

SOUTH AFRICA / JUDGMENT

Jack and Others v Cape Peninsula University of Technology and Others (C850/2017) [2021] ZALCCT 88 (19 November 2021)

[2021] ZALCCT 88

COURT
Labour Court Cape Town

BEFORE
Lagrange

CASE / FILE NUMBER
C850/2017

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THE
LABOUR COURT OF SOUTH AFRICA,
HELD
AT CAPE TOWN
Not
reportable
Case
No: C 850/2017
In

the matter between: CECILIA JACK & 7
OTHERS First
Applicant
and
CAPE PENINSULA
UNIVERSITY OF TECHNOLOGY First
Respondent
COMMISSION FOR
CONDILIATION,
MEDIATION &
ARBITRATION, CAPE TOWN Second
Respondent
K KLEINOT
(N.O.) Third
Respondent
Date
of Set Down: 18 November 2021
Date
of Judgment: This judgment was handed

down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 19 November 2021.

Summary:

(Review
– Ground – evaluation of evidence – arbitrator not failing to evaluate evidence - arbitrator's assessment of evidence not resulting in a conclusion no reasonable arbitrator could have reached)

JUDGMENT

LAGRANGE J

Introduction

- [1] The eight applicants bringing this review application were dismissed by the respondent, ('the university' or 'CPUT') in February 2017. The University terminated their services on the basis that they were not eligible to have been employed under the terms of a transfer of an undertaking which took place pursuant to an agreement between itself and a former provider of security services on the campus. This was pursuant to an undertaking given by the university to insource certain services, following the 'fees must fall' campaign on the campus.
- [2] The letter of termination went on to say that the University was only insourcing the employees who were employed by the previous security companies on the CPUT the site who were doing duty at the CPUT site as at 31 October 2016.
- [3] The pleadings in the application consist only of the original notice of motion and founding affidavit and an answering affidavit.
- [4] In terms of the agreement, the staff to be transferred to the employment of the university were those who were engaged by the security service and fulfilling its security obligations on the campus when the contract terminated at the end of October 2016. The details of the employees who were transferred were only provided to the University in January 2017 because the security service believed it could not provide their personal details writing to the provisions of the Protection of Personal Information Act, 4 of 2013. Consequently, the question of verifying who was entitled to employment in terms of the agreement was only resolved then.

- [5] In essence, the Commissioner found that the applicants were engaged by the University pending the outcome of a verification exercise to determine if they were covered by the transfer, which resulted in the dismissal of those who should not have been employed under the agreement.
- [6] In paragraph 29 and 30 of her award the Commissioner found, for a variety of reasons, that none of the applicants were working on the site during 2016, prior to the termination of the security services contract at the end of October, even if some of them had afterwards been posted to work in November 2016.
- [7] During the arbitration, it was argued that the University had acted inconsistently in continuing to employ the four staff in question, who had been regularly used by the security company as temporary substitutes for staff engaged at the campus, when the latter were absent for one reason or another. It subsequently turned out that only three of the four were in issue.
- [8] The arbitrator concluded that none of the applicants were entitled to benefit from the insourcing arrangement, in the form of a 197 transfer in terms of which employment with the security service at the end of October 2016 was to continue with the University from 1 January 2017.

Grounds of review

- [9] The applicants contend that the arbitrator improperly relied on the validity of information supplied to it in implementing the in sourcing agreement. By implication, had she applied her mind to that information she would have realised that the three security offices who provided temporary services had in fact already been dismissed by the service provider by 2016 and accordingly did not qualify for continued employment. Moreover, she failed to appreciate that the names of those individuals also did not appear on the list of the security company's employees. The implicit thrust of the argument was that these employees were no more eligible to be transferred than the applicants and, because their situation could not be rationally distinguished from that of the applicants, the termination of the applicants' services on the basis of being ineligible for the transfer was inconsistent and therefor unfair.
- [10] A related ground raised by the applicants is that this alleged inconsistency meant that the arbitrator ought to have realised that the University implemented the terms of the in sourcing agreement in a selective arbitrary and unfair manner.
- [11] Lastly, the applicants initially claimed they were prevented from submitting documentary evidence to show that the information relied on by the arbitrator was in accurate. However, ground this was not pursued in argument at the hearing of the application.

Evaluation

- [12] It is true that the arbitrator placed reliance on the list of security company staff and neither the names of the applicants, nor those of the three individuals mentioned, appeared on the list. Mr Baloyi, who testified for the University, made it very clear that the list was not the only criterion. The University had also taken legal advice as to who should be included in the complement of staff transferred from the security service. That advice was to the effect that staff who had rendered temporary services for the company during 2016, as temporary substitutes for absent full-time security staff on the site, should also be transferred.
- [13] The legal advice obtained was clarified before the applicants started leading evidence in the case. The effect of the legal advice was that the University was advised that anyone who had been working at CPUT for the previous nine months before the end of the security firm's contract should be included in the transfer of staff. Hence the criterion applied by the University was that to qualify for transfer the individual had to have worked for the security company at the CPUT sites during the nine months prior to the end of the service contract, but not necessarily continuously.
- [14] The applicants were unable to provide evidence that none of the individuals were engaged during the period in question. On the evidence before the arbitrator, it is also apparent that none of the applicants were engaged on the CPUT sites during 2016.
- [15] As mentioned, the arbitrator found that there was no evidence the applicants were posted at the site at any time during the nine months ending on 30 October 2016. It was on this basis that the arbitrator distinguished their situation from the few individuals who had been regularly engaged on the site during that period, but not permanently so. Consequently, there was a consistent basis for distinguishing them from the applicants, and the applicants could not claim to have been in the same situation because none of them had been employed by the security company at the site during that period. The arbitrator found that one of the applicants, Ms Mangaliso, had not been able to provide proof that she was employed on the campus by the company until she was employed in November 2016, which was on the assumption that she was part of the workforce that would be insourced. The only other applicant, who testified to being employed during that time, Ms Jack, had been dismissed by the security company in July 2016.
- [16] The kind of review which the applicants have brought relates to an alleged misdirection by an arbitrator about their evaluation of the evidence. It is now trite law in such a case, that the applicant must demonstrate not only that the alleged flaw exists in the arbitrator's award, but also that, if it were not for that flaw the arbitrator would have been compelled to come to a different conclusion.[1]
- [17] In this case, the first difficulty the applicants have is that the arbitrator did consider the evidence relating to their claim that the University had acted inconsistently. She weighed and evaluated the evidence and found, in effect, that the basis on which the applicants had been found ineligible to have benefited from the in sourcing arrangement had been consistently applied. In particular, she found that the situation of the other employees,

whom the applicants argued should also have been ineligible for employment by the University, was different.

[18] This was not a case in which it can be said that there was no rational basis on the evidence for her to distinguish between them as she did. Moreover, it does not necessarily follow that if she had found that the other individuals ought not to have been employed either, that the dismissal of the applicants, who were not eligible for employment under the in sourcing agreement, was therefore unfair.

[19] In the circumstances, the review application falls to be dismissed.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives

For the Applicant T

C Kathemba of Mango & Associates Attorneys

For the First Respondent C de Kock instructed by Carelse Khan Inc.

[1] See, e.g., Head of Department of Education v Mofokeng & Others

(2015) 36 ILJ 2802 (LAC) at 2813, para [33].

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