

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Not Reportable

CASE NO: JS 347/10

In the matter between:

CHAND FARHANA

APPLICANT

AND

OPEN LEARNING SYSTEMS EDUCATION TRUST

RESPONDENT

REASONS FOR ORDER

MOLAHLEHI J

INTRODUCTION

- 1] This matter came before court as an application for a default judgement. The initial view that the court had was that the applicant had not complied with directive 12 of the Consolidated Practice directive of 2010 made by the Judge President of the Labour Court. (Directive 12) covers only service done in terms of Rule 4(2). The service in this matter was done in terms of Rule 5(b) (a) of the Rules of the Labour Court. It may be an oversight on drafters of the directive not to include service by way of registered post to be covered by directive 12.
- 2] In terms of directive 12 in addition to having ruled that the service in this matter was not covered by directive 12, the court was then satisfied that proper service was effected and that the respondent failed to file its statement of opposition to the applicant's statement of case and accordingly the matter proceeded on basis of application for default judgement.
- 3] In the statement of case the applicant divides her relief into two parts being A and B. Under part A, the Applicant claims that the dismissal for operational

requirements by the respondent was both substantively and procedurally unfair.

4] The case of the Applicant under part "A" is that:

6. *The Applicant was employed by the Respondent on 1 December 1996. At the date of dismissal the Applicant held the position of Deputy Director. A certificate of service by the Respondent to the Applicant issued in terms of the Basic Conditions of Employment Act 1997 is attached hereto marked "FC 1"*
7. *At the date of dismissal the Applicant received a monthly salary of R33 766.00 a 13th cheque equivalent to her monthly salary.*
8. *The Respondent main business was to provide delivery of foundation phase curriculum learning programmes and radio receivers to schools and other institutions through the public broadcaster SABC. Other services included ongoing teacher training and support. This business was not confined to South Africa and included Africa and Asia. To date the SABC continue to flight programmes of the Respondent.*
9. *The Respondent relied heavily on donor funding to enable it to conduct business. The aim of the funding was also to ensure that the Respondent becomes self sustainable.*
10. *On or about 16 November 2009 a Management memo was sent to all staff indicating that the Royal Netherlands Embassy funding had ended and that there was no funding to continue operations. It further indicated that no salaries would be paid. A copy of the memorandum is attached marked "FC2."*
11. *On or about 18 November 2009 the Applicant received a certificate of service (FC1) indicating that her date of termination was 18 November 2009. The reason advanced by the respondent was as follows: "As open Learning Systems Education Trust, has been informed that no more funding will be forthcoming, we are forced to cease operating. We are virtually in liquidation, and unable to make any further salary or wage payments". The Applicant was informed that she need not return to work.*
12. *The Applicant referred an unfair dismissal dispute to the CCMA and a certificate of non resolution was issued on 27 January 2010. A copy of the certificate is attached hereto marked "FC 3".*

5] In terms of Part B, the Applicant says that she was victimised and denied salary increment of 10% when all other staff members received the same. The Applicant's claim in as far as this part of the case is concerned is set out commencing at paragraph 19-29 of the statement of case. That part of the statement of case reads as follows:

- “19. On or about mid 2009, the Applicant was suspended and charged with various allegations of misconduct. One of the allegations related to the Applicant speaking to funders and more specifically the Royal Netherlands Embassy without any authority.*
- 20. The Applicant was called to a disciplinary enquiry chaired by an independent chairperson. The Applicant was found not guilty at the disciplinary enquiry.*
- 21. Upon returning to work, the Applicant was stripped of all her responsibilities.*
- 22. The Applicant was also aware that at that stage the Royal Netherlands Embassy was conducting an audit on the affairs of the respondent and had also been interviewed by them.*
- 23. Unbeknown to the Applicant, staff members had received salary increment.*
- 24. A copy of an e-mail received by the Applicant from one of the staff on or about 1 October 2009 alerted the Applicant that staff had received increments even though the Applicant was not responsible for authorising or discussing increment. A copy of the e-mail is attached hereto marked “FC 6”.*
- 25. Staff received a salary increment of 10%.*
- 26. The Applicant did not receive a salary increment.*
- 27. The Applicant contends that the reason she was not given a salary increment was as a result of discussions she had with the Royal Netherlands Embassy and therefore victimised.*
- 28. At her disciplinary enquiry, the applicant made an application for legal representation on the basis of a Protected Disclosure. The application was granted.*
- 29. It is the applicant contention that as a result of her highlighting serious financial irregularities to the chairperson of the Board of the respondent, Mr Moeletsi Mbeki, and to the funders, that she was charged for misconduct and ultimately stripped of her responsibilities and not given any increment.”*

6] In terms of the relief under claim B the applicant claims 24 months compensation which amounts to R810 384.00. This means by implication that the cause of action is founded under section 187 (1) (f) of the Labour Relations Act 66 of 1995(“the LRA”), which reads as follows:

“187. that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation,

age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

- 7] After some debates in respect of the relief sought under B, the court directed that the applicant should take the witness stand and testify about this aspect of the claim. She testified that the Respondent treated her unfairly after she brought to the attention of the Chairperson financial irregularities which were committed by the Chief Executive Officer.
- 8] After making that disclosure, she was questioned at a meeting about it. She also testified that she never received the 10% increase. She stated that she believes that she was excluded from receiving the salary increase because of the protected disclosure. The protected disclosure concerned certain conduct of the Chief Executive Officer which included allegations that he allocated himself certain loans without proper authorisation.

Evaluation

- 9] I deal firstly with claim A of the applicant. In as far as this claim is concerned, I am satisfied that the applicant has made out a case that she was dismissed for operational reasons and the validity of that reason is questionable. She has accordingly in this respect discharged her duty of showing that there was a dismissal and that the reason for such dismissal was related to operational reasons.
- 10] In terms of s 192 of the LRA, the onus is firstly on the employee to establish existence of a dismissal. As indicated in this matter earlier, the applicant has indeed discharged that duty.
- 11] Section 192 (2) requires the employer to prove that the dismissal was fair. The employer in the present instance, having failed to challenge the averment of the applicant that she was unfairly dismissed has therefore failed to discharge its onus under s 192 (2) of the LRA.
- 12] I have no reason to doubt the version of the applicant that she was unfairly dismissed and accordingly make the order set out at the end of this judgment.
- 13] I now turn to deal with part B of the applicant's claim. As indicated the claim

under this heading falls under the category of unfair labour practice.

14] As indicated earlier, the applicant has prayed for 24 months compensation for the unfair labour practice as a result of the alleged victimisation that she has suffered in the hands of the respondent. Section 194(4) of the LRA provides that compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all circumstances, but not more than the equivalent of 12 months remuneration. In terms of s 194(3), the employee successfully made out case for automatically unfair dismissal and unfair labour practices would be entitled to 24 months compensation.

15] The applicant contends that the respondent committed unfair labour practice by denying her a salary increment when all other employees received theirs. The applicant annexed a copy of an e-mail received from one of the staff alerting the applicant that staff had received increments. The applicant also contends that she was victimised by the respondent in that she was stripped of her duties after she had highlighted financial irregularities to the chairperson of the respondent.

16] In the case of *Protekon (Pty) Ltd v CCMA and others* [2005] 7 BLLR 703 (LC) the court held that where the employer is bound by contractual obligations to confer benefits to its employees, then the employee has an option to pursue a contractual claim or to allege an unfair labour practice, such a dispute can be adjudicated by the Labour Court. However, where it is the discretion of the employer whether or not to confer a benefit, and the employer chooses not to confer such a benefit, then only the CCMA will have the jurisdiction to adjudicate such a dispute. The Applicant has elected to approach the court on the basis of unfair labour practice and will therefore have to prove that there has indeed been an unfair labour practice.

Unfair Labour Practice

17] Section 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") provides that everyone has the right to fair labour practices. Unfair Labour Practice concept is defined by s 186 (2) (a) of the LRA as follows:

“Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.”

Does non-payment of salary increase constitute Unfair Labour Practice?

18] It is important to consider whether failure to award salary increment is an unfair labour practice. On the face of it, the employer's conduct in awarding increment to other staff members to the exclusion of the applicant is arbitrary and inconsistent. However, looking at each aspect of the matter separately, it would appear that the employer did not actually commit an unfair labour practice.

19] To constitute an unfair labour practice, a salary increase should amount to a benefit, if it is found that it is not a benefit, then the conduct of the respondent cannot be said to be an unfair labour practice. In *Hospersa v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC), the appeal court dismissed the applicant's claim on the basis that an allowance to an employee for acting temporarily in a more senior position, in the absence of an agreement to that effect, was not a right dispute arising *ex contractu* and *ex lege* and could therefore not amount to unfair labour practice.

20] Furthermore, the case of *Mutual & Federal Insurance Co Ltd V Maeta & Others* (2000) 5 Lrd 10 (LAC), the court held that salary increases are interest dispute as they create fresh rights.

What constitutes a “benefit”?

21] In terms of section 186 (2) (a), an employer would be guilty of unfair labour practice if he/she commits any form of unfair conduct relating to the provision of benefits to an employee. In the case of *Gaylard v Telkom SA Ltd* (1998) 19 ILJ 1624 (LC), the court determined that remuneration, which is defined as any payment in money or kind, or both money and in kind made or owing to any person in return for that person working for any other person, was not a “benefit”. Furthermore, in the case of *Northern Cape Provincial Administration v Hambidge NO & others* [1999] 7 BLLR 698 (LC), the court held that while the

claim for payment for the additional responsibilities of acting as matron of a hospital seemed fair, such claim could not be said to concern a benefit even if its receipt would have been beneficial to the employee. The court went further to hold that such a claim is a salary or wage issue, and that such claims are about matters of mutual interest.

22] In *Khuzwayo and Somta Tools (Pty) Ltd* (2005) 26 ILJ 947 (BCA), the court held that benefits should be interpreted as excluding all payments falling under the broad definition of remuneration. Furthermore, the case of *Madlongwane v University of Transkei* [2004] 11 BALR 1333 (P), held that a complaint about not having received an increase when others have received an increase related to remuneration and not benefit.

23] Salary increases do not fall within the ambit of benefits. Salary increases are “economic” demands and the court held in *Hospersa (supra)* that should such demands form the basis of an unfair labour practice, then that would have the effect of undermining collective bargaining.

Discrimination

24] In cases involving allegations of discrimination the duty is on the party making the allegations to show that there was discrimination. And whether the discriminatory practice has impacted on the dignity of the affected individual, See Grogan J *Workplace Law*, 10th Ed (Juta 2009) 9. To determine whether there has been discrimination, regard should be had to section 6 (1) of the Employment Equity Act 55 of 1998 which reads as follows:

“No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion culture, language and birth.”

25] In the case of *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), the court held that where discrimination is based on some other grounds, the complainant must establish unfairness. Furthermore, the court in the case of *Ntali v SA Breweries* (2001) 22 ILJ 214 (LC), warned against

the practice of simply alleging discrimination on 'arbitrary' conduct by the employer, without specifying the grounds for that allegations. In the case of *Mothoa v SA Police Service and others* (2007) 28 ILJ 2019 (LC), the court held that where an employee complains about discrimination on an unlisted ground, he/she must provide evidence that the act complained of affected his/her dignity, injured feelings are insufficient to prove a claim of discrimination.

26] **The applicant has failed to specify expressly on what ground she had been discriminated against. She has failed to discharge the onus of proving discrimination.**

27] In the present matter the applicant has also not been able to show that the respondent had committed an unfair Labour practice by failing to give her an increase. In fact even if she was able to show unfair labour practice this court would not have had jurisdiction because unfair labour practice matters are the responsibility of the CCMA. In any case, failure to grant a salary increase dispute is a dispute of interest and not a right dispute.

28] **The relief sought under claim B should fail.**

29] **In the premises claim B is dismissed. As concerning claim A the following order is made:**

1. **The statement of case having been duly served on the respondent and the time for the respondent to file its statement of opposition having expired and the respondent having failed to serve and file its opposition to the statement of case a**

judgment by default is made in the following terms:

- 1.1 The dismissal of the applicant for operational reasons was both substantially and procedurally unfair.
- 1.2 The respondent is ordered to compensate the applicant in the maximum compensation as ordered in terms of section 194 of the Labour Relations Act 66 of 1995 in the amount of R405 192.00 calculated at the salary which the applicant received as of the date of her dismissal.
- 1.3 The respondent is to pay the applicant the severance pay in the amount of R93 577.80 calculated at 12 weeks' salary.
- 1.4 The respondent is to pay the applicant the salary for the month of November 2009 in the amount of R33 766.00
- 1.5 The respondent is to pay the cost of the applicant.

Molahlehi J

Judge of Labour Court Of South Africa

Date of Hearing 23 March 2011

Date of reasons for order: 29 April 2011

Appearances:

For the Applicant: Farhan Suder from Patelia Cachalia Attorneys

For the Respondent: Unopposed

LABOUR COURT