

THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL

Case No: 1093

In the matter between:

ARNOLD ROBERT HUDSON

Employee

And

THE SOUTH AFRICAN POLICE SERVICE

Employer

ARBITRATION HEARING

1. The conciliation / arbitration hearing was held on 15 May 2002 at Pretoria. The Applicant represented himself. The Respondent was represented by Mr P Oosthuizen. Attempts made to conciliate the dispute were unsuccessful. Hence the parties proceeded directly to the arbitration phase.
2. At the commencement of the arbitration, the Respondent raised a point in limine. The Respondent contends that only the Labour Court has jurisdiction to entertain the dispute. Before dealing with this argument, it is necessary to sketch a brief background to the matter.

3. The Applicant applied for a certain post, namely, No. 879 Commander: Judicial Information Criminal Record Centre. The post was advertised in September 2000 and the Applicant was invited to an interview on 19 January 2001. The Applicant was one of seven candidates who were short listed for the post. He attended an interview. It is common cause that the Applicant was the most eligible candidate. The Respondent contends that by virtue of its affirmative action policy, a suitable non-white candidate was appointed in place of the Applicant. Accordingly, Superintendent Mangale was appointed.
4. The Applicant being dissatisfied with this state of affairs referred a dispute to the Bargaining Council. By virtue of Schedule 7 item 2 (l) (b) of the LRA of 1995, he alleged that the Respondent had acted unfairly in not promoting him to the post.
5. After the hearing, it was agreed that the parties would submit written heads of argument. This was duly done. I am indebted to the parties for their helpful submissions.
6. The Respondent's arguments can be summarized as follows:
 - The right to a fair labour practice encompasses both unfair discrimination and the unfair conduct in relation to failure to promote

(hereafter unfair promotion). Jurisdiction lies in the nature of the dispute. If the nature of the dispute is unfair discrimination, the Labour Court has jurisdiction. If the nature of the dispute is unfair conduct in relation to promotion, the CCMA has jurisdiction.

- The Employment Equity Act (hereafter the EEA) prohibits any unfair discrimination in the workplace and provides for the defence of affirmative action. A dispute of this kind must be resolved through adjudication.
 - The Employer advertised the post in dispute, internally and externally.
 - The Employee applied for the post in dispute.
 - The Employer used a policy described as the National Instruction 3/2000 Appointments to Posts on Salary Levels 11 to 15.
 - The Policy provides for a selection committee to make recommendations on the appointments to posts advertised, including the post in dispute.
 - The Employee received the highest marks allocated by the selection committee. The Employee's marks were 78%. The Employee was prima facie the most suitable candidate.
 - The candidate, A Wiener was a white female and received the second highest marks (72,5%).
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- The only black male on the preference list was LA Mangale, who received a mark of 64%. This placed him sixth on the preference list.
 - The Divisional Commissioner JF de Beer specifically recommended the sixth candidate LA Mangale as the most suitable candidate to secure adequate representivity in the post in dispute.
 - The National Commissioner approved the appointment of LA Mangale.
 - The reason for the appointment is Employment Equity.

7. The Applicant contends the following:

"It is evident that Supt. Mangale was not the most suitable candidate. This appointment was done contrary to the National Instruction. The Employer, the South Africa Police Service, neglected to apply it's own instruction when deciding to appoint the most suitable candidate... I as the employee and being the grieved party am then the Master of the dispute and I have a right to choose the cause of action and the ground thereof.

... The mere fact that the respondent chooses to raise a defence that would also be open to them under a discrimination action does not affect or change the nature of my dispute with the respondent

... there was no approved employment equity plan in place for the department in question that could have allowed for the breach in established conduct and procedure."

8. ANALYSIS OF THE PARTIES' RESPECTIVE SUBMISSIONS

I wish to state at the outset that in determining the jurisdictional divide I am of the view that a formal approach is not appropriate. One must determine what is the true nature or substance of the dispute. At face value, an employee party may refer any dispute to arbitration concerning a promotion to the Commission or to a bargaining council. However, the question must be asked as to whether such a referral is competent irrespective of the reason as to why the employer failed to promote the employee. Once it is established that the reason is based on racial discrimination, the dispute falls outside the ambit of item 2(1)(b). All disputes concerning racial discrimination must be dealt with by the Labour Court unless the parties consent to the jurisdiction of the CCMA or bargaining council.

9. Based on the material placed before me, I have no doubt that the Applicant was not promoted because he is a white male. The person who was promoted clearly fell within a designated group. Whether that person was a suitable candidate and his appointment was in conformity with the Respondent's professed policy of creating representivity in the department, is not for me to decide.
10. These are matters for the Labour Court to pronounce upon. In the final analysis, the real reason for the Applicant's non-promotion is that he was discriminated against. The Applicant did not advance any other possible reason.
11. For the foregoing reasons, the Respondent's point in limine is upheld. In the result, the Bargaining Council does not have jurisdiction to entertain the dispute. The Applicant is advised to refer the matter to the Labour Court.

DATED ON 24 JUNE 2002.

ADV. W J HUTCHINSON