

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO C489/98

In the matter between:

FADILA ETHNE LAGADIEN

Applicant

and

UNIVERSITY OF CAPE TOWN

Respondent

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JUDGMENT

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JAMMY AJ

1. The Applicant in this matter is a 41 year-old paraplegic, having been permanently disabled in a motor accident in December 1985. Having attained a Standard 8 education level, she was forced, she testified, to leave school and work in the straitened financial circumstances in which her family found itself as a consequence of the boarding of her father through ill-health.
2. These disadvantages notwithstanding however, she was able to complete courses inter alia in bookkeeping, typing, office administration, computer management, media awareness and fund raising and organisational leadership training. She also acquired computer literacy comprising management of software and hardware in a range of computer systems.
3. Following her accident, she was employed variously by organisations known as DPSA (Disabled People South Africa) and PADI (People for Awareness on Disability Issues), the latter for a period of six years during which she established the organisation in Cape Town and was responsible for all aspects of organisational development and management. In addition she worked for and on a large number of committees in which, according to her curriculum

vitae, she was actively involved in research, writing policy documents at organisational and government level and shaping the development of the Community Media Sector towards the facilitation of the inclusion of disabled people into society. Currently, and in addition to her consulting activities in that context, she conducts workshops focusing on the integration of disabled people into society and lectures in physiotherapy, occupational therapy and to fourth-year medical and social work students at the University of Cape Town, the University of the Western Cape and Stellenbosch University.

4. The Applicant's Statement of Case in these proceedings has been the subject of a turbulent series of amendments in this Court. It is unnecessary for me to review them in the context of this judgment save to record that, as finally amended pursuant to an Order of Court in August 1999 which rejected aspects of her allegations as constituting an unfair labour practice dispute falling outside the jurisdiction of this Court, and a direction to the Applicant "to make provision for her case based upon indirect discrimination, on the basis of lack of academic qualifications", the Applicant's cause of action was finally defined as follows:

"Respondent unfairly discriminated, directly or indirectly, against Applicant on the basis of lack of academic or tertiary qualifications."

5. It must be pertinently here recorded that, having initially alleged that an element of that discrimination was sourced in her gender and her race - the Applicant is a black woman, - these allegations were expressly withdrawn by the Applicant and did not constitute a substantive issue for determination in these proceedings.

6. The following facts, as recorded in a pre-trial minute filed and in documents submitted by the parties, are common cause.

- 6.1 The Applicant was appointed as Acting Co-Ordinator of the Respondent's Disability Unit from 15 January 1998 to 14 April 1998. It was specifically

agreed that her responsibilities would be re-negotiated if a new Head of the Disability Unit was appointed prior to the termination of her contract.

- 6.2 The post of Head:Disability Unit included the following functions:
management of the staff and operations of the unit;
fund raising;
policy development;
working with individual students with disabilities, with their lecturers and with support departments to optimise equal opportunities for the students;
education about disability;
advising on barrier-free design.
- 6.3 Candidates were expected to have proven skills in, or knowledge/experience of, the functions and it was indicated that a tertiary-level education and personal experience of disablement would be advantageous.
- 6.4 In December 1997 and through the medium of an e-mail advertisement on its notice board, the Respondent invited applications for the position of Head:Disability Unit. That unit, it was stated, was based in the Human Resource Management Department and comprised administrative staff and a co-ordinator of the Blind Students' Reading Programme. The job, it was stated, would include -
**"management of the staff and operations of the unit;
fund raising;
policy development;
working with individual students with disabilities, with their lecturers and with support departments to optimise equal opportunities for the students;
education about disability;
advising on barrier-free design."**
- 6.5 Significantly, in the context of the issues for determination in this matter, the advertisement continued thus:

"To be considered for this position you will need proven skills in, or knowledge/experience of, the above areas.

A tertiary-level education together with personal experience of disablement will be advantageous. Applications from **previously disadvantaged South Africans who are suitably qualified**, will be particularly welcomed."

(Emphases as per advertisement).

- 6.6 The Applicant, amongst others, applied for the post. The Respondent's Selection Committee interviewed four candidates including the Applicant and certain Ms L Magama. Ms Magama is a Zimbabwean citizen, a black disabled woman and has extensive experience in the relevant field, having held the post of Co-Ordinator, Disabled Students' Services Centre at the University of Zimbabwe since October 1995. She holds the degrees of B.Sc (Architecture) and M.Sc (Urban and Regional Planning).
- 6.7 None of the other candidates, including the Applicant, was considered by the Selection Committee to be suitable for the post on a basis which would render any of them automatically appointable in the event of Ms Magama declining, or for any other reason being unable, to accept the position.
- 6.8 Having initially accepted the appointment, Ms Magama could not ultimately be appointed to the position as a consequence of the refusal by the Department of Home Affairs of an application by the Respondent for the issue to her of a work permit, in the face of an objection to that application lodged by the Applicant.
- 6.9 The position in question was re-advertised by the Respondent on 15 October 1998. The only differences in the wording of the second advertisement from that of the first, differences, it should be stated, to which the Applicant attaches considerable significance, were that whereas, in the initial advertisement, the Disability Unit was stated to be based in the Human Resource Management Department, it was, in the second advertisement stated to be based "in the recently restructured Student Development and Services Department" and whereas, in the first advertisement, reference to the

management of the administrative staff and co-ordinator of the Blind Students' Reading Programme was made in the opening paragraph of the advertisement and not specifically in the job description, that same reference, namely the function of management of that staff and co-ordinator, was sited in the job requirements of the post as described in the second advertisement. The initial function of "working with individual students with disabilities, with their lecturers and with support departments to optimise equal opportunities for the students" was re-worded, on the second occasion, as follows: **"..... work with the academic sector and support departments to allow students and staff with disabilities to reach their full potential."**

Of relevance in that context was that, in the second advertisement, a tertiary-level education and personal experience of disablement were still stated to be advantageous.

6.10 The Applicant applied again for the position in response to the second advertisement but on this occasion was neither short-listed nor interviewed by the Respondent's Selection Committee which, in due course, appointed certain Mr Michael Watermeyer to the post. It is common cause that Mr Watermeyer was appointed as Acting Head of the unit in March 1998 following the resignation of the then incumbent director due to ill-health, that he continued to act in that position pending the expected finalisation of the appointment of Ms Magama and that, when that failed, he remained in that acting capacity until his permanent appointment as Head of the unit in December 1998.

7. The Applicant's allegations of unfair discrimination are narrowly premised. Having regard to the advertised requirements of the position, Ms Magama, at the time of her selection as the designated Head of the Disability Unit, was no better a candidate for that position than she was. Whilst it was correct that she did not hold academic qualifications of any significant nature, those held by Ms Magama were unrelated to the functions of the position in question and her own experience in the fields referred to in the advertisement was as extensive as that of Ms Magama, if not more so. The appointment, furthermore, of a Zimbabwean citizen to a post in which the Respondent had expressly indicated that a previously disadvantaged South African would be

welcome, was *per se* a contradiction of that policy.

8. The unfairness of the Respondent's conduct moreover, the Applicant contended, was perpetuated and exacerbated when the post was re-advertised in October 1998. The appointment thereafter of Mr Watermeyer was, to all intents and purposes as far as she was concerned, a predetermined and foregone conclusion. Notwithstanding her initial candidacy, she was on this occasion neither short-listed nor interviewed. Once again, her own competence for the position matched or exceeded that of Mr Watermeyer in all material respects save for his possession of tertiary academic qualifications. This was yet a further instance of the unfair discrimination against her based solely on her lack of tertiary education.
9. The Applicant, in the course of her evidence, made frequent references to two aides memoire, relating to meetings of the Selection Committee respectively on 26 February 1998 and 16 March 1998, at which the perceived attributes and deficiencies of the four candidates who had responded to and were interviewed following the initial advertisement for the post were analysed. It is unnecessary that the substance of those documents be reviewed in any substantive detail in this judgment. An aide memoire, as the Respondent's witnesses emphatically pointed out, does not constitute a comprehensive and/or accurate minute of the discussions at the meeting to which it relates and nor was it intended to do so. The shorter Oxford English Dictionary defines it as "a book or document serving as an aid to the memory" and that, it was emphasised, was precisely its purpose. The two aides memoire in question were prepared by the Respondent's Equal Opportunity Officer, Mr D F Molteno, for the information and assistance of the Respondent's Deputy Vice Chancellor and Chairperson of the Selection Committee, Prof M E West. Comments by members of the Committee therein recorded related to their individual opinions and did not constitute resolutions or unanimous perceptions of the Committee as a whole. Where, having deferred a decision on the appointee to the position in question at its first post-interview meeting on 26 February 1998 for final determination at the meeting on 16 March 1998, a "straw vote" was taken at

the second meeting, that was not intended to be a formal or final ballot but merely an indication of the thinking of individual members of the Committee at that stage. In the end result of that meeting and notwithstanding what the Applicant submitted was strong support for her candidacy, a unanimous decision was taken that Ms Magama be appointed to the position of Head, Disability Unit. It was further recorded that if, for any reason, she did not take up that position, it would be necessary for the Committee to reconvene.

10. The Applicant's contention that she was unfairly discriminated against solely on the basis of her lack of tertiary education, was emphatically rejected by both Mr Molteno and Prof West, the two witnesses for the Respondent. The reasons that she was not appointed and Ms Magama preferred following the initial interviews, were, it was stated, set out in Mr Molteno's response to an enquiry by the Applicant on 6 April 1998 as to the reasons for her non-appointment and that of Ms Magama. In a letter to her on 20 April 1998 Mr Molteno said this:

"The Selection Committee, after very careful consideration, came to the conclusion that one of the other short-listed candidates was best suited to fulfil the requirements of the position. A successful candidate was deemed to be clearly the best applicant in terms of qualifications, skills and appropriate work experience for what is a senior position.

While a weakness in your candidacy, for example, was your lack of tertiary-level experience and undoubted strengths were your personal qualities and your knowledge and experience of disability issues, the simple answer to your question as to why you were not the successful applicant is therefore that you were not the best applicant for the job in question. I would point out that the University's equity policy is a matter of record and that international applicants are not precluded from applying for positions here. We have in fact been able to offer the position to an outstanding, well-qualified and experienced candidate, who is also black, a woman and a disabled person."

11. Whilst a tertiary level of education was, as stated in the advertisement for the position, perceived to be an advantage, it was not, it was stressed, the sole criterion. Had that been the case, said Mr Molteno, the Applicant would not have been short-listed and interviewed in the first place. The overriding factor, it was repeatedly stressed by both witnesses, was that whilst she was in many respects a strong candidate, endorsed as such by the previous Head of the Disability Unit, the critical issue debated by the Selection Committee was that of credibility with academic staff and counselling skills with students in an academic environment. The incumbent would be required to work closely with academic staff, heads of departments, deans and students. The Applicant's interaction experience had been as an activist and change agent in non-governmental organisations and outside institutions. She had not worked in that context in an academic environment and this, as far as the Selection Committee was concerned, was the critical factor negating her appointment. She could not match the level of experience in that environment attained by Ms Magama at the University of Zimbabwe. Her lack of tertiary academic qualifications was not, it was reiterated, the sole criterion disqualifying her but was a factor in determining whether she could perform the function of the post effectively in the academic context. It was decided that she could not and that she was not appointable for that reason.
12. The position re-advertised in October 1998 following the withdrawal of Ms Magama's appointment was no different in any material respect from that initially publicised. The Applicant's candidacy status had been examined fully in the first round of interviews and her deficiencies for the post in question as then evidenced, had resulted, at this later stage, in the Committee's determination that she was unsuitable for the position to an extent which rendered it inappropriate and unnecessary for her to be short-listed and interviewed again. Mr Watermeyer, who had acted in the position for some eight months had, it was stated, performed outstandingly during that period and brought competency and skills to the position which the other candidates lacked. The Applicant had never, from the outset, been regarded, as she contended, as a "token" candidate, accepted for interview and possible

appointment as a "window-dressing exercise" to enhance the purported credibility of the Respondent. Her strengths and attributes were obvious and her candidacy was seriously and responsibly assessed. The decision to reject her was neither arbitrary, frivolous nor unfairly discriminatory as contended by her.

13. The discrimination, which the Applicant challenges as unfair, is directed towards her, she submits, not in her individual capacity, but as a member of a class or group of persons who are disadvantaged, impliedly through circumstances beyond their control, by a lack of tertiary academic qualifications. It was, by its nature, indirect and was unfair in that it was exercised arbitrarily and capriciously.

14. The concept of indirect unfair discrimination is examined by -

Du Toit et al: The Labour Relations Act of 1995. Second Edition at page 434.

"An employer may be guilty of indirect discrimination if the use of an apparently neutral criterion has a significant adverse impact on a particular group and the criterion is not sufficiently relevant to workplace needs to justify that impact. Examples of such criteria are educational qualifications and physical characteristics (such as height) in situations where the employer is unable to justify the required standard."

15. Indirect unfair discrimination will thus be brought about, inter alia by -
-**"..... a standard which, inter alia -**

***cannot be shown to be justifiable in the circumstances; and**

***operates to the complainant's detriment because he or she cannot comply with it."**

(at page 435.)

16. In the context of her amended Statement of Case, the ground of discrimination alleged by the Applicant is, as I have stated, specified. It is her lack of

academic or tertiary qualifications. It is that criterion, she submits, which forms the basis of the differentiation between her and the other personae in the dispute, Ms Magama and Mr Watermeyer. That contention, on the basis of the examination by the Constitutional Court of the concept of unfair discrimination in -

Harksen v Lane NO & others 1998(1) SA 300 at 325

raises a presumption of unfairness which the Respondent bears the onus to rebut. It must do so by showing that in the context in which it was applied, it was justified and in that regard -

"The justification requirement lies at the heart of the enquiry into unfair discrimination and involves the careful consideration of the context in which the dispute arises. There is no fixed formula to be applied mechanically."

Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others (1997) 11 BLLR 1438 (LC) at 1448.

17. Of relevance to that examination in the present case is the wording of both the first and second advertisements for the post in question. In neither case was a tertiary-level education stated to be anything other than an advantage. No suggestion or indication is made that it is an inherent requirement of the position or that persons, otherwise suitably appointable, would be disqualified for the lack of it. What are however in each advertisement, unequivocally stated as being immutable requirements for the position are **"proven skills, experience and knowledge"** in specified areas, defined, inter alia, in the first advertisement as -

***working with individual students with disabilities, with their lecturers and with support departments to optimise equal opportunities for the students;**

and in the second advertisement as -

***work with the academic sector and support departments to allow students and staff with disabilities to reach their full potential."**

18. It was in this specific sector, the Respondent contends, involving the

indispensable requirement of experience of the work described in an academic environment, that the Applicant, notwithstanding her undoubted strengths and attributes at other levels, fell short and was determined to be not appointable.

19. That requirement, bolstered as would unarguably be the case by a level of tertiary education, was not an unfair one and constituted justifiable discrimination within the ambit of s62(b) of the Employment Equity Act 55 of 1998 (Schedule 2 of which repealed the residual unfair labour practice provisions of the Labour Relations Act 1995 upon which the Applicant, in her pleadings, relies). That section provides that -

"(2) It is not unfair discrimination to -

(a).....

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

20. There is, in my opinion, nothing in the evidence adduced or documentation tabled in this matter to suggest that the Selection Committee's assessment of the deficiencies and attributes of the respective candidates was anything other than responsible and objective, or to justify the allegation that its final determination in that regard was arbitrary, capricious or fanciful as the Applicant contends. On the contrary, the substance of the correspondence and the aides memoire to which I have earlier referred, evidences a comprehensive debate and exchange of views between members of the Committee a concerned and careful addressing of the issues.

21. It does not seem to me that, having sought and been given the comprehensive reasons for her unsuccessful initial application, the Applicant could have had any reasonable expectation of success in her second application for what, despite her submissions to the contrary, was in all material respects the same job, requiring the same qualifying criteria. That she was aggrieved and disappointed that she was not successful, is understandable. That reaction does not however render the conduct of the Respondent in the process of selection and appointment which was followed, unfair or open to legal or moral challenge.

22. For these reasons, the application must fail. No reason has been advanced or suggested to me to justify deviation from the general principle that an award of costs will normally follow the result, and I accordingly make the following order:

The application is dismissed with costs.

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B M JAMMY
Acting Judge of the Labour Court

26 September 2000

Dates of hearing:

18 and 19 September 2000.

Representation:

For the Applicant: Mr A Y Sondag: Sondag Attorneys

For the Respondent: Mr H Niewoudt: Deneys Reitz