Collaboration Space / UCT Equality Law Database / 2007

THEKISO V IBM SOUTH AFRICA (PTY) LTD

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

YEAR: 2007

PLAINTIFF / APPLICANT / APPELLANT: APPLICANT: THEKISO, JOSEPHINE

DEFENDANT / RESPONDENT: RESPONDENT: IBM SOUTH AFRICA (PTY) LTD

COURT: LABOUR COURT

CITATION: (2007) 28 ILJ 177 (LC)

POST / PRIOR ACTION: N/A

JUDGE(S): FREUND AJ

GROUND(S) OF DISCRIMINATION: RACE, GENDER

STATEMENT OF FACTS:

The applicant, a black female, was retrenched by the respondent. Jobs within the applicant's department were made redundant following the lost of a lucrative client contract. The team primarily assigned to the client contract within the department was reduced from 6 roles to 1 encompassing role of a more technical and managerial nature than the previous positions. In compliance with s 189 (3) of the Labour Relations Act of 1995 (LRA), letters instituting the consultation process were distributed, and explained, to the applicant and the other affected employees. The letter included the proposed selection criteria for the vacancy, which was "the required skill set". On the same day as receiving the letter, the applicant and Mr McLean, the applicant's manager and head of the department, met as part of the consultation process. At no time during the meeting did the applicant dispute the selection criteria for the new post or any other aspect of the consultation process.

All the affected employees, which included the applicant, were invited to apply for the new post. They were required to assess their abilities against the skill set required by the advertised position. Mr McLean discussed with each affected employee their self-assessment scores. Interviews were also conducted by Mr McLean with such employees. The applicant was unsuccessful in her application. The position was filled by a white male -being one of the 6 affected employees within the applicant's team. Mr McLean testified that he had appointed the white male employee as such individual was the best qualified for the position.The successful employee's self-assessment score was the highest, and Mr McLean believed such scores where commensurate with Mr McLean's own assessment of the employee based on his working experience with the said employee. The applicant was thereafter retrenched. Attempts were made by Mr McLean to secure employment for the applicant elsewhere in the company, in addition to the applicant applying for available positions within the company. All attempts and applications were unsuccessful.

Following her retrenchment the applicant instituted proceedings in the Labour Court. She proceeded within an application alleging that the respondent had directly discrimination against her on the grounds of gender and race. During proceedings she abandoned such claim. She introduced the allegation that the respondent had failed to "consider certain requirements" of the Employment Equity Act 55 of 1998 (EEA) "when determining parties for retrenchment or redeployment." This she alleged rendered her dismissal unfair. The respondent opposed the application.

The applicant did not testify or call any witnesses. The respondent called two witnesses, one of which was the applicant's above-mentioned manager, Mr McLean. The case was decided on the basis of the evidence lead by the respondent.

ISSUE OF LAW:

In the context of the retrenchment and retention of employees, is an employer obligated under the EEA and LRA to apply affirmative action considerations when taking the decision who to retrench? Does such omission by the employer, and its retrenchment of an employee from a designated group amount to an unfair dismissal?

DECISION, RATIO AND OUTCOME (including minority judgment):

The court dismissed the applicant's application. It held her dismissal was substantively and procedurally fair.

The applicant argued that there had been inadequate consultation prior to her retrenchment. The court dismissed such argument.The respondent had complied with s 189 (2) of the LRA in fulfilling its consultation obligations. It was not unfair to have expected the applicant to consult with Mr McLean on the same day as receiving the consultation letter. The court factored in that the applicant was a university graduate, and that the contents of the letter and its implications were orally conveyed to her. At no point during the consultation, or at any time prior to her retrenchment, did she raise any objection to the timing of the consultation nor was there evidence submitted to prove she had suffered prejudice as a result of same. The timing of the consultation did not render her dismissal unfair.

The applicant argued that the proposed selection criteria was not sufficiency dealt with in the consultation. The court noted that the minutes from the consultation reflected that the issue was dealt with briefly. However when Mr McLean explained the proposed selection criteria, the applicant did not comment. The court determined that it was reasonable for Mr McLean to assume that the applicant had no objection to the proposed selection criteria. Furthermore nothing precluded the applicant from raising concerns at anytime prior to her retrenchment. As such her inaction amounted to her acceptance of the proposed selection criteria.

The court further dismissed the applicant's contention that the respondent should have commenced consultations earlier than it did. The court found no merit in such allegation.

The applicant argued that in terms of s 15(2)(d)(ii) of the EEA, read with s 20 (3) of the EEA, the employer was obliged to retain the applicant in preference to the white male employee, provided that applicant had the ability to acquire the skill for the advertised within a reasonable time. Mr McLean testified that he had not considered affirmative action measures during the consultation process, and in filling the vacancy. It was argued that s 15(2)(d)(ii) of the EEA, read with s 189 (2)(a)(i), s 189 (3)(b) and s 189 (3)(d) of the LRA, obliged the respondent to consider its affirmative action obligations when making the retrenchment decision, and in so doing favouring the retention of the applicant. The court dismissed the applicant's argument. It regarded the applicant's argument as incompatible with the Labour Court judgment of *Dudley v City of Cape Town*, which was followed in *PSA on behalf of Karriem v SA Police Services*. *Dudley v City of Cape Town* held that the EEA does not create an individual right to affirmative action, and it provides no right for an applicant to have direct access to the Labour Court in respect of a claim to such a right. The court noted the "programmatic and systematic" formulation of chapter III of the EEA. Following *Dudley v City of Cape Town* the court held that the applicant had no right to pursue a claim in the Labour Court alleging that her retrenchment amounted to a breach by the employer of its affirmative action obligations in terms of chapter III of EEA. The court held that there exists no obligation on an employer when making an appointment or dismissal to give preference "to suitably qualified employees from a designated group."

The court noted that neither the applicant nor the respondent during the consultation process raised the role of affirmative action in the retrenchment process.

The court dismissed the applicant's argument that the application of the selection criteria was unfair. The court noted that the applicant had acquiesced to the selection criteria and that Mr McLean had applied it fairly and objectively. Mr McLean did not rely on the self-assessment scores in isolation. The court was satisfied that Mr McLean had applied his own judgment to the self-assessment scores. The court noted that it would have been unreasonable and unfair had Mr McLean solely relied on the self-assessment scores.

The court dismissed the applicant's argument that the respondent had not fairly and properly considered alternatives to retrenchment. Mr McLean had attempted to seek other employment for the applicant. There was no evidence to indicate that the respondent would not have consider alternatives.

LINK TO FULL DECISION: http://www.saflii.org.za/za/cases/ZALC/2006/91.html

LABELS: