

19TH ANNUAL LABOUR LAW CONFERENCE

PROMOTION OF EMPLOYEES IN THE PUBLIC SECTOR

Presented by Sean Molony

Summarised by Alucia Mdaka

Introduction

In his introduction, Molony focused on the issue of promotion in the Public Service by referring to the applicable legislations. He explained that promotion of employees within the organisation involves consideration and application of both human resources practice and applicable legislation. Section 186(2)(a) of the LRA appeared to be the applicable legislation that addresses the issue of employee promotion. It provides that "unfair labour practice means any act or omission that arises between an employer and an employee involving an unfair conduct by the employer relating to the promotion of an employee". He further explained that Part VII of the General provisions of Chapter 1 under the Public Service Regulations 2001 as amended deals with the procedure for appointment, selection and promotions and termination of services. Chapter II Part 4 deals with recruitments, selection and appointment.

What does promotion mean?

Molony explained that promotion differs from other human resources practices such as secondment, acting in a post, transfers and grading. Promotion also differs from appointment. According to Grogan, some arbitrators viewed a complaint by a non-appointed applicant for an externally advertised post as a dispute concerning appointment. The case of Department of Justice v CCMA & Others (2001) 11 BLLR 1229 (LC) addressed the issue. In this case, the applicants (two white males) had applied for the two vacant positions of senior assistant state attorney in Cape Town branch. They were both unsuccessful. The respondent contended that the dispute did not concern promotion because the positions that they applied for had been externally advertised. It also contended that it had used the word "appointment" and not promotion in the advertisement. The respondent further contended that as they had to apply and attend the interviews, the issue was, therefore, not promotion but rather non-appointment. The LC held that the respondent had refused to promote the two applicants as they were already in the public service.

The confusion between promotion and appointment was also found in the Education sector. The Personnel Administrator Measure, Chapter B item 2.1(c) (PAM) does not give a definition of promotion. PAM only defines an appointment as the transfer of an educator to a higher post level grading within the same education department or to another.

Numerous arbitrators and judges had commonly defined the term promotion. They stated that promotion "is the process of selection of the most suitably qualified employee from a pool of candidates and the appointment of that employee to a position of a greater status, responsibility and authority than previously enjoyed by the employee in the organisation". The candidates must be employees and there must also be an employment relationship between the employee and the employer.

The issue was addressed in the case of Misra v Telkom (1997) 6 BLLR 794 (CCMA) and the one of Mashegoane v University of the North (1997) 2 (LC) 1.1.93.

Dispute of interest or rights?

The question had arose as to whether a dispute concerning the failure or refusal to promote an employee is a dispute of right or of interest. Promotion also results in an increase in remuneration, therefore, if the claim only concerns an increase in remuneration, the CCMA, bargaining council, and Labour Court would lack jurisdiction to entertain the matter. This issue was addressed in the case of Department of Justice v CCMA & Others (2004) 4 BLLR 297 (LAC). The applicants alleged an unfair labour practice in terms of item 2 of Schedule 7 of the LRA. The employer argued that the promotion dispute was a dispute of interest and not that of a right. The LAC noted that "item 2(1)(b) confers on an existing employee a right not to be subjected to an unfair labour practice that takes the form of conduct relating to promotion, demotion, disciplinary action short of dismissal, the training of an employee and the provision to benefits of an employee". Therefore, the right that an applicant for employment and an employee have under item 2(1)(b) are rights conferred on them *ex lege*. For that reason, the Court held that, a dispute was one of a right.

Two causes of action

Molony mentioned that an employee who alleges that his/her employer has failed to promote him/her, has two causes of actions. Firstly, he/she can allege that the employer's failure to promote him/her amounted to an unfair labour practice. Secondly, the employee can also allege that the employer's decision not to promote him/her had unfairly discriminated against him/her. Where there are two causes of action available to an employee, the arbitrator has a duty to determine whether the main issue was the one to be

entertained by the CCMA. Examples given were cases of Department of Justice v CCMA & Others (2001) 22 ILJ 2439 (LC) and the one of Dudley v City of Cape Town (2004) 25 ILJ 305 (LC). These cases addressed the principles that were applicable in situations where two possible causes are present.

The process of promotion

Inherent requirement of the job

The concept of an inherent requirement arises in the Employment Equity Act, 55 of 1998 (EEA). It arises as a jurisdiction for unfair discrimination and as a building block from which key performance areas of a particular job are put together. Part 7, s C1.1.1 of the Public Service Regulations deals with the determination of composite requirements for the employment on the basis of inherent requirement whereas Part 7, s C2 deals with the advertisement for the vacant post and the selection process. It is evident that the Public Service's advertisements in the press usually mention the key responsibilities and key performance areas and does not mention the inherent requirement for the post. The Public Service's failure to mention the inherent requirement for the post would amount to unfair labour practice claims. However, the Public Service Regulations states that an advertisement for post should also specify the inherent requirements. Therefore, any advertisement that is not in compliance with such regulations contravenes the regulation.

The advertisement

Part VII of the Public Service Regulations provides that all vacant posts should be advertised in an effective and efficient manner. It must reach the entire pool of potential applicants including those with historically disadvantaged background. The Regulations also provide that in circumstances where the post could be filled within the department, the appointment could be made under affirmative action programme.

A number of unfair labour practice matters have dealt with the fairness of the advertisement. In Westraat v South African Police Services (2003) 24 ILJ 1197 (BCA), the requirements for the post were found to differ from those in the advertisement. The case of Benjamin v University of Cape Town (2003) 12 BLLR 1209 (LC) also addressed this issue. In this case, the word "music" in the advertisement had played a vital role in the Court's finding. The advertisement's contents of the above two cases had been the material in the matter between Lagadien v University of Cape Town (2001) 1 BLLR 76 (LAC). In this case, the applicant alleged that she had been unfairly discriminated against on the grounds that she lacked tertiary qualifications.

Gathering of information

Part of the promotion process involves gathering information about the candidates for the post. This may reveal information such as criminal records. However, rejecting an applicant because of his/her criminal record may constitute *prima facie*

indirect discrimination. Pretorius *et al* states that a complete exclusion of candidates with a criminal record would not be justifiable. The employer must prove that those candidates would be unable to meet the inherent requirements of the job or its operational requirement renders someone with such record unsuitable.

References are another common source of information. The Code of Practice on the Protection of Workers' Personal Data provides a useful guideline with respect to references. Item 10(1) states that personal data of the applicant for employment or former employee should not be communicated to a third party without the worker's explicit consent. The information can only be disclosed only if the employer needs to prevent serious and imminent threat to life or is required for the enforcement of criminal law.

The application forms

The Code of Good Practice, on the Employment of People with Disability states that application forms should focus on identifying an applicant's ability to perform the inherent requirements of the job. Pretorius *et al* states that the question about the date of birth, sex, marital status, religion and race would be discriminatory only if the employer uses that information to make a decision to offer the employment.

The selection criteria

The Public Service Regulations provide that the selection committee should make recommendations on the suitability of candidates after it had considered the following:

- Information bases on valid methods, criteria or instruments for selection that are free from any bias or discrimination,
- The training, skills, competence and knowledge necessary to meet the inherent requirement of the post,
- The needs of the department of developing human resources,
- The representativeness of the component where the post is located, and
- The department's affirmative action programme.

It is when applying the selection criteria to the candidates that determining the inherent requirements of the post become evident. In the case of Coetzee v South African Police Services (2004) 2 BALR 139 (SSSBC), it was held that promoting a candidate who does not possess the inherent requirements for the post amounted to an unfair labour practice. Incorrect use of selection criteria also constitutes an unfair labour practice. The case of Public Servants Association obo Steenkamp v South African Police Services (2003) 7 BALR 753 (CCMA) had addressed this issue.

Work experience

In terms of section 20(3) (c) of the EEA relevant experience is one of the factors which the employer must consider when

determining a more suitable candidate for the job. However, section 20(5) provides that an employer may not unfairly discriminate against a person solely on the grounds that the person lacks relevant experience.

It is suggested that when considering the criterion of work experience, the fact that a candidate has or does not have a particular number of years' experience does not mean that he/she automatically qualifies or does not qualify for the post. However, in the SAPS, to qualify for promotion, the minimum number of years' experience is stipulated to be two to three years.

The selection committee

Part VII D.1 states that an executing authority shall appoint a selection committee to make recommendations on appointments to post. The selection committee should consist of at least three members who are employees of a grade equal to or higher than the vacant post or suitable person from outside the public service.

Members of the selection panel should not be biased towards the candidates. In Rousseau & Monama v South African Police Services (2003) 12 SSSBC 6.9.9, one of the panellists was an investigating officer in a charge of corruption and had given evidence against the employee. The arbitrator held that that panellist could have not reasonably assessed the employee's application.

Molony quoted Rycroft's processes that should be followed by selection committee. They are as follows:

- Prior articulation of attributes or competences sought in the application,
- Weighting to be given to each attribute or competency,
- Preparation of specific questions which relate directly to the chosen attributes,
- Private evaluation of each candidate by each member of the selection committee according to the agreed weighting, and
- Totalling of scores to arrive at a rating or ranking of applicants.

Rycroft stated that if the panel does not follow the carefully recorded technique, it may be difficult for a committee to justify its decisions. The issue arose in cases of van Zyl v Western Cape Education (2003) 24 ILJ 485 (BCA) and the one of Samuel v South African Police Services (2003) 24 ILJ 1189 (BCA). Furthermore, the failure to short list a candidate who met the selection criteria had been held to be an unfair labour practice relating to promotion. This was addressed in the case of Govender v Department of Health (2001) 1 BALR 21 (CCMA).

In the case of PSA obo CM Peltzer v Department of Home Affairs (1998) 7 CCMA 1.1.2, it was held that the committee should furnish reasons in writing to the unsuccessful candidate.

Pre-employment testing

Sections (7) and (8) of the EEA contains provisions relevant to medical, psychological tests and other similar assessments. The Public Service Regulations makes reference to instruments based on valid methods which the committee may use to make its recommendations on the suitability of the candidate. The instrument that most companies utilise is the polygraph test. Molony mentioned that Christianson had noted that most employers are turning to utilise the lie detector test not only to detect dishonesty at the workplace but also utilise it at the pre-employment screening. The employers who require a high level of trust from their employees mostly use this test. The question of the use and validity of pre-employment tests arose in the case of FAWU v SA Breweries Ltd (2004) 11 BLLR 1093 (LC).

The interview

The Public Service Regulations do not say much about the obligation to interview candidates in public services. In terms of item 9(1) of National instrument 1/2004 for the SAPS the interviews should only be conducted if the National Commissioner had approved that there is a necessity to do so.

The unfair labour practice

The onus

In Westraat v South African Police Services (2003) 24 ILJ 1197 (BCA), the arbitrator noted that the applicant bears the onus of proving that the employer had exercised its discretion improperly. The arbitrator, therefore, held that the evidence was not enough to discharge the onus of showing that the panel had exercised its discretion improperly.

The arbitration of a promotion dispute

Molony stated that it is not the arbitrator's function to overtake the functions of the selection committee. In Westraat's case, the arbitrator raised a question of how far could arbitration go in reviewing an appointment made on the strength of a notice of vacancy and a process of selection? It was noted that an appointment "is a discretionary decision that is subjected to a limited challenges and the arbitral jurisdiction on the merits in no more than a limited review". It was also noted that an employer's discretion to appoint, assign or promote might be reviewed only if it shows some very serious flaws. The arbitrator held that an unfair labour practice jurisdiction does not extend to permitting an arbitrator to replace an employer's determination of its job requirements and assessment of applicants.

Elements of an unfair labour practice

In order for the applicant to prove that the employer had committed an unfair labour practice relating to promotion, the applicant should prove that:

- The applicant is an employee of the employer,
- The employer had committed an act or omission relating to promotion of the employee,
- The employer's act or omission was an unfair one,
- That there was a causal connection between the employer's unfair conduct and the failure to promote the employee, and
- The reasonable remedy by which an unfair conduct could be remedied.

Causation

In order to establish an unfair labour practice, the employee must prove that there was a causal connection between the employer's unfair conduct and the failure to promote such an employee. The failure to deal with the question of causation in the arbitration is a ground for review of the award. In Minister for Safety & Security & Others v Jansen NO & Others (2004) 2 BALR 143 (LC), the arbitrator held that the third respondent should be promoted. The Court held that the arbitrator must have considered whether there was a causal connection between the unfair conduct and the failure to promote.

5.3.2 The reasonable remedy

The remedy of promoting the applicant to the promotion post had been awarded by a number of arbitrators. For example, in Bosman v South African Police Services (2003) 5 BALR 523 (SSSBC), the arbitrator had ordered the respondent to promote the applicant but left the parties to agree on the post. As in the case of Coetzer & Others v The Minister of Security & Another (2002) 11 LC 6.9.2, the Court ordered the respondent to promote the applicant to the post. Another similar case is the one of Cowley v South African Police Services (2003) 12 (SSSBC). In this case, the applicant was promoted to the rank and the level he sought.

However, in the case of Beukes v South African Post Office (2000) 11 (CCMA) 6.9.5, the arbitrator ordered that the respondent should pay the applicant a difference between the remuneration received and the remuneration he would have received from the date of the referral of dispute to date of arbitration.

Reference

Molony, A. 2005. Promotion of Employees in the Public Sector. Presentation made at the 19th Annual Labour Law Conference, 5-7 July 2006. South Africa.