a reasonable expectation that they will be advanced and then, without adequate reason, frustrate that expectation. It has also been held to be unfair for an employer to advertise a position, setting a prescribed minimum qualification, and then to appoint a person who did not possess that qualification..."

[6] The arbitrator also correctly noted that, in terms of the advertisement for the post, it was a requirement to have a Bachelor's degree or equivalent tertiary qualification; and that it was undisputed that Van den Berg had no degree. She continues:

"What then had to be determined on this score was whether the course that [Van den Berg] attended at the CCMA was an equivalent tertiary qualification. From the testimony of the applicant NQF5 is a diploma while

² 2007 at 263.

NQF6 is a degree. The applicant advanced that the course attended by [Van den Berg] had no SAQA value. As proof of this he relied on the e-mail sent by one Mr Keet around September 2006 to Ms Yolande van Dyk...”

- [7] The CCMA commissioner training course referred to is a 27 day course to be trained as a CCMA commissioner.
- [8] The arbitrator found that the email “clearly does not say that the course had no SAQA value at the relevant time when [Van den Berg] applied, this email rather reads ‘note that the coordinator was unable to forward the NQF status of the course since they are still awaiting accreditation, however he did inform me that the course was previously accredited and that it has expired... We are currently awaiting renewed recognition”.
- [9] The arbitrator then referred to recognition of prior learning and formed the view that “the applicant gave his case away on the lack of qualifications of [Van den Berg] when he referred me under cross examination to... a letter dated 13 July 2006 from the Public Service Coordinating Bargaining Council.” That letter reads:

“Your query pertaining to the NQF level for the CCMA training has reference.

Please note that Mr Maripe Majokotja of the CCMA training department confirmed this morning that the CCMA Commissioner Training Course is presented on NQF level 5 i.e. equivalent to a diploma.”

- [10] The arbitrator then concluded:

“On the strength of the letter from the PSCBC above which was handed in by the applicant himself I am not persuaded that [Van den Berg] did not have the relevant qualification. As a party making an allegation of lack of qualifications on the part of [Van den Berg] the applicant ought to have demonstrated that the qualifications required for the position were indeed lacking rather than merely referring me to an email of Mr Keet referred to above which in my view says nothing pertaining to the qualification of the applicant at the time when he attended interviews and or subsequently.”

- [11] After having had regard to the other complaints raised by the applicant, the arbitrator found in summary that she was satisfied that the Department had regard to the qualifications and experience attached to the post and

applied its mind to the interview process. She concluded that the department did not commit an unfair labour practice against the applicant.

Review grounds

[12] The applicant submits that the arbitrator committed a reviewable irregularity by ignoring the fact that Van den Berg did not meet the minimum requirements for the post. Given my view on that ground of review, I need not consider the others.

Evaluation / Analysis

[13] Before I deal with the merits of the review application, I need to deal with two applications for condonation.

Condonation: Founding affidavit

[14] The review application was seven weeks late. The applicant was initially not legally represented. He took advice from his trade union. The union told him to appoint an attorney. When he did so, the attorney, Mr Yusuf Nagdee, told him that he was a panellist for the PHWSBC (the second respondent) and therefore had a conflict of interest and could not assist him. Further delays were occasioned by the applicant having to find new attorneys, based in Johannesburg, while the applicant is based in Kimberley.

[15] Although the delay is quite lengthy, the explanation is acceptable. As will become apparent, the applicant's prospects of success are good. And more importantly, there is no prejudice to the Department, given the much lengthier delay occasioned by it and the state attorney in delivering the answering affidavit, to which I now turn. Condonation is granted for the late filing of the review application.

Condonation: answering affidavit

[16] The answering affidavit was delivered four months late. On 9 September 2010 Basson J ordered the Department to deliver an application for

condonation within 10 days. The Department and the state attorney failed to do so. They only did so on 4 October 2010, almost a month later.

[17] The explanation for lateness is poor. It is mainly due to the incompetence of the state attorney. The state attorney in Kimberley briefed an Adv Memani in Johannesburg to “prepare an opinion” in this matter as long ago as 11 February 2008. Inexplicably, a consultation was only held with advocate Memani almost one and a half years later, on 9 June 2009. The applicant had filed his notice in terms of rule 7A(8)(b) on 6 April 2009. It then took Adv Memani more than a month until 15 July 2009 to prepare a draft answering affidavit. The acting Head of Department who eventually deposed to the undated answering affidavit that was only delivered another month later, on 17 August 2009, Mr Herman Matlhomola Mooketsi, “was also confronted with an extra workload which made it difficult for him to attend not only to his work but the extra burden placed upon him, including the matter *in casu*” – being an answering affidavit comprising 13 pages.

[18] The delay in filing the answering affidavit is excessive and the explanation therefor is poor. To make matters worse, the Department and the State Attorney did not comply with Basson J’s order to deliver the application for condonation within ten days of 10 September 2010. For that non-compliance it offered no explanation. And as will appear below, the Departments prospects of success are not good. The application for condonation for the late filing of the answering affidavit is dismissed.

The merits

[19] The most important bone of contention is Van den Berg’s not having a Bachelor’s degree. That much is common cause. The remaining question is whether the arbitrator’s finding that “the applicant ought to have demonstrated that the qualifications required for the position were indeed lacking”, was a reasonable one.

[20] The arbitrator effectively put the onus on the applicant to show that the 27-day course that Van den Berg had attended, is somehow equivalent to a Bachelor’s degree of three years. [The arbitrator’s reference to the

applicant's qualifications, and that the email from Mr Keet is "irrelevant" to the applicant's qualifications, is hard to fathom. It is and was common cause that the applicant did have a B Iuris degree].

- [21] The email from Mr Keet – apparently an employee of the Northern Cape provincial government – does nothing more than stating a hearsay allegation that the CCMA course, no longer accredited, was previously accredited at NQF level 5. There is nothing in the evidence to suggest that that is equivalent to a Bachelor's degree. It is indeed highly improbable that a 27-day course, not offered by a university, can be equated to a three-year degree.
- [22] In the documentation that was presented to the arbitrator, there does appear a computer printout, apparently from the personnel administration of the national Department of Public Works. That printout equates NQF level 5 with a "higher certificate" while a Bachelor's degree is equivalent to an NQF level 7. However, it does not appear that any definitive evidence was led before the arbitrator to explain what the actual SAQA accreditation of the CCMA course was; or, if it could be equated to NQF level 5, what that equivalent would be when compared to a Bachelor's degree. At the very least, there was no evidence to suggest that Van den Berg did possess a tertiary qualification equivalent to a Bachelor's degree.
- [23] Faced with this lack of evidence, the arbitrator's conclusion that Van den Berg did meet the qualifications for the job, specifically a Bachelor's degree or the equivalent tertiary qualification, was so unreasonable that no other arbitrator could have come to the same conclusion. And that conclusion led to her further conclusion that the Department did not commit an unfair labour practice.
- [24] That conclusion must be reviewed and set aside. Another arbitrator must decide, at the hand of proper evidence, whether Van den Berg did or did not have the requisite qualifications. Given my finding in this regard, it is unnecessary to consider the remaining grounds of review.

Conclusion and Costs

[25] The dispute turns primarily on the question whether Van den Berg had a qualification equivalent to a Bachelor's degree, which is a prerequisite for the contested post. No proper evidence was placed before the arbitrator to answer this question, neither did she ask for any such evidence. It was a reviewable irregularity for her to place the onus on the applicant to prove a negative, i.e. that Van den Berg did not have an equivalent qualification, when it was common cause that he did not have a Bachelor's degree. The only way to correct that irregularity is to remit the dispute to the Bargaining Council in order for the relevant evidence to be placed before another arbitrator in order to determine whether Van den berg did or did not fulfil the requirements for the job, i.e. whether he did or did not have the equivalent of a Bachelor's degree.

[26] The upshot is that the dispute remains unresolved. In law and fairness, even though the applicant has been successful to the extent that the award has been set aside, I do not consider a costs order in those circumstances to be appropriate, especially since the applicant is still employed by the Department. However, the Department should pay the costs occasioned by its late filing of the answering affidavit and its non-adherence to the Basson J's order.

Order

[27] I therefore make the following order:

27.1 The arbitration award under case number PSHS 487-06/07 is reviewed and set aside.

27.2 The dispute is remitted to the second respondent (the Bargaining Council) for a fresh arbitration before an arbitrator other than the first respondent.

27.3 The third respondent (the Department of Social Services and Population Development, Northern Cape) is ordered to pay the costs for the condonation application occasioned by the late filing of its answering affidavit and concomitant application for condonation.

Steenkamp J

APPEARANCES

APPLICANT: T Mapheto (attorney).

THIRD RESPONDENT: T Mkhwanazi
Instructed by the State Attorney, Kimberley.