



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case number: JA15/2017

In the matter between:

RONALD MAILE

Appellant

and

FOSKOR (PTY) LTD

First Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

NELSON LEDWABA N.O.

Third Respondent

Heard: 23 September 2020

Delivered: 27 October 2020

Coram: Coppin JA, Murphy AJA and Savage AJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of this Court, is against the judgment of the Labour Court (Tlhotlholemaje J) which dismissed an application brought by the appellant, Mr Ronald Maile, to have an arbitration award of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), set aside on review.
- [2] The matter concerns an unfair labour practice claim in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ('the Act') relating to the provision of benefits. The benefit in question is the payment of an allowance aimed at retaining skilled employees in the employ of the first respondent, Foskor (Pty) Ltd ('Foskor'). The appellant was employed as an artisan by Foskor in 1994 and in 2004 was appointed into the position of Superintendent Safety, Health, Environment and Quality (SHEQ). That post became redundant in 2008 and, as an alternative to retrenchment, the appellant was appointed into '*a similar environment (SHEQ)*' with no reduction in salary. In 2010 the appellant was appointed as a SHEQ trainer. In March 2017 the appellant resigned from his employment with Foskor.
- [3] During 2006 the company introduced a scarcity or retention allowance ('the allowance') to attract and retain scarce and critical employee skills in various technical fields. Foskor employs technical, operational and SHEQ trainers. In 2008 technical trainers became eligible to receive the allowance. From 1 November 2011 eligibility was extended to operations and SHEQ trainers. Although the appellant as a SHEQ trainer was eligible to receive payment, Foskor exercised its discretion not to pay the appellant the allowance given that the gross monthly salary was R38 758,04 was higher than that received by the other SHEQ trainer, Mr A G Xulu, who earned R35 448,37 per month, including the allowance of R5000,00, and operations trainers, Mr KM Mosweu, Mr EQ Sekgobela, Mr SR Paulse and Mr CJ Roos, who earned R37 736,05, R33 408,91, R36 751,13 and R32 730,72 per month respectively, including the allowance.¹
- [4] Dissatisfied with the decision not to pay him the allowance the appellant lodged an internal grievance. The grievance was unsuccessful on the basis

¹ As earned on 31 October 2013.

that the appellant's remuneration "*was already more than that of the other SHEQ trainer and the rest of the operations trainers*" even after they had received the allowance from November 2011.

- [5] In November 2013, the appellant referred an unfair labour practice claim to the Commission for Conciliation, Mediation and Arbitration challenging the fairness of the decision not to pay him the allowance. At arbitration, the appellant testified that he had been treated unfairly in that the allowance was paid to trainers across the board, including Mr Xulu, his fellow SHEQ trainer and to trainers who earned more than him, such as Mr CJH Vorster, who earned R44 993,87 per month including the allowance.

- [6] Mr Johannes Liversage, employed as specialist in operational benefits, testified for Foskor that the purpose of the allowance was to attract and retain technical staff due to skills shortages. He indicated that different categories of trainers perform different job functions and that both Mr Vorster and Mr J Makhoba, who earned R40 502,21 per month, including the allowance, were technical trainers and in a different category to the appellant. Mr Liversage explained that some salary distinctions between employees were the result of differences in appointment date, sign-on salary negotiations or annual salary increments granted. The reason the appellant was not paid the allowance was that he was already highly remunerated before the allowance was extended to other trainers in 2011 and that his earnings exceeded those of the other SHEQ trainer and operations trainers after they had received the allowance.

- [7] The third respondent ('the commissioner') found that the allowance arose out of a practice rather than out of the contract of employment and that it was for the appellant to prove that he had the necessary skills to justify receipt of such allowance. Since he had not shown that he fell within the category of recipients intended to benefit from the scheme given that he earned more than his counterparts, he was not entitled to the allowance. This was so since he already earned more than the other SHEQ trainer and other operations trainers. Mr Vorster, as technical trainer, had technical skills justifying his greater remuneration. The commissioner rejected evidence that the appellant was a qualified artisan on the basis that it was put up in re-examination for the

first time and that Foskor had not had the opportunity to rebut the evidence. With the employer's reasons for the allowance not challenged and the appellant not having demonstrated unfairness in the implementation of the benefit given that he earned '*way above most of his counterparts*', it was found that no unfair labour practice had been proved. The claim was, therefore, dismissed.

Judgment of the Labour Court

- [8] On review to the Labour Court, the appellant contended that the commissioner's findings were defective, unreasonable and wrong. The Labour Court found that the commissioner had erred in finding that the appellant lacked the skills required to qualify for the allowance since it was undisputed that he was an artisan. Nevertheless, with reference to *Head of the Department of Education v Mofokeng & others*² the commissioner's errors of fact were found not to be sufficient to justify the arbitration award being set aside. With no written policy regulating payment of the allowance, its payment was discretionary. The fairness of the discretion exercised had to be assessed against the purpose of the allowance, which was primarily to retain scarce skills. Since the appellant earned significantly more than his counterparts, had the allowance been paid to the appellant, it would have created further unfairness in that it would have caused his earnings to increase further. Consequently, the Court found that there existed a rational basis for deciding not to pay the allowance to the appellant and that it had not been shown that the discretion was exercised unfairly, arbitrarily, capriciously or in bad faith. The commissioner's conclusion that Foskor's conduct did not amount to an unfair labour practice fell within the band of reasonableness required and the review application was dismissed with no order as to costs.

Submissions on appeal

- [9] On appeal, it was argued for the appellant that the Labour Court had erred in dismissing the review application when the outcome reached by the commissioner was unreasonable. This was so in that the appellant fell within

² [2015] 1 BLLR 50 (LAC) at para 31.

the category of employees entitled to receive the allowance. It was argued that he, therefore, had a right to payment and Foskor held no discretion not to pay him. The appellant disputed that the purpose of the allowance was to achieve parity in wages or that he earned significantly more than other trainers when trainers such as Mr Vorster received the allowance and were paid more than him. Foskor, it was submitted, had considered only the remuneration of the appellant and not of other employees and there existed no rational basis for him not being paid the allowance, with it argued that the decision taken was arbitrary, capricious, in bad faith and unfair. The result was that payment of the allowance to other employees increased their earnings but caused an effective reduction in the appellant's income. For these reasons, the appellant sought that the appeal succeeds, with costs, and that it be ordered that an unfair labour practice had been committed against him, as a consequence of which Foskor pay him the allowance from the date on which it was extended to SHEQ and operations trainers.

- [10] Foskor opposed the appeal on the basis that the Labour Court had correctly found that the commissioner's decision fell within the band of reasonableness required and was not reviewable. The allowance was a practice administered at its discretion. The appellant was eligible to receive payment of it but Foskor had exercised its discretion against him since he earned significantly more than his fellow SHEQ trainer and other operational trainers and when payment to him would have perpetuated a disproportionate disparity in earnings between employees. It was submitted that the appellant could not rationally attack the exercise of the discretion which not exercised unfairly, arbitrarily, capriciously or in bad faith. All employees in a category were not entitled as of right to receive payment of the allowance and for all of these reasons the appeal should fail with costs.

Evaluation

- [11] The allowance constituted a benefit in the sense that it was an existing advantage or privilege to which an employee "*is entitled as a right or in terms*

of a policy or practice subject to the employer's discretion".³ Taking the form of an unwritten policy or practice, eligibility for and payment of the allowance was determined by Foskop at its discretion. Although the appellant submitted for the first time in this appeal that Foskop did not exercise a discretion in refusing to pay him the allowance, there was no evidence before the commissioner to sustain the contention that employees were entitled as of right to payment of the allowance. The issue before this Court is therefore whether the commissioner's finding that the exercise of that discretion was rational and fair was one that a reasonable decision-maker could not reach.⁴

- [12] The purpose of the allowance was to retain scarce employee skills. To do so different categories of employees were determined by Foskop from time to time to be eligible to receive the allowance. Eligibility was extended in 2008 to technical trainers and on 1 November 2011 to operations and SHEQ trainers. Foskop exercised its discretion not only in relation to the eligibility of a category of employees to receive the allowance, but also to determine which employees within any such category were to receive such allowance. A determination of eligibility did not create a right to payment.
- [13] The allowance was not paid to the appellant on the basis that he earned more than the other SHEQ trainer and operations trainers employed, even after the allowance had been paid to them. The appellant disputed that the decision not to pay him the allowance was rational or fair on the basis that the purpose of the allowance was not to achieve parity in wages and other trainers who received the allowance, such as Mr Vorster, earned more than he did. The evidence showed clearly however that those employees who earned more than the appellant were employed in a different category, as technical trainers to whom eligibility to receive payment of the allowance had been extended in 2008. A comparison between the salaries of technical trainers and the appellant was therefore misplaced. The appropriate comparison to be made was between the salaries of SHEQ and operations trainers, into which category the appellant fell. Within that category, the evidence was that the

³ *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* [2013] 5 BLLR (LAC) at para 50. In that matter at para 25 the distinction between the terms "remuneration" and a "benefit" was found artificial and unsustainable.

⁴ At para 110.

appellant earned more than any one of his colleagues, even after payment of the allowance.

[14] Foskor's expressed purpose in making provision for the allowance was to retain scarce employee skills. It sought to achieve this by bolstering earnings to make continued employment attractive. While some differentiation existed between salaries earned by employees within an identified category, even after payment of the allowance to employees in his category the appellant earned more than his counterparts. Foskor exercised its discretion not to pay the allowance to the appellant for this reason. Had it paid him the allowance this would have perpetuated the historical wage distinction which existed between SHEQ and operations trainers. Conceivably, this risked undermining the very purpose of payment of the allowance, namely to retain scarce skills, insofar as it would have perpetuated an uneven situation in which one employee within the category received earnings well in excess of the others.

[15] The CCMA, in the exercise of its unfair labour practice jurisdiction, was required to scrutinise the fairness of the employer's conduct in the exercise of its discretion.⁵ Unfairness implies a failure to meet an objective standard, which may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.⁶ In *Protekon (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*⁷ it was stated that:

'With fairness as the test, questions of proportionality will invariably need to be considered. The disadvantages to a minority may, as a matter of fairness, outweigh the advantages to a majority. In the present case, however, there is no reason to conclude that any adverse impact on the Third Respondent is disproportionate to the settled interests of the majority of employees in the affected class'.⁸

[16] Although the result was that payment of the allowance increased the earnings of other SHEQ and operations trainers and not the appellant, it brought their

⁵ *Protekon (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2005] ZALC 75 at para 35.

⁶ *Apollo (supra note 3)* at para 53.

⁷ *Protekon (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2005] ZALC 75.

⁸ At para 58.

salaries more closely in line with his while the appellant continued to earn more. The commissioner found that the decision taken by Foskor was for this reason not shown to be arbitrary, capricious, in bad faith or unfair. The Labour Court cannot be faulted for finding that, despite its factual errors, the conclusion reached by the commissioner fell within the band of reasonableness required. There existed a clear, acceptable, fair and rational basis for deciding not to grant the appellant the allowance having regard to the purpose of the allowance, the earnings of SHEQ and operations trainers and the comparatively greater amount earned by the appellant as compared to his counterparts. The employer was not shown to have exercised its discretion unfairly against the appellant, and the commissioner arrived at a decision which was not one that a reasonable decision-maker could not reach.

- [17] For these reasons, the appeal against the judgment of the Labour Court cannot succeed. Both parties sought costs in the event of their success on appeal. Having regard to considerations of law and fairness, it is not appropriate to make an order as to costs in this matter.

Order

- [18] The following order is made:

1. The appeal is dismissed.

SAVAGE AJA

Coppin JA and Murphy AJA agree.

APPEARANCES:

FOR APPELLANT: M E S Makinta of Makinta Attorneys

FOR FIRST RESPONDENT: M Edwards instructed by Bowmans