IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C 727/16

Reportable

In the matter between:

ESKOM HOLDINGS SOC LTD	**Applicant**
and	
NUM obo N COETZEE & 4 OTHERS	**First Respondent**
C M BENNETT N.O.	**Second Respondent**
CCMA	**Third Respondent**

Heard: 18 October 2017

Delivered: 14 November 2017

Summary: Review – unfair labour practice – regrading – whether CCMA had jurisdiction in terms of LRA s 186(2)(a). Award set aside on merits despite CCMA having jurisdiction. Award not reasonable – conclusion disconnected from the evidence.

JUDGMENT

STEENKAMP J:

Introduction

[1] The National Union of Mineworkers (NUM, the first respondent) represents five of its members who are employed by the applicant, Eskom, at its Koeberg nuclear power station. They successfully referred an unfair labour practice dispute in terms of s 186(2)(a) of the Labour Relations Act[1] to the CCMA.[2] Commissioner C M Bennett[3] found that Eskom had committed an unfair labour practice when it failed to upgrade the employees as part of its "Transformation and Migration Process". He ordered Eskom to upgrade four of them to level T10 (warehouse supervisor) from level T6 on the TASK grading system; and one of them, M Zatu, to level T12 (senior warehouse supervisor) from level T10. He also ordered Eskom to pay them backpay calculated on the difference in salaries. Eskom seeks to have the award reviewed and set aside.

[2] At the beginning of the hearing, I granted condonation for the late filing of the review application and the answering affidavit. Neither application for condonation was opposed.

Background facts

[3] Four of the employees – Coetzee, Lambert, Smit and Wolstenholme – were graded as "senior storepersons" at grade T6. They claimed that they were performing duties as "warehouse supervisors" at T10. The fifth, Zatu (aka Tafeni), was graded at T10 as a warehouse supervisor. He claimed to be performing duties as a "senior warehouse supervisor" at grade T12.

[4] The employees submitted grievances seeking the reclassification or regrading of their posts. Eskom embarked on a "Transformation and Migration process". One of the stated aims of this process was to harmonise grading structures across Eskom's divisions and regions. The principles of that process envisaged three scenarios:

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[1] Act 66 of 1995 (the LRA).

[2] The Commission for Conciliation, Mediation and Arbitration (the third respondent).

[3] The second respondent (the arbitrator).

4.1 Positions that are unaffected, i.e. the job profile (job content, minimum requirements and grade) and location remain the same.

4.2 Positions that have changed by less than 30%, in which case grading would remain the same.

4.3 Positions that have changed more than 30%, i.e. after regrading the new grade attached to the job would be higher than the old one.

[5] The outcome for the applicants was that Tafeni remained at T10 and the other four employees remained at T6.

[6] On 21 May 2015 Eskom's "senior manager – nuclear commercial" , B Culligan, sent Tafeni (aka Zatu) a letter in these terms:

> "Dear Mr Tafeni
>
> **APPOINTMENT DURING ESKOM TRANSITION**
>
> **POSITION:** WAREHOUSE SUPERVISOR
>
> **GRADE**: T10
>
> **DEPARTMENT/SECTION**: SUPPLY CHAIN OPERATIONS
>
> It is confirmed that Eskom is currently in a transition in order to implement its business plan. In terms of the principles that govern the migration of employees during the transition, Eskom has given the undertaking that no loss of employment will occur during this process.
>
> In order for Eskom to honour that undertaking you are hereby informed the job content, designation and grading of your current position have remained unchanged.
>
> You do not have to reapply for your current position since your position is not affected by the transformation.
>
> All your Eskom staff benefits, terms and conditions of employment, and remuneration remain unchanged.
>
> Feel free to contact the author or your HR practitioner should you have any queries.
>
> I wish you success in your career and trust that you will be successful in your work environment."

[7] The other four employees received similar letters, advising them that they would remain on T6 as "senior storeperson". They were dissatisfied. They appealed to the Employee Care Group (ECG), a body that was established to deal with disputes arising from the process. It operated on these principles:

> "Employee Care Group (ECG) is a system of committees that is composed of representatives from Eskom management and the trade unions recognised by Eskom. The purpose is to monitor the implementation of these principles and rules, to facilitate the placement of unplaced employees and to resolve appeals lodged by employees in terms of these principles and rules. The ECG will be established at BU/OU/divisional and national levels."

[8] The ECG panel hearing the appeal of the five employees at divisional level comprised, inter alia, a number of union and management representatives, including Mr Lionel Henn, a human resources business practitioner at Koeberg. It met on 14 July 2015. The minutes of that meeting reflect the following:[4]

> "**Koeberg Power Station – Warehouse Supervisors**
>
> **Job Title – Snr Storeman (T06)**
>
> Labour representative was present.
>
> **Appellants gave background on the case:**
>
> The appellants are T6 operating at a T10 level (senior supervisors). Their job went for grading and came back as T10. They believe that they should be upgraded to T10 based on the job outputs and that the jobs were graded at T10.
>
> There desired outcome with the appeal is that management and HR upgrades them to T10.
>
> **Response from management and HR:**
>
> Management confirmed that the employees are operating at T10 level. In 2007 they logged an appeal and the jobs went for grading and came back at T10 level. Management supported that they should be upgraded to T10

[4] My underlining.

> because they play pivotal role in the Department and they perform the duties very well and it's only fair that they are appointed as T10.
>
> HR confirmed that the employees logged a grievance in 2007 and outcome of the grievance was that they wait for the transformation process. When the jobs were graded at T10, remuneration and benefits rejected that they be moved to T10 because on SAP they were occupying T6 positions.
>
> **ECG response and recommendation:**
>
> ECG advised management and HR to rectify the employees' designation on SAP and automatically they will be upgraded at T10 because the grades will be correct."

[9] It will be immediately apparent that the recordal that the employees' jobs had been regraded at T10 is not commensurate with the letters they received two months earlier, in May 2015.

[10] On the other hand, in respect of Zatu (Tafeni), at least, the letter of May 2015 is contradicted by an earlier letter that Lionel Henn sent him in December 2014. In that letter, Henn informed him that his job profile had changed more than 30% and that the job evaluation had confirmed his new grading at TASK grade 12 at the position of senior warehouse supervisor. He also told Tafeni:

> "It is confirmed that after consultation with you it was determined that you:
>
> do not meet the minimum requirements established by the new job profile and that you have the necessary skills, knowledge and experience to perform the job outputs."

[11] The other four employees did not present similar letters to the arbitrator but claimed that they had also been upgraded before December 2014.

[12] On 3 September 2015 Lionel Henn sent an email to a number of his employees with the subject line, "Warehouse employees" and reading as follows:

> "Hi colleagues
>
> You would recall that the ECG recommended that we should "rectify the employees' designation on SAP". We did the paperwork and sent it to HRSSU, but they requested that Remuneration and Benefits (R&B) sign it off because of the change in grading. Subsequently it was sent to them.

> After my engagement with Beulah at R&B she informed me that she is not comfortable signing these grade changes. The requirement from HRSSU to have the paperwork signed by R&B did not yield success and therefore these grading changes cannot happen.
>
> Regards
>
> Lionel."

[13] The reference to HRSSU is to the Human Resources Shared Services Unit. Beulah Sishuba is a middle manager in that unit, dealing with remuneration and benefits.

Referral to CCMA

[14] The employees were unhappy with the failure to upgrade them. Their trade union, NUM, referred an unfair labour practice dispute to the CCMA on their behalf in terms of section 186(2)(a) of the LRA.[5]

[15] In their initial referral to conciliation, the dispute was described as follows:

> "The company refuses to upgrade our members as per the migration principles. Please note that our members are already doing the work at the higher grade."

[16] The union asked as a result of conciliation that "the employer must upgrade our members." Conciliation failed. The union requested arbitration, describing the issues in dispute as follows:

> "Promotions was [*sic*] not effected after the transformation process as guided by the migration principle document."

[17] The union requested that the arbitrator make a ruling that "the company must promote our members".

<u>The award</u>

[18] At the arbitration, Eskom raised a jurisdictional argument. It argued that, if the dispute related to the transformation and migration policy, it was one relating to the interpretation and application of a collective agreement; and

[5] Tafeni/Zatu was joined at a later stage.

because that was not the dispute that had been referred to the CCMA, the CCMA lacked jurisdiction.

[19] The arbitrator rejected that argument. He was satisfied that the dispute was one "concerning upgrading of posts". Relying on the authority of the Labour Appeal Court in *Apollo Tyres*[6] he found that "dispute of this nature may be categorised as an unfair labour practice disputes" in terms of s 186(2)(a). He also cited *Thiso & ors v Moodley NO*[7] and found that the dispute about grading is what of benefits because, should the job be upgraded, the applicant would be entitled to better benefits.

[20] Having found that he does have jurisdiction and that the dispute over regrading concerned one of "benefits" as an unfair labour practice, the arbitrator accepted that, "according to the minutes of the respective ECG meetings, local management and HR accepted that the employees *were* carrying out the duties of the jobs claimed". He found that Eskom committed an unfair labour practice when it failed to treat the applicants in the same way that it treated another group of employees, Van Wyk *et al*. Those employees were upgraded to T10. He concluded:

> "It is clear from the documentary evidence (ECG minutes) that applicants are carrying out the duties described in the T10 and T12 job descriptions and that the ECG should have placed them into those positions as it did with Van Wyk and his colleagues."

[21] The arbitrator ordered Eskom to upgrade the employees with effect from 1 September 2014.

Grounds of review

[22] Mr *Boda*, for Eskom, raised the following grounds of review:

22.1 Lack of jurisdiction: The arbitrator incorrectly found that Eskom had committed an unfair labour practice in terms of section 186(2)(a) when it failed to upgrade the employees as part of the transformation and migration process. The dispute was not about promotion and thus the CCMA lacked jurisdiction to hear the matter.

[6] *Apollo Tyres South Africa (Pty) Ltd v CCMA* (2013) 34 *ILJ* 1120 (LAC).

[7] [2015] 5 BLLR 54 (LC).

22.2 The decision and outcome was not one that a reasonable decision-maker could have arrived at. He identified six individual "difficulties" which, he submitted, individually or cumulatively render the award and result unreasonable.

22.3 The Commissioner acted in a procedurally unfair manner and misconceived his duties as an arbitrator.

Evaluation / Analysis

[23] I will deal with each of the three broad review grounds in turn.

Jurisdiction

[24] Mr *Boda* argued that the CCMA did not have jurisdiction. On questions of jurisdiction, the reasonableness test in *Sidumo*[8] does not apply. The question is simply whether the arbitrator was right or wrong when he ruled that the CCMA did have jurisdiction.[9]

[25] Did the CCMA have jurisdiction? The first point of departure is the union's referral of the dispute. Although the referral form in the CCMA does not constitute pleadings like a statement of claim in a referral to this Court does, I think the following *dictum* of the Constitutional Court in *Gcaba* [10] addresses the same principle when considering the question of jurisdiction rather than the merits of the claim:

> "[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the

[8] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 29 *ILJ* 1097 (CC).

[9] *SARPA v S A Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC) par 40; *Public Servants Association v Minister of Correctional Services* [2017] 4 BLLR 373 (LAC) par 20; *Parliament of the RSA v NEHAWU* [2011] 9 BLLR 905 (LC) par 15; *Thiso & ors v Moodley NO* (2015) 36 *ILJ* 1628 (LC) par 6.

[10] *Gcaba v Minister of Safety & Security* (2010) 31 *ILJ* 296 (CC) par 75.

> pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."

[26] In this case, the union referred an unfair labour practice dispute[11] to the CCMA in terms of s 186(2)(a) of the LRA and, as set out above, it described the dispute as follows in the referral to conciliation:

> "The company refuses to upgrade our members as per the migration principles. Please note that our members are redoing the work at the higher grade."

[27] The union asked that "the employer must upgrade our members." When conciliation failed and the union requested arbitration, it described the issues in dispute as follows:

> "Promotions was [*sic*] not effected after the transformation process as guided by the migration principle document."

[28] The union requested that the arbitrator make a ruling that "the company must promote our members".

[29] It is clear from these referrals that the union referred an unfair labour practice dispute "relating to promotion" to the CCMA in terms of s 186(2)(a) of the LRA. That subsection reads:

> ' "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—
>
> (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to

[11] Initially two disputes, but they were consolidated and they were referred on exactly the same basis.

> probation) or training of an employee or relating to the provision of benefits to an employee;'

[30] It is beyond doubt that the CCMA has jurisdiction over a dispute involving a promotion. But, argued Mr *Boda*, this was a dispute over grading. It does not fall into the definition of an unfair labour practice. It is either a mutual interest dispute that is not arbitrable, or it is a dispute over the interpretation and application of a collective agreement that must be dealt with in terms of s 24 of the LRA.

[31] Mr *Boda* referred to *Public Servants Association v National Prosecuting Authority*[12] and to *MEC, Department of Sports, Recreation, Arts & Culture, Eastern Cape v GPSSBC*[13] in support of his argument that a grading dispute is a matter of mutual interest and thus not arbitrable as a promotion dispute.

[32] In *NPA* the Labour Appeal Court accepted[14] that "[i]n the normal course of mutual interest disputes such as this one was alleged to be, upon the failure of conciliation, industrial action in the form of a strike or lockout would have ensued. However, no strike action was initiated as the employees of the NPA involved in this matter are precluded from engaging in strike action as they have been designated in terms of s 71 of the LRA to be engaged in an essential service." And it further accepted:[15]

> "The arbitrator's conclusion that the dispute was one of interest is, in my view, rationally connected to the material before him and his analysis of the facts before him. In this regard, he properly took account of the fact that if the recommendations for job upgrades had become legal entitlements in the form of rights, then the regulations provided no shield to the respondents to avoid total implementation until they had found money. Recommendations are just that and nothing more. They are required to be effected and/or implemented before crystallising into substantive rights. It cannot be that the appellants were entitled to the higher salaries but could not enjoy them until the NPA found money."

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[12] [2012] 8 BLLR 765 (LAC) [*NPA*].

[13] [2015] 12 BLLR 1224 (LC).

[14] In para 13 (my underlining).

[15] Par 29.

[33] In *MEC, Department of Sport* the facts were distinguished from those in *Mathibeli v Minister of Labour.*[16] There was no evidence that a job grading was done and that approval was granted for the upgrading of his post and that his claim was that he should be paid at the upgraded post. He was simply seeking to upgrade his salary level.

[34] As Ms *Ralehoko* pointed out, the authority in *NPA* is also questionable in the light of the more recent authority of the LAC in *Mathibeli.* In that case the Department employed the applicant as a legal officer at grade 10. After a job evaluation exercise, the grading team recommended that his post be upgraded to grade 11. The Department of Public Service and Administration told the Department that it could not be implemented as it had been done in error. He referred an unfair labour practice dispute to the Bargaining Council. At the arbitration the question arose whether it was a dispute of interest rather than a dispute of right. The arbitrator found that he did have jurisdiction. The Labour Court set that decision aside on review and held that it was an interest dispute. The Labour Appeal Court overturned the decision of the Labour Court. Sutherland AJA held that the arbitrator did have jurisdiction to arbitrate the matter, with reference to the decision by Freund AJ in *Potterill*:[17]

> "[15] In my view there is no merit in this point. The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct 'relating to the promotion' of the employees.
>
> [16] In my view regulation 24 requires one to draw a distinction between a decision to regrade a post and a decision to allow the incumbent employee in the regraded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is, in my view, 'promoted'. In my view such a situation falls within the first meaning given for the word 'promote' in The Concise Oxford Dictionary (9 ed), namely:

[16] (2015) 36 *ILJ* 1215 (LAC); [2015] 3 BLLR 267 (LAC).

[17] *National Commissioner of SAPS v Potterill* (2003) 24 *ILJ* 1984 (LC) par 11-16.

'V.tr.1 (often foll. by to) advance or raise (a person) to a higher office, rank, etc (was promoted to captain).'

[17] …

[18] The employees' complaint that regulation 24(6) had not been applied with regard to their posts and their request that their salaries be increased to the salary level of directors must, in my view, be construed as a complaint that they were entitled to be, but had not been, promoted. By alleging that their employer was guilty of an unfair labour practice they impliedly alleged unfair conduct on its part 'relating to' its failure to promote them. Having regard to the substance of the dispute as the parties understood it I am satisfied that this was a dispute about alleged unfair conduct relating to promotion.

[19] …

[20] I do not accept the argument that the dispute was a 'dispute of interests' which, for this reason, fell beyond the jurisdiction of the arbitrator. The employees' case was that they were the victims of an unfair labour practice and that, as a matter of law, they were entitled to salary increases. This was a 'dispute of rights'. The fact that the remedy sought was an increase in salary does not change the character of the dispute. A claim for a higher salary as a matter of right is not an 'interests dispute'."

[35] The LAC agreed with these sentiments and held that the arbitrator did have jurisdiction, although Mr Mathibeli's claim was meritless on the facts.

[36] Much the same pertains to this case. The union referred an unfair labour practice relating to promotion. Its case was that its members had been upgraded to levels T10 and T12 respectively and that they were entitled to be paid accordingly. That is a rights dispute over which the CCMA did have jurisdiction in terms of s 186(2)(a) of the LRA. That also distinguishes it from *NPA*, where the employees attempted to create fresh rights rather than relying on claimed existing rights.

[37] The fact that the arbitrator in this case decided instead that he had jurisdiction because it was an unfair labour practice relating to 'benefits', rather than relating to promotion, is, in my view, a bit of a red herring. Even if he was mistaken in that view, he still had jurisdiction to decide an

unfair labour practice dispute in terms of s 186(2)(a). Whether his award can be sustained on the merits is a different question.

[38] Ms *Ralehoko* also referred to *Parliament of the Republic of South Africa v NEHAWU*[18] in support of the argument – with which I agree – that the CCMA did have jurisdiction in this case. In that case, the trade union referred a dispute about an alleged unilateral change to the terms and conditions of employment after they had been appointed to new positions but kept on the same grades. The court found that the dispute concerned an alleged failure to promote and thus an unfair labour practice dispute.

[39] Ms *Ralehoko* quite properly pointed out that, before the decision in *Potterill*, the Labour Court had reached a different decision in *Polokwane Local Municipality v SALGBC*.[19] in that case, the employee applied to have her job upgraded. The employer created a new position and she applied for it. She was unsuccessful. She claimed that the employer had committed an unfair labour practice. The Commissioner agreed but on review, the court disagreed and found that the dispute was one of mutual interest.

[40] Firstly, the *Polokwane* case is distinguishable as it related to the creation of a new job. The employee in that case unsuccessfully applied for a new job – something that may well be seen as a dispute of interest. In the case before me (and before the commissioner), the employee's claim that they were entitled to be paid at the higher level. And secondly, I agree with Ms *Ralehoko* that, in the light of the LAC decision in *Mathibeli,* the decision of the Labour Court in *Polokwane* may no longer be good rule. And she pointed out that, in *Thiso v Moodley NO*[20]*,* this Court also expressed the view that *Polokwane* is no longer good law in the light of the LAC judgement in *Apollo Tyres.*[21]

[41] That brings me to the question whether the Commissioner's decision that he had jurisdiction because the dispute related benefits could in any event

[18] (2011) 32 *ILJ* 2534 (LC); [2011] 9 BLLR 905 (LC).

[19] [2008] 8 BLLR 783 (LC); (2008) 29 ILJ 2269 (LC).

[20] (2015) 36 *ILJ* 1628 (LC); [2015] 5 BLLR 5443 (LC).

[21] *Apollo Tyres South Africa (Pty) Ltd v CCMA* (2013) 34 *ILJ* 1120 (LAC).

be sustained. In *Thiso*, the employees were employed in job category A3 and a job evaluation committee recommended that the position be upgraded to level A2. The employer appealed successfully against the decision and it was not implemented. The employees referred an unfair labour practice dispute relating to promotion. The Commissioner ruled that the CCMA did not have jurisdiction because it concerned a matter of mutual interest. On review, the Court held:[22]

> "[15] The parties agreed that the employer in this case had a discretion whether to upgrade the positions. If that is so, the arbitrator is correct that the applicants could strike in support of that demand. It is a matter of mutual interest. But where he is wrong, is in finding that that option excludes arbitration of an unfair labour practice dispute in terms of s 186(2)(a).
>
> As the LAC clarified in *Apollo Tyres*:
>
> 'As pointed out above employees will have an election to strike or go the arbitration/adjudication route in respect of many rights disputes. In my view, the better approach would be to interpret the term 'benefit' to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion.
>
> …
>
> An employee who wants to use the unfair labour practice jurisdiction in section 186 (2) (a) relating to promotion or training does not have to show that he or she has a right to promotion or training in order to have a remedy when the fairness of the employer's conduct relating to such promotion (or non-promotion) or training is challenged."
>
> [16] In this case, it may be that the applicants could have elected to follow the collective bargaining route. But they elected to refer an unfair dismissal dispute to the CCMA in terms of s 186(2)(a) of the LRA. It is clear from the *dictum* in *Apollo Tyres* that they were entitled to do so.

[22] At paras 14-17.

> [17] The CCMA does have jurisdiction to arbitrate the unfair labour practice dispute that the applicants referred in terms of s 186(2)((a) of the LRA. The commissioner's award to the contrary must be reviewed and set aside."

[42] In this case, the Commissioner's decision that the CCMA did have jurisdiction could be sustained on this basis as well; but in any event, as discussed above, the CCMA did have jurisdiction to decide the dispute as one of an unfair labour practice in terms of s 186(2)(a).

[43] Lastly, albeit argued faintly, Eskom did not abandon its argument that the dispute concerned the interpretation and application of a collective agreement. But that is not the dispute that the union referred to the CCMA. The fact remains that the CCMA did have jurisdiction to arbitrate the unfair labour practice dispute that the union referred to it in terms of s 186(2)(a).

[44] As the learned authors in *Labour Relations Law: A Comprehensive Guide*[23] point out:

> "[T]he closed nature of the list of unfair labour practices that are actionable in terms of s 186(2) obliges employees who are aggrieved by other forms of conduct to seek to fit them into one of the statutory categories or to rely on an alternative cause of action. … Alternatively, the LRA may provide a remedy if the dispute is governed by a collective agreement [s 24]. …
>
> The 'remedy-shopping occasioned by the closed definition of an 'unfair labour practice' may be problematic, given the cost and delay associated with approaching the High Court or Labour Court on a contractual or constitutional basis on the one hand and the artificiality that may be involved in seeking to protect a non-statutory cause of action (such as transfer) in a statutory guise (such as demotion). An assessment of the unfair labour practice provision in a concept paper prepared for the President's Office in 2005, indeed, questioned the need for several of the statutory forms of unfair labour practice and recommended a far-reaching overhaul of s 186(2). These recommendations … have not yet been addressed by government and did not feature in the LRA [Amendment Act] 6 of 2014."

[23] Du Toit *et al*, *Labour Relations Law: A Comprehensive Guide* (LexisNexis 6ed 2015) at 545-6.

[45] I conclude that the arbitrator did have jurisdiction to deal with the dispute before him as one of an alleged unfair labour practice in terms of s 186(2)(b) of the LRA. This ground of review fails.

Reasonable outcome?

[46] Having decided that the CCMA did have jurisdiction, the next question is whether the arbitrator's decision can be sustained on the merits.

[47] The Commissioner found that Eskom had committed an unfair labour practice when it failed to upgrade the individual employees as other employees on the same grade level upgraded to T10 during the migration process. He found that it was clear from the documentary evidence that the employees were carrying out the duties described in the higher T10 and T12 job descriptions respectively and that they should have been placed into those positions. He accepted that, according to the minutes of the ECG meetings, local management and HR accepted that the employees were carrying out the duties of the jobs claimed.

[48] The first difficulty with the Commissioner's award that Eskom has identified is that there was no evidence that the ECG could make that decision.

[49] It is indeed so that the arbitrator himself stated:

> "But there appears to be a hierarchy here because from the evidence that has been presented by Mr Coetzee, it appears that in the hierarchy, that somewhere along the line, it has come out of the crunching machine at T10, but somebody still has the authority to say: 'no'. Now, and that authority appears to be vested higher than ECG."

[50] The Commissioner ignored the extensive evidence led on behalf of Eskom that the ECG did not have the final authority; it made a recommendation, but Ms Beulah Sishuba – the Remuneration Benefit Manager – had the final authority at national level after the ECG had made the recommendation and divisional or local level. She also explained that the decision to place employees at her higher level would need to follow the principles in the recruitment and selection process, and could not be done through the migration process. According to her, "it cannot be done because in essence you are promoting the employee and that is outside of

the mandate as the ECG to just say go and change because in essence they say what they are saying and I think they did not really realise the implications, like, go and promote, that is what they're saying, and that is really outside of the scope. I think here they overstepped their bounds in terms of that the ECG could do and not do."

[51] The employee who testified on behalf of the four senior storemen, Mr Coetzee, conceded that the manager for remuneration and benefits can override any decision of the managers earlier in the process. He also agreed that, what was reflected in the ECG minutes, was subject to the final approval of the Remuneration and Benefits Manager. The Commissioner simply ignored this evidence.

[52] The second difficulty is that the Commissioner did not consider the employer's evidence that the migration principles were simply inapplicable to this process. In this regard Lionel Henn, the Human Resources Business Partner at Koeberg, explained as follows against the background of the fact that the employees' job grades had remained unchanged:

> "I think we embarked on a very collaborative process where we think you know we could have redesigned the organisation and do all kinds of things, which unfortunately I think you know it was not within our powers, because most other people just, you know, settle the organisation very quickly but that is sometimes the way we do things at Nuclear, having said that, if you look at this particular case, except the mishaps that have happened, in terms of administratively which obviously way we were very positive, thinking that we can assist employees from upgrade perspective, purely in terms of the rules of the game which is the migration principles and in terms of the national process that we have to follow, unfortunately the five individuals their jobs remained unchanged in terms of what has been used throughout the migration principle process which is firstly SAP information which I use as the basis to do activities, secondly in terms of the migration principles the job has not gone for grading and has come out at the higher grade, so that cannot be used, thirdly it is not new positions because new positions obviously, I went through in detail will reflect a different process that will have to be followed, so from those perspectives is that it did not qualify in any way of any of those three possibilities to be migrated

> differently from what I've currently on the system which is the jobs and grades remain unchanged."

[53] Ms Sishuba confirmed that:

> "ECG had to look at migration principles and it had to remain and confine themselves within what the migration principles were saying and when they say go onto SAP and change people's grades."

[54] The arbitrator also ignored this clear evidence. It simply accepted that the recommendation of the ECG panel – as part of the migration principles – had to be accepted and implemented by changing the grading of the employees on the SAP system and remunerating them accordingly.

[55] A further difficulty is that the Commissioner ignored the requirement in the Migration Principles that, if a job changed more than 30% resulting in a higher grade, the incumbent employee could only remain in that position if he met the minimum requirements or if he could attain them through an Individual Improvement Plan. In the case of these five employees, the evidence was that they were told in May 2015 that their jobs remained unchanged. Yet the arbitrator ignored this material aspect.

[56] The May 2015 letters were unequivocal. The only testimony to the contrary was that of Zatu, who produced a letter purporting to inform him in December 2014 that his job had been regraded to T12. But Henn gave extensive evidence that that letter was unauthorised and should never have been issues. Zatu himself testified that "HR said we need to hold on to the letters, not to issue the letters, they will come back to us"; and he conceded under cross examination that there was an instruction from HR not to issue the December 2014 letters. No evidence was produced to show an actual job evaluation resulting in an upgrading of the applicants' jobs.

[57] The final difficulty relates to the issue of consistency. The main tenet of the Commissioner's finding is that the applicants were treated differently to Van Wyk *et al.* That group was upgraded after they had lodged grievances whereas the applicants were not. The Commissioner found that Eskom had committed an unfair labour practice "when it failed to treat applicants in the same way that it treated Van Wyk *et al.* The treatment was arbitrary

and without rational explanation in relation to the others had been treated. It is clear from the documentary evidence (ECG minutes) that applicants are carrying out the duties described in the T10 and T12 job descriptions and that the ECG should have placed them into those positions as it did with van Wyk and his colleagues."

[58] The first problem with this finding is that there was no documentary evidence that the applicants "are carrying out the duties described in the T10 and T12 job descriptions". The ECG panel simply accepted the say-so of the applicants. They had no actual job evaluation of the applicants' jobs before them. And in the arbitration Coetzee relied on the job description of a warehouse supervisor (T10) instead of that of a senior storeperson (T6) – the job that he in fact occupied.

[59] Secondly, Eskom led some evidence that the output of the positions held by van Wyk et al was significantly different to the output of the applicants even though they were all employed on the T6 level. Whilst the applicants remained on the same level, van Wyk *et al* had to be moved to new positions at T10. They were placed into the position of Assistant Officer Quality Assurance – graded at T10 – as opposed to storeperson (T5) and senior storeperson (T6) respectively. In their case the ECG minutes reflect that "local HR at Koeberg indicated that they support the upgrade of T10 as their outputs are more [than] 30% as per the migration principles".

[60] The arbitrator simply accepted that the applicants should have been upgraded, the same as Van Wyk *et al*, without taking these distinctions into account.

[61] The conclusion reached by the arbitrator, in my view, falls within the same category as that in *Mathibeli*[24], where Sutherland JA concluded:

> "The upshot is that:
>
> 21.1. There is no merit in the claims of the appellant, having regard to the facts adduced in evidence: he was not an incumbent of a grade 11 post.

[24] Above at par 21.

21.2. The award was unreasonable because the evidence demonstrated the meritless[ness] of the claims, and the rationale for finding otherwise was not rationally connected to the evidence.

21.3. The award should be set aside in its entirety.

21.4. The appropriate outcome should have been the outright dismissal of the dispute."

[62] The award should be reviewed and set aside for these reasons. The finding of the arbitrator was disconnected from the evidence before him. That rendered his award unreasonable.

Procedural fairness

[63] Given my view on the second main ground of review, I need not consider the oblique attack on the way that the commissioner dealt with the arbitration process. He did make some inappropriate remarks, and his attempt to exclude Eskom's witnesses from hearing the evidence of the employees – who bore the onus to prove the unfair labour practice – was entirely irrational. But in the end Ms Singh – the attorney who appeared for Eskom at the arbitration – stood her ground and her witnesses remained in attendance. These irregularities did not have any discernible effect on the outcome.

Conclusion

[64] I find that the CCMA did have jurisdiction; Eskom's first ground of review fails. However, the review application succeeds on the merits. The arbitrator came to a conclusion that is disconnected from the evidence that was before him and the outcome was unreasonable.

[65] It would serve little purpose to remit the dispute for a fresh arbitration. All of the evidence was before Court. On that evidence, I am persuaded that Eskom did not commit an unfair labour practice.

Costs

[66] The individual applicants are still employed by Eskom. And there is an ongoing relationship between their trade union, NUM, and Eskom. They

had an arbitration award in their favour. It was not unreasonable to oppose the review application. Eskom was successful on its second review ground but unsuccessful on the first. Taking into account the requirements of both law and fairness, I do not think a costs award is appropriate.

Order

[67] I therefore make the following order:

67.1 The late filing of the review application and the answering affidavit is condoned.

67.2 The arbitration award issued by the second respondent, Commissioner CM Bennett, under the auspices of the third respondent, the CCMA, under case number WECT 15971 – 2015 on 6 August 2016 is reviewed and set aside.

67.3 The award is replaced with an award that the applicant, Eskom Holdings SOC Ltd, did not commit an unfair labour practice.

67.4 There is no order as to costs.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Firoz Boda SC
Instructed by	Ms S Singh of Cliffe Dekker Hofmeyr Inc.
FIRST RESPONDENT:	Tapiwa Ralehoko
	of Cheadle Thompson & Haysom.