

REPUBLIC OF SOUTH AFRICA



Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 381/10

In the matter between:

DEPARTMENT OF ECONOMIC DEVELOPMENT

AND TOURISM, WESTERN CAPE

Applicant

and

ADV JP HANEKOM N.O.

First respondent

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Second respondent

PSA obo DAWID LABUSCHAGNE

Third respondent

Heard: 15 September 2011

Delivered: 23 September 2011

Summary: Review – unfair labour practice concerning promotion – not reviewable.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant seeks to review the award of the First Respondent (the arbitrator) in which he found that the applicant had committed an unfair labour practice in failing to shortlist the third respondent, Mr Dawid Labuschagne, for a promotional post. The arbitrator awarded the third respondent compensation equal to two months' salary.

[2] The applicant seeks to review the award in terms of s 145 of the LRA on the basis that:

- 1.1. "First Respondent has committed misconduct in relation to his duties and has misconceived his duties and jurisdiction;
- 1.2. Has committed a gross irregularity in the conduct of the proceedings;
- 1.3. Has exceeded his powers; and
- 1.4. The award is not rationally justifiable in relation to the facts and reasons given for the award."

[3] In oral argument, though, Mr *Taylor*, for the applicant, agreed that these grounds – as set out in s 145 of the LRA – have been suffused in the standard of reasonableness as set out in *Sidumo*¹ and that that is the applicable test.

Background

[4] The third respondent was one of 65 candidates who responded to the applicant's advertisement inviting candidates to apply to be interviewed for a post of manager: employee services at the level of deputy director (level 11). This would be a promotional post for the third respondent.

[5] The advertisement specified the following requirements:

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).

"The formal qualification required for this position is an appropriate B- degree or equivalent (Human Resource Management or Industrial Psychology) plus extensive working experience in a human resource management (personnel Administration and labour relations) environment. Further requirements include: a valid driver's license; good communication skills in at least two of the three official languages of the Western Cape; at least three years management/supervisory experience; financial management experience; computer literacy; report writing experience."

[6] The advertisement did not set out the detailed requirements, weight allocation and scoring method used by the selection committee that shortlisted candidates in terms of a "grid". These were:

- (a) requirements of post;
- (b) public service personnel management experience;
- (c) public service labour relations experience,
- (d) supervisory/management experience;
- (e) financial management experience;
- (f) report writing experience;
- (g) presentation skills;
- (h) project management skills;
- (i) equity (race, gender and disability).

[7] The third respondent's CV set out his extensive experience in the public service labour relations area. He had been employed in personnel functions since 1986 and is at present an assistant manager: employee services. His CV and also outlined his duties as Assistant Director: Labour Relations, a position he had filled from 1999 to 2006. That included the operational and strategic management of the departmental labour relations in: financial input; and budgeting and control.

[8] The selection panel did not shortlist the third respondent to be interviewed because they did not allocate him a sufficiently high score in terms of the grid compared to his CV.

Grounds of review

[9] The Applicant's grounds for review rest on the following:

3.1. The Applicant disputes the First Respondent's finding that the question of point scoring during the screening process was a procedural flaw. According to the Applicant the point scoring function is a reflection of the interpretation of a set of facts stated in the CV by the person presiding over the screening process.

3.2. The point scoring function during the screening process is a substantive issue in that it was a matter of interpretation of the applicant's CV by the shortlisting panel at the time that the shortlisting was conducted.

3.3. The selection panel was precluded from drawing inferences from information set out in a candidate's CV but not specifically stated therein.

3.4. The First Respondent arrived at his conclusion that the shortlisting process was unfair by using inferential reasoning which was not open to the selection panel at the time and by substituting his own assessment of the points to be allocated by the selection committee to the Third Respondent in circumstances where it was not open to the First Respondent to act as an "*employment agency or shortlisting panel*".

3.5. In estimating the points that, in the First Respondent's opinion, ought to have been allocated to the Third Respondent, the First Respondent failed to have regard solely to the information provided in the Third Respondent's CV.

Discussion

[10] It became clear in oral argument that the crux of the Applicant's argument is that the points allocated by the shortlisting panel was based on its interpretation of the facts stated in the *curricula vitae* before it, and that an arbitrator cannot second guess this assessment and substitute it with his own interpretation of what the most appropriate points should have been. Further, that the selection committee was precluded from inferring information which was not on the Third Respondent's CV.

[11] In effect, what the Applicant argued is that an arbitrator cannot interfere with a choice of candidate which an employer has made based on a point scoring system.

[12] But in *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & Others* (2010) 4 BLLR 428 (LC) Francis J made it clear that this sort of deference should not be expected of an arbitrator: that would mean that employees who are victims of an unfair labour practice would be left with no remedy.²

[13] The Applicant, on the version of its own witness (Mr Romeo Adams), was not sure as to how the scoring of the candidates had to take place. It appears that the grid contained in the applicant's "transversal policy" was not properly applied or that the incorrect grid was used for the shortlisting exercise. According to Adams, the maximum score that could be allocated for experience was a 2. Adams further confirmed that the criteria should have been 1 for less than 2 years and 2 for more than 2 years. Adams conceded that it was possible that he made mistakes in this regard.

[14] What this means is that none of the candidates should have been allocated a score above 2. Yet it did happen. The process that the shortlisting panel followed is commonly known as a "screen out process". This involves an objective assessment of whether or not an applicant has met the broad requirements of an advertised position. It was clear that normally during this process no discretion is given to the selection panel to decide on the appropriate score which an applicant must be given. For example, if an applicant has report writing skills then he should be given the points associated with having such skills. The question as to the weight to be attached to any specific requirement forms part of a competency assessment which takes place later, should a candidate be shortlisted.

[15] It was not open to the Applicant to criticise the Third Respondent for his apparent lack of detail in his CV, when the advert itself was not specific on critical issues such as the length of service required. It cannot be fair to apply the criteria based on years of experience to a job applicant when that applicant

² At para 24.

was not asked to specify his length of experience in respect of a specific requirement.

[16] There is also no merit in the Applicant's argument that it was not open to the shortlisting panel to infer from the Third Respondent's CV what his experience was, as the Applicant had no problem inferring apparent experience from the successful candidate's CV. In this regard, the successful candidate did not put any financial management experience down on his CV. Notwithstanding this, during cross-examination Adams stated that project planning involves looking "not only at the Human Resources but also the financial resources for that specific project."

[17] Ultimately, the conclusion that the arbitrator came to was that the Third Respondent was not allocated scores in respect of issues such as supervisory skills even though these are mentioned on his CV. The arbitrator also correctly readjusted the scores which were patently incorrect in respect of the other shortlisted candidates and arrived at a decision which saw the Third Respondent qualifying for the shortlist.

Conclusion

[18] In my view the decision reached by the arbitrator is one which a reasonable decision maker could have reached. He applied his mind to the evidence before him, the relevant criteria, and the concessions made by the applicant's witness, Adams. His decision that the applicant committed an unfair labour practice in failing to shortlist the third respondent, given the mistakes in the scoring system it applied, is not unreasonable. Neither is the award of compensation of two months' salary.

[19] The application for review is accordingly dismissed with costs.

Anton Steenkamp
Judge

APPEARANCES

APPLICANT: Graham Taylor
Instructed by the State Attorney.

THIRD RESPONDENT: Bradley Conradie attorney.

LABOUR COURT