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NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION v OFFICE OF THE PREMIER: PROVINCE OF THE EASTERN CAPE

Created by Jenny Erasmus [Administrator], last modified on May 10, 2013



YEAR: 2011

PLAINTIFF / APPLICANT / APPELLANT: NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION

DEFENDANT / RESPONDENT: OFFICE OF THE PREMIER: PROVINCE OF THE EASTERN CAPE

COURT: LABOUR COURT

CITATION: (2011) 7 BLLR 681 (LC); (2011) 32 ILJ 1696 (LC)

POST / PRIOR ACTION: CCMA

JUDGE(S): MOLAHLEHI J

GROUND(S) OF DISCRIMINATION: GENDER , RACE

STATEMENT OF FACTS:

The applicant, an african male, in the employ of the first respondent, applied for an advertised vacancy at the first respondent. The advertisement stated amongst other things that no late applications would be entertained, that the first respondent was an equal opportunity, affirmative action employer and that 'women and people of disability are encouraged to apply.' After the expiry of the deadline for applications, the first respondent head-hunted the second respondent and invited her to apply for the position. The first respondent appointed the second respondent, a colour female, despite the applicant scoring higher than the second respondent. The applicant challenged the appointment of the second respondent. He claimed that he had been unfairly discriminated against contrary to s 6 of the Employment Equity Act. The first respondent contended that it appointed the second respondent as a means to address gender imbalances within the particular department.

The applicant referred his non-appointment to the CCMA, and failing resolution, he proceeded to the Labour Court. The applicant sought an order that his non-appointment be deemed an unfair labour practice in terms of s 186 (2)(a) of the Labour Relations Act; that preferring a female candidate without a signed employment equity plan was unfair discrimination contrary to the Employment Equity Act 55 of 1998 and that he be appointed to the contested position, alternatively be awarded compensation.

ISSUE OF LAW:

Whether the non-appointment of the applicant amounted to unfair discrimination?

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

The non-appointment of the applicant did not amount to unfair discrimination. The applicant's claim failed and was dismissed with no order as to costs.

The court made the following determinations:

- Contrary to the assertion of the applicant, the court held that the first respondent had an established employment equity plan in place at the time of the appointment of the second respondent. It was noted that had the second respondent not been appointed, the imbalance of woman to men, in favour of men, within the department would have been further exacerbated.
- The targeted recruitment of the second respondent was permissible and properly conducted by the first respondent. It was not disputed that the affirmative action plan of the first respondent was rational and goal directed. The targeted appointment of the second respondent sought to achieve the goals of such plan by addressing existing gender and racial imbalances in the

particular department. Furthermore, the aims and provisions of the first respondent's recruitment policy permitted the first respondent to head-hunt and consider the late application of the second respondent.

- The applicant's attack on the procedural aspect (the consideration of the late application of the second respondent) of the appointment of the second respondent raised a jurisdictional issue. The court's jurisdiction is limited to the adjudication of claims of discrimination under the Employment Equity Act. The applicant had failed to establish a case in terms of such an allegation of discrimination.

LINK TO FULL DECISION: <http://www.saflii.org/za/cases/ZALCPE/2011/2.html>

LABELS: