REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 820/08

In the matter between:

C J GEBHARDT	**Applicant**
and	
EDUCATION LABOUR RELATIONS COUNCIL	**First Respondent**
ADV LUVUYO BONO	**Second Respondent**
THE WESTERN CAPE EDUCATION DEPARTMENT	**Third Respondent**

Heard: **29 August 2012**

Delivered: **7 September 2012**

Summary: Review – ULP – LRA s 186(2)(a) -- promotion -- application of different employment equity criteria.

JUDGMENT

STEENKAMP J

Introduction

1] This review application brings into stark focus the difficulties that employers face when confronted with the application of employment equity targets where the applicants for promotion are members of different designated groups.

2] The applicant wishes to have an arbitration award by the second respondent ("the arbitrator") reviewed and set aside. The arbitrator found that the applicant had failed to prove that she had been subjected to an unfair labour practice involving promotion, as contemplated by section 186(2)(a) of the Labour Relations Act.[1]

Background facts

3] The applicant, Ms CJ Gebhardt, started working for the Western Cape Education Department (the third respondent) at Paarl College in 1992. She was appointed Faculty Head at Boland College in 2003. In that same year, she suffered heavy bouts of vertigo and realised that she was losing her hearing. In 2006 she was diagnosed as suffering from Mèniére's disease.[2] Her hearing deteriorated to such an extent that she was required to wear hearing aids in both ears.

4] The applicant informed the human resources manager of Boland College, Mr Hough, of her hearing loss in a telefaxed survey form in which she indicated that she is disabled. Under the heading, "nature of disability" (*aard van gestremdheid)* she indicated "gehoorgestremd". She also indicated that she had suffered total loss of hearing by 2006. Apart from this formal notification, she also mentioned informally to the CEO and Vice-rector of the College that she had to wear hearing aids in both ears.

5] In April 2006 the applicant applied for a promotional post at Boland College, being that of Senior Education Specialist: Post Level 3. She had

1 Act 66 of 1995 ("the LRA").

2 A disease of the membraneous labyrinth of the ear associated with tinnitus, progressive deafness, and intermittent vertigo.

acted in that position for three years. She mentioned her hearing disability on her application form.

6] The interviewing panel interviewed three shortlisted candidates and indicated their preference for the applicant as the recommended candidate. It is common cause that she attracted the highest score based on a list of criteria. Nevertheless, the WCED appointed the candidate with the second highest score, Ms CF van Voore. It is unfortunately relevant for the purposes of this judgment to mention that, under apartheid-era race classification, Ms van Voore would have been classified "coloured" and the applicant would have been classified "white".

7] The applicant referred an unfair labour practice dispute involving promotion to the first respondent (the Bargaining Council). The arbitrator found that she had not discharged the onus to show that the WCED had committed an unfair labour practice.

The arbitration award

8] Apart from the applicant's evidence, the arbitrator heard evidence from WCED's employment equity coordinator, Mr Allan John Meyer; and from the College's human resources manager, Mr Marius Hough.

9] Meyer testified, in short, that the WCED had to comply with employment equity targets that were agreed to in terms of the Employment Equity Act.[3] At the time of the appointment, there was an "under-representation" of "coloured females" in the so-called FETC sector (under which the College fell). Van Voore was appointed because she fell into this category; because she was the second best candidate; and because she was eligible for the post. Although he acknowledged that the applicant had indicated in her application form that she had a disability, the WCED had not taken this into account as it could not be verified on the PERSAL system (the payroll and personnel administration system used by WCED). No-one contacted the applicant in an effort to ask her to verify her status as a disabled person, and thus part of a designated group in terms of

3 Act 55 of 1998 ("the EEA").

section 1 of the EEA. (Of course, the applicant is also part of a "designated group" because she is a woman; but in terms of the WCED's employment equity targets, white women were "over-represented" in the FETC category and therefore this fact did not assist her).

10] Hough, the HR manager, was the chairperson of the interview panel. He testified that there was a big difference in the scores the interview panel had allocated to the applicant and to Van Voore, respectively; i.e. the applicant had received a much higher score. In a subsequent meeting, he advised the WCED that the applicant had a disability.

11] The arbitrator formed the view that all three shortlisted candidates were eligible[4] for the post and that the non-appointment of the applicant, who received the highest score, was not necessarily unfair. He found that the appointment was fair in the light of the WCED's employment equity policies. With regard to the applicant's disability, he found that the onus was on the applicant to provide proof of her disability:

> "Surely the person alleging the disability carries more responsibility of ensuring that the employer is notified of her alleged disability. It is uncontested that the [WCED] has its own process of verifying an alleged disability before it even loads such disability on persal and clearly in this case such process was not undertaken as there seems not to have been proper notification of the [WCED] of the employee's disability."

12] The arbitrator concluded that the applicant had failed to prove that the WCED had committed an unfair labour practice.

Grounds of review

13] Having raised number of grounds of review in her founding affidavit, the applicant focused on two grounds of review in oral argument:

13.1 The arbitrator failed to apply his mind to the evidence before him. In particular, he failed to take into consideration that Hough, the HR manager, had informed WCED's Meyer that the applicant had a

4 The arbitrator said that the candidates were "legible" and that Van Voore was not "illegible". I presume that he meant "eligible" and "ineligible".

disability and that Meyer undertook to investigate it.

13.2 The arbitrator committed an error of law and thus misunderstood the nature of his discretion, in that he wrongly assumed that the applicant bore the onus of proving that she was a member of a designated group, whereas the EEA places this duty on the employer.

Evaluation / Analysis

First ground of review: Hough's testimony

14] It must be borne in mind that WCED, and not the applicant, called Hough (the HR manager) to testify on its behalf. There was no suggestion from either side or from the arbitrator that Hough's testimony was in any way tainted, improbable or not credible.

15] It is common cause that the applicant reported her disability to Hough before she applied for promotion. She also indicated her disability on the very application form for the promotional post.

16] After the interviews had been conducted and the interview panel had recommended the applicant as the best candidate for the job, Hough met Meyer, the WCED's employment equity coordinator, together with other representatives of the WCED to discuss the recommendations in the light of employment equity targets. He told Meyer of the applicant's disability. The WCED representatives said that they would investigate and revert to the College. They never did.

17] Hough made no reference in his evidence to the question whether the applicant's disability was recorded on PERSAL or not. In its answering affidavit in this review application, the WCED has referred to a policy document with regard to the employment of people with disabilities in the WCED. That document did not serve before the arbitrator and cannot now be introduced into evidence. But in any event, it does not assist the WCED. It provides that:

"Should the disability not be self-evident, it may be required that the

employee disclose sufficient information to confirm the disability or the accommodation needs."

18] Unfortunately this clause is drafted in the passive voice. It does not make it clear who is required to "disclose sufficient information to confirm the disability". But where the employee has alleged a disability, and the employer is not satisfied, surely it must be read to mean that the employer must then require the employee to disclose the information. In this case, the WCED never ask the applicant to disclose further information to back up her claim in the job application that she was disabled.

19] Given these facts, it is clear from the arbitration award that the arbitrator failed to apply his mind to the evidence that the HR manager, Hough, informed the employment equity coordinator, Meyer, of the applicant's disability. He failed altogether to consider the question whether the WCED should have given the applicant the opportunity to provide further evidence in circumstances where it was not satisfied that she was indeed disabled, as she had stated on her application form and as the HR manager informed the employment equity coordinator.

20] This was a material omission, as it is common cause – and conceded by the WCED's own witnesses – that the applicant's disability, had it been considered, would have made a significant difference to the outcome of the application.

21] The arbitrator clearly failed to apply his mind to this crucial issue that arose in evidence. This led to an irrational conclusion. It is not only irrational, but it is so unreasonable that no other reasonable arbitrator could have come to the same conclusion.

Second ground of review: the duty to inform and to prove disability

22] The arbitrator assumed that the applicant had to not only inform her employer that she was disabled, but that she had to provide proof thereof.

23] One only needs to consider the position of other designated groups to

conclude that this assumption is irrational. The Population Registration Act[5] was repealed decades ago. The citizens of a democratic South Africa are no longer classified according to race. How, then, would a person who is classified as "coloured" and who is therefore given preference for appointment – such as Ms van Voore -- provide proof of that categorisation?

24] The EEA[6] provides that:

> "Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act."

25] The duty is clearly on the employer to effectively implement affirmative action measures for people from designated groups, such as people with disabilities. Section 19 of the EEA further provides that the employer must collect information on conduct and analysis of its workforce was in each occupational category and level in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels in its workforce.

26] The Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans published in terms of the Employment Equity Act further prescribes[7]:

> "The first step in conducting an analysis of the workforce profile is to establish which employees are members of designated groups. The information should be obtained from employees themselves… If existing records are utilised for this purpose, e.g. employee should have the opportunity to verify or request changes to this information."

27] In the current case, the WCED made no effort to give the applicant an opportunity to verify the information that she provided that she is disabled.

28] From the aforegoing, it is clear that the duty is on the employer to gather –

5 Act 30 of 1950.

6 Section 13.

7 Item 7.3.2 (a).

and when necessary concern – the disability of a person who alleges that she is a member of that designated group. By assuming the contrary, the arbitrator misconstrued the entire legal basis of his finding. On this ground as well, the award falls to be reviewed and set aside.

Remit or substitute?

29] This is not a matter where the court is in a position to substitute its own finding for that of the arbitrator. Another arbitrator will have to consider the unfair labour practice dispute afresh, taking into account the evidence of the applicant's disability; the failure of the WCED to consider it; and the correct principles emanating from the EEA. That arbitrator will then have to consider whether an unfair labour practice has been committed; and if so, whether the applicant is entitled to promotion, or whether her application for promotion should be considered afresh, taking into account and weighing up her membership of a designated group.

30] Both parties submitted that costs should follow the result. I agree.

Order

31] I order as follows:

31.1 The award of the second respondent dated 9 September 2008 is reviewed and set aside.

31.2 The unfair labour practice dispute is referred back to the first respondent to be considered afresh by an arbitrator other than the second respondent.

31.3 The third respondent is ordered to pay the applicant's costs.

Steenkamp J

APPLICANT:	F Rautenbach
	Instructed by Murray, Fourie & Le Roux (Worcester).
THIRD RESPONDENT:	L Abrahams
	Instructed by the State Attorney (Cape Town).