

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN DURBAN

CaseNo: DA29/01

In the appeal between:

TELKOM SA Ltd

Appellant

and

P. RAJBUNSI

1ST Respondent

COMMISSIONER A. DEYZEL

2nd Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

3rd Respondent

JUDGEMENT

ZONDOJP
Introduction

[1] After hearing argument presented on the appellant's behalf in this matter, we dismissed the appeal but made no order as to

costs as it was not opposed. We indicated then that the reasons for that order would follow. These are they.

- [2] The appellant appealed to this Court against a judgement given by the Labour Court in an application brought by it to have a certain arbitration award reviewed and set aside. The award had been issued by the second respondent, a commissioner employed by the Commission for Conciliation, Mediation and Arbitration, the third respondent, in a dispute between the appellant and the first respondent. The dispute related to the correct rate of pay applicable to the first respondent. The arbitration award was in favour of the first respondent. The Labour Court dismissed the appellant's review application and made no order as to costs. It subsequently granted the appellant leave to appeal to this Court, hence this appeal.

The facts

- [3] Prior to November 1998 the first respondent was employed by the appellant as a technician in Umbilo, Durban. He fell into the C1 grade in terms of the Pattersen grading system. Although he was called a technician, in effect he was, as far as he was concerned, a level C1 technical officer. He earned R6 519, 25 per month which put him at R 78 230,00 per year. The next

grade above level C1 was level C2. The starting salary for level C2 was R 86 533,00 per year.

[4] On the 29th May 1998 the appellant advertised two posts of technical officer. One of these posts was a level C1 post whereas the other one was a level C2 post. At that time the post that the first respondent was occupying was on level C1. The closing date for applications was the 12th June 1998. The first respondent submitted his application for the post within the specified period. The first respondent was a member of the Communication Workers Union.

[5] On the 8th July 1998 the appellant and the union concluded a collective agreement in terms of which level C1 and level C2 grades were abolished as grades and a new grade 8 was established in which the employees who had been on levels C1 and C2 prior to that now fell. In terms of a practice that had become established between the appellant and the union, collective agreements concluded between them came into operation on the first day of the month following the month in which they were concluded. Accordingly the collective agreement abolishing levels C1 and 2 and creating the new

grade 8 came into operation on the 1st August 1998.

- [6] On the 6th August the first respondent was informed that he had been short-listed for an interview on the post. The interview took place on the 11th August 1998. During the interview the issue of a salary rate for the post was not mentioned. Indeed, neither the persons who conducted the interview nor the first respondent were aware of the changes brought about by the collective agreement in respect of levels C1 and C2.
- [7] On the 3rd November 1998 the first respondent was informed by way of an e-mail from a human resources consultant of the appellant that his application had been successful. The position was that of Technical officer (Telematics). On the 28th December 1998 the first respondent was informed by the appellant's regional manager, human resources, of his success but he also informed him that his move from his position to the new position was a horizontal one in terms of the collective agreement concluded with the union and that, for that reason, there would be no change in his salary. The first respondent believed that the salary that he should be paid once appointed to

the new position was the salary rate that attached to the position prior to the change brought about by the collective agreement.

- [8] A dispute arose between the appellant and the first respondent on whether or not the first respondent was entitled to the level C2 rate of pay or whether he was not entitled to any increase at all to his salary. The appellant took the attitude that the first respondent was not entitled to the higher salary rate whereas the first respondent maintained that he was entitled. The first respondent contended that the appellant's conduct in denying him the higher salary rate constituted an unfair labour practice as contemplated by item 2(1)(b) of Schedule 7 to the Labour Relations Act, 1995 (Act no 66 of 1995) (~~the Act~~). Item 2(1)(b) provides that:-

(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving-

(a) Ψ .

(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;

(c) Ψ

(d) Ψ

Arbitration proceedings

- [9] The dispute was referred to arbitration. The second respondent was appointed to arbitrate the dispute. The appellant did not call any witnesses. The first respondent testified and called a witness as well. Ultimately the second respondent concluded that the appellant's conduct constituted an unfair labour practice and found that the first respondent was entitled to the higher salary rate. He issued an award ordering the appellant **Ato remunerate [the first respondent] with effect from 7 December 1998 on the salary that he would have earned had he been on the lowest notch of a grade C2 position prior to August 1998 i.e. on a salary of R 86533.00 per annum.**

Proceedings in the Labour Court

- [10] The appellant was aggrieved by the second respondent's arbitration award. It brought an application in the Labour Court to have the award reviewed and set aside. As already stated above the Labour Court dismissed that application but granted the appellant leave to appeal to this Court.

The appeal

[11] In support of its prayer for the setting aside of the award, the appellant relied on two grounds of review in its founding affidavit. The one was that the award was not justifiable in that there was no rational connection between the evidence properly before the second respondent and his conclusion. The other one was that the second respondent committed a gross irregularity in the conduct of the proceedings **Ain that he made certain mistakes of law which resulted in his misconceiving the nature of the enquiry and in so doing, denied a fair hearing**.

[12] In support of the contention that the award is not justifiable and that the second respondent committed a gross irregularity, the appellant averred that it was an express term of the collective agreement that persons in level C1 and C2 would retain their salary and other benefits. The answer to this is that, assuming that there was such an express term agreed, this did not mean that a person who was appointed to what up to then had been a level C2 position and who had previously been on a level C1 position had to retain the previous salary despite the increase in the responsibilities or even despite a change in the functions. On the face of it what that meant is that the mere change from

levels C1 and C2 to grade 8 would not on its own entitle an employee to a higher rate of pay. This was not the first respondent's circumstances. His situation was that a level C2 position was advertised at a time when, to everyone's knowledge, it carried a higher salary rate than a level C1 position which he occupied at the time, that he applied for it and was interviewed and was not advised of anything different until after a decision had been taken that his application had been successful. He was, therefore, not in the same position as the other employees whose grades changed from levels C1 and C2 to grade 8 without them having applied for a position that paid at a higher rate than their own and which at the time of advertisement was known to carry a higher salary rate.

- [13] The second respondent concluded in his award that the advertisement of the position constituted an offer which the appellant subsequently accepted and, by implication, because the offer was conveyed to the appellant at a time when the position carried the higher salary, the first respondent was, so reasoned the first respondent, entitled to the higher salary rate. The second respondent was wrong to conclude that the advertisement constituted an offer. The advertisement was simply an invitation to do business. However, this does not

necessarily render his award reviewable. It is clear from the second respondent's award that his finding that the appellant's conduct constituted an unfair labour practice did not depend entirely or even mainly on his conclusion that the advertisement constituted an offer. The reasons for the second respondent's finding appear in three paragraphs at page 8 of his award. He gives his reasons thus:-

In my view the respondent's actions clearly amounted to unfair conduct relating to promotion. The respondent advertised a position at a higher level than that occupied by the applicant. The applicant applied for that position and his application was successful. The interview panel clearly had it in mind that the applicant should be appointed to a higher position and that was what they recommended. Mr Meth in his opening statement indicated that had it not been for the restructuring of the grading system the applicant would have been appointed on the lowest level of C2. How the re-grading of the respondent's salary structures changed the position was not explained. The agreement relating to the restructuring of the grading system made provision that persons on grade C1 and

C2 would retain their salary and other benefits. The post was advertised prior to the restructuring of the grading system and at the time the idea was that the successful candidate would receive the salary and other benefits that a C2 received. There was no indication that the restructuring of the grading system had any effect on the level of the post that the applicant applied for.

In my view fairness required the respondent to view the applicant's position as if he had been successful in applying to a C2 position as at the time of the closing date for applications. Had the applicant been successful in applying for the advertised position prior to 1 August 1998 his appointment to that position would have been accompanied by a salary increase. The position carried more responsibilities and appointment to the position would have been a promotion. The advertisement implied that the appointment would be made on the salary pertaining to a level C2 position. There was no evidence as to why

this was changed and whether the person that decided to change this had any authority to do so.

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[14] In my judgement the appellant's contention that the second respondent's award is unjustifiable or that the second respondent committed a gross irregularity in coming to the conclusion that the appellant committed an unfair labour practice is devoid of any merit. Accordingly, the Court a quo was correct in dismissing the application.

ZondoJP

I agree.

DavisAJA

I agree.

Du PlessisAJA

Appearances

For the Appellant : Mr Mc Gregor
Instructed by : Deneys Reitz

For the respondent : No appearance

Date of judgement :