



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA17/2020

DEPARTMENT OF DEFENCE

Appellant

and

RUTH FARRE

First Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Second Respondent

COMMISSIONER JACQUES BUITENDAG NO

Third Respondent

Heard: 17 August 2021

Delivered: 11 October 2021

Coram: Waglay JP, Davis JA and Kubushi AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This case concerns the question as to whether the appellant committed an unfair labour practice by demoting the first respondent from a position to which she claimed she had been promoted with effect from 1 March 2014. The first respondent holds a BSC degree in Ocean and Atmosphere Sciences and Environment and Geographic Sciences. In 2005, she was appointed as a Superintendent of Tidal Information by the appellant after having acted in the position since 2001. According to the job description, her key responsibilities were:

‘Collecting, collating, analysing and archiving tidal information from a network of tide gauges (TG’s); Maintaining and operating the TG network in the RSA and Namibia; Planning and executing tidal stream observations; calculating and preparing tide tables for the RSA and Namibia; Manage relevant environmental projects undertaken by IMT on behalf of the Hydrographic Office, and Lecture tidal theory and Oceanography.’

- [2] In October 2008, the Job Evaluation Committee of the South African Navy noted that the work that the first respondent was required to perform had been inappropriately classified as administrative. It accordingly recommended that this classification be amended at which time there were no financial implications as the post remained at salary level 9.
- [3] This recommendation was not approved by the Minister of Defence because it appears that shortly after the recommendation had been generated, the Occupational Specific Dispensation (OSD) for Engineers and Related Occupations was approved. In terms of a letter generated by R K Pienaar Manager Naval Management and Renewal Services (Fleet Command): Deputy Director on 28 July 2011 “the post in question will potentially also be covered by the OSD and as such there are different salary scales attached to the post. The current post incumbent will therefore potentially benefit from the OSD.” However, in a further letter of 11 October 2011 signed by Rear Admiral SL Pillay: “the

Technicians and Artisans Occupational Specific Dispensation (OSD) is currently been finalised within the SANDF and submissions for the approval is currently being prepared for submission". In terms of the OSD's policy, the above mentioned post (that is the post held by the first respondent) "will not be considered for translation to the Technical OSD as it is currently approved as an Administrative post and not a Technical post."

[4] The OSD was implemented by the appellant in January 2011. It applied only to employees who on 1 July 2009 fell within the occupational categories that required registration within the appropriate professional council. This registration was considered to be an inherent requirement for the relevant post. When the OSD was implemented only employees covered by its scope were translated to the OSD as a "once off action".

[5] According to a resolution of the second respondent (Resolution 5 of 2009) further appointments after the translation date would be dealt with as follows:

'5.1.1. An employee meeting the appointment requirements, inclusive of but not limited to, possessing the relevant qualification (s), prescribed years of experience, registration with an appropriate professional council;

5.1.2. Availability of posts; and

5.1.3. After appointment the employee must perform the functions of the new posts (job).'

[6] According to the appellant as the first respondent did not occupy a professionally designated post on 30 June 2009 she could not as at January 2011 be translated in terms of the OSD retrospectively to 1 July 2009. Thus she was not translated along with those employees whose posts as at 30 June 2009 fell within the scope of the OSD. On 13 December 2011, CA Spreeth, Chief Business Analyst together with RK Pienaar made the following recommendation:

'It is recommended that the post class Assistant Director: Admin be amended to Control Oceanographic Technician (050348), with a resultant CORE change to

the Natural Sciences Core (D2010500). The post number is 3810/376469/C944/001 on the establishment of Fleet Command HQ.'

- [7] As the code of remuneration (CORE) had been abolished with the introduction of the OSD, the Core codes were no longer available as they been abolished, deactivated and replaced by the OSD post dispensation. It followed that a recommendation based on a deactivated system was never placed before the Minister.
- [8] On 4 April 2012, a further request was made to Colonel JA Zietsman who worked in the office of the Chief of Human Resources in which the recommendation was again made that the first respondent's Class Code be changed to "Control Oceanographer Technician" while the post title code of "Superintendent Tidal Information should be retained as is."
- [9] It appears that instead of creating an OSD post to be filled in accordance with a competitive interview process in terms of resolution 5 of 2009, a post class code 052803 was issued on 23 November 2012 for a "Control Scientific Technician Grade A without the requisite authority". It meant that the first respondent's purported translation was effected in a manner not provided for by the OSD agreement or any of the relevant directives that had been issued at that time. In response to what appeared to have been a practice, the Director General of the Department of Public Service and Administration informed all national provincial departments in provincial administrations that:
- 'Departments that have erroneously advertised and filled post of Control/Chief at Grade B are requested to rectify the affected employees' salaries as such remuneration is regarded as incorrectly granted remuneration and departments must recover the overpayment, in terms of the provision of Public Service Act, 1994 section 38, from the affected officials.'
- [10] In August 2012, the first respondent submitted her registration and paid the applicable fees to the South African Council for Natural Scientific Professions (SACNASP) and she was then registered as a Geo – Spatial Scientist with effect

from 31 July 2013. Thereafter on 28 January 2013 Mr Pienaar wrote to the South African Navy Hydrographer in which he stated “the post of Superintendent Tidal Information has been included in the above documentation as the post class has been amended and the post had been translated to the OSD. As the post levels have been centrally evaluated by the DPSA, no further job evaluation results are required for posts translated in the OSD.”

- [11] Her OSD salary was backdated to 1 March 2014 because that was the date upon which she received her registration details from SACNSASP. As the first respondent stated in her answering affidavit:

‘Owing to delays in giving effect to the change in the classification of my post, I was translated to the OSD three years after my colleagues. Whereas my colleagues’ translation was backdated to July 2009 (the date on which the OSD was approved), my translation was only backdated to 1 March 2014. This appeared to me to have been done somewhat arbitrarily. (The Department has subsequently explained that my translation was backdated to the date on which it received my proof of registration with SACNASP).

On 27 August 2014, I lodged a grievance setting out the history and requesting that my translation be backdated to July 2009 in line with my colleagues’ translations. The Grievance Office did not resolve my grievance within the requisite time period, and it remained unresolved when the following events unfolded.’

- [12] The events to which the first respondent referred commenced in April 2015 when she obtained her salary advice for that month which reflected that she had received a zero take home pay. Certain changes had been unilaterally made to her terms and conditions of employment. Her job description had been amended to administrative support personnel and her salary notch had been decreased. She was now informed that she owed the appellant an amount of R 168 629.28.

- [13] It was this set of events which finally resulted on 22 February 2017 in the first respondent referring an unfair labour dispute relating to her alleged demotion to

the second respondent who appointed the third respondent to arbitrate the dispute. In finding that the appellant had committed an unfair labour practice and ordering the latter to restore the first respondent's position to Control Scientific Technician grade BCSTGB retrospectively with effect from 1 March 2014, the third respondent justified the granting of the order thus:

'In my determination the applicant is denied a translation to the OSD because the respondent dragged its feet to re-classify the ASD post from administrative to scientific and because the respondent did not follow its own internal approval procedures to effect the change from ASD Admin to Control Oceanographic Technician with a change to the CORE to natural science.¹

...

The experimental competency, qualification and statutory registration for this OSD post is a Diploma in Science or relevant qualification; 6 years post equalisation technical (scientific) experience and compulsory registration with SACNASP. The applicant meets these requirements. She achieved her BSc – Ocean & Atmosphere and Environmental & Geographic Science degree in 2000. She has performed the same functions since 2005 and is registered with SACNASP.'

[14] Pursuant to this finding the appellant then approached the court *a quo* on review to set aside this award. I turn to deal with the judgment of the court *a quo*.

The decision of the court *a quo*

[15] Sitting in the court *a quo*, Rabkin-Naicker J found that, even if it was correct that the post had been wrongly migrated to the new OSD establishment in July 2014, it was possible for the appellant to have corrected this problem without violating the first respondent's right to a fair labour practice. Her status, salary and benefits

¹ This finding by the third respondent is not factually accurate. To classify the conduct of the appellant as foot dragging is incorrect in that the first respondent did not translate to the OSD in January 2011 because she had not so occupied an OSD post at of 3 June 2009 and further at that time she did not have all the requisite professional qualifications. However, the enquiry on review depends less on the reasoning of the arbitrator and, in essence, on whether the result arrived at by the arbitrator is justified for reasons that are based on the facts of the dispute

had been diminished when she had “been restored” to her pre-translation post in April 2015. The court *a quo* thus held that the third respondent had reasonably concluded that this action on the part of the appellant constituted a demotion. The learned judge also found that the third respondent had correctly found that the appellant had not complied with the *audi alteram partem* rule before it had taken the decision effectively to demote the first respondent. Further the learned judge found that the reason for this demotion was that “the employer dragged its feet in reclassifying her post”. Furthermore, the functions which the first respondent had performed would have always been scientific and not administrative which was clearly evident from the description of that which she was required to perform in terms of her post.

[16] For these reasons, Rabkin-Naicker J concluded thus in dismissing the review application with costs:

‘In the court’s view, the remedy provided by the arbitrator to restore the status quo ante is a reasonable one, and within his powers. The decision cannot be faulted on the Record before him. This was the remedy that Farre sought given her long service and qualifications and the fact that her job function has essentially stayed the same through the many years of her employment by the applicant. I can find no basis to conclude that the review should succeed. It is surely time that the applicant takes steps to ensure that Farre’s function and Farre herself are given the necessary formal recognition.’

The appeal

[17] On appeal, the appellant’s counsel referred to a judgment of this Court in *Public Servants Association of South Africa obo Ramukhesha and others v Department of Agriculture Forestry and Fisheries and others* (2021) 42 ILJ811 (LAC) which held in effect that a formal function as set out in an OSD description of the relevant post has to be employed in the translation process. It followed on the basis of this judgment that if an employee such as the first respondent was incorrectly translated by the appellant, there could be no question of a demotion

or the commission of an unfair labour practice. Developing this argument, counsel contended that the third respondent could not have determined the fairness of the demotion without first examining Resolution 5 of 2009 of the second respondent and thus determining its applicability to whether there was a post into which the first respondent could be translated.

[18] Notwithstanding the plethora of documents that engulfed this court, the first respondent's claim that her work had always been technical and scientific in nature could not be gainsaid. Similarly, it was clear from the evidence that the appellant had realised that the first respondent technical and scientific work justified a translation into the post to Control Scientific Technician. Indeed, it was this recognition that caused the translation of her post into the OSD, albeit that it had taken three years longer than had been the case with some of her colleagues. Although the translation may have taken longer in her case as a result of the later attainment of the necessary professional qualifications. The sharp point is that the translation was backdated to 1 March 2014 and more than a year later in April 2015 she received a notice that the translation had been reversed. This raises the question of the basis on which a case of an unfair labour practice can be based.

[19] In turn this raises the further question as to whether an unfair labour practice can only be claimed when there is a prior right which has been infringed by the practice. The answer to this question is required to deal with the appellant's argument that there was no position into which the first respondent was entitled to be translated. Thus she could invoke no right in support of her unfair labour practice claim. The legal nature of an unfair labour practice has been canvassed by this Court on a number of occasions. Suffice to say that in *Apollo Tyre South Africa (Pty) (Ltd) v CCMA* [2013] 5 BLLR 434 (LAC) this Court agreed with the minority judgment of Goldstein AJA in *Department of Justice v CCMA* (2004) 25 ILJ 248 (LAC) para 14 where the learned judge said:

'Whatever the position it seems to me respectively with the view expressed in paragraph 9 that item 2(1)(b) provided only for rights which arose *ex contractu ex lege* was clearly wrong. If that was so, the provision would have been redundant since such rights would have been enforceable in the absence of item 2 (1)(b). It is significant that item 3 (4)(b) expressly provided for a dispute referred to inter alia in item 2 (1) (b) to be resolved in arbitration. It is significant to that the introductory words in item 2 (1) and the cardinal words in item 2 (1)(b) concerned an unfair labour practice and unfair conduct. Just as the LRA provides for disputes arising from unfair dismissals in respect of which there are no contractual remedies and remedies of common law to resolve an arbitration so was item 2 (1)(b) designed for situations when neither the contract of employment nor the common law provided an employee with a remedy.'

[20] In following this approach, Musi AJA in *Apollo Tyres* said at para 51:

'An employee wants to use the unfair labour practice jurisdiction in s 186 (2) (a) relating to promotional training does not have to show that he or she has a right to promotion or training and ought to have remedy when the fairness of the employers' conduct relating to such promotion (or non-promotion) or training is challenged.'

[21] In my view, therefore the third respondent was correct to hold that the conduct of the appellant was unfair in that it was unfairness of the practice rather than the breach of a pre-existing right which formed the basis of the claim. This observation is subject however, to one issue which, in view, is dispositive of this dispute, being the existence of an independent existence of a post into which the first respondent could be placed. The appellant's counsel in argument before this Court contended that there was no post into which the first respondent could be placed and hence there was no basis by which she could be so translated.

[22] The appellant's counsel referred to the approach adopted by the appellant to the first respondent's grievance by way of a letter generated by the Chief Director HR Strategic Direction and Policy, Major General Shongaye of 23 February 2015 in which he stated that the process by which the first respondent had been

translated into her technical role “was regarded as an expansion of OSD post that was not the intention of the OSD.” Thus, it followed that if there was no post existed into which the first respondent could have been translated, the issue as to whether the appellant had committed an unfair labour practice had to be reconsidered in the light thereof. However, there was uncontested evidence that “the reconfiguration of SA Navy- Hydrographic Officers DIMS on 3 September 2013 was confirmed and that attached to that letter were documents which referred to the post of Superintendent Tidal Information.” Furthermore, the third respondent asked Ms Patrick, who worked in career management section of the directorate fleet human resources and who gave evidence on behalf of the appellant as to “and this other post- is there another post here that says a Control Scientific Technician, is there such a blokkie?” To which the answer was in the affirmative. Ms Patrick also confirmed that the post under dispute would be advertised. Significantly, in the letter signed by General Sit Shongaye he states further, “Ms Farre was absorbed in the newly created Controlled Scientific technician grade B post even though the post should have been advertised”.

- [23] It does appear that much of the evidence led by the appellant concerned whether the first respondent was ineligible for the post either on the basis that her work was administrative or that she did not meet the appointment criteria. However, given her job description it was clear that her work was scientific and not administrative and certainly the following passage from her answering affidavit does not appear to have been placed in dispute:

‘I fall within the occupational classes identified in the OSD collective agreement for translation. I am a Natural Scientist whose fields of practice includes Geographic Information Science, Geographical Science and Hydrological Science (all of which fall within the scope of the OSD). I am registered as a Certified Natural Scientist (which is the equivalent to the Scientific Technician) in Geospatial Science by SACNASP.’

- [24] In my view, there was a post into which the first respondent could and unquestionably should have been placed. That she was, in effect placed in this

post only for the decision to be reversed at great cost to the first respondent was manifestly unfair. That the appellant itself eschewed certain requirements of Resolution 5 of 2009 does not detract from the fact that there was a post available into which a suitably qualified person had been placed by the appellant. That she was then “transferred” back to her previous post with the concomitant reduction of salary and obligation to repay R 178 88.98 clearly constituted the kind of practice which falls within the scope of principle of an unfair labour practice which does not depend on a priori right as opposed to the assessment of the conduct of the appellant causing significant unfairness to a dedicated employee. It is this latter classification, based on the facts that successfully grounds the first respondent’s cause of action

[25] For all of these reasons, the appeal is dismissed

Davis JA

Waglay JP and Kubushi AJA concur.

Appearances:

FOR THE APPELLANT: Brenton Joseph SC & Adv Ntwanano Mashava

Instructed by the State Attorney

FOR THE RESPONDENT: Adv Suzanna Harvey

Instructed by Brendan Guy Attorneys