



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JR 1391/14

In the matter between:

BRENDAN NKAMBULE

First Applicant

**GENERAL INDUSTRIES WORKERS
UNION OF SOUTH AFRICA**

Second Applicant

and

**THE NATIONAL BARGAINING
COUNCIL FOR THE CHEMICAL
INDUSTRIES**

First Respondent

PANELLIST MANISHA SINGH (N.O.)

Second Respondent

AEL MINING SERVICES

Third Respondent

Heard: 16 March 2017

Delivered: 29 March 2017

Summary: (unfair labour practice – claim for retrospective remuneration consequent on job regrading – claim for grading adjustment to a higher level within a grade)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an opposed review application relating to an unfair labour practice concerning remuneration for upgrading
- [2] The first applicant, Mr B Nkambule ('Nkambule') had claimed back-pay amounting to R 76,137.65 on the basis of the re-grading of his position. He claimed that since August 2011, he had performed the tasks in the position he occupied which was upgraded in September 2013. He also sought upgrading of his level within the grade from level 2 to level 2A and demanded back pay for that too.
- [3] The arbitrator decided that payment of back-pay was not feasible for the following reasons:
- 3.1 It was indeterminate when Nkambule had commenced doing the higher graded work. In regard to the schedules he submitted in support of doing prior work at the higher grade, the arbitrator found that the schedules only related to competency levels 1 and 2 and the fact that he was trained at certain levels did not mean he was actually performing tasks at those higher levels.
 - 3.2 It would be impractical to make retrospective adjustments every time a job was upgraded.
 - 3.3 There was no practice of retrospective implementation of back-pay for upgrading.
- [4] The arbitrator dismissed Nkambule's claim that he should have been paid at level 2A. Although he had testified that he performed maintenance and quality tasks which were the criteria to be on that level, the arbitrator accepted the employer's evidence that level 2A had been created as a 'once-off' exercise in 2001 and the only employees who were still on that

level were the remaining persons from the affected 2001 group who were still in employment. It appears that the arbitrator also accepted that Nkambule had not been assessed for a change in his levels and had concluded that, the only reason for not being assessed was that he had outstanding tasks to complete. Nkambule had testified that multi-skilling did not stop after 2001 and people continued to do quality and maintenance work and were held accountable for it.

- [5] The arbitrator ultimately concluded that Nkambule's claim was not a claim for a benefit but a claim for remuneration and therefore fell outside of the scope of the term 'benefit' for the purposes of the unfair labour practice. In effect this means that even though the arbitrator ruled on the merits of the claim, she in fact held that, properly speaking, the claim fell outside her jurisdiction.

Grounds of review and assessment:

- [6] Firstly, the applicants argued that the arbitrator incorrectly characterised the dispute as one of remuneration when in fact it was about training and promotion, which was never an issue that was disputed. Consequently, she applied irrelevant criteria in arriving at her decision. However, this does not square with Nkambule's own characterisation of the dispute in the referral form on which it was expressed as a straightforward claim for compensation for quality and maintenance tasks performed and adjustment of the salary grade and back-pay. In effect, it was a claim for recognition of past work allegedly performed at a higher grade and for recognition of current maintenance and quality tasks performed by adjusting Nkambule's wage level to level to 2A. In Nkambule's representative's opening address at the arbitration hearing, the dispute was characterised as a failure to match the applicant's remuneration with the higher grade in which he had been placed and that the relief sought was back pay. It would seem therefore that the arbitrator's conclusion that she was not dealing with a claim for benefits but simply for a claim for arrear remuneration was well founded. In so far as the applicant contends that the claim in fact concerned an alleged unfair labour practice relating to

promotion, that also does not seem to be a basis on which the arbitrator would have had jurisdiction given the absence of an indication in the referral that the matter concerned a promotion dispute and also given that the applicant was in essence seeking compensation for a promotion which had taken place. Nonetheless, despite the apparent absence of jurisdiction to determine the dispute, I have considered the other grounds of review in the event that I am wrong on this issue.

- [7] Secondly, a fundamental pillar in Nkambule's case is that, the arbitrator had improperly relied on documentary evidence which had been "unlawfully restructured". This claim of fabricated evidence concerned a document produced to support the respondent's argument that the 2A level had been a temporary measure in 2001. Nkambule contends that the company logo on the bulletin describing the temporary measure did not exist in 2001 and that accordingly, the document was purposely manufactured and untrue. The company witness conceded that the logo on the document was incorrect, but in his evidence in chief, he tendered the document with the original logo and gave detailed evidence as to the origin of level 2A. He stated it was developed as a measure to accommodate people who did quality and maintenance work previously, before multi-skilling was introduced.
- [8] It was submitted that Nkambule was unable to even identify designated tasks he had supposedly performed, which were associated with level 2A, on the document he produced as evidence in support of his claim to perform that type of work. The document relied on by Nkambule makes no reference to level 2A, but only to levels 1, 2, 3 and 4. In cross-examination of the respondent's witness, it was suggested to him that some of the tasks under level 4 performed by Nkambule should have placed him on level 2A. His response was that levels 2A and 2B ceased to exist after 31 December 2001. Thereafter anyone engaged after that date was graded under the new multi-skilling model.
- [9] The document, which Nkambule disputed the authenticity of, contained a diagram showing that an interim arrangement had been devised in 2001 to accommodate employees who were both competent and accountable for

quality and maintenance tasks in the multi-skilling system, the respondent had adopted. The document makes it clear that the two bands introduced to accommodate such employees were part of a “parallel interim model”. The document explained the term as follows:

“ ‘Parallel’ means that the two bands not part of the multi-skilling model but to run along side it. ‘Interim’ means that bands A and B not intended to be permanent. They are there to meet the need of defined existing employees.

Beneath the diagram showing the relationship between the parallel interim model and the existing multi-skilling system, the following additional explanation appears:

“This will be a ‘once-off’ exercise, meaning that no further employees (whether existing or new employees) will be allowed into bands A and B after the present exercise of defining employees is completed and implemented. This exercise was supposed to be closed by 31 December 2001. But was officially closed on 30 June 2002 after been extended a number of times due to requests from union representatives and line management.”

[10] In the context of all the oral testimony relating to this interim arrangement which was not seriously contested in the cross-examination of the third respondent’s witness, save for the dispute about the authenticity of the document itself, it cannot be said that the arbitrator acted unreasonably in refusing to discount the document as a fabrication. To consider it as such, would entail concluding that the third respondent had embarked on a scheme of deception of an extraordinarily elaborate nature just to deny Nkambule what was due to him. It would also have required the arbitrator to simply ignore the fact that the document relied on by Nkambule himself made no reference to the intermediate grade levels 2A and 2B. I am satisfied that the arbitrator’s conclusions in relation to the non-existence of level 2A as an intermediate grade level that can be applied to employees other than those who were specifically subject to the parallel interim arrangements in 2001 and 2002 were not conclusions that no reasonable arbitrator could have arrived at on the evidence.

[11] Thirdly, the applicants also submit that the arbitrator unreasonably relied on the evidence of a senior manager rather than someone with knowledge

of HR practices policies. This ground of review seems to be a somewhat belated attempt to discredit the expertise of the respondent's witness in circumstances where his ability and competence to testify were not disputed at the arbitration.

- [12] Fourthly, it is claimed that the arbitrator had no basis for deciding that because Nkambule claimed to be have been trained at certain levels that he was actually performing work at that level. As the essential issue in this review is whether it was possible for a person like Nkambule, who was not part of the group that was placed on level 2A or 2B in 2001, to still be classified in that group, and since it was not unreasonable to conclude that entry into those levels was not possible after that interim period, it makes little difference whether he was performing such work or not as his grading had to relate to the permanent grading structure.
- [13] It was also claimed that the arbitrator had ignored evidence there had been other instances of employees receiving back-pay for upgrading and showed undue concern for setting a precedent by recognising a right to back-pay. On the available evidence, the employer's witness had explained that this had only happened where people had been placed in a new job without a pre-existing grade being attached to it. In the case of the applicant, his job had been graded at a certain level for many years and the regrading was not the same as a delay in grading a job for the first time. I also note that in the applicant's evidence in chief, the allegation of back-pay was not supported with specific examples and it was only in re-examination that he made a vague reference to a case of some individuals who had been found to be on a higher grade and received retrospective compensation. In the circumstances, it cannot be said that the arbitrator's finding on this issue was one that no reasonable arbitrator could have arrived at.
- [14] In conclusion, I am satisfied that even if the arbitrator did have jurisdiction to consider the applicant's complaint, her other findings are not ones that no reasonable arbitrator could have arrived at. Moreover, to the extent that she may have erred in some respects, her errors were not ones that would

have had the result that her award would necessarily have been different had she not made them.¹

[15] Although Nkambule was assisted in this matter by his union, *albeit* perhaps after he had filed papers initially, I accept the applicants might genuinely believed his application had some merit and it was not frivolous or vexatious. In the circumstances, I do not believe a cost award against the applicants is warranted.

Order

[16] In light of the above,

16.1 The application is dismissed.

16.2 No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

¹ See *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at 60 par [32].

APPEARANCES

APPLICANT:

M V Bayi of Bayi Attorneys

THIRD RESPONDENT:

B Masuku of Mervyn Taback Inc.

LABOUR COURT