



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR: 2575/09

In the matter between:

SOUTH AFRICAN DEMOCRATIC

TEACHERS UNION

EPHRAIM ESKIE SOKE

AND

EDUCATION LABOUR

RELATIONS COUNCIL

CAWE N.O.

DEPARTMENT OF EDUCATION: GAUTENG

Date of hearing: 09 February 2012

Date of judgment: 06 December 2012

Summary: Review application. Unfair labour practice. Reasonable expectation to be appointed into a position seconded to.

First Applicant

Second Applicant

First Respondent

Second Respondent

Third Respondent

JUDGMENT

Molahlehi J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the arbitrator) under case number PSES497-08/09GP on 4 August 2009. In terms of the arbitration award the arbitrator found that the third respondent had not committed an unfair labour practice in not appointing the second applicant to a position higher than the one from which he was before he was seconded to the head office of the third respondent.

Background facts

- [2] The applicant was employed by the third respondent as an educator on Post Level 1 (PL1), as from 1988 and at that time his main duties at the secondary school where he was assigned, was to conduct teaching for the learners. After 14 years as a classroom educator the second applicant was during July 2003 seconded to the head office in the institutional development and support– general education and training unit (GET). The secondment was initially supposed to be for a period of three months with the possibility of extension. The letter of seconding the applicant to the head office reads as follows:

1. "I am pleased to inform your secondment has been approved below:

DATE OF EFFECT	:	20/01/2003
RANK	:	Educator PL1
SALARY NOTCH	:	R92 100 per annum
SALARY SCALE	:	R78 429- R92 100
ESTABLISHMENT	:	GET: Head Office
SENIORITY	:	None

2. The aforementioned secondment is subject to the provisions of the Educators Employment Act, 1998 (Act 76 of 1998) Section (9) the Government Employee's Pension Law, 1996 (proclamation no 21

of 1996) the regulations promulgated in terms of this act and any amendments to the aforementioned acts and regulations.

3. This secondment is subject to the acceptance thereof within 30 days from the letter. Unless the reply is received within 30 days, the offer will lapse. Should you accept, you are requested to sign the attached annexure B and return it to the above mentioned address, for attention Mr J Ramoshaba: Room 606.
 4. In spite of all precautions it is still possible that errors may occur. Such errors will be rectified and overpayments, if any, will be recovered as soon as it is discovered."
- [3] In accepting the offer of secondment to GET the applicant stated that the following:
- "I hereby wish to inform you that I have decided to accept the post of EDUCATION (PL1)."
- [4] It seems common cause that the position of PL1 does not exist at the head office where the second applicant had been seconded to. It is also common cause that the position to which the second applicant was seconded to at head office was higher than PL1. At the end of three months the second applicant's secondment was extended until the end of the year, 2003. The secondment was extended further in January 2004.
- [5] The issue that gave rise to the dispute arose in 2005 after the respondent advertised two post of deputy chief education specialists which were at Post Level 4. The applicant applied for that post but was unsuccessful. Two people were appointed to the two posts. However, according to the second applicant he continued performing the same duties at the head office even after the appointment. Towards the end of September 2006 the chief education specialist made a submission to the chief director recommending that the applicant be appointed to the post higher than PL1. It seems also common cause that the applicant applied again for a higher post in 2007 but never received any feedback regarding outcome of the interviews which were conducted during June 2008.
- [6] The applicant says for a period of seven years that he served at head office on secondment he undertook several training courses which were arranged

by the third respondent. He received the training in project management and financial management. He also contends that during that period he performed his duties with excellence and integrity.

- [7] The applicant has raised a formal complaint about his non appointment to level at which he was performing at the head office during June 2008. It would appear that in an attempt to address the problem raised by the applicant the third respondent offered him during June 2009 a clerical post at the head office. If he was to have accepted the offer then he would have lost employment under the Educators Employment Act and would have been employed under the Public Service Act. It was for this reason that he rejected the offer. It was following this that the applicant declared a dispute with the bargaining council. And following the failure of conciliation the matter was arbitrated by the arbitrator.

The grounds for review

- [8] The applicants contend that the arbitration award is reviewable because the arbitrator amongst other things failed to consider the uncontested evidence that the second applicant performed his duties for the period of seven years that he served on secondment to the head office at the level of DCES post. It would seem the other point raised by the applicants is that the arbitrator failed to apply his mind to the issues which was placed before her in that she is alleged to have placed unnecessary weight on the issue of the remuneration which the applicant received rather than on the issue of whether the applicant should have been appointed to the post of DCES.
- [9] The applicants further contend that the arbitration award is reviewable on the following grounds:

- “47.1 The arbitrator failed to have regard to, or to consider my evidence and gave undue weight to the evidence presented on behalf of the third respondent;
- 47.2 The arbitrator failed to apply her mind to the evidence before her, and
- 47.3 Even if the arbitrator concluded that I was not the best candidate for the job, the arbitrator failed to consider the unfairness of retaining me in the effective capacity of a DCES for 7 years without promoting me or adjusting my remuneration, and failed

to consider whether an award of compensation would have been appropriate.”

The arbitration award

[10] The basis upon which the arbitrator arrived at the conclusion that the third respondent did not commit an unfair labour practice in not appointing the second applicant to the post of DCES is correctly summarised by the applicants in their heads of argument as follows:

- “15.1 The Second Applicant was a PL1 educator and had been seconded as such.
- 15.2 The Second Applicant could not simply be confirmed in a DCES post, I'd process of advertising and interviewing had to take place and it was not The Second Applicant's evidence that he was the best candidate for the DCES position he had applied for.
- 15.3 The Second Applicant's submissions that the phrase "we are in the process of making a submission to finalise the move" meant that he was to be confirmed in the DCES post could not be accepted because if it was the case. "A letter of appointment into a DCES post or at least an announcement to the effect would have been made in 2003."
- 15.4 The Second Applicant was only entitled to the remuneration of PL1 educator and had therefore been correctly remunerated.
- 15.5 The letters confirming the Second Applicant's secondment stated that there is no change in the seconded person's rank and simulating.
- 15.6 The Second Applicant "might have acted for 7 years in the desired post but the onus was on him to question the numerous extensions. He authored his own misfortune by not challenging his not been appointed thereto."

Legal principles

[11] The concept of a reasonable expectation has generally been applied in cases involving non-extension of fixed term employment contract.¹ the

¹ In this regard Section 186 of the Labour Relations Act of 1995 provides that:

“(1) Dismissal means that ...(b) An employee reasonably expected the employer to renew a fixed term contract of employment on the same

test to apply when considering the existence of a reasonable expectation is an objective one. The onus in this regard rests with the employee. In *Minister of Land Affairs v GPSSBC and Others*,² the court held that:

“14 Generally, a reasonable expectation may arise as a result of a prior promise, either express or implied, by the employer to renew the fixed term contract or as a result of prior practice, for example, where the employer has habitually renewed the contract. The onus is on the employee to prove that a reasonable expectation of renewal existed.”

The court further held that:

“The test for establishing a reasonable expectation is an objective one. The court will enquire whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his or her fixed term contract on the same or similar terms. A number of factors have been considered by the courts in assessing whether or not a reasonable expectation exists.”

[12] The factors which the court will take into account in considering the existence of a reasonable expectation include:

“... the evaluation of the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of employer’s business.’³

or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.’

² 2011 ZALCJHB 162 (LC).

³ *Dierks v University of South Africa* (1999) 20 ILJ 1227 at 1246.

[13] In *SA Bank of Athens Ltd v Celliers NO and Others*,⁴ the court held that:

"The fact that the contract contains a clause permitting renegotiation does not in itself create a reasonable expectation.⁵ Likewise, a clause stating that the contract will not be subject to renewal does not preclude a challenge that a reasonable expectation of renewal was created. However, the Labour Appeal Court has held that when a contract specifically states that it is for a fixed period and that there will be no expectation of renewal, a party claiming a reasonable expectation must advance more than 'flimsy evidence'

Evaluation

[14] The issue which the arbitrator had to consider in this matter was essentially whether the second applicant had a reasonable expectation to be appointed to the post of deputy chief education specialist subsequent to his secondment to the head office of the third respondent.

[15] The case of the second applicant is that he had reasonable expectation that his secondment to the head office of the respondent would be confirmed after he had been seconded to perform tasks at the LP 4 level and served at that level for a period of seven years. He further says that his expectation was raised when a proposal was made that his "secondment be formalised." The other basis upon which the applicant contends that his expectation was raised is that he had undertaken a number of training courses during the period of his secondment.

[16] In relation to the courses he attended during the period of his secondment the applicant conceded during cross examination that those qualifications were when not a prerequisite for the position of DES LP4. He further conceded that the training which he undertook was never for the purposes of upgrading him from PL1 to DES PL4.

[17] In my view the letter recommending the formalisation of the secondment does not assist the case of the applicant in that it does not say that he be

⁴ (2009) 30 ILJ 197 (LC).

moved from PL1 to DES PL4. Even on his own version and also his subjective view there was no expectation that he would be automatically be appointed to LP4. In this respect the second applicant says the following:

"My secondment raised my expectation to get the post, but I knew very well that I have to contest the post."

[18] The same applies to the letter he wrote to the Acting- Director- GET dated 19 April 2007, wherein he had the following to say in relation to his secondment:

"I was employed in permanent capacity at Namedi Secondary school from 1988. In January 2003, I was seconded to Head Office in the General Education and Training (GET) Directorate- IDS. I was deployed to serve in the Sub Directorate Organisation and Governance.

I have been out of classroom situation for quite a long period and I have assumed a new role of dealing with policy. My position as is, is that I strongly feel that going better to school would create untold problems as I was left out in the changes that occurred. My contribution in the governance unit is huge and highly valued in that I am responsible for successfully coordinating RCL activities. I have bonded with the past and present RCL members as well as RCL coordinators throughout the province and see no reason why I cannot be given a chance to continue acting on the post and take advantage when it advertised to contest for it.

I sincerely request your intervention. With regard to clarify my position. This will assist me not to be left in limbo.

Hoping for a favourable consideration for my request.

Yours faithfully."

[19] The proper reading of the above letter indicates very clearly that the second applicant was not expecting to be automatically appointed to the position of DES PL4 but wanted to continue working at GET. The one thing that is clear is that the expectation of the second applicant from the reading of the letter was to have the post he was seconded to be advertised and for him to compete for that post. The expectation of the second applicant was not for him to be appointed to the position at DES LP4 level but that the he be allowed to "continue acting on the post until it is advertise and I contest for it."

[20] The view that the second respondent failed during the arbitration proceedings to show that he had reasonable expectation to be promoted to DES LP4 is further supported by the submission made on his behalf during the closing argument. There is no mention during that submission that the second applicant had an expectation that he was supposed to have been promoted to the post of DES PL4. In this respect the representative of the second applicant had the following to say:

“The department has unfairly treated Mr Soke by keeping him in this unit for seven years without remunerating him and making him to perform duties that are not meant for his level and expect him to go back to school. By the way Ms Commissioner there is no school for improving levels, levels are only attained through promotional posts. The seven years experience that Mr Soke gained and the evaluation conducted by the DES in his unit makes him to qualify to perform the functions has been performing for 7 years.”

[21] The approach adopted by the Commissioner must be understood in the context where as a matter of general principle there is no automatic right to promotion for a person acting in a senior position when that position becomes available.⁶ The approach has to also be understood in the context it the prerogative of an employer to appoint or promote an employee who it considers best or most suitable for the position.⁷ In my view the arbitrator cannot be faulted for the approach she adopted in dealing with the dispute. She applied her mind to the facts which were before her and also applied the relevant test for determining whether the second applicant has discharged his duty of showing that the third respondent had created a reasonable expectation by seconding him to work at the head office. The conclusion reached by the arbitrator that the third respondent did not commit an unfair labour practice is well reasoned, rational and reasonable.

⁶ See *Gurarnah v South African Weather Service* [2004] 4 BALR 454 (CCMA) and *Limekaya v Department of Education* [2004] 5 BALR 586 (GPSSBC).

⁷ See authorities referred to in *Labour Law Through Cases-* Service no 17 page LRA 8-17.

[22] In my view the secondment applicant has failed to make out a case warranting interference with the arbitration award. I do not however believe that in the circumstances of this case cost should be allowed to follow the results.

Order

[23] In the premises, the applicants' application to review and set aside the arbitration award made under case PSES 497– 08/09 GP dated 14 August 2009 is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant :Adv H Barnes instructed by Cheadle Thompson & Haysom

For the Third Respondent :Adv V P Ngutshane instructed by State Attorney