

SOUTH AFRICA / JUDGMENT

Jeftha v Public Health and Social Development Sectoral Bargaining Council and Others (C147/2022)

[2024] ZALCCT 42 (6 September 2024)

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COURT

Labour Court Cape Town

BEFORE

De Wet

CASE / FILE NUMBER

C147/2022

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THE

LABOUR COURT OF SOUTH AFRICA

HELD

AT CAPE TOWN

CASE NO: C147/2022

In the matter between:

GLORIA
JEFTHA
Applicant
and
PUBLIC
HEALTH & SOCIAL DEVELOPMENT
SECTORAL
BARGAINING COUNCIL
First
Respondent
GAIL
McEWAN N.O
Second
Respondent
DEPARTMENT
OF HEALTH,
WESTERN
CAPE
Third
Respondent
Date

of Hearing: 26 June 2024

Date of Judgment: 6 September 2024

Summary: This is an

opposed application in terms of s 145 read with s 158(1) (g) of the

Labour Relations Act 66 of 1995 to review and set aside a

jurisdictional ruling issued by the second respondent on 18 February

2022 in respect of an unfair labour

practice dispute pertaining to

benefits.

JUDGMENT

DE WET AJ:

Introduction:

1. It is common cause that during 2018 the applicant successfully applied for the post of Deputy Manager: Nursing (Level 1 and 2 Hospitals) Obstetrics, Neonatologh and Surgery Departments. The advertisement for this post stated that the remuneration package was R 801 918 per annum and that a portion of the package could be structured according to the individual's personal needs.
2. The applicant referred an unfair labour practice dispute to the first respondent during 2021 in terms of s 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA"). She claimed that since her promotion to salary level 11 in 2019, her contributions to the Government Employee Pension Fund (the "GEPPF"), were less than her previous contributions had been, when she was employed as an assistant manager on level 10. The applicant sought an award that her pension fund contributions be re-instated to the amount she had been receiving immediately prior to her promotion, alternatively that she be paid a solatium of 12 months compensation due to the reduction in the contributions to her pension fund.
3. At the commencement of the arbitration hearing, the representative of the third respondent raised a preliminary point that the first respondent lacked jurisdiction because the applicant had elected how she wanted to structure her salary package and thus the third respondent had no discretion in this regard.
4. The jurisdiction issue was premised on the basis that at salary level 11 the pensionable emoluments of an employee are based on the employee's basic salary due to a specific dispensation effective from 1 July 2005 which regulates the Inclusive Flexible Remuneration Package System for MMS (Middle Management Service) on levels 11 and 12, and further, that the applicant had chosen to structure her remuneration package on a 70/30 split. Due to the applicant having exercised a choice, it was argued that the employer had no discretion in respect of the amount of the contribution. The applicant disputed that she had made a choice as alleged by the third respondent.

5. On 18 February 2022 the second respondent under the auspices of the first respondent ruled as follows: “(11) The Council has no jurisdiction in this matter as it is a benefit over which the employer does not exercise discretion and is regulated by the Dispensation effective from 1 July 2005”.
6. The applicant seeks to review the aforesaid ruling and requests that this Court determine that the third respondent had committed an unfair labour practice in respect of the applicant’s benefits and determine the appropriate compensation in respect thereof. In the alternative, that it be determined that the first respondent has the necessary jurisdiction to determine the applicant’s dispute and order that the dispute be remitted to the first respondent with a different arbitrator to determine the dispute.
7. The application was opposed by the third respondent. It was however submitted, as an alternative to the dismissal of the application, that should the Court be of the view that the first respondent has the required jurisdiction to determine the dispute, the matter be referred back to the it for hearing on the merits. This alternative request was premised on the fact that the second respondent had relied on hearsay evidence to reach her conclusion. I shall return to this aspect later.

The applicable legal principles:

8. Since this Court is determining whether a jurisdictional ruling should be reviewed, the question to determine is whether the second respondent was right or wrong when she ruled that the first respondent does not have jurisdiction to determine the unfair labour practice dispute referred to it by the applicant. This is consequently a so-called correctness review.
9. If the second respondent was wrong in deciding that the first respondent does not have the necessary jurisdiction, it would ordinarily be for this court to decide whether the first respondent indeed has the required jurisdiction and if so, whether the applicant was subjected to an unfair labour practice. It was held in *Universal Church of the Kingdom of God v Myeni and Others* (20150 36 ILJ 2832 (LAC at para 27) that “...the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling of convenience. ...If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.”
10. Section 186(2)(a) of the LRA provides that an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of a benefit to an employee. The term benefit has been defined as an existing advantage or privilege to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion.

11. There are two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the first respondent under its unfair labour practice jurisdiction. The first instance is where an employer fails to comply with a contractual obligation that it has towards an employee and the second is where the employer exercised a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.
12. In *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) at paras 29 and 30 it was held as follows: “[29] Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour practice proceedings, seek to have instances where the employee then did not receive such benefit adjudicated. So therefore, even if the benefit is not a guaranteed contractual right per se, the employee could still claim same on the basis of an unfair labour practice if the employee could show that the employee was unfairly deprived of same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee and exercises such discretion unfairly. As the court said in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*: “Disputes over the provision of benefits may fail into two categories: firstly, where the dispute concerns a demand by employees that a benefit be granted or reinstated irrespective of whether the employer’s conduct in not agreeing to grant or in removing the benefit is considered to be unfair. This kind of dispute can be settled by way of industrial action. Secondly, the dispute may concern the fairness of the employer’s conduct. This kind of dispute may be settled by way of adjudication.”

“[30] What is clear from the above, is that the applicant’s case referred to is squarely that of an unfair labour practice. It pertains to a benefit founded in an employment policy and collective agreement (thus *ex contractu*) which the applicant contends he was unfairly deprived of as a result of unfair conduct by his employer (the respondent) pertaining to the same. The fact that the applicant also challenged his ultimate moderated performance score, would also entail a challenge of the respondent’s discretion in this regard as well, further cementing the conclusion that the principle at stake in this matter is an unfair labour practice. Therefore, I conclude that the other issue forming part of the applicant’s case in this matter concerns a dispute concerning an unfair labour practice relating to a benefit.”
13. It was the applicant’s case that she had not made an election as alleged by the third respondent and hence, if I understand it correctly, she was unfairly deprived of a benefit as a result of the unfair conduct of the third respondent.

The arbitration hearing:

14. Normally in disputes of this nature, the inquiry at arbitration would be whether the applicant had objectively established that an unfair labour practice had been committed.
15. As the third respondent raised a jurisdictional objection, the second respondent, correctly so, first had to determine whether the first respondent had the necessary jurisdiction to arbitrate the matter. It was common cause that the jurisdictional issue turned on the question whether the applicant had exercised a choice regarding the structuring of her remuneration package by selecting set 2 (the 70/30 split). If established that the applicant

had indeed made a choice in this regard, it would follow that the third respondent has no discretion and the first respondent would not have jurisdiction to determine the unfair labour dispute.

16. Unfortunately, the second respondent determined this factual dispute without hearing the evidence of the applicant or any other person who had personal knowledge of the circumstances pertaining to the structuring of the applicant's contract in the new post. Instead, she relied on the evidence of the representatives of the applicant and the third respondent, whose evidence was given under oath, whilst they were not present when the applicant purportedly exercised her choice.

Discussion:

17. The second respondent did not appreciate that there is a factual dispute whether the applicant had indeed made such a choice and if not, the consequences thereof. This question of fact could not be determined without the second respondent hearing direct evidence pertaining thereto.
18. Neither Mr Solomon nor Mr Parker (the parties' respective representatives who testified at the arbitration hearing) were present or had any knowledge of the circumstances pertaining to the structuring of the applicant's employment package. Their evidence was consequently of no probative value and inadmissible.
19. The second respondent could not determine, given the lack of evidence, whether the first respondent had jurisdiction and unfortunately, due to the lack of evidence, this Court is also unable to determine whether a choice was afforded to and exercised by the applicant.
20. The second respondent for the same reason could also not determine the merits of the dispute.
21. I am of the view that the matter should be referred back to the first respondent to firstly determine whether the first respondent has jurisdiction and if so, whether an unfair labour practice had been committed in terms of s 186(2) (a) of the LRA as alleged by the applicant. In this regard there is clearly a dispute between the parties pertaining to inter alia the following: whether the applicant knew when she was appointed to the post of Deputy Manager that her salary structure would be different; whether it was explained to her how the structuring of the package would work; whether the two options pertaining to her pension were explained to her; whether she was aware that the pension contribution was based on her basic salary; whether she exercised an election when she circled the word "yes" and whether she knew she had exercised a choice or should reasonably have known the proposed change to her remuneration package. These disputes show that the issue of jurisdiction and the merits of the dispute are inextricably linked.
22. As a result the second respondent was wrong to conclude that the first respondent lacked jurisdiction to hear the unfair labour practice dispute.

23. In the circumstances the following order is made:

1. The jurisdictional ruling dated 18 February 2022 under case number PSH646-21/22 is set aside.
2. The applicant's unfair labour dispute is remitted back to the first respondent to be heard by a different arbitrator.
3. There shall be no order as to costs.

De Wet AJ

Acting Judge of the Labour Court of South Africa

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