



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 276/15; JS 721/14

In the matter between:

BRILLIANT AND 50 OTHERS

Applicants

and

GAUTENG GAMBLING BOARD

Respondent

Heard: 9 October 2015

Delivered: 12 October 2015

JUDGMENT

VAN NIEKERK J

- [1] The first to 51st applicants have referred a dispute to this court in terms of the Employment Equity act. They contend that they have been unfairly discriminated against and specifically, that the respondent has failed to compensate them in accordance with the principle of equal pay for work of equal value. The respondent has raised a number of points in *limine* and these are the subject of the present proceedings.
- [2] The first objection raised by the respondent is one of *lis pendens*. In this regard, the respondent contends that on 30 September 2014, the applicants referred an alleged unfair labour practice dispute to this court under case number JS 721/14. In that referral, the applicants contend that the respondent has incorrectly applied the Paterson grading system and incorrectly applied what is referred to as the 'median policy'. The manner in which the referral was drafted clearly indicates that the dispute is one concerning an unfair labour practice in relation to the provision of a benefit.
- [3] It is patently clear to me from the terms of the referral that this court has no jurisdiction to entertain it. The Labour Relations Act does not empower this court to entertain an unfair labour practice dispute; indeed, section 157 (5) specifically provides that the court may not adjudicate an unresolved dispute if the Act requires the dispute to be resolved through arbitration. A dispute concerning an unfair labour practice regarding the provision of benefits, of course, is a matter that must be referred to arbitration (see s 191 (5)). I fail to appreciate why the respondent has not raised a special plea in response to the referral, but that question will no doubt be a matter that this court will be obliged to deal with in due course.
- [4] Although the facts and circumstances giving rise to the present proceedings and those under case number JS 721/14 are substantially the same and involve the same parties and much the same subject matter, two different causes of action are pleaded.

Assuming that the referral under case number JS 721/14 is valid (in the sense that the court has jurisdiction to entertain it), the questions of law raised are fundamentally different. The objection of *lis pendens* accordingly cannot succeed.

- [5] Turning next to the point taken in regard to the late referral of the dispute, the respondent contends that the referral made in terms of the Employment Equity Act required that it be referred to the CCMA within six months of the applicants becoming aware of the act that they alleged to constitute unfair discrimination. In their statement of claim, the applicants aver that as long ago as 2011, a staff association was formed with the objective of addressing and resolving issues with management and that during the course of 2012, queries were raised concerning disparities in remuneration. The respondent contends that the dispute ought therefore to have been referred during the course of 2012 and that the referral, made as it was in 2014, was out of time.
- [6] A claim for equal pay for the same or similar work or work of equal value, certainly while the employee concerned remains employed, is quintessentially what has been referred to as an act that is ongoing. The Labour Appeal Court has held (see *SABC Ltd v CCMA* [2010] 3 BLLR 251 (LAC)) that where a dispute concerns not a single act of discrimination but one that is repeated monthly, the employee may refer the dispute any time and need not seek condonation for doing so more than six months after the discriminatory practice commenced. In the present instance, there is accordingly no need for the applicants to seek condonation for a late referral. However, the date of the referral has implications for the nature and extent of the applicants' claim, as will appear below.
- [7] The third preliminary point raised by the respondent is an exception. The respondent contends that of the 51 applicants before the court, only five set out facts in the statement a case in regard to alleged unfair discrimination. The applicants are clearly employed in different

positions, have different qualifications, experience and length of service. The respondent contends that the remaining 46 applicants cannot rely on the factors pleaded in relation to the five applicants to find a claim of unfair discrimination, given these differentials.

- [8] Paragraph 5.1 of the statement of case makes clear that to 'prevent unnecessary duplicity' a number of examples are contained in the statement of claim. As I have indicated, the document goes on to describe the specific circumstances of only five of the applicants. Each of the five applicants chooses a comparator who is employed on the same Paterson grade and whom it is alleged is paid a different salary. However, it is clear that even in respect of the five applicants whose circumstances are described in the statement of case, they are not employed in the same work. For example, in paragraph 6 of the statement of case it is alleged that one Lawrence Sikoe is employed as an on-site inspector later 'rotated' to the position of compliance auditor. His chosen comparator is a Patrick Mashangoane, who is described as an auditor. It is alleged that Sikoe and Mashangoane perform the same work but are remunerated differently. I raise this example only to illustrate that the circumstances in which each applicant is employed are very different and that given the requirement of a chosen comparator in an equal pay claim, the basis for the comparison must be made clear in each individual case.
- [9] It is not sufficient, in my view, as the applicants have done, to pursue an equal pay claim without at least disclosing the personal circumstances of each applicant, his or her post in the organisation, level of remuneration, the chosen comparator, the basis of the comparison and the basis on which any differential is alleged to constitute unfair discrimination in the form of a breach of the principle of equal work for the same or similar work, or work of equal value. Of course, it is not incumbent on an applicant to anticipate and negate every defence that might be available to a respondent (in the form of differentials in skill, level of experience, length of service and the like),

but each applicant should at least identify his or her chosen comparator and assert the basis on which any identified differential is alleged to constitute unfair discrimination. This is particularly so where, as in the present case, the applicants rely on discrimination on an arbitrary ground. The basis on which they contend that any differential between them and their chosen comparator is arbitrary (as opposed to merely different) ought to be alleged, so as to enable the respondent to plead to that case.

- [10] To the extent that Mr Thompson in argument submitted that what was really at issue was the salary adjustment affecting the applicant's monthly salary referred to in paragraph 5.14.4 of the statement of case and that this applied to all of the applicants, this is simply not the case that has been pleaded. On the contrary, the five applicants record their circumstances in relation to their chosen comparator and assert that the discrepancies to which they point are the result of discriminatory practices on arbitrary grounds and a breach of the policy of equal pay for work of equal value. If their case had been confined to the discriminatory basis on which the salary adjustment was effected, they would have said so.
- [11] Further, I understood Mr Thompson to concede during argument that the relief sought in the statement of claim, and particularly paragraph (f), is not competent since it seeks to effect a correction to the applicant's remuneration retrospectively to 1 April 2012. Mr Thompson did not dispute that the effect of the limitation on referrals under the Employment Equity Act had the effect that any retrospective relief was limited to a period six months prior to the date of the referral.
- [12] In summary, the exception stands to be upheld and the applicants afforded time within which to amend their statement of claim so as to reflect their personal circumstances, those of their chosen comparators and the basis on which they contained that any differential constitutes unfair discrimination on an arbitrary ground.

Further, the applicants are required to amend the relief that they seek in respect of retrospective adjustments to the remuneration. Given the large number of applicants, I intend to afford them a period of 30 calendar days within which to file the amendment.

[13] In view of the findings to which I have come, it is not necessary for me to decide the application to consolidate matters number JS 276/15 and JS 721/14 that has been filed by the applicants.

I make the following order:

1. The applicants are to file an amended statement of claim within 30 calendar days from the date of this order
2. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant Mr M Thompson

For the respondent (excipient) Mr P Maserumule

Labour Court