

Employment Law ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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Failure to promote an employee to a restructured position in a retrenchment process: Can this constitute an unfair labour practice?

In Telkom SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2019] 40 ILJ 1093 (LC), the primary issue that the court was required to decide was whether the failure to appoint an employee to a more senior position, after their existing position was made redundant, as part of an alternative to retrenchment during a section 189 process constitutes an alleged unfair labour practice dispute related to promotion.



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Failure to promote an employee to a restructured position in a retrenchment process: Can this constitute and unfair labour practice?

In *Telkom SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2019] 40 ILJ 1093 (LC), the primary issue that the court was required to decide was whether the failure to appoint an employee to a more senior position, after their existing position was made redundant, as part of an alternative to retrenchment during a section 189 process constitutes an alleged unfair labour practice dispute related to promotion.

In 2016 Telkom embarked on a restructuring process, which included reducing the number of employee relations (ER) positions within the organisation. As part of this process, Mr Gcaba's position as an ER specialist was made redundant. Gcaba was not appointed to either of the alternative positions that he applied for within the new structure. There were no viable alternatives to Gcaba's retrenchment in Telkom's view and, as a result, he was eventually retrenched.

Gcaba *inter alia* referred an alleged unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA) citing Telkom's failure to promote him to a more senior ER position in the new structure. At the time of the referral Gcaba was an employee, but he was subsequently retrenched.

Notwithstanding Telkom's challenge that the CCMA lacked jurisdiction to hear the matter because it related to a section 189 retrenchment process and had nothing to do with

promotion, the CCMA found that it had jurisdiction. The CCMA reasoned that this was a hybrid situation where promotional opportunities were contemplated as part of a retrenchment process in terms of section 189 of the LRA.

Telkom applied to the Labour Court to review and set aside the CCMA's jurisdictional ruling.

In reaching its decision on the primary legal issue, the court found that:

- Inviting affected employees to apply for positions within an employer's new structure is an alternative to retrenchment and not a method for selecting employees for retrenchment.
- The application of assessment criteria in deciding whether to appoint an employee to a position within the new structure does not amount to selection criteria, even though the employee may be retrenched if they are not appointed to the new position.

Webinar Invitation

Employment impact:

State of national disaster: Electricity

 Wednesday, 29 March 2023

 09h00 – 09h45 (CAT)

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Failure to promote an employee to a restructured position in a retrenchment process: Can this constitute and unfair labour practice?

CONTINUED

- An alleged failure to appoint an employee to a different position during a retrenchment process as a possible alternative to retrenchment, even if such position is more senior, does not amount to an alleged dispute related to promotion and as such does not constitute an unfair labour practice dispute as contemplated in the LRA.

As a result, the court reviewed and set aside the CCMA's decision that it had jurisdiction to hear the matter and the resultant arbitration award, on the basis that the commissioner misconceived the nature of the enquiry and rendered an incorrect award.

Implications for employers

Where employers restructure their operations as contemplated by section 189 of the LRA and, as an alternative to retrenchment, they may invite potentially affected

employees to apply for positions in the new structure to the extent that there are new positions created. The failure to appoint an employee in this context cannot give rise to an unfair labour practice. However, if the assessment of the employer was unfair or the employer did not furnish legitimate reasons as to why an employee was not suitably qualified for the new position, then this could potentially result in the employee having a valid claim of an unfair dismissal as part of a retrenchment process. To mitigate this risk and any allegations of unfair discrimination, employers should ensure both a fair process and fair reasons in assessing and appointing employees to new positions during a restructuring and retrenchment process.

Leila Moosa and Jose Jorge



Cliffe Dekker Hofmeyr

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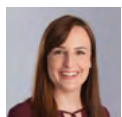
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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