

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO 583/2000

In the matter between:

Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

First Respondent

Second Respondent

THE PUBLIC SERVANTS ASSOCIATION OF

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

JUDGMENT

FRANCIS AJ

Introduction

1. The applicant, the South African Revenue Service, has brought an application to review and set aside an arbitration award which was issued by the second respondent (“the arbitrator”), a commissioner of the Commission for Conciliation, Mediation and Arbitration (the CCMA), on 23 June 2000. The award related to a dispute by the fourth to sixth respondents (“the individual respondents”) who claim that they have been unfairly treated by the applicant in being refused promotion to the position of Principal Taxation Officers.

Background facts

2. For a proper appreciation of the relevant issues, it is necessary to set out in some detail the personnel structure of the relevant post levels and ranks, and the history of the requirements relevant to promotions. This can be gleaned from the papers before me, the supporting documents that were filed at the arbitration proceedings and from the award.
3. Prior to 1 October 1997 the applicant was a separate Department within the Public Service. As such, it was bound by all applicable policies and procedures formulated by the Department for Public Service and Administration. These are policies issued by the Department for Public Service and Administration which set out appointment requirements, promotional requirements, job content and remuneration attached to, the occupational class covered by a particular PAS. Since 1994 the provisions of these PAS's have been negotiated with various unions representing employees in the Public Service.
4. In terms of the South African Revenue Service Act, the applicant became an autonomous body outside the Public Service on 1 October 1997. However, in terms of the aforesaid Act, and by virtue of a collective agreement entered into with the unions representing persons employed in the old department, all employees were transferred to the applicant from the Public Service on the same terms and conditions of employment that they enjoyed with the Department. All policies and procedures, including PAS's that had previously applied, continued to apply. These were to remain in force until such time as they were amended by the applicant after negotiations with the unions represented in the South African Revenue Service National Bargaining Forum.
5. Of particular importance to this dispute were various PAS's issued during the period 1988 to 1997, which regulated and amended the conditions on which appointments to posts within the occupational class of Taxation Officer could be made, as well as the conditions to be met for promotions within this occupational class.

6. The dispute concerns what is referred to as an occupational class of taxation officers. This occupational class comprises three post levels, namely, taxation officers, principal taxation officers and deputy directors.

These are further divided into appointment and promotion ranks as follows:

Within the post level of Taxation Officer

The appointment and promotion ranks of:

Assistant Taxation Officers

Taxation Officer

Senior Taxation Officer

Within the post level of Principal Taxation Officer

The appointment and promotion ranks of:

Principal Taxation Officer

Chief Taxation Officer

Within the post level of Deputy Director

The appointment and promotion rank of Deputy Director.

7. In terms of clause 8 of the PAS, read with the provisions of clause 11(1)(a)(iv) to (iv) thereof, the positions of

Assistant Taxation Officer up to and including Principal Taxation Officer, are entry level positions, i.e.

these are open for appointment to persons from outside the applicant, whilst only existing employees of the applicant may be appointed to the position of Chief Taxation Officer and Deputy Director.

8. Prior to 1 August 1988:

8.1 no post matric degree or diploma was required for appointment or promotion to any of the abovementioned ranks.

8.2 within the appointment and promotion ranks of Assistant Taxation Officer, Taxation Officer and Senior Taxation Officer, promotion was automatic in the sense that, where an employee had served in a particular post for a specified number of years, he or she would automatically be promoted to the next rank, but this did not apply beyond promotion to the rank of Senior Taxation Officer.

8.3 above the rank of Senior Taxation Officer, i.e. for promotion to the rank of Principle Taxation Officer, Chief Taxation Officer or Deputy Director, there was a “*promotion barrier*” also known as a “*post barrier*” which required the advertisement of a vacancy whereafter there was a selection process to be followed before the vacancy could be filled.

9.A further requirement was added at a later date in that in respect of certain ranks, internal courses had to be passed.

10.The individual respondents were appointed to the post of Taxation Officer prior to 1988 and none of them had a post matric qualification.

11.During 1988 two amendments were introduced to the system then prevailing:

11.1 a minimum qualification of an appropriate post matric 3 year degree or diploma became a requirement for appointment to the post of Taxation Officer; existing employees who had already been appointed to such ranks, such as the individual respondents, were not affected by this requirement as it only applied to new appointments.

11.2 A further change introduced in 1988 was a so-called “qualification barrier”, where an employee was promoted to the rank of either Chief Taxation Officer or Deputy Director, he or she had to have a post matric three year degree or diploma referred to as the “*RVQ13 qualification*”. This change was called a “qualification barrier”. This was, however, phased in over a period of years in that for the year 1989, only four courses towards such a degree or diploma were required, for 1990 seven such courses were required and for 1991 nine such courses were required.

12.In 1995 the qualification barrier applicable to promotions to the ranks of Chief Taxation Officer and Deputy Director was partially relaxed: the RVQ13 qualification was no longer required for promotion to the rank of either Chief Taxation Officer or Deputy Director or provided that the employee concerned had been employed prior to 10 June 1994. Any employee recruited after that date would still have to satisfy the

RVQ13 qualification requirement.

13. A further development was brought about in 1996. The PAS was amended to grant employees who had obtained a Bachelors degree with certain specified subjects an entitlement to automatic rank promotions up to the level of Principal Taxation Officer and Chief Taxation Officer, provided that they had passed the certain internal courses and had completed the necessary qualifying period. In the case of this category of employees, the “*post barrier*” or “*promotion barrier*” as referred to above did not apply. In other words, they did not have to wait for a vacant post and successfully apply for that post.

14. In 1997 this entitlement was extended also to employees with a three-year diploma with certain subjects. The rationale for this relaxation was to promote the retention of skills of qualified employees. The individual respondents had been employed prior to 1998, and had not obtained any post matric qualification.

15. In order to obtain promotion from the level of Senior Taxation Officer to the next rank of Principal Taxation Officer, the individual respondents faced the “promotion (or post) barrier”. This meant that any one of them could only obtain promotion:

(a) if there was a vacant post available; (b) such post was advertised; and (c) they applied for it and was appointed to it.

16. The individual respondents, who are employed by the applicant as Senior Taxation Officers at the Bellville branch of the applicant, applied to be promoted to Principal Taxation Officers. Their application for promotion was largely based on the grounds that the post barrier did not apply to them. The applicant refused to appoint them as Principal Taxation Officers. The reason given by the applicant for refusing their applications for promotion was that the individual respondent still had to comply with the post barrier.

17. The individual respondents adopted the attitude that the applicant’s refusal to promote them constituted an unfair

labour practice as defined in Schedule 7 item 2 (1)(b) of the Act. They then referred that dispute to the CCMA for arbitration. The individual respondents contended that the applicant misread the applicable provisions of the PAS.

The Arbitration Proceedings

18. At a pre-arbitration hearing the parties formulated the nature of the dispute as follows: “*Whether the non-provision of Senior Taxation Officer without RVQ13 qualifications but who comply with the personnel administration standard requirement to be promoted to the rank of Principle Taxation Officer, due to SARS’s alleged unfair interpretation and application of the qualification barrier as from 10 June 1994, constitutes an unfair labour practice.*”
19. The arbitrator issued his award. He found that the applicant’s conduct constituted an unfair labour practice in that “*The non-promotion of Senior Taxation Officers without RVQ13 qualification but who comply with the Personnel Administration Standard requirement to be promoted to the Rank of Principal Taxation Officer, due to SAR’s alleged unfair interpretation and application of the qualification barrier as from 10 June 1994, constitutes an unfair labour practice*”.
20. The grounds upon which the arbitrator came to his conclusion was his interpretation of the relevant PAS. He interpreted the relevant PAS for each of the years 1995 to 1997 as involving a relaxation of the promotional requirement which applied to the benefit of the individual respondents.
21. The arbitrator came to the conclusion that the applicant was acting unfairly in its approach to promotion.
22. The applicant brought an application to review and set aside such award.

The Review Application

23. The arbitration proceedings before the arbitrator were conducted in terms of Schedule 7, item 3(4)(b). Those

provisions provide thus:

“(4) *If the dispute remains unresolved -*

(a)

2.any party to the dispute, if the dispute is about an act or omission referred to in item 2(1)(b), (c) or (d), may request that the dispute be resolved through arbitration.

4 **Powers of the Labour Court and Commission**

1).....

2)The arbitrator has the power to determine any dispute that has been referred to it in terms of item 3 on **reasonable** terms”.

24.In terms of section 145(1) of the Act, this Court is empowered to review an arbitration award granted in arbitration proceedings conducted under the auspices of the first respondent if there is a defect in such proceedings. In terms of section 145(2)(a) a defect in such proceedings has occurred if:

“(a) *the commissioner -*

(i) *committed misconduct in relation to the duties of the commissioner as an arbitrator;*

(ii) *committed a gross irregularity in the conduct of the arbitration proceedings; or*

(iii) *exceeded the commissioner’s powers.*

25.As grounds of review in this matter the applicant contends that:

25.1 the arbitrator misunderstood fundamental aspects of the evidence that was placed before him, failed to apply his mind properly to the matter or to consider properly appreciate relevant evidence and issues, and the award cannot reasonably be justified.

25.2 by reason of such flaw as can be found in the approach to the reasoning of the arbitrator, the arbitrator has committed misconduct, or a gross irregularity in relation to his arbitrator’s duties and that by reason of his conduct of the proceedings, he has failed to act properly and reasonably.

The respondents Contention

26. The individual respondents contended that the arbitrator indeed did not misconceive the nature of the enquiry and the issues to be decided. According to them the dispute before him had been clearly defined with reference to the provisions of the PAS and, in particular, the RVQ 13 qualification. They contended that the afore going practise adopted by applicant was unfair and unjust and that it constituted an unfair labour practice. In support of their allegation as aforesaid, they alleged that:-
- 26.1 Applicant's interpretation and application of the PAS did not give effect to clause 11(b) of the PAS for 1996 and 1997 which clearly stated that the RVQ13 barrier did not apply to persons appointed prior to 10 June 1994;
- 26.2 Persons in possession of the RVQ13 qualification were unfairly and unjustly preferred to the individual respondents.
- 26.3 The effect of the practise adopted by applicant is that the individual respondents are, for all practical purposes effectively barred from being promoted to Principal Taxation Officer because such posts as do become available, are automatically filled by persons who hold the RVQ-13 qualification.

Analysis of the facts and arguments raised

27. On a proper analysis of the reasons set out in the arbitrator's award, it is apparent that the arbitrator came to the conclusion in favour of the individual respondents on the basis of the assumption that the obstacle in the way of promotion faced by the individual respondents was the RVQ13 qualification barrier. The arbitrator concluded that this was in fact not a valid barrier, in view of the provision in the PAS for each of the three relevant years (1995 to 1997), which provided that the RVQ13 qualification requirement was, as from 1995, relaxed in the case of those already employed prior to 10 June 1994. Of particular significance in this regard is the following passage from the arbitrator's award:

"One aspect that, in my view, cannot be discarded is the fact that in all three PAS that I have seen, the provisos were retained, namely that the said requirements did not pertain to appointments before 10 June 1994. This, in my view, stymies the contentions set by Mr Wybenga."

28. This manifests a fundamental misapprehension of the real issues and factual material to an extent that precluded the arbitrator from properly deciding the matter. It is quite correct that in terms of the 1995 amendment, the RVQ13 qualification barrier was relaxed for those employees employed prior to 10 June 1994. What is, however, significant, and has plainly been overlooked by the arbitrator, is the fact that the RVQ 13 qualification barrier applies to promotion of existing employees from the level of Principal Taxation Officer to Chief Taxation Officer, and from Chief Taxation Officer to Deputy Director. The individual respondents were still at the rank of Senior Taxation Officers; their next possible promotion would be to the rank of Principal Taxation Officer. The fact that this qualification barrier was relaxed in respect of those employed prior to 10 June 1994 did not mean that there was an automatic entitlement to promotion of existing employees such as the individual respondents. What still had to be overcome was the promotion or post barrier which required that there be a vacancy which was advertised, and that the employee applied for and was selected for that post. In other words while the qualification barrier was relaxed, the promotion or post barrier was not relaxed for employees such as the individual respondents. That had never been amended or removed, save that in terms of the 1996 amendment to the PAS, provision was made for automatic rank promotions up to the ranks of Principal Taxation Officer and Chief Taxation Officer provided that the applicant had a Bachelors degree as well as had successfully completed certain internal courses. This reinforces the fact that the promotional post barrier was still applicable to all employees generally. It would, otherwise, have been quite superfluous to have made this concession applicable to those with Bachelors degrees, had every one such as the individual respondents not had to overcome the promotion post barrier.

29. Ms de Swardt for the individual respondents submitted that the manner in which applicant has interpreted and applied the applicable provisions of the PAS has resulted in the anomalous result that, although the RVQ 13 qualification barrier is expressly stated as not being applicable to persons in the employ of applicant prior to 10 June 1994, such persons are, for purposes of promotion, effectively required to have such qualification and that, if they do not, they are not afforded rank promotion.

30. I am unable to uphold Ms de Swardt's submission. The notes to the PAS provisions for 1995, 1996 and 1997 did no more than relax the qualification barrier for those employed prior to June 1994, in respect of whom it was therefore no longer required that they hold an RVQ13 qualification for promotion to the rank of CTO or higher. What was, however, still required, and remained unaffected by those notes to the relevant PAS provisions, was that they still had to overcome the promotion or post barrier i.e. that there must be a vacant post for which they successfully apply. This meant that the individual respondents could only qualify for promotion from their current ranks of Senior Taxation Officers if there was a vacancy in the rank of Principal Taxation Officer. Thereafter they would likewise have to overcome the promotion or post barrier if they were to seek promotion to the rank of Chief Taxation Officer (i.e. there would again have to be a vacant position for that rank advertised and successfully obtained). If they were able to overcome that barrier and reached that stage, they would then not face the qualification barrier, by virtue of the fact that they were employed prior to 10 June 1994. It would be in that context that they would benefit from the 1995 relaxation referred to above. It would not however have the effect that it overcame promotion or post barrier.

31. On a proper analysis of the arbitrator's award and reasons, it becomes clear that the arbitrator plainly misconceived the nature of the enquiry and the issue to be decided. He wrongly understood the dispute to concern the question whether the individual respondents were precluded by virtue of the qualification barrier from obtaining promotion. That was in fact not the true question and was not the issue. The applicant did not dispute that, because the individual respondents were employed before the relevant date of June 1994, they were not precluded from promotion by virtue of their lack of an RVQ13 qualification. What did however remain the obstacle was the post or promotion barrier requiring a vacancy and successful selection for that post rather than automatic entitlement. The individual respondents are not being precluded from promotion but are simply expected, along with all other employees in the same category, to comply with this requirement, which had been accepted by all the parties as part of a collective agreement by all the

parties. That barrier is quite independent of the qualification barrier and therefore unaffected by the 1995 relaxation.

32. It is crucial that an arbitrator who is conducting arbitration proceedings to know what the true issues are that he is called upon to determine. Where he issues an award which is based on a failure by him to appreciate the true nature of the issue before him, he commits a gross irregularity which vitiates the entire proceedings.

33. In this matter the arbitrator completely failed to appreciate the issue before him and based his award on a wrong understanding of the issue before him which he was called upon to decide. His failure constitutes a reviewable irregularity. Accordingly his award falls to be reviewed and set aside. I am of the opinion that this is not a matter where the applicant should be awarded costs. I have taken into account that the parties do have an ongoing relationship. The opposition was not frivolous.

34. In the result I make the following order:

(a) The arbitration award issued by the second respondent on 23 June 2000 in CCMA Case No WE 21564/Marlh is reviewed and set aside.

(b) The dispute is referred back to the CCMA to be heard by a commissioner other than the second respondent.

(c) There is no order as to costs.

FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: PAUL KENNEDY SC

INSTRUCTED BY BRINK COHEN LE ROUX ATTORNEYS

MADELEINE DE SWARDT SC

INSTRUCTED BY DE KLERK & VAN GEND ATTORNEYS

: 6 MARCH 2001

: 30 MARCH 2001