

VIC & DUP/JOHANNESBURG/LKS
IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE NO. J525/98

In the matter between:

<u>THE NORTH WEST TOURISM COUNCIL</u>	Applicant
and	
<u>THE COMMISSION FOR CONCILIATION</u>	
<u>MEDIATION AND ARBITRATION</u>	First Respondent
<u>G G SEBOTH A N.O.</u>	Second Respondent
<u>L J M MAKHETHE</u>	Third Respondent

JUDGMENT

SUTHERLAND, AJ:

[1] The Applicant is the employer of the third Respondent, to whom I shall refer as the employer and employee respectively. The second Respondent is a commissioner of the first Respondent, to whom I shall refer as the commissioner. The application is for the

review of the award given by the commissioner on 28 January 1998.

[2] The employee accepted employment with the employer on 19 November 1996 in a post described as a computer network coordinator, which at that time was graded po9 on the Perommes job grading system. Her duties, stated on her letter of appointment, included the training of students and staff and the management of the network software.

[3] On 22 October 1997 she referred a dispute to the CCMA for conciliation on the standard form. The nature of the dispute was said to be -

".. about the discrimination in terms of grading of lecturing staff. When all the lecturing staff were moved to grade 8, I was left on grade 9 for reasons unknown to me."

The special features of the dispute were said to be -

"The position of IT supervisor/lecturer was advertised and I was interviewed for the same position .. but I was later appointed [to] a different position of network coordinator without an explanation or prior communication."

The outcome to the dispute sought from the CCMA was stated to be -

"I would like to be moved to grade 8 like the other

lecturing staff, especially because I am performing additional functions other than training students and staff ..."

After the dispute had been referred the employee amplified the details of her grievance by writing on 31 October 1997 to say that she relied on the provisions of schedule 7 to the Labour Relations Act, item 2(1) (b). By so doing the employee sought to characterise the dispute as -

"unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee."

Thereafter she made a request for arbitration in which she alleged that the issue in dispute was:

"Discrimination in terms of grading of lecturing staff; when all the lecturing staff were moved to grade 8, I was left on grade 9, for reasons unknown ...:

and persisted with a claim for the relief already mentioned.

[4] After hearing the parties the commissioner made an award in which he ordered that the employee be placed in the post of information technology supervisor retrospectively to the date of her employment together with all the remuneration that logically went with such an order.

[5] It is contended on behalf of the employer that the granting of this relief demonstrates that the commissioner failed to grasp the issues ventilated before him. The relief has the effect of placing the employee in a post in which she was never employed. Although the employee had in 1996 applied for that post and been interviewed, she had never been offered the post and indeed had accepted another post and worked in that other post for almost a year. No dispute had been raised about not being offered the post either in November 1996 or in the references to the CCMA in October 1997. The heart of the articulated grievance related to the failure of the employer to regrade the post of which the employee was the incumbent.

[6] It seems that the inspiration for the form of the relief awarded is derived from certain evidence given by the employee to the effect that when she was offered the post of coordinator she was told by the person that the grade of that post would be upgraded at a later stage. This "promise" was confirmed, so she said, by Mr Mabale, the head of the finance department. The employer denied the making of such a representation and Mabale testified to that effect. The commissioner does not say why the evidence of the employee is to be preferred to that of Mabale and there are no apparent

reasons to do so.

[7] There is un rebutted evidence from the employer to the effect that the employee was unqualified and lacked necessary know-how in relation to the advertised post of technology supervisor. Apparently none of the interviewees matched the employer's requirements and this circumstance motivated a restructuring of the functions of the position. An employment opportunity for the employee was created when the post of coordinator was established.

[8] On the probabilities the employee's grievance originated from the common cause fact that in the course of a re-grading exercise in 1997 the post of coordinator was left unchanged whilst several lecturing posts were re-graded up one level to Perommes po8. It is apparent that there was a considerable degree of confusion about what the re-grading process entailed. Although job grading ought logically to be distinct from the individual who occupies the job, the management of the employer seem to have blurred that distinction. The explanation for not upgrading the employee's post is, in part, that she lacks the academic qualification of a three year diploma, an attribute which distinguishes the employee from the lecturers whose posts were upgraded. The evidence also

discloses enquiries made by the employee to have her qualifications assessed to determine if they might constitute a substantially similar qualification to that possessed by the lecturers. This was not successful.

[9] The commissioner was himself fundamentally confused as is evident from his first words in the award where he erroneously states that "the principal issue is whether the [employer's] restructuring of a post after interviews consisted of an unfair labour practice". Whatever else the case may be about, it is not about that question, nor, having regard to the acquiescence of the employee as dealt with above, could it have formed the foundation of a cogent complaint a year later.

[10] The commissioner treated the employee's case as that of an applicant for employment who is subjected to unfair discrimination. What escaped the attention of the commissioner is that the CCMA has no jurisdiction to

adjudicate on such a question as it falls within the provisions of item 2(1)(a) of schedule 7 to the labour Relations Act and is reserved for adjudication by this court. The rationale for the award demonstrates that the commissioner exceeded his powers in this regard,

his finding being that:

"The [employee] has discharged the onus upon her and has on a balance of probabilities satisfied the hearing that there has been an unfair labour practice and further that there has been discrimination against her and that the discrimination was not based on the inherent requirements of the post."

[11] If indeed the cause of action which the employee has is irrational discrimination then the commissioner had no jurisdiction to hear it. If the cause of action is that the employee had a legitimate expectation that the position which she accepted in 1996 would be upgraded such a complaint is not a matter concerning promotion as contemplated in item 2(1)(b) of schedule 7 to the Act. Even if on a tortuous interpretation of item 2(1)(b) the complaint could be brought within the scope of a promotion, there is no rationale connection between a failure to promote the employee and placing her in a post which no longer exists, more particularly when that post, when it did exist was graded a level higher than the lecturing posts are now graded, and with whom the employee believes she is on a par, and for that reason should be treated equally. Lastly, it seems to me that if the employee was indeed induced to accept the job of coordinator on the strength of a

misrepresentation, her cause of action is in delict and not in terms of any remedy created by the Act.

[12] It is therefore plain that the award of the commissioner must be set aside on the grounds that he exceeded his powers, and that he failed to apply his mind to the real issues put before him. The employer does not seek a cost order.

[13] In the circumstances it is appropriate to make an order as follows:

1. The award is set aside.
2. If the third respondent wishes to pursue a complaint about an unfair labour practice, she may file a fresh reference in the appropriate form to the appropriate forum

ROLAND SUTHERLAND

ACTING JUDGE OF THE LABOUR COURT

17 JUNE 1998