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CITY OF TSHWANE METROPOLITAN COUNCIL v SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL AND OTHERS

Created by Jenny Erasmus [Administrator], last modified on Jun 24, 2013



YEAR: 2011

PLAINTIFF / APPLICANT / APPELLANT: APPLICANT: CITY OF TSHWANE METROPOLITAN COUNCIL

DEFENDANT / RESPONDENT: FIRST RESPONDENT: SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL

SECOND RESPONDENT: R VENTER (N.O)

THIRD RESPONDENT: IMATU obo RETIEF DE VILLIERS

COURT: LABOUR COURT

CITATION: (2011) 12 BLLR 1176 (LC)

POST / PRIOR ACTION: ARBITRATION

JUDGE(S): LAGRANGE J

GROUND(S) OF DISCRIMINATION: UNFAIR LABOUR PRACTICE

STATEMENT OF FACTS:

The third respondent was unsuccessful in his application for a promotion. He contested his non-appointment, and the appointment of the successful candidate. The third respondent argued that the successful candidate failed to comply with the required requirements and recommended criteria for the position. Unable to resolve the matter internally, the third respondent's grievance was referred to the first respondent as an unfair labour practice.

At arbitration the applicant argued that the appointment of the successful candidate was based on merit "measured by the aggregate points scored by each candidate in the interviews". During arbitration two of the four panelists admitted that considerations of employment equity had affected the selection process, despite the applicant having no employment equity plan in effect at the time of the selection. The arbitrator determined that applying affirmative action measures without an approved employment equity plan was procedurally unfair. Furthermore it was found that the appointed candidate lacked the formal requirements and experience required of the position. An analysis of the scoring of the interview panel reflected subjective scoring by two of the panelists in favour of the successful candidate. It was accordingly substantively unfair to allow the fair scoring to be ousted by the subjective scoring. The arbitrator noted the causal connection between the subjective scoring and the failure to appoint the third respondent, as his non-appointment was based on such scoring. The arbitrator held that the third respondent should have been appointed to the contested post, and that the applicant had accordingly committed an unfair labour practice. The arbitrator ordered that the applicant retrospectively appoint the third respondent. The award was handed down three years after the the successful candidate appointment to the contested promotion.

The applicant proceeded to the Labour Court seeking a review of the arbitrator's decision alleging that the arbitrator had acted outside his scope of authority on the basis that he:

1. had declared that the third respondent be appointed retrospectively without regard to the fact that the position had be filled;
2. substituted his decision for that of the interview panel of the applicant; and
3. was biased in that he relied on the facts of the third respondent's case without regard to the facts of the applicant's case.

ISSUE OF LAW: Whether the arbitrator's decision was reviewable

DECISION, RATIO AND OUTCOME (including minority judgment):

The court set aside the relief awarded by the arbitrator, and upheld the arbitrator's decision that the applicant's failure to promote the third respondent constituted an unfair labour practice.

The court dismissed the applicant's allegation that the arbitrator's decision accounted only for the third respondent's account of the facts. It held that there existed no factual evidence to prove such allegation or any other alleged bias by the arbitrator against the applicant.

With respect to the applicant's allegation that the arbitrator substituted his own findings for that of the interview panel: the court noted an arbitrator is permitted to declare a non appointment unfair if the employer fails to prove a rational explanation for a person's non-appointment. The court determined that the arbitrator's findings was not irrational and was based on sound reasoning. With reference to the arbitrator's discussion as to the discrepancies in the interview panels scoring of the third respondent and the appointed candidate, the court noted that such discrepancy could have been attributed to employment equity considerations. Nonetheless such a consideration has to be stated as a separate criteria of evaluation. On the facts it was not a stated criteria. The practice of accounting for an unstated factor by adjusting the scoring on another criteria could not be held to be fair. Considering that the successful candidate did not fulfill the prerequisite requirements of the position and the suspected absence of impartiality of certain panelists, the court agreed with the arbitrator's determination that the third respondent should have been appointed.

With respect to the arbitrator's award that the third respondent be appointed retrospectively: the court held that this aspect of the arbitrator's decision was flawed. The arbitrator had omitted to consider the three year time lapse since the third respondent initially contested his non-appointment and that the successful candidate had been fulfilling such role for the duration of the said period . The court noted that the fact that someone occupies a contested post when such a remedy is granted would not automatically affect the validity of the remedy. The court determined on the facts that the more appropriate remedy was to order the applicant to financially compensate the third respondent by paying the third respondent the difference between his actual salary and what he would have earned had he been promoted "for the period he remains in the applicant's employment from 1 September 2003".

LINK TO FULL DECISION: <http://www.saflii.org/za/cases/ZALCJHB/2011/154.html>

LABELS: