



Collaboration Space / UCT Equality Law Database / 2000

AUF DE HEYDE v UNIVERSITY OF CAPE TOWN

Created by Jenny Erasmus [Administrator], last modified on Jun 25, 2013

YEAR: 2000PLAINTIFF / APPLICANT / APPELLANT: APPLICANT: AUF DE HEYDEDEFENDANT / RESPONDENT: RESPONDENT: UNIVERSITY OF CAPE TOWNCOURT: LABOUR COURTCITATION: (2000) 8 BLLR 877 (LC)POST / PRIOR ACTION:JUDGE(S): JAMMY AJGROUND(S) OF DISCRIMINATION: RACE, GENDERSTATEMENT OF FACTS:

The applicant, a white male, applied for a fixed term position as a lecturer within the Chemistry Department of the respondent. He was appointed. His appointment letter specified, inter alia, a three year contract appointment, and expressly stated that the offer did "...not carry any commitment to a permanent appointment on the University staff." The advertisement for the position indicated a possible extension of the three year fixed term contract to a five year fixed term contract. In or around the same time, two black, fixed term contract lecturers were appointed in the same department. Prior to the expiry of the applicant's contract, the respondent advertised for a permanent lecturing post in the Chemistry Department. The applicant applied and was unsuccessful. In or around the same time the two black, fixed term contract lecturers were appointed to permanent positions as lecturers within the same Department. The respondent did not renew or extend the applicant's contract on its expiration.

The applicant, aggrieved by his non-appointment, proceeded to the Labour Court and alleged that:

1. He had a reasonable expectation that the respondent would appoint him to a permanent position alternatively renew/extend his fixed term contract. Accordingly the failure of the respondent to appoint him permanently or renew/ extend his contract constituted an automatically unfair dismissal as the respondent:-
 - a. failed to fairly applied its Equal Opportunity Employment Policy, alternatively,
 - b. unfairly discrimination against the applicant on the basis of race or gender.
2. In the alternative, the respondent failed to follow due procedure in terminating his employment on operational grounds.

The respondent denied that it dismissed the applicant. The respondent argued that in the instance that the court found that it had dismissed the applicant, the dismissal was not automatically unfair. The respondent conceded that in the event that court found the dismissal was based on operational requirements, the dismissal was procedurally unfair. The respondent argued that the applicant was unsuitable for the permanent position for which he applied; and the permanent appointment of the black, fixed term contract lecturers, without interviews, were for posts other than the advertised position for which the applicant applied, and were appointments in compliance with its Equal Opportunity Employment Policy.

ISSUE OF LAW:

- Whether s 186 (b) of the Labour Relations Act 66 of 1995 (LRA) deems a dismissal to have occurred when an employee, on a fixed term contract, has a reasonable expectation that the employer will permanently appoint him/her?
- Whether an employer has rationally and fairly applied its affirmative action policy?
- Whether non-South African citizens can benefit from affirmative action measures?

DECISION, RATIO AND OUTCOME (including minority judgment):

The court held that the applicant had been dismissed for operational requirements, and such dismissal was procedurally unfair. It awarded compensation to the applicant.

The court firstly assessed whether the applicant had been dismissed. The court referred to s 186 (b) of the LRA. Section 186 of the LRA deems a dismissal to have occurred if

"...an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

The court determined, with reference to local jurisprudence, that s 186 (b) does not envisage a dismissal when there is a reasonable expectation for a permanent position following from a fixed term contract. Section 186 (b) provides explicitly for a reasonable expectation of the renewal of a fixed term contract. It does not cater for a reasonable expectation of a permanent position. This omission was not regarded as an oversight, and the court regarded it as untenable to expand the scope of a clear provision. Therefore the court found that the applicant could not argue that he was dismissed based a reasonable expectation of permanent employment. Accordingly the applicant was left to prove a dismissal based on either s 187 of the LRA (automatically unfair dismissals), or s 186 (b). The court noted that the applicant had included, by way of amendment, the allegation that the respondent's conduct constituted an unfair labour practice in terms of item 2(1) of Schedule 7 of the LRA. (Note to reader: the latter item has subsequently been repealed).

It was argued that s 187 (1) (f) of the LRA applied as the respondent had unfairly applied its Equal Opportunity Employment Policy, alternatively that the respondent's conduct amounted to direct or indirect unfair discrimination based on race and gender. In assessing whether the applicant has been unfairly discrimination against the court firstly examined whether the applicant had been dismissed. It assessed whether the applicant had a reasonable expectation that his fixed term contract would be renewed or extended. It found in favour of the applicant. Influencing factors were, inter alia, the wording of the advertisement which indicated a possible extension to a five year fixed term contract; the wording of the letter appointment which included the reference to a possible five year fixed term contract, the said Department's conduct and discussions with fellow colleagues, the fact that finance was available to employ the applicant; and that the applicant had been assimilated into the faculty. The applicant had accordingly been dismissed.

In assessing whether the dismissal of the applicant was automatically unfair, the court examined the minutes of the selection committee. It found that the respondent's failure to appoint the applicant was not based on any of criteria provided for in s 187 (1) (f) of the LRA. The court determined that neither the application of the respondent's Equal Opportunity Employment Policy, or the race of the applicant, was a factor in the respondent's non-appointment of the applicant to a permanent position or the decision/failure of the respondent to not renew or extend the applicant contract.

With respect to the alleged selective application of the respondent's Equal Opportunity Employment Policy (policy): - It was argued that the requirements and procedures of such policy in the appointment of the black lecturers to permanent posts was not adhered to. The applicant argued that for affirmative action measures to be fair they must be applied with "certainty, objectivity and transparency", which it alleged was lacking on the facts. However, the court was satisfied that the black lecturers were the most suitable candidates, irrespective of their race, and that in addition their appointment addressed past historical discrimination. The court found that the evidence presented did not support the allegation that the applicant was more suitable than either appointed black lecturer, nor that the respondent's said policy was applied randomly, arbitrary or haphazardly. Therefore the selective application of the policy in the appointment of the black lecturers did not constitute unfair discrimination or an unfair labour practice against the applicant.

The applicant alleged that the respondent had incorrectly applied its policy to one of black appointed lecturers who was not a South African citizen. It argued that affirmative actions measures were not for the benefit of such individuals. The alleged lack of application of the policy to such individual meant, the applicant argued, that a non-South African citizen had wrongly benefited and was appointed over and above the applicant. It argued that this application of policy was unfair. The court, finding support from academic authorities, found that it was not impermissible for affirmative actions measures to apply to non-South African citizens, provided that such measures applied to beneficiaries who "have been disadvantaged by general societal discrimination, whether indirect or direct." On the facts this was not established. Therefore the policy, in affecting affirmative action measures, was not applicable to the black foreign lecturer. However the court regarded the respondent as applying the policy in good faith, and found that such conduct could not be construed as an unfair labour practice. The court noted that there was an absence of "submissions of material relevance" in this regard.

With respect to the allegation of unfair discrimination arising from the incorrect application of the policy:-The court inferred that it is was the position of the applicant that had the policy been correctly applied, that the applicant would have been successfully appointed to a permanent position. The court found no merit in such an inference. No evidence was presented to indicate that the applicant would have been appointed had the respondent not applied its policy to the foreign lecturer. It found that while the race of the foreigner was a contributory factor to his appointment, it was not decisive. Therefore the applicant's allegation of unfair discrimination based on such basis was without merit.

Having rejected the applicant's allegations that its dismissal was automatically unfair based on the grounds discussed above or that it constituted an unfair labour practice, the court examined the alternative claim, namely whether the dismissal was based on operational requirements, and if so whether such dismissal was fair. The court held that the applicant was dismissed for operational reasons. In making such a determination the court referred to the respondent's submission that should the court deem there to a dismissal, it can only be based on operational requirements. As conceded by the respondent, the dismissal in such instance was held to be procedurally unfair. The applicant did not contest the substantive fairness of such dismissal.

In determining compensation for procedural unfairness, the court in examining case law disagreed with the Labour Court judgment of *Whall v Brandadd Marketing* which permitted patrimonial or actual loss to be a factor in the consideration of an award for compensation, which was contrary to the Labour Appeal Court decision of *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union*. The court held that whether patrimonial loss is suffered it irrelevant in the court's determination of the amount of compensation. The court awarded the applicant compensation equivalent to twelve months remuneration.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALC/2000/30.html>

LABELS: