



Collaboration Space / UCT Equality Law Database / 2009

DIRECTOR GENERAL OF THE DEPARTMENT OF LABOUR AND ANOTHER v COMAIR LIMITED

Created by Jenny Erasmus [Administrator], last modified on May 20, 2013



YEAR: 2009

PLAINTIFF / APPLICANT / APPELLANT: FIRST APPLICANT: DIRECTOR GENERAL OF THE DEPARTMENT OF LABOUR (THE FIRST RESPONDENT IN THE COUNTER APPLICATION)

SECOND APPLICANT: THE MINISTER OF LABOUR

DEFENDANT / RESPONDENT: RESPONDENT: COMAIR LIMITED (THE APPLICANT IN THE COUNTER APPLICATION)

COURT: LABOUR COURT

CITATION: (2009) 11 BLLR 1063 (LC); (2009) 30 ILJ 2711 (LC)

POST / PRIOR ACTION: N/A

JUDGE(S): BASSON J

GROUND(S) OF DISCRIMINATION: N/A

STATEMENT OF FACTS:

Under the Employment Equity Act 55 of 1998 (EEA) a designated employer is, amongst other things, under an obligation to implement an employment equity plan. The EEA permits the first applicant, namely the Director General (DG) (through its inspectors), to approve of an employer's employment equity plan, alternatively, issue a recommendation to the employer detailing the steps the employer must take with respect to its employment equity plan in order to comply with the EEA; the deadline by which the employer must comply; and any other prescribed information. Failing compliance with the recommendation, the EEA permits the DG to refer the employer's conduct to the Labour Court.

The DG took a decision that the respondent was in breach of its obligations under the EEA with respect to the implementation of an employment equity plan. As a result it made a recommendation to the respondent. Failing the respondent's compliance with the recommendation the DG referred the alleged non-compliance to the Labour Court. This formed the subject matter of the main application. The respondent launched a counter-application challenging, by way of review, the lawfulness of the DG's exercise of its powers under the EEA, and the referral of the non-compliance to the Labour Court. The counter application formed the subject matter before this court. The parties agreed that the main application would be disposed of should the counter application be decided in favour of the respondent.

The respondent sought the following order:

1. The review and setting aside of the recommendation issued by the DG to the respondent pursuant to s 44 (b) of the EEA; and
2. The review and setting aside of the decision of the DG (pursuant to s 45 of the EEA) to refer the respondent's alleged non-compliance with the recommendation in terms of s 44 (b) of the EEA to the Labour Court.

The respondent argued that in terms of s 50(1)(h) of the EEA, the court was permitted to review the decisions of the DG as contemplated in the EEA.

Note to reader: For sake of clarity, the applicant refers to the Director-General of the Department of Labour and the respondent refers to Comair.

ISSUE OF LAW:

1. Whether the Labour Court had jurisdiction to review the functions/actions of the DG under the EEA?

2. If so, whether the DG had properly exercised the public power bestowed upon it in terms of EEA (and which it applied to the respondent)?
3. Should the DG be found to have improperly exercised its public power, whether or not the decision of the DG should be set aside?

DECISION, RATIO AND OUTCOME (including minority judgment where applicable):

The Labour Court upheld the respondent's counter application. The court reviewed and set aside:-

1. The recommendation by the DG in terms of s 44 (b) of the EEA, and
2. The decision by the DG (in terms of s 45 of the EEA) to refer the respondent's alleged non-compliance with the DG's recommendation to the Labour Court.

The judgment canvassed the aims of the EEA. The court focused on the concepts of formal equality and substantive equality, and how the achievement of such notions are reflected in the provisions of the EEA. The court discussed the relevant sections relating to an employer's obligation to implement an employment equity plan, and the associated enforcement mechanisms. It specifically addressed the powers and functions of labour inspectors (sections 36 and 37 of the EEA) and the review powers of the DG (section 43).

As to whether the labour court had jurisdiction to review the actions/functions of the Director-General (DG) under the Employment Equity Act, the court held that s 50(1)(h) of the EEA grants the court the power to review the actions of the DG. Section 50 (1)(h) permits the court to make any appropriate order "including 'reviewing the performance or purported performance of any function provided for in the Act or any act or omission of any person or body in terms of the Act on any grounds that are permissible in law.'" In addition s 49 of the EEA grants the court exclusive jurisdiction to determine any dispute relating to the interpretation of the EEA, unless the EEA provides otherwise. The court noted that nowhere in the EEA are the actions of the DG granted immunity from review. If it had been the intention of the Legislature to grant such immunity, the Act would have been explicit in doing so. Due to the clarity provided by s 50 (1) (h) of the EEA, the court regarded it unnecessary to examine whether the review was competent in terms of s 145 of the Labour Relations Act 66 of 1995 or the Promotion of Administrative Justice Act 3 of 2000 or the common law, as was argued by the first applicant.

The court determined that the DG was exercising a public power when conducting a review, issuing the recommendation and referring the matter to the Labour Court. Powers which are provided for in the EEA. The exercise of such public power was subject to the scrutiny of the court "in accordance with fundamental principles of constitutionalism and administrative law." On the facts the DG's conduct was reviewable for lawfulness and compliance with the requirements set out in the relevant legislation.

The court determined that the recommendation issued by the DG to the respondent was flawed. An examination of the recommendation led to the conclusion that the DG had omitted to apply its mind to the matter. The DG had failed to comply with the mandatory instruction as provided for in s 42 of the EEA, which lists factors which the DG must consider in assessing the compliance of an employer prior to arriving at a recommendation. The court dismissed the first applicant's argument that the list as contemplated in s 42 of the EEA was an "assessment tool". In dismissing such argument the court noted that the language of the contested section clearly reflected its mandatory nature i.e. 'applying this Act, *must*, in addition to the factors stated in section 15, take into account all of the following [s 42 (a) - (e) of the EEA.'" The documents filed by the applicant reflected the absence of such considerations. The recommendation was found to be paraphrasing extracts of the relevant sections of the EEA.

Accordingly the court held that it had the power to review the decisions of the DG and that the DG had failed to properly exercise its powers.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALC/2009/78.html>

LABELS: