



Collaboration Space / UCT Equality Law Database / 2012

PUBLIC SERVANTS ASSOCIATION ON BEHALF OF TLOWANA v MEC OF AGRICULTURE AND OTHERS

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

YEAR: 2012PLAINTIFF / APPLICANT / APPELLANT: PSA obo M P TLOWANADEFENDANT / RESPONDENT: MEC OF AGRICULTURECOURT: LABOUR COURTCITATION: (2012) 33 ILJ 2675 (LC)POST / PRIOR ACTION: ARBITRATIONJUDGE(S): CELE JGROUND(S) OF DISCRIMINATION: GENDER, AFFIRMATIVE ACTIONSTATEMENT OF FACTS:

The applicant employee applied for a promotion. The interview panel recommended his appointment. Nevertheless the interview panel's second recommendation was appointed. Aggrieved by his non-appointment the applicant employee referred an unfair labour practice dispute relating to the promotion to arbitration. The employer was successful in defending the claim. On review the applicant employee successfully had the arbitration award set aside and the matter was remitted back to the bargaining council for a de novo arbitration. Meanwhile the successful candidate transferred to new position, as such the contested position was re-advertised. The applicant re-applied and was appointed. Seeking compensation for the delay in his promotion, he referred an unfair labour practice dispute to conciliation. Conciliation failed and at arbitration the arbitrator found in favour of the employer. The proceedings before the Labour Court dealt with the applicant's application to review such arbitration award.

ISSUE OF LAW:

Whether in appointing the initial successful candidate the employer had acted rationally and applied its mind to considerations relevant to the application of the provisions of the Employment Equity Act 55 of 1998.

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

The arbitration award was set aside. The court ordered that the applicant deserved to be have been appointed at the time the initial successful candidate was appointed. The applicant was accordingly entitled to compensation for the delay in his promotion.

The court considered various case law which affirmed that affirmative action plans should be applied rationally, with due regard to relevant guiding considerations which includes, amongst other things, fairness and justice; consideration of the situation of the complainant in society, their history, the nature and purpose of the discriminatory practice and so forth. In addition, the court considered case law emphasizing the importance of the proper construction and implementation of employment equity plans in achieving substantive equality.

Assessing the facts the court held that a formula devised by the MEC to achieve affirmative action in favouring the selection of a woman candidate was rational. However it was common cause that the initial successful candidate had failed to satisfy the minimum requirements of the advertised position. Accordingly the employer erred in that the selected candidate should not have been shortlisted for the position. Therefore the initial successful candidate was not properly selected. Had the initial successful

candidate not been shortlisted the applicant would have stood a greater chance at being appointed. The omission of the arbitrator to apply his mind to this material evidence lead the court to pronounce that the arbitrator had misdirected himself and committed a gross irregularity.As such the arbitration award could not stand and was set aside.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALCJHB/2012/121.html>

LABELS: