



(1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR1446/22

In the matter between:

INDEPENDENT ELECTORAL COMMISSION

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

P KEKANA N.O.

Second Respondent

**NATIONAL EDUCATION, HEALTH AND ALLIED
WORKERS UNION OBO MEMBERS**

Third Respondent

Heard: 19 September 2025

Delivered: 16 March 2026

JUDGMENT

ITZKIN, AJ

Introduction

- [1] The IEC (which is the applicant in this review application) seeks an order reviewing and setting aside an arbitration award issued by the CCMA in an unfair labour practice dispute pertaining to benefits, which was pursued by NEHAWU (the third respondent herein).

- [2] In the award, the Commissioner dismissed a jurisdictional point raised by the IEC and upheld an unfair labour practice dispute pursued by NEHAWU, ordering as follows:

‘239 The dispute is an unfair labour practice relating to the provision of benefits to an employee. The CCMA has jurisdiction to arbitrate this dispute.

240 The respondent’s conduct of selective implementation of the Lekoko report amounted to an unfair labour practice.

241 The respondent is ordered to apply the Implementation Rules to the entire Lekoko Recommendations.

242 There is no order on costs.’

Relevant chronology

- [3] In 2016, NEHAWU demanded an organisational review due to alleged disparities relating to employees’ positions and the terms associated therewith.

- [4] In 2018, the IEC embarked on a job evaluation exercise. To that end, it engaged Lekoko Consulting to conduct a job grading exercise using the Paterson job grading system.

- [5] At the end of the job re-grading exercise, all jobs in the IEC were graded. Some posts were upgraded, whilst others were unchanged, downgraded, or abolished, resulting in certain offices having over-established posts while other new posts were created, and some old ones were modified.

- [6] On 29 September 2018, the IEC adopted resolutions pertaining to the HR review project based on several proposals by NEHAWU. The document recording this, refers to the “*union issues and proposal*”, the “*answer/response*” from management, and the “*Commission Resolution*”.

- [7] With reference to the topic of “*Implementation date of new organogram*”:

7.1 the “*union issues and proposal*” portion records:

'If new positions are being implemented as termed "critical" then the structure must be implemented on 1 April 2019 this goes the same way as HR 2 appointments.

The structure to be implemented by, if selected posts on the new structure are prioritised.'

7.2 the "*answer/response*" portion records:

'Recommended that the new organogram be implemented in a phased manner, with emphasis on filling of high priority positions as soon as possible.

Provide capacity through FTC / APC for the duration of election only, with no further extension.'

7.3 the "*Commission Resolution*" portion records:

'Resolved that –

- the new organogram be approved;
- implementation be in a phased manner, with emphasis on filling of high priority positions as soon as possible; and
- capacity be provided through FTC / APC for the duration of the 2019 NPE elections only, with no further extension.'

[8] On 2 October 2018, the IEC sent a letter to NEHAWU stating the following:

'HR REVIEW PROCESS

The Commission met on Saturday, 29 September 2018 to consider various urgent matters. Amongst these was a full presentation on the HR review process and inputs received from NEHAWU, as well as MANCO.

The Commission considered the submissions of the union made at the last meeting of the PSC and the recent ECNBF. After careful consideration, the Commission **RESOLVED** that –

- the proposed organogram be approved;
- it was extremely crucial that institutional capacity be augmented by filling critical posts on the organogram as it was necessary for the delivery of the NPE2019 elections;
- all matters relating to the rewards and any revision of the grading of posts be considered after the NPE2019 elections;
- the administration be urged to proceed with the filling of posts as per the priority list of positions; and
- HR responds to the union as per the resolutions of the Commission and co-ordinate with managers to commence the filling of positions (see attached – **HR REVIEW PROJECT RESOLUTIONS FROM COMMISSION: SATURDAY 29 SEPTEMBER 2018.**)

[9] On 30 October 2018, the IEC approved the 'Implementation Rules' (which serve as policy to guide migration of employees to the new organogram), paragraph 1.3 of which provides:

'All employees should be notified in writing about placement on the approved organogram.'

[10] Paragraph 6, which is headed 'PLACEMENT PRIORITIES', reads as follows:

'A list of priority positions was developed for consideration and attached herewith. It is proposed that these positions be filled as a matter of priority.'

[11] On 2 November 2018, the IEC's Acting CEO sent an e-mail to all employees with the subject line "*Announcement: Organisational Review: Implementation of New Organogram*", stating the following:

'Dear Colleagues

I write in connection with the Organisational Review (sometimes known as the HR Review) which has been going since last year:

1. After consultation with the various stakeholders within the Electoral Commission, the Commission approved the new organogram on 29 September 2018.
2. In order to implement the new organogram, it was agreed that implementation would be done in phases.
3. A set of implementation rules were developed by the HR Team and subjected to consultation by the same internal stakeholders. On completion of the consultation process, the Commission approved these rules on 30 October 2018. The purpose of these set of rules is to provide an agreed process of migrating to the new organogram.
4. A list of positions that need to be filled as a matter of urgency in order to support the work required to deliver the 2019 Elections was prepared and agreed upon. Placement of the positions on this list is what has become known as Phase 1 of the implementation of the new organogram.
5. This first phase of implementation is intended to ensure stability within the organisation and minimise employee movement during the heightened activity period when the Electoral Commission is seized with preparations for the 2019 Elections.
6. Certain positions in Phase 1 will be filled on a permanent basis whilst others will be filled through fixed term capacity. This fixed capacity will remain in place until a specified time after the 2019 Elections.
7. Positions that will be advertised will result in permanent placement. Given the urgency of the need to fill these positions, the CEO has approved a deviation that allows that these positions be advertised internally for transfer and promotional purposes simultaneously. If this step does not yield a positive outcome, the position will be advertised externally.
8. **Finally, Colleagues, it is important that I emphasise that issues pertaining to remuneration and job grading will be dealt with at a date to be announced after we have delivered the 2019 Elections.**

9. **For your reference, please find attached the new organogram as approved by the Commission as described in Point 1 above.**

10. The implementation rules referenced in Point 3 above are also attached.

May I take this opportunity to thank all persons who worked very hard and long to get this process to where it is today.'

[12] The new approved organogram was attached to the email.

[13] On 3 May 2019, NEHAWU issued a letter stating the following:

'NEHAWU CALLS ON IEC TO RESPOND POSITIVELY TO WORKERS DEMANDS BEFORE ELECTIONS

Friday May 03, 2019

The National Education, Health and Allied Workers Union (NEHAWU) is vehemently opposed to the media statement issued by the Independent Electoral Commission (IEC) on its readiness for the forthcoming national general elections scheduled for the 08th May 2019.

The union is extremely concerned that its members at the IEC for the past three (3) years have been fighting for the implementation of the Organisational Review Recommendations which were tabled by the service provider sourced by the IEC at an exorbitant fee. To date, the IEC is refusing to implement such recommendations. These recommendations suggested that the salary bands and structure to be changed with immediate effect. As things stand, workers are not paid accordingly and are subjected to slave wages.

Members are also expressing their discontent about the employer's refusal to assist with tools of trade such as transportation to move from one station to the other for purposes of the delivering and fetching ballot boxes as per the recommendations made by the bargaining forum task team. This has resulted into the lowest staff morale ever at the IEC hence our members are not looking forward in providing good service during this period if the employer does not resolve issues related to movement of ballot boxes and papers.

We have also noticed that members who testified against one of the managers who was dismissed in the Disciplinary Committee hearing and later overruled by the CEO without any justification are being harassed. It is very unfortunate that our members are now subjected to harassment and victimization by the management.

NEHAWU members are prepared to fight for what rightfully belongs to them. In this regard, we have written to the IEC CEO demanding an urgent meeting to resolve these issues with immediate effect. If our issues are not addressed our members will not guarantee fair elections as we might withhold our labour.

Issued by NEHAWU Secretariat.'

- [14] An agreement was concluded between the IEC and NEHAWU on 6 May 2019, which contained the following provisions:

'The implementation date for the new organogram will be 01 September 2019 as previously agreed in the Electoral Commission National Bargaining Forum.

Parties through the three members per task team will meet within 30 days of signature of this agreement to engage to consult on the finalisation of the salary structure and job grading for implementation on 1 September 2019 as per policy and procedure of the Electoral Commission.'

- [15] The task team referred to in the agreement was established, and its terms of reference included *"[t]o consult on the finalisation of the salary structure and job grading for implementation on 1 September 2019 as per policy and procedures of the Electoral Commission"*.

- [16] On 6 August 2019, a task team meeting was held. The minutes of the meeting record that the purpose of the meeting was to *"look at"* the outcome of the job evaluation, and the financial implications thereof.

- [17] On 7 August 2019, a presentation was made to the Electoral Commission National Bargaining Forum of various scenarios, all of which resulted in financial deficits (other than one in which employees are placed in the new organogram but remain at their current salary scales).

[18] It records various financial implications and reflects monetary shortfalls relating to various implementation scenarios. It also refers to three proposals under the heading 'The Options to obtain additional funding were discussed at length', which respectively entail certain funds for IT consultants to be reallocated (with Treasury approval), maintaining the status quo, and implementing the change with incumbents below the minimum being moved to the minimum.

[19] It concludes with a paragraph which reads as follows:

'It was agreed that affordability and sustainability of the proposed structure are the biggest challenges in the implementation of the organogram. Proposals in this regard must be cost effective and the organisation must guard against anything that may lead to retrenchments in the future.'

[20] On 30 August 2019, the IEC's Commission held a meeting, the minute of which refers to a National Treasury instruction to the IEC to cut its baseline budget, and records the following:

'Taking into consideration the above, the Commission resolved that the organization should remain with the current job grading and remuneration strategy of the Electoral Commission.'

[21] On 20 March 2020, employees received letters stating that the job grading and remuneration proposals were not feasible, sustainable, or affordable.

[22] This prompted NEHAWU to refer the dispute to the CCMA, which culminated in the award forming the subject of this application. In particular, NEHAWU alleged that the IEC's failure to adopt and implement Lekoko Consulting's recommendations in their entirety amounted to an unfair labour practice.

[23] The IEC raised a jurisdictional point *in limine* to the effect that the CCMA lacked the requisite jurisdiction to arbitrate the dispute. The Commissioner declined to determine the merits of the jurisdictional objection prior to the arbitration and deferred it for determination after hearing all of the evidence.

[24] The arbitration proceeded, with NEHAWU calling three witnesses. Once NEHAWU had closed its case, the IEC closed its case without calling any witnesses.

[25] The Commissioner declined to uphold the jurisdictional point *in limine*, and with reference to the merits, he found that an unfair labour practice had been committed.

The jurisdictional issue

[26] The jurisdictional issue arises from the following aspects recorded in the pre-arbitration conference minutes:

26.1 The following common cause fact:

‘6.12 The applicant alleges that the Respondent’s failure to adopt and implement the Lekoko report in its entirety amounts to an unfair labour practice. The Respondent disputes this claim.’

26.2 The following, which is identified as an issue to be decided by the Commissioner:

‘8.2 Whether accepting and implementing certain portions of the Lekoko report and excluding the remuneration strategy and other recommendations amount to an unfair labour practice.’

[27] Although the jurisdictional objection appears to have initially been framed more broadly, in argument, it was limited to the contention that the IEC did not exercise any decision in respect of an existing policy or practice, as the dispute pertained to a proposed new policy which the IEC ultimately elected not to proceed with owing to funding challenges.

[28] This contention is recorded in the following terms in the IEC’s heads of argument:

‘49. It is where an employer, including the state as employer, has adopted a Policy and fails to apply that Policy consistently and fairly that an unfair labour practice can be found. It is quite the opposite where the employer chooses not to adopt a Policy so that it is not faced with an

obligation to implement and apply a Policy which it knows it cannot financially afford.’

[29] The relevant portion of section 186(2)(a) of the Labour Relations Act 66 of 1995, pertaining to the definition of an unfair labour practice on benefits, refers to “*any unfair act or omission that arises between an employer and an employee involving - unfair conduct by the employer relating to the provision of benefits to an employee*”.

[30] In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*,¹ the Labour Appeal Court (LAC) held as follows:

‘[46] I also agree, with qualification, with the Labour Court’s conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.

[47] The first instance is in sync with the *HOSPERSA* approach. The second instance calls for qualification. Mr *Pretorius* argued that the effect of the judgment is that there must be contractual terms even in instances where the employer exercises a discretion. If that is indeed what the Labour Court meant, then I cannot agree with it. I am of the view that the Labour Court used the words ‘contractual terms’ loosely. It did not mean that the source of the discretion must be found in a contract. It is in my view clear that, if one has regard to the context of the whole judgment and the Labour Court’s conclusion, it actually meant when the employer exercises a discretion under the terms of the scheme conferring the benefit. Therefore, even where the employer enjoys a discretion in terms of a policy or practice relating to the provision of benefits such conduct will be subject to scrutiny, by the CCMA, in terms of s 186(2)(a).’ (My emphasis.)

¹ (2013) 34 ILJ 1120 (LAC); [2013] ZALAC 3.

- [31] NEHAWU's case is grounded, in part at least, on the contention that there was an agreement to implement the new organogram, including the new salary structure and job grading system. In particular, it relies on the agreement concluded on 6 May 2019.
- [32] Whilst the IEC's representative argued, at the hearing of the matter, that the agreement should be interpreted to mean that the obligation to practically implement the new organogram is contingent on finances being available, that is an issue relevant to the merits (and is addressed below in relation thereto). For jurisdictional purposes, the dispute is based (in part at least) on an alleged failure to comply with a contract obligation which has a bearing on the employees' benefits. It follows that the CCMA had the requisite jurisdiction to entertain the matter.
- [33] Even if this were not the case, the jurisdictional objection would be unsustainable given that it is evident from the factual chronology that the IEC is alleged to have approved and adopted a policy and to have proceeded to implement portions of it, using its discretion regarding which parts to implement when, and NEHAWU takes issue with the alleged selective implementation thereof.

The merits

- [34] The following were included as common cause facts in the pre-arbitration conference minutes:

6.3. The [IEC] accepted certain portions of the Lekoko report. Specifically, the new organogram, ie. the number of "boxes" in the new organisational structure, but not the job evaluation and grading systems, job descriptions and remuneration strategy.

6.4. The [IEC] has informed [NEHAWU] alleges that it does not have the financial means to finance the proposed structure in so far as it relates to the job evaluation system, job descriptions, job grading and remuneration structure attached to those positions as same has not been budgeted for and if adopted and implemented, may rest in result

in irregular expenditure in contravention of the Public Finance Management Act of 1999 and possible retrenchments.’

[35] It is thus common cause that following the issuing of the Lekoko report, the IEC did not accept its recommendations pertaining to job evaluation and grading systems, job descriptions, and remuneration strategy, citing the absence of available budget for this.

[36] These common cause facts must be contextualised in relation to the evidence presented.

[37] These include the following:

37.1 The e-mail of 2 November 2018, from the IEC’s Acting CEO, in which he communicated that issues pertaining to remuneration and job grading would be dealt with after the 2019 Elections.

37.2 The agreement of 6 May 2019, which confirmed the implementation date for the new organogram as 1 September 2019, and provided that a task team would engage to consult on the finalisation of the salary structure and job grading for implementation on 1 September 2019.

37.3 On 30 August 2019 (i.e., shortly before the agreed implementation date of 1 September 2019), the IEC’s Commission held a meeting at which it resolved that the IEC should remain with the current job grading and remuneration strategy.

[38] With reference to the 6 May 2019 agreement, at the hearing of the matter, the IEC argued that the implementation of the new organogram was contingent on finances being available.

[39] However, in my assessment, on a proper interpretation of the 6 May 2019 agreement it is that it is not subject to that qualification (i.e., implementation was not made contingent on affordability, by way of a suspensive condition or otherwise). Instead, it was agreed that implementation would occur on 1 September 2019, with consultation occurring in the interim in relation to the specifics of the salary structure and job grading to be implemented.

- [40] Consultation differs from negotiation, in that in relation to the former, the employer retains the discretion to make the ultimate determination (having engaged with the other party before doing so).
- [41] In this case, that determination pertained to the matters identified for consultation in the 6 May 2019 agreement, being the salary structure and job grading to be applied upon the implementation of the new organogram on 1 September 2019.
- [42] That determination did not pertain to whether or not to implement the new organogram, given that it was agreed, in the 6 May 2019 agreement, that the new organogram would be implemented on 1 September 2019. Whether or not to implement it was thus not an issue for consultation, nor was it an issue on which the parties agreed that the IEC could make a determination in due course.
- [43] That being the case, the Commissioner's determination that an unfair labour practice was committed in the context of the failure to implement the new organogram, is sustainable on the evidence, and not reviewable.
- [44] The same would apply even if the IEC's commitment to do so did not include a contractually binding dimension, and was limited to the approval of the organogram and the undertakings and representations that the IEC made in the correspondence.
- [45] With reference to the existence of budgetary constraints, this does not detract from what the IEC committed itself to, nor does it eliminate the resultant unfairness.
- [46] The essence of the relief granted by the Commissioner is that the IEC must continue with the process of implementing the approved organisational structure in accordance with the implementation rules.
- [47] This accords with what the IEC committed to do, and there is no basis on which this stands to be interfered with on review.

Costs

[48] Both parties' representatives referred to the ongoing relationship between them and submitted that it would not be appropriate to make a costs order in this matter. I agree.

[49] In the circumstances, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

R Itzkin

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: P Maserumule of Puke Maserumule Attorneys

For the Third Respondent: G Fourie SC

Instructed by: MPM Attorneys

LABOUR COURT