



**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)**

Case no: D 320/23

Not Reportable

In the matter between:

NOMAVA REJOICE KESWA

First Applicant

RAASHNA REDDY

Second Applicant

and

OFFICE OF THE PREMIER

First Respondent

**DEPARTMENT OF PUBLIC SERVICE
AND ADMINISTRATION**

Second Respondent

GPSSBC

Third Respondent

COMMISSIONER WAYNE PAUL

Fourth Respondent

Heard: 27 November 2024

Judgment delivered: 10 February 2025

JUDGMENT

WHITCHER J

- [1] The applicants applied to this court for an order in the following terms:
- (i) That the decision by the first and second respondents not to upgrade the applicants from level 9 to 12 be reviewed and set aside.
 - (ii) That upon the upgrading of the applicants' position to level 12, it be implemented retrospectively with backpay.
 - (iii) Alternatively, the arbitration ruling rendered by the fourth respondent on 2 May 2023 be reviewed and set aside and replaced by an order upgrading the applicants to level 12 retrospectively with backpay.
- [My emphasis]

[2] The applicants' review application is accordingly two-fold, the first part under section 158(1)(h) of the LRA (a legality review) and the alternative prayer in terms of s145 of the LRA.

The legality review

- [3] Given the history of the matter, the lateness of the application is condoned.
- [4] The applicants are employed by the first respondent in its Provincial Public Service Training Academy as Education Training and Development Practitioners: Curriculum Development. The post of Education Training and Development Practitioner: Curriculum Development was created in 2008/9 and at the time evaluated at salary level 9.
- [5] The review primarily rests on a contention that the first respondent made a decision to upgrade the post from level 9 to 12 which decision was signed and approved by the Executive Authority on 31 May 2019.

[6] However, as demonstrated by the first respondent, it made no such decision.

[7] In support of their contention, the applicants rely on a route form and a submission from the Director of the Provincial Organisational Development (POD) to the Director General¹ requesting a bench-mark approval on the grading of their posts.

[8] The applicants consider this submission to be a decision that has been made to upgrade the post to grade 12 but, as stated by the first respondent, they fail to have regard that it was merely a submission and the purpose thereof was a request for the Director General to approve the recommendations contained therein and that the matter be sent to the second respondent for consideration.

[9] The recommendation was supported by the acting director general, *but* on the condition that the matter be referred to the second respondent for consideration.

[10] As such before a decision was to have been made, it had to be approved by the Director General and the second respondent.

[11] There is no evidence that the Director General approved the recommendation, and it is common cause that the second respondent did not approve the recommendation.

[12] Further, it is apparent from the papers that job evaluations in first respondent are conducted by job evaluation committees, in this case by the Provincial Job Evaluation Panel.

[13] In this instance, the submission itself states that:

The ETDP Post in terms of the CORE from DPSA and Organised Framework of Occupations (OFO), is regarded as a specialist post which operates within an Education and Training field. However, during the job evaluation of this

¹ I have to assume the Director General of the first respondent because the submission does not say which director general.

post this was not accurately captured and it led to a lot of questions. The Provincial Job Evaluation Panel Members perceived this post to be similar to the departmental HRD practitioner post and therefore could not apprehend the technicality of the functions of the post.

[14] This is to say the Provincial Job Evaluation Panel was unable to reach a decision to upgrade the post as requested by the applicants which, in the circumstances, as I read the submission, necessitated the advice and direction of the second respondent (which, as stated, did not approve the recommendation/submission).

[15] As such, it cannot be said that the first respondent made a decision to upgrade the post from level 9 to 12.

[16] It therefore falls to reason that if no decision was made by the first respondent to upgrade the post from level 9 to 12, the applicants complaints regarding the conduct and authority of the second respondent are of no consequence – basically sections 41 and 45 of the Public Service Regulations 2015 and the Circular relied upon by the applicants (if one accepts their interpretation thereof) has no effect in so far as it relates to the applicant's dispute.

[17] In any event, the applicants' submission that the second respondent is barred from validating any job evaluation exercise or from giving direction or advice on the grade of their posts has no merit.

[18] Clause 43(4) of the Public Service Regulations 2016 states:

If an executive authority intends to evaluate jobs or implement job evaluation results that will affect the grade of an occupation or the salary level within an occupation where such occupation is utilized by more than one department then he or she shall do so in consultation with the Minister and the Minister of Finance.

[19] On the evidence, there are other academies similar to the academy where the applicants are based and similar occupations utilized by these different academies across the country.

[20] The applicants' contention also flies in the face of a court order obtained by consent (issued by this court under case number D 2058/18) which specifically ordered the first respondent to submit the job evaluation results of the applicants' post to the second respondent for verification, such post being already evaluated in 2018 by the Provincial (KZN) Provincial Job Evaluation Panel.

The section 145 review

[21] Jurisdiction is determined on the cause of action pleaded and not on the merits of the case.

[22] It is common cause that the applicants referred (that is, to say, essentially pleaded) an unfair labour practice dispute concerning the provision of benefits to the bargaining council, a cause of action over which the bargaining council has jurisdiction in terms of section 191(5)(a)(iv) of the LRA.

[23] Moreover, the Labour Appeal Court in *National Union of Mineworkers on behalf of Coetzee & others v Eskom Holdings SOC Ltd* confirmed that a grading dispute falls within the remit of an unfair labour practice claim relating to the provision of benefits under s186(2) of the LRA for the simple reasons that benefits (including status, remuneration, eligibility for promotion etc.) are normally determined by the grade of job.²

[24] Accordingly, the arbitrator's decision that the bargaining council has no jurisdiction over the applicants' dispute was clearly wrong.

² See also: *City of Cape Town v South African Local Government and Others* (C47/2020) [2024] ZALCCT 8 (12 February 2024).

[25] It appears the arbitrator conflated and misunderstood the concepts of jurisdiction, the substantive merits of the applicants' unfair labour practice dispute³ and the rules of evidence (relating to expert testimony). Whether or not the applicants' pleaded unfair labour practice dispute was well founded in fact and law and whether the arbitrator had the expertise to evaluate the correctness or fairness of a grading decision were entirely different enquiries which had no bearing on the question of the bargaining council's jurisdiction.

Costs

[26] I find no reason to make an award of costs against the first respondent even though the applicants were partly successful.

Order

[27] In view of the analysis above, the following order is made:

1. The legality review application is dismissed.
2. The ruling rendered by the fourth respondent on 2 May 2023 is reviewed and set aside and substituted with a ruling that the bargaining council has jurisdiction to decide the applicants' unfair labour practice dispute concerning the provision of benefits.
3. The applicants' unfair labour practice dispute is remitted to the bargaining council for a rehearing on its merits before a different arbitrator.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Adv M Mtati, instructed by Adrian Moodley Attorneys

For the First Respondent: Adv N G Winfred, instructed by State Attorney, KwaZulu-Natal

³ Which they only managed to address in part in the first respondent's point *in limine*.