DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

8 SEPTEMBER 2014

IN THIS ISSUE

THE LAST LEG: CONSTITUTIONAL COURT FINDS THAT SAPS DECISION TO NOT PROMOTE BARNARD WAS NOT UNLAWFUL

South African Police Service v Solidarity obo Barnard CCT 01/14

On 2 September 2014, the Constitutional Court (CC) handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal. The appeal involved the question as to whether the decision of the National Commissioner of the South African Police Service (SAPS) to not promote Barnard to the position of superintendent in the SAPS National Evaluation Service (NES), constitutes unfair discrimination on grounds of race in contravention of (i) section 9 of the Constitution and (ii) section 6 of the Employment Equity Act, 55 of 1998 (EEA).

Barnard joined the SAPS in 1989. During 2005, the National Commissioner (Commissioner) advertised a position within the NES. Barnard applied for this promoted position on two occasions. Despite being shortlisted, interviewed and recommended as the best suited candidate, she was unsuccessful on both occasions.

The Commissioner's reasons for not appointing Barnard were that it would 'not enhance racial representivity at that particular salary level and that since the post was not critical to service delivery, it was not necessary to fill the vacancy immediately.'

The Labour Court, which found in favour of Barnard, held that the Commissioner's decision was not a fair and appropriate method of implementing SAPS's Employment Equity Plan. Further, it held that SAPS had not given Barnard sufficient reasons for the Commissioner's decision. As such, SAPS had not discharged its onus to establish that the decision was rational and fair.

SAPS took the decision on appeal to the Labour Appeal Court (LAC), which then found in its favour.

The LAC held that the implementation of restitutionary measures is not subject to an individual's right to equality in terms of section 9(3) of the Constitution. Accordingly, the decision not to promote Barnard was not unlawful because the Commissioner was not obliged to fill the advertised post.

On a further appeal to the Supreme Court of Appeal (SCA), the reversed the Labour Appeal Court's decision and found that:

- Barnard was discriminated against on the listed ground of race; and
- SAPS failed to rebut the presumption of unfairness.

Against this, the SCA held that Barnard suffered unfair discrimination in terms of section 9(3) of the Constitution and section 6(1) of the Act.

SAPS applied to the Constitutional Court for leave to appeal the SCA decision.

The Court was unanimous that the appeal should be upheld.

The majority judgment, by Moseneke ACJ, held that the SAPS Employment Equity Plan is a restitutionary measure contemplated in section 9(2) of the Constitution and section 6(2) of the EEA. Therefore, the SCA misunderstood the issues before it and the law. The SCA was under an obligation to examine the equality claim in light of section 9(2) of the Constitution and section 6(2) of the EEA.

Sections 9(2) of the Constitution and 6(2) of the EEA confirms that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA. Barnard did not challenge the validity of the SAPS Employment Equity Plan.

The CC found that the appeal in that SCA was decided on the wrong principle.

Accordingly, the appeal was upheld. The order of the SCA was set aside and that of the LAC revived.

Employers should ensure that affirmative action in the workplace is implemented in accordance with a valid and carefully considered Employment Equity Plan. According to the principles confirmed by the CC, an employer is not obliged to fill vacancies where it would negatively impact on its Employment Equity Plan.

Lauren Salt

WHAT IS UNFAIR DISCRIMINATION ON AN 'ARBITRARY GROUND'?

The Employment Equity Amendment Act, No 47 of 2013 (EEAA) has introduced an amendment to s6 of the Employment Equity Act, No 55 of 1998 (EEA) – the listed grounds of discrimination. The EEAA prohibits unfair discrimination of an employee on any one or more of the listed grounds (for example race, gender, sex, disability, pregnancy, religion and HIV status) or on any other arbitrary ground.

But what does this mean?

Prior to the amendment of the EEA, where employees sought to establish unfair discrimination on an unlisted ground, they were required to illustrate that the basis upon which they allege unfair discrimination is analogous to a listed ground. In *NUMSA & Others v Gabriels (Pty) Ltd [2002] 12 BLLR 1210 (LC)*, the Labour Court interpreted this to mean that the ground relied on must be clearly identified and it must be shown that it is 'based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparable manner.

It has been said that the amendment was implemented to bring the EEA in line with the terminology used in s187(1)(f) of the Labour Relations Act, No 66 of 1995 (LRA). Section 187(1)(f) provides that discriminatory dismissals based on grounds similar to those listed in s6 of the EEAA are automatically unfair. The section also refers to the term 'any arbitrary ground'. In light of this it is important to look at the terms 'arbitrary ground' in the context of s187(1)(f) of the LRA, so as to provide an understanding of how the courts may interpret this phrase in relation to s6(1) of the EEAA.

In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland [2009] 12 BLLR 1181 (LAC)*, the respondent employee alleged that his dismissal was automatically unfair in that he was arbitrarily discriminated against due to his depression. The Labour Appeal Court held that the question when assessing whether discrimination has occurred on an 'arbitrary ground' is the following – 'did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent?' The LAC found that the conduct of the employer constituted an egregious attack on the dignity of the employee and accordingly fell within the grounds set out in s187(1)(f) of the LRA.

Against this background, it seems that the inclusion of 'any other arbitrary ground' in s6(1) of the EEA does not widen the scope of the section's original application. The courts will, in all likelihood, apply the same test as is presently used in determining whether discrimination has occurred on a ground which is analogous to a listed ground, in order to determine whether discrimination has occurred on an arbitrary ground.

Kirsten Caddy, Lauren Salt and Christelle Wood

AMENDMENTS TO THE EMPLOYMENT EQUITY ACT REQUIRE INCREASED REPORTING

A host of amendments to the Employment Equity Act, No 55 of 1998 (EEA) came into operation on 1 August 2014.

Among the amendments, are the amendments made to s21 of the EEA. Section 21 is concerned with the report detailing the employment equity plan and progress made in implementing the plan.

Prior to its amendment, s21 distinguished between employers who employed more, and employers who employed less, than 150 employees. This distinction

no longer applies. All employers who employ more than fifty employees, or have an annual turnover higher than the amount identified in Schedule 4, are required to submit the report annually.

If the employer, for the first time, exceeds the threshold on a date between the first working day of April and the first working day of October, then the employer would not be required to submit its first report in that year. An employer, in this regard, would then be required to submit its first report on the first working day of October of the following year.

The content of the first report is required to detail the initial development of, and consultation processes surrounding, the employer's employment equity plan.

Employers who previously met the threshold, and who have submitted the first report, are still required to submit a report to the Director-General of the Department of Labour (Director-General) annually on the first working day of October. As such, employers who previously employed more than 150 employees, are not affected by the amendments, and the frequency of submissions remains the same. In contrast,

employers who employ less than 150 employees now need to submit reports annually, as opposed to once every 2 years, as the EEA previously required.

If an employer anticipates that they will not be able to submit the report in time, the amendment now requires that the employer notify the Director-General in writing of this anticipated failure. Such notification must be submitted before the last working day of August. The written submission, in addition, must clearly set out the reasons why the employer anticipates that they will not be able to comply with the time periods imposed by the EEA.

If an employer fails to follow the EEA in accordance with any of the requirements, the Director-General is empowered to approach the Labour Court for an order to have the employer fined. Failure in this regard is identified as the complete failure to submit a report, failure to notify the Director-General of late submissions, and/or providing false or invalid reasons.

The fines which could be imposed are identified in Schedule 1 of the EEA and are dependent on whether the employer is a first time or repeat offender. A first time offender, as an example, could be fined the greater of either R1,5 million or 2% of the employer's annual turnover. Repeat offenders, in relation, could face fines equal to the greater of R2,7 million or 10% of the employer's turnover.

It is advised that employers identify whether they have reached the thresholds identified in the EEA to determine whether they are required to submit annual reports. If they now fall within this threshold and anticipate that they will not be able to submit a report in time, it is advisable that the employers notify the Director-General as a matter of urgency of their anticipated failure to submit timeously.

Lauren Salt, Zinhle Ngwenya and Ernst Müller

AMENDMENTS TO THE EMPLOYMENT EQUITY ACT

Section 27 - Income differentials, of the Employment Equity Act, No 55 of 1998 (EEA) refers.

An interesting amendment to s27 is the adding of the words unfair discrimination.

Section 27 regulates the statement/report an employer has to submit when reporting in terms of s21(1) on the remuneration and benefits received in each occupational level of that employer's workforce.

This is done in accordance and as prescribed, to the Employment Conditions Commission established by s59 of the Basic Conditions of Employment Act.

The only amendments to s27 were the heading, subsection 1 and 2.

The old s27 only placed focus on the issue of disproportionate income differentials and that the designated employer had to take steps to rapidly reduce them, subject to guidance as may have been given by the Minister.

The amended s27 now not only places the onus on the employer to rapidly reduce disproportionate income differentials but added the words or unfair discrimination by virtue of difference in terms and conditions of employment as contemplated in s6(4).

The rest of the section from subsection 4-6 remained the same.

Subsection 4 sets out but does not limit the measures the employer can take to rapidly reduce any disproportionate income differentials or unfair discrimination on the terms and conditions of employment namely:

- collective bargaining;
- compliance with sectoral determinations made by the Minister in terms of s51 of the Basic Conditions of Employment Act;
- applying the norms and benchmarks set by the Employment Conditions Commission; and

- relevant measures contained in skills development legislation.

Sections 5-6 set out that the Employment Conditions Commission must research and investigate the norms and benchmarks for proportionate income differentials and accordingly advise the minister on appropriate measures for reducing disproportionate differentials. The Commission may not disclose any information pertaining to individual employees or employers. The only instance where information can be disclosed is when parties to a collective bargaining process request the information contained in the statement submitted by the employer. This request is however subject to s16(4) and (5) of the Labour Relations Act, No 66 of 1995 that regulates confidential information that an employer does not have to disclose to a trade union.

It would therefore be best to act proactively if the employer notices any form of disproportionate income differentials or potential unfair discrimination.

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