



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C306/2015

In the matter between

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION OBO DAMONS**

Applicant

and

CITY OF CAPE TOWN

Respondent

Heard: 13-14 November 2017; Heads of Argument received 12 December 2017

Delivered: 20 April 2018

Summary: Unfair discrimination claim; injured firefighter precluded from advancement through the ranks of firefighters.

JUDGMENT

RABKIN-NAICKER J

- [1] This is an alleged unfair discrimination claim in which the applicant (Damons) claims that the City's Advancement Policy (the Policy) precludes him from advancing to the position of Senior Fire Fighter. It is alleged that the application of the Policy to Damons discriminates against him on the basis of his disability.
- [2] Damons was permanently injured while on duty in 2010. An incapacity process was set in motion and completed in January 2013. Damons was first transferred to a position in the Fire Service's Billing Section in Goodwood and later to his current position in the Fire and Life Safety Education Section in Belville. In his current position Damons performs administrative and educational work.
- [3] Although he can no longer perform the 'core' functions of a firefighter he retained his designation as a Firefighter and salary level, including a 22.8% standby allowance. The City employs Learner Firefighters, Firefighters and Senior Firefighters. Advancement is regulated through the Policy which was published in April 2009.
- [4] In order to advance from the rank of Firefighter to that of Senior Firefighter, the Policy requires an employee to "Successfully undergo a practical (physical) assessment as per Service Order – Section 6, No. 2" which includes the physical application of theoretical knowledge.
- [5] The job function of firefighters of all levels is described in job description forms and includes being physically fit and able bodied for the performance of tasks associated with specific key performance areas of the posts. Damons is not physically fit and able as required in these job descriptions and is also not able to perform the annual physical fitness assessment or the routine physical drills due to his disability.

[6] Ian Schnetler, the respondent's Chief Fire Officer gave evidence relating to the job description of Senior Firefighter which includes all the physical requirements of the more junior posts and testified that in addition Senior Firefighters are required to:

"carry out specialized rescue operations...in order to provide an effective and efficient emergency Fire and Rescue Service" including the following:

- Advanced rescue work e.g. urban search and rescue, high angle and other related functions pertaining to the profession.
- Diving rescue (retrieving of bodies from sea, dams, sewers etc.)
- Hazardous material incidents (involving chemical spills, biohazard incidents).
- Rescue boat operations.
- Emergency medical services at Basic Life Support level: consistent with level of training."

[7] He testified with reference to the relevant documentation that most of the physical firefighting and maintenance functions of a Senior Firefighter are listed as being required on a daily basis. These physical requirements are also included in Platoon Commanders and station Commanders job description.

[8] It was Schnetler's testimony that Damon's plays no operational role at present and has not done so since his injury. In his view he had not been prejudiced in his career advancement as he still has a career path with the Admin or Command and Control function of the Fire and Rescue Service and within the broader organisation.

[9] Under cross examination, he conceded that Damons advancement opportunities were now 'out of the window', but qualified that to be the case in "his chosen career". He agreed that Damons' promotion opportunities have been prejudiced since his injury. He was referred to the final incapacity report dated 28 January 2013. It is recorded in the Report that Damons agreed with the Management's outline of his capacity problem but "indicated that alternative placement would be acceptable to him as long as certain requirements of his would remain applicable

– specifically w.r.t. his current remuneration package as well as future promotions.”

- [10] It was put to Schnetler that Damons was offered the alternative placement after the hearing and that it was not reflected in the report that management rejected the conditions. He agreed. It was further put to him that Damons was offered the alternative placement taking into consideration the conditions that Damons had put. Schnetler said he has to agree. He testified however that the Policy was already in existence at the time that the Incapacity Report was written. He agreed that there was no other reason that Damons was refused advancement other than his disability but stated that it was because he was not able to comply with the physical component of Advancement Policy.
- [11] Damons testified that he was appointed in February 2005. After his accident in a fire drill simulation he was finally placed in Belville after three incapacity hearings. There was no objection from the employer that he was still to receive his standby allowance and to progress. He considered the statement in the Report emanating from the third and final capacity hearing regarding future promotions to be binding. He had applied for promotion to senior firefighter but the final outcome was that he was unfit to contest for that post because of his injury.
- [12] He stated that the City had destroyed his life and he felt he was worth nothing. He said he would never have signed the Report if he had known his progress was halted. He had done all the courses necessary to progress to Senior Firefighter. He testified that lower and middle management such as Platoon Commander and Station Commander do not do physical work but oversee the platoon and may sit next to the driver.
- [13] Under cross examination, he was asked if the union wrote to management about the alleged agreement on promotion. He said he had no comment. He did not agree that he was not a firefighter any more. He stated that he was just performing different functions. He still went out to fires on standby but didn't do physical firefighting. He agreed that he is no longer an active firefighter. He stated that he wants the City to relax physical requirements of the Policy so he is

not prejudiced. It was put to him that it cannot be an obligation on the City to create an administrative stream path in the Service. Damons said that those working in life safety education like himself were still fire fighters. They do practical demonstrations and evaluations because there is a fire inspectorate that runs out of the operations section.

[14] Mr Conradie for the City argued that the City's defence throughout has been that the physical requirement is an inherent requirement of the job. To determine whether the physical requirements are inherent requirements for the position of a Senior Firefighter one must look at what a "firefighter" does. If a firefighter cannot fight fires, the Fire Service would not serve any purpose he submits. It was also emphasised on behalf of the City that in the determination of whether an inherent requirement exists, there is no blanket ban contained in the Policy that excludes Damons as referred to in the case of **IMATU and Another v City of Cape Town**¹. In that matter, the question before the Court was whether the City's position of a blanket ban on the employment of diabetics as fire-fighters amounts to unfair discrimination.

[15] It was further submitted for the City that Damons is excluded on an individual basis due to the fact that he cannot pass the physical assessment requirement contained in the Policy. The Policy does not impose a blanket ban on disabled persons becoming firefighters – the inherent requirement of physical fitness results in the exclusion.

[16] The legal case as pleaded on behalf of Damons is as follows:

"20. The application of the Policy to Damons discriminated, and continues to discriminate, against him on the basis of his disability.

21. It is alleged that such discrimination constitutes either direct discrimination, or alternatively indirect discrimination, in as much as the Policy is ostensibly neutral yet has the effect of prejudicing all firefighters with disabilities.

22. The aforesaid discrimination is unfair, inter alia, because:

¹ [2005] 11 BLLR 1084 (LC)

- 22.1 The requirement of a physical assessment is not an inherent requirement for all employees wishing to be advanced from the rank of Fire Fighter to that of Senior Fire Fighter.
- 22.2 The City was obliged to continue employing Damons in terms of his current duties, but at the rank of Senior Fire Fighter.
- 22.3 The refusal to advance Damons is contrary to the stated purpose of the Policy itself.
- 22.4 The application of the Policy to Damons prohibits his further career advancement and his entitlement to the benefits of employment within the City.
- 22.5 Damons is ultimately treated differently to other employees employed as Fire Fighters."

Evaluation

[17] The argument that the physical requirements of holding a post of firefighter through the ranks of advancement, are an inherent requirement of the job, and thus the refusal to appoint Damons into the position of a senior firefighter does not amount to unfair discrimination, is problematic. This is because the City reasonably accommodated² Damons after his injury and permanent disability caused by it, and kept him within the structure laid out in the Policy on the level of a Firefighter. He is a Firefighter in terms of his employment. However, he is a Firefighter, who is denied progression in remuneration or status through the ranks.

² In terms of the Employment Equity Act 'reasonable accommodation' means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment;"

[18] In **SA Airways (Pty) Ltd v Jansen van Vuuren & another**³ the Labour Appeal Court considered factors to be taken into account when a court determines whether discrimination is unfair in terms of section 6 of the EEA, stating that:

"[43] There is no closed list of relevant factors that ought to be taken into account when determining the fairness of the discrimination and the factors to be considered depends on the facts of the case under consideration. In Hoffmann, Ngcobo J (as he then was) stated:

'At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim.'

[44] What is clear is that in considering the issue of fairness under the EEA, the position and interests of the employee and employer must be considered and balanced, and that the objectives of the EEA must be the guiding light in applying a value judgment to established facts and circumstances. The determining factor, however, is the impact of the discrimination on the victim. This is consistent with the approach in Hoffmann.

[45] Unlike in the case of an equality analysis under s 9 of the Constitution which also allows for a further step, namely a justification analysis in terms of s 36 where one is dealing with the law of general application, the EEA does not allow for justification of unfair discrimination. Its language is clearly prohibitive. Section 6(2) does not contain justifications for unfair discrimination. The Act provides that

³ (2014) 35 ILJ 2774 (LAC)

it would not be unfair discrimination to take affirmative measures consistent with the purposes of the EEA or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. They are complete defences to an allegation of unfair discrimination. In s 11, the EEA recognizes that there may be considerations other than those specifically referred to in s 6(2) which may render discrimination fair.

[46] The employer has an onus to establish fairness on a balance of probabilities. An enquiry into fairness contemplated in the EEA will necessarily involve more than a consideration of the moral issues and the impact of the discriminatory action on the complainant. It will also include a consideration and require a balancing of the defences raised by the employer for the discrimination as well as issues such as proportionality of the measure, the nature of the complainant's right that he alleges has been infringed, the nature and purpose of the discriminatory measure, and the relation between the measure and its purpose.

[47] Since the onus is upon the employer to prove the fairness of the discriminatory measure, it would be incumbent upon it to ensure that all the necessary material and evidence is before the court in order to enable it to make a finding of fairness. As stated earlier, the onus is only discharged if fairness is found on a balance of all the relevant factors and evidence.”

[19] In this matter, the defence put up by the employer, in essence the ‘inherent requirement of the job’ defence, as referred to above, is undermined by its own previous decision to keep Damons in the Fire and Rescue Service albeit in a position that does not require active firefighting. It did so on an individualised basis after a painstaking series of incapacity investigations. The City insisted that the Policy applied to Damons in the proceedings before this Court. There can be no doubt therefore that objectively, Damons is currently employed as a Firefighter despite his inability to perform certain functions of the role (which the City submits are an inherent requirement of the job) because of his disability.

[20] At issue therefore is the question of whether applying the Policy to Damons in a way that prevents him from advancement due to his disability amounts to unfair

discrimination. I take note of the guidance provided by the Code of Good Practice on Employment of Persons with Disabilities⁴ in my assessment of whether the City has proved that the discrimination in question is fair. Clause 7.5 of the Code reads in material part as follows:

“7.5 Terms and Conditions of Employment

7.5.1 An employer may not-

- (a) employ people with disabilities or,
- (b) retain employees who become disabled, on less favourable terms and conditions than employees doing the same work, for reasons connected with the disability.”

[21] Applying the law to the evidence before me, there is no question that the barrier to Damons’ advancement impairs his dignity. A particular factor that needs to be considered by the court is that Damons’ disability arose because of an accident at work when a decision was taken to use him, instead of a dummy, during training. As to the interests of the employer, it did not raise issues of financial prejudice as a reason for its stance. It relies on the need for consistency in the application of the Policy whose purpose was to eliminate the inconsistent and unfair application of previous advancement criteria, before the various fire stations merged into the Unicity.

[22] It is noteworthy that by the time the final incapacity report was signed by Damons and his employer, it indicated that Damons injury was permanent and his work could be adapted “to accommodate his incapacity.” Further, it records that he: “can be transferred to a section in the Fire & Rescue Service that does not require him to perform the physical functions that he may not perform and still add value to the work of the Fire & Rescue Service...”. This was not a situation, as the respondent sought to submit, in which a firefighter was accommodated in

⁴ GN 1085 in GG 39383 of 9 November 2015

the Fire and Life Safety Section while being rehabilitated. In all the circumstances I consider that the city has not met its onus in establishing fairness on a balance of probabilities.

[23] The parties did not address the Court on compensation/damages as claimed for in the pleadings, nor was evidence led on this claim. I do not consider an order for costs is apposite in view of the ongoing relationship between the parties. I make the following order:

Order

1. The application by the City of the Fire and Rescue Advancement Policy to Mr A Damons, amounts to unfair discrimination in terms of section 6(1) of the Employment Equity Act;
2. The City is ordered to re-consider Damons' advancement application in the light of clause 1 above, by no later than 15 court days of this Order.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances

For the Applicant: Z. Feni instructed by Qhali Attorneys

For Respondent: Bradley Conradie Halton Cheadle Attorneys