Employment law update

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Victimisation – strike action

The applicants in *Lungile and Others v Chester Butcheries* [2012] 8 BLLR 785 (LC) complained that they were victimised and unfairly discriminated against because they had participated in a protected strike.

Chester Butcheries operates a chain of about 19 butchery stores. In early 2010 the applicants' union recruited members of three of these stores, namely the Richards Bay Taxi Rank store, the Empangeni store and the Belvedere store. The applicants were employed at the Richards Bay Taxi Rank store. Chester Butcheries pays discretionary bonuses on an annual basis and the applicants received bonuses in January 2010 for the year 2009, and in January 2012 for the year 2011. No bonuses were paid to them in respect of 2010. The applicants linked the non-payment of bonuses to their having participated in a protected strike in November 2010 and pleaded that Chester Butcheries took a unilateral decision that all employees who had participated in the November 2010 strike would not receive a bonus, while employees who did not participate in the strike were paid bonuses.

It transpired during evidence that members of the union working at the Empangeni and Belvedere stores were in fact paid bonuses even though they had participated in the November 2010 strike and that 60 employees from various stores nationwide were not paid bonuses.

In response to this, the applicants argued that the employees who were paid bonuses at the Empangeni and Belvedere stores returned to work from the strike a day earlier than the seven applicants who held out longer at the Richards Bay Taxi Rank store.

The financial director of Chester Butcheries testified that the company pays discretionary bonuses based on the performance and profitability of the particular store and, as such, bonuses vary from store to store. The Richards Bay Taxi Rank store opened in 2009 and the applicants were paid bonuses only once in the past; that is, in respect of the 2009 year. He contended that the non-payment of bonuses in respect of 2010 had nothing to do with the protected strike action; bonuses were not paid because this store ran at a loss.

The Labour Court, per Whitcher AJ, referred to s 5(1) of the Labour Relations Act 66 of 1995 (LRA), which provides that no person may be discriminated against for exercising any right conferred by the LRA. In terms of s 10 of the LRA, the onus is on the employee that alleges victimisation to prove the facts of the conduct, and the employer must then prove that the conduct complained of did not violate the provisions of s 5. In the present case, the applicants accordingly had an initial evidentiary burden to produce evidence that showed they were treated differently because they had participated in the strike action. They had to establish ‘a credible possibility’ that the non-payment of bonuses was based on the fact that they ‘had participated in the strike’ action. Only then would the burden of proof shift to the employer.

In considering the evidence, the court held that the applicants failed to make out a *prima facie* case 'to even put the company to a defence'. This was so, first, because employees at other stores who had participated in the strike action were paid bonuses. Participation in strike action was accordingly not a criterion for withholding a bonus as alleged. Similarly, bonuses were not paid at other stores that ran at a loss and where the employees did not participate in the strike at all. There was therefore nothing discriminatory in the non-payment of bonuses.

In the circumstances, the claim was dismissed, with no order as to costs.

Practitioners should note that the court observed in passing that an employer is permitted to reward employees unequally even though they are performing the same job. The basis of such differentiation must, however, be objective and fair and based, for example, on their comparative skill, experience, years of service or productivity.

Improper promotion

In *Public Servants' Association obo Tlowana v Member of the Executive Council for Agriculture* [2012] 8 BLLR 805 (LC) the applicant sought to have an arbitration award reviewed and set aside.

Tlowana commenced employment with the first respondent employer in 1998. In July 2005 he held the position of assistant director. On 22 July 2005 the employer advertised the position of manager corporate services: Sekhukhune. Tlowana applied for the post together with a number of other persons, including the fourth respondent. Tlowana was the recommended candidate and the fourth respondent was ranked number two. There was a differential margin of about 2% between them. The employer appointed the fourth respondent to the post. Tlowana was aggrieved by his non-appointment and referred an unfair labour practice dispute relating to promotion. The arbitrator found in favour of the employer. Tlowana successfully applied for the review of that award and the matter was remitted to arbitration.

In the meantime, the fourth respondent successfully applied for a horizontal transfer from the contested post to another post. The employer accordingly re-advertised the contested, now vacant, post. Again Tlowana applied for the post, to which he was appointed.

He then sought compensation for the ‘delayed’ appointment and referred an unfair labour practice dispute relating to promotion to conciliation. Conciliation failed and he referred the matter to arbitration. The arbitrator dismissed the referral.

Tlowana then took the award on review and argued that the arbitrator had committed a gross irregularity in the conduct of the proceedings in that, *inter alia*, the arbitrator had committed such a misdirection that culminated in a failure of justice that was so fundamental as to vitiate the award.

Essentially, the court had to determine whether the initial appointment of the fourth respondent was properly made. The court, per Cele J, observed that it had become common cause between the parties that the fourth respondent was not in possession of one of the essential requirements specified in the advertisement, namely proper knowledge of the PERSAL personnel salary system. She should not have been shortlisted and her appointment was accordingly ‘haphazard and random’. Insofar as the arbitrator failed to consider this, he committed a reviewable irregularity.

In the circumstances, the court held that Tlowana deserved to have been promoted from the date on which the fourth respondent was initially appointed to the contested post and he was entitled to the compensation claimed.

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Employment equity groups – who bears the onus?

Gebhardt v Education Labour Relations Council and Others (LC) (unreported case no C820/08, 7-9-2012) (Steenkamp J)

For purposes of meeting employment equity targets, does the employer or the employee bear the onus to prove that the employee forms part of a designated group as defined in the Employment Equity Act 55 of 1998 (EEA)?

The court in this case had to identify and refer to specific persons in accordance with how they were racially classified under the apartheid regime.

The applicant, a 'white' female educator, contracted a disease while employed by the third respondent, the Western Cape Education Department (the department). The applicant worked at Boland College, which fell in the Further Education and Training Certificate (FETC) sector. As a result of her illness, the applicant suffered a total loss of hearing. The applicant indicated her disability in a survey form, and further informally advised the chief executive officer and vice-rector of Boland College of her hearing impairment.

In the same year, the applicant applied for a promotion to the post she had been acting in for the past three years. She indicated her hearing disability on the application form.

Together with two others, the applicant was shortlisted for the post and invited to attend an interview before a panel. Despite the panel recommending the applicant for the post, the department appointed another candidate, Van Voore, a 'coloured' female educator.

The applicant referred an unfair labour practice dispute to the first respondent bargaining council, alleging that the department had acted unfairly by not appointing her.

During arbitration, the department's employment equity coordinator testified that both the applicant and Van Voore were eligible for the post, which required the department to appoint the candidate who best met its equity targets. The employment equity coordinator added that, in terms of these targets, coloured female educators (as opposed to white female educators) were under-represented in the FETC sector and this resulted in Van Voore being appointed over the applicant.

The second person to testify on behalf of the department was the college's human resources manager, who testified that the applicant scored considerably higher at the interview stage compared to Van Voore. He further stated that before the appointment was made, he advised the employment equity coordinator of the applicant's disability. The employment equity coordinator said he would investigate same and revert to the human resources manager.

The arbitrator found that the basis for the department's decision lay in its equity policy and appointing Van Voore over the applicant in line with its equity targets was not unfair. With regard to the applicant's disability, the arbitrator held that an employee bears the onus of establishing he falls within a specific designated group that entitles him to be considered when an employer seeks to achieve its equity targets. On the facts, the arbitrator found that the applicant had failed to prove her disability to her employer and, as such, there was no obligation on the department to consider the applicant's alleged disability when filling the post in question.

The arbitrator accordingly dismissed the applicant's claim.

On review, the applicant made two arguments for the award to be reviewed and set aside, namely:

• The arbitrator failed to consider the fact that the employment equity coordinator, having been informed by the human resources manager of the applicant's disability, failed to investigate same as he had undertaken to do.

• The arbitrator misunderstood which party bore the legal onus to prove an employee falls within a designated group.

Steenkamp J upheld the applicant's first argument. It was clear, according to the court, that on the common cause facts the arbitrator did not apply his mind to the merits of the matter. It was not in dispute that the applicant indicated her disability in her application form. Further, she advised the human resources manager of her disability and he, in turn (and as a result of the panel recommendation), informed the employment equity coordinator, who said he would investigate and revert to the human resources manager but failed to do so. The court held that the arbitrator failed to take these material concessions made by the department's witnesses into account. Further, the department conceded that any consideration of the applicant's disability would have had a significant impact on its choice as to which candidate to appoint.

On the second ground, the court said the following:

'The arbitrator assumed that the applicant had to not only inform her employer that she was disabled, but that she had to provide proof thereof.

One only needs to consider the position of other designated groups to conclude that this assumption is irrational. The Population Registration Act [30 of 1950] was repealed decades ago. The citizens of a democratic South Africa are no longer classified according to race. How, then, would a person who is classified as "coloured" and who is therefore given preference for appointment – such as Ms van Voore – provide proof of that categorisation?'

The court also referred to the following provision in the EEA:
‘Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.’

In this respect, the court held: ‘The duty is clearly on the employer to effectively implement affirmative action measures for people from designated groups, such as people with disabilities.’ The court also referred to s 19 of the EEA, which provides that the employer must collect information and conduct an analysis of its workforce in order to determine the degree of under-representation of people from designated groups in various occupational categories and levels in its workforce.

In conclusion, the court held: ‘[I]t is clear that the duty is on the employer to gather … the disability of a person who alleges that she is a member of that designated group. By assuming the contrary, the arbitrator misconstrued the entire legal basis of his finding. On this ground as well, the award falls to be reviewed and set aside.’

In addition, the dispute was remitted to the bargaining council to be heard afresh before another arbitrator.

The department was ordered to pay the applicant’s costs.