

SOUTH AFRICA / JUDGMENT

Senekal v MEC for Education (Gauteng Province) and Another (JEQ01/2010; J1980/2005) [2015] ZALCJHB 303 (19 August 2015) [2015] ZALCJHB 303

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JEQ01/2010; J1980/2005

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IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JEQ01/2010 & J1980/2005

In the matter between:

MR DIRK CORNELIUS SENEKAL

Applicant

and

MEC FOR EDUCATION (GAUTENG PROVINCE)

First Respondent

GAUTENG DEPARTMENT OF EDUCATION

Second Respondent

Heard: 17, 18 & 19 November 2014

Delivered: 19 August 2015

Nkutha-Nkontwana AJ

Introduction

- [1] The issues for determination in this matter emanate from number of related matters involving same parties that had been consolidated and were dealt with simultaneously on 3 March 2014 by the honourable LaGrange J. He undertook a very daunting task of going through the maze that had been concocted for almost a decade. To his credit, he successfully managed to weed out all the matters that had been disposed of and to guide parties on how to proceed with matters that are properly before this Court.
- [2] The details of the honourable LaGrange J's exertion are captured in his Trial Direction Order which accordingly provides a crucial clarity on the ambit of the matters before this Court and I am greatly indebted. Accordingly, in this judgement I deal with two matters, namely J1980/05 and JEQ01/2010.

The claim under case number J1980/05

- [3] This matter was referred to this Court on 13 October 2005 by way of an application seeking the following relief:

- 3.1 The unfreezing or reinstatement of the Applicant's salary with immediate effect;
- 3.2 An order preventing the Respondents from committing any acts that might result in an unfair labour practice against the Applicant or victimisation of the Applicant;
- 3.3 An order preventing the Respondents from withholding any service benefits;
- 3.4 An order compelling the Respondents to attend to grievances which the Applicant claimed had been ignored for 13 months; and
- 3.5 An order compelling the Respondents to respond to his claims for scarce skill allowance and disability claim under the Employment Equity Act 55 of 1998 as amended ("EEA").

- [4] This matter was launched at the time when the Applicant was still employed by the Second Respondent hence the nature of the relief he sought at that time was informed by the currency of his employment status. It was set down before Honourable Francis J and was postponed sine die by agreement between the parties with a view to enter into settlement discussions. It would seem that the parties never met subsequently and as such the issues had been carried over as part of the scrambled litigation subsequently pursued by the Applicant.

- [5] At the commencement of the trial, the Applicant abandoned some of the above claims, including a claim for damages. As a result, the following are the only claims that he persisted with:

- 5.1. Medical aid contribution;
- 5.2. Salary related claims (pay progression and cash bonus); and

5.3 Promotion.

Claim under case number JEQ01/2010

- [6] This matter was initially launched under the auspices of the Equality Court at the Johannesburg Magistrates' Court on 1 December
2009. Distinctive to the Applicant's approach, even this matter commenced as a conglomeration of different disputes that had been dealt with in different institutions, including an alleged unfair discrimination and dismissal. On 28 January 2010, Magistrate H R Viana transferred the matter to this Court. On 24 March 2010, it was set down before Honourable Van Niekerk J, who in turn ordered the matter be referred to the Commission for Conciliation Mediation and Arbitration ("CCMA") for conciliation within 30 days from the date of the order in terms of section 10 of the EEA. Pertinently, Van Niekerk J also ordered that should the matter remain unresolved, the Applicant would be free to refer the matter back to this Court for adjudication.
- [7] Indeed, the matter was referred to the CCMA for conciliation which was held on 15 April 2010. The outcome of that conciliation hearing was a settlement agreement whereby the parties agreed to refer the dispute concerning the unfair dismissal to Education Labour Relations Council ("ELRC") for arbitration.
- [8] Advocate K Tip SC ("Tip") presided over the arbitration proceedings at the ELRC. It is clear from the arbitration ward that the Applicant attempted, without success, to place before the arbitrator the issues emanating from the grievances he had launched in 2005. Tip confined her findings to the unfair dismissal dispute and accordingly held that she lacked jurisdiction to deal with any issue outside the scope set in the CCMA settlement agreement between parties. In that regard, she states the following:

"I now turn to the other grievances which Mr Senekal had taken up. One of those is his partial hearing disability. He produced a voucher to that effect issued by the Pension Administration of the National Treasury. That aside, I do not in any way doubt the evidence that Mr Senekal gave as to the impact of his impediment in inter alia a classroom environment."

On a balance, it appears that GDE did very little if anything to address the problem. Whether imperfectly or not, Mr Senekal

brought it to the Department's attention and I have empathy with his view that the relevant officials were more inclined to be defensive than helpful. Nonetheless, in the context of this dispute, the same analysis must be applied to this grievance as to the case of those already considered in this award. The process for dealing with an instance of disability is a clearly defined one. See for instance Schedule 1 of Employment of Educators Act, 76 of

1998. It embodies certain rights on the part of a person who asserts a disability. If a Department does not respond in accordance with the prescripts of the process, then the effected employee can institute measures to enforce his/her rights. There is nothing extraordinary about this and there is no good reason to treat Mr Senekal as though his position was unique. The real

problem arose when he decided that he would impose the solution of withholding his services instead of taking his dispute to a definite outcome. As with other grievances that decision can enjoy no approval and Mr Senekal's prolonged absenteeism cannot be justified by it."

[9] The Applicant brought this matter in terms of Section 10 of the EEA, alleging that the Second Respondent unfairly discriminated against

him on a ground of disability and he seeks the following relief:

9.1. The finding that he has been unfairly discriminated against and that the Respondents be ordered to pay him compensation equal to 24 months remuneration;

9.3 That the Respondents be ordered to comply with Section 10 of the EEA and submit the Employment Equity Report to Court within 30 days of the order;

9.4 That the Respondents be ordered to comply with Occupational Health and Safety Act, 35 of 1993; and

9.5 That the Respondents pay the Applicant's costs.

[10] The above relief is predicated on the following allegations:

10.1 The Respondents failed to accept that the Applicant's disability is of a permanent nature;

10.2 The Respondents failed to take measures to identify and eliminate employment barriers in the light of his permanent disability;

10.3 The Respondents failed to consult with the Applicant over his disability;

10.4 The Respondents failed to, or failed even to attempt to, adapt the Applicant's duties on account of his disability;

10.5 The Respondents failed to consider an alternative employment for the Applicant, taking into account his disabilities;

10.6 The Respondents failed to pay the Applicant the correct salary;

10.7 The Respondents failed to pay the Applicant all service benefits, medical aid and cash back bonuses due to him;

10.8 The Respondents failed to adjust the Applicant's salary in accordance with 1% and one automatic pay progression to which he was entitled;

10.9 The Respondents failed to pay the Applicant's medical aid contributions for nearly two years; and

10.10 The Respondents denied the Applicant promotion for period 2005 to 2008 which he should have received, or failed even to consider him for promotion during that time.

[11] It is clear from the above allegations that the demarcation line between these two matters is very blurry. Regardless, that is not an insurmountable challenge since it would seem to me that the unfair discrimination allegation is the main peg that hangs all of the Applicant's claims.

Condonation

[12] The Respondents are no longer opposing the grant of condonation. On the other hand, the Applicant is adamant that there is no need for a condonation application since his referral is consequent to the order by Van Niekerk J which, in his view, gave him a right to refer the matter back to this Court after the CCMA conciliation.

[13] Although the EEA does not expressly set a time limit for the referral of disputes for adjudication, it is trite that the 90-day time limit set by the LRA also applies to referrals of disputes to the this Court under the EEA.[1] In *South African Transport and Allied Workers' Union obo Members v South African Airways (Pty) Ltd and others*, [2] concretising the above tenet, the LAC stated that:

"...claims of unfair discrimination are not to be lightly brushed aside and that by that it does not mean that every claim must be entertained no matter how slender the factual basis of the grounds advanced. It is however also important to note that the appellant is seeking to assert its members' rights in terms of the EEA. The purpose of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace."

[14] It is clear from the record that the delay was due to the referral of the matter to the ELRC for arbitration as indicated above. The Applicant ought to have referred the matter within ninety (90) days from 17 April 2010, the date of the CCMA conciliation hearing. On 29 September 2010, the Applicant launched a review application under JR 2478/10 challenging Tip's arbitration award and subsequently incorporated all the other matters between the parties including JEQ01/10 and J1980/05. On 28 April 2011, honourable Molahlehi J dismissed the review application but ordered that the matters under JEQ01/10 and J1980/05 should be heard separately.

[15] The degree of lateness is five months. It is my view that the reason for the delay is adequately reasonable, especially given the history of these matters. Since the application for condonation is no longer opposed, I do not deem it necessary to consider the issue of prejudice and the prospects of success.

[16] In the circumstances, condonation is granted for both matters.

Survey of evidence

Medical Aid Contribution

[17] The Applicant testified that the Second Respondent terminated his medical aid for the period between January 2006 and September

2007. As a result, he was deprived of medical aid benefit which he seriously needed given his disability and at that time he had a child in Grade 1.

[18] During cross-examination, he conceded that he was not a member of a Medical Aid Scheme at that time. Also, it was the period when he had absented himself without authorised leave, a conduct which he was subsequently dismissed for.

[19] Even though in his evidence in chief he testified that he is not interested in any monetary relief, in re-examination he made it clear that he is looking for compensation simply because it was not his fault that his medical aid benefit was terminated.

[20] On the other hand, it was submitted on behalf of the Respondents that the Second Respondent was not obligated to contribute toward the Applicant's medical aid since he was not a member of a Medical Aid Scheme. Also, that the Second Respondent's medical aid contribution portion had already been allocated to the Applicant's total package of remuneration. Therefore, the Applicant failed to prove that he had been discriminated against in that regard, so it was contended.

[21] Clearly this claim cannot succeed solely on the basis that at that particular time the Applicant was not a member of any Medical Aid Scheme. In any event, it would seem that the Applicant was not prejudiced since the Second Respondent's medical aid contribution was already incorporated in his remuneration package.

Salary related claims (cash bonus and pay progression)

[22] The Applicant testified that he commenced his employment with the Respondent in 1991. At the time when his services were terminated, he had 17 years of experience. When the Second Respondent migrated to a new system, he lost his years of service and as a result he was incorrectly remunerated. However, he conceded during cross-examination that his service was broken when he went for military conscription in 1992 to 1993. In 1993 to 1994 he worked at a remedial school and in 1995 he worked at a private school. He resumed employment in the public sector in February 1996 until his dismissal in December 2007. Therefore, he had 11 years of experience when his services were terminated.

- [23] On the issue of cash back bonus, the Applicant testified that in 2005 he graduated with a BA degree in Education. Therefore, the Second Respondent treated him unfairly by refusing to increase his notch from level Relevant Qualification Value (“REQV”) 14 to 15 in recognition of his additional qualification.
- [24] The Respondents led evidence of Ms Bongzi Memeza, a Deputy Director: Human Resources. She testified that a cash bonus is paid to an educator who obtains a qualification which influences his/her REQV status upward. In this instance, the Applicant had a four year High Diploma in Education prior acquiring a BA degree which is also a four year degree. Therefore, there was no upward movement or improvement because both qualifications are at the same level (REQV14). To move to REQV 15, the Applicant had to acquire a qualification equivalent to an Honours degree.
- [25] On a pay progression claim, the Applicant testified that the total amount he had been paid for pay progression was calculated incorrectly. He conceded that he did not have an exact figure but was working on a ballpark figure of R60 000.00.
- [26] In contrast, the Respondents led evidence of Mr Sashi Nangu, a Chief Education Specialist, which was corroborated by Ms Mameza. He testified that pay progression is paid to employees in terms of PSCBC Collective Agreement 2/2005. The Applicant did receive his pay progression automatic payment which was an amount of R47 968.50, constituting of 1% notch progression with effect from 1 July 2004. However, the Respondents have since realised that the Applicant had been short paid by an amount of R1 948.50 which has been tendered to the Applicant.
- [27] For the period commencing from 1 July 2005, it was Nangu’s evidence that pay progression was paid on the basis of educator’s performance. The Applicant did not receive any pay progression for that year simply because he failed to meet the performance standards. Whilst, for the year 2006 extending to 2007 the Applicant was absent from work. The Applicant conceded that in 2005 he failed to meet the required performance standard and for two years he was not at work all because of his disability that was never attended to by the Second Respondent.
- [28] Even though this dispute is purely about remuneration as correctly contended by the Respondents, the Applicant also claimed that the Second Respondent’s conduct in withholding his cash bonus and pay progression amount to unfair discrimination.
- [29] Nonetheless, I find nothing arbitrary in the Second Respondent’s conduct in relation to a cash bonus. It is clear that the applicant was not eligible to receive a cash bonus since his additional BA degree qualification did not amount to upward movement.

- [30] On the issue of pay progression, it is my view that the Applicant's complaint is merely about arithmetic computation, especially for the year in which he was eligible and had been paid. To the Respondents' credit, there is a tender to pay the Applicant whatever outstanding amount due to him. However, for the period between 2005 and 2007, the Applicant conceded that he was not eligible for a pay progression.
- [31] I accordingly, find that the Applicant failed to prove that he had been unfairly discriminated in that regard.

Promotion

- [32] The Applicant testified that he applied for two advertised positions at Allen Glen High School in his capacity as a person with disability sometime in 2005. He was not shortlisted for both positions. On 24 November 2005, he wrote a letter to the Second Respondent wherein he challenged its failure to shortlist him. The Provincial Office referred the dispute to the District Director of Johannesburg East but to no avail.
- [33] The Applicant testified that he was not challenging promotion as such but he just wanted the shortlisting criteria because he was of the view that had he been shortlisted and appointed, those positions would have dealt with his disability grievance, in particular the noise and the travelling distance.
- [34] The Respondents, on the other hand, submitted that this issue has since become moot subsequent to the Applicant's dismissal and the fact that he was no longer interested in promotion but looking for the shortlisting criteria (policy).
- [35] I am not persuaded that this claim is moot. Conversely, the Applicant takes issue with the Second Respondent's failure to recognise his disability and the fact that it missed the opportunity to reasonably accommodate him by promoting him to a high school

environment. Accordingly, my finding on this claim is deferred to the discussion of unfair discrimination heading underneath.

Employment Equity Plan and Reports

- [36] In this claim, the Applicant seeks an order compelling the Respondents to submit their employment Equity Plan and Reports to the Court in order to show whether or not they are implementing the plan. In response, the Respondents submitted that the Court lacks jurisdiction deal with the Second Respondent's compliance with its Employment Equity Plan and Reports especially given the reality that the Applicant's case is not predicated on the Second Respondent's Employment Equity Plan and Reports.
- [37] I concur with Second Respondent that this Court lacks jurisdiction to deal with the Second Respondent's compliance with its Employment Equity Plan and Reports in a dispute that is referred in terms of Section 10 of the EEA. Moreover, the Applicant has since distanced his unfair discrimination claim from the said Employment Equity Plan and Reports.

Occupational Health and Safety Act, 85 of 1993

[38] The Applicant also testified that the First Respondent failed to comply with the provisions of the Occupational Health and Safety Act 85 of 1993 (“OHSA”) with regard to the safe work environment. As such, the Applicant seeks an order compelling the First Respondent to comply

with the OHSA. In opposition, the Respondents submitted that the Applicant’s claim in that regard is limited to the period he was still in the employment of the Second Respondent. However, subsequent to his dismissal, there is no evidence that the Second Respondent is not complying with the OHSA. Accordingly, the Court lacks jurisdiction to grant the relief claimed by the Applicant and as such the claim stands to be dismissed, so it was further submitted.

[39] Certainly, this Court lacks jurisdiction to deal with this claim. In fact, non-compliance with the OHSA is a criminal offence in terms of Section 38 of the OHSA and Section 49 thereof affords the Magistrates’ Courts a special jurisdiction.

Unfair discrimination

[40] The Applicant testified that he has a permanent hearing impairment which affected his ability to perform his duties. He lost hearing in his left ear sometime in 2001. On 7 October 2004, he formally notified the Second Respondent of his disability by serving a National Treasury Treatment Authority as a proof.[3] As a result of being deaf in one ear, he was sensitive to noise. The noise level at the primary school where he had been placed to teach, Yeoville Community School, was intolerable to him. As a result, he could not continue in a classroom environment because of the high level of noise.

[41] Despite the Second Respondent’s concession that the Applicant has a permanent disability, it failed to reasonably accommodate him in one or more of the following ways:

41.1 To remove him from the noisy environment;

41.2 To adapt his working conditions in order to minimise the impact of his impairment on his capacity to fulfil his job;

41.3 To medically board him;

41.4 To consult with him on alternatives that had been available, given the seriousness of his impairment; and

41.5 To reasonably accommodate him given the fact that he sustained his injuries on duty.

[42] The Applicant further testified that the Respondents missed an opportunity to address his condition when they failed to appoint him in one of the positions that had been vacant at Allen Glen High School, a less noisy environment and more suitable since it was closer to his home at that time.

[43] During cross-examination, the Applicant conceded that even though he had a hearing impairment, he was still able to perform his duties as a teacher at a primary school. Nonetheless, he was adamant that a primary school environment was not convenient since he could have lost balance and injured himself or the students. He was expecting the Respondents to consult with him in order to establish the extent of his impairment and agree on the process to reasonably accommodate him. Instead, they instituted a disciplinary hearing and terminating his services ultimately.

[44] He testified further that he was not asking for something that was impossible. The Respondents could have looked for an alternative

position that was office bound in order to accommodate him. He, however, conceded that reasonable accommodation in terms of the Disability Guidelines does not mean that the employer had to find an alternative job if he could have been reasonably accommodated as a teacher.

[45] The Respondents did not lead any oral evidence but made the following

submissions:

47.1 The Applicant failed to show, on a balance of probabilities, that he had been discriminated against by the

Respondent's failure to reassign him to a non-teaching position;

47.2 The Respondents had no legal obligation to appoint the Applicant to a non-teaching job as a result of his

hearing impairment and, as such, failure to do so did not amount to unfair discrimination; and

47.3 The hearing impairment did not prevent the Applicant from discharging his functions as a teacher or to advance as a teacher. As such, his disability was not one that qualified for protection under EEA.

Legal principles and analysis

[46] The heart of the Applicant's case is that the Respondent discriminated against him on the ground of disability, i.e. his permanent hearing impairment. Section 6(1) the EEA prohibits any person from unfairly discriminating, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including disability. Whilst Section 6(2)(b) provides that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

[47] The Constitutional Court firmly held that when it comes to interpretation of statutes, “it was no longer going to be business as usual” – that business being the statute as the starting point. The starting point is no longer the statute but the Constitution itself.[4] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[5] the honourable Justice Ngcobo, as was then, stated that:

“The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court “must promote the spirit, purport and objects of the Bill of Rights” when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: First, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights “is a cornerstone of [our constitutional] democracy.” It “affirms the democratic values of human dignity, equality and freedom””

[48] In *IMATU v City of Cape Town*,[6] Murphy AJ, as was then, expansively dealt with the tenets relating to unfair discrimination on the ground of disability. He then

emphatically adopted the following test as laid down in *Harksen v Lane NO*: [7]

“The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-staged analysis. Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to “discrimination”, did it amount to “unfair discrimination”? If it is found to have been on a specified ground, unfairness will be presumed under the Bill of Rights by virtue of the provisions of section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges discrimination on analogous grounds. As I read section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown.”[8]

[49] He stated further that: [9]

“The word “disability” is not defined in the EEA, but item 5 of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, enacted in terms of the EEA, defines “people with disabilities” as “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”. Item 5 commences with the following statement in item 5.1:

“The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.”

The definition is therefore not based on the medical model of disability but rather on the effect the impairment has in limiting the complainant’s entry into, or advancement in, employment...”

[50] Section 11 of the EEA, before the 2013 amendment, did not expressly restrict the presumption of unfairness to discrimination on one or more of the listed grounds save to state that ‘whenever an unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair’. At most, the Applicant must show that he was discriminated against and the basis thereof even though the burden of proving fairness rests on the Second Respondent. Accordingly, I have to first determine whether the conduct of the Second Respondent amounts to discrimination and thereafter determined the fairness thereof.

Was there any discrimination?

[51] The objects of EEA are, inter alia , to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure

implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative

of all our people.[10] Section 6 of the EEA expressly prohibits unfair discrimination whilst Section 5 of the EEA obliges every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Unlike provisions of Chapter III of the EEA which is applicable to the designated employers only, Sections 5 and 6 fall under Chapter II of the EEA which mandatorily applies to all employers.

[52] Turning to the facts of this case, it is not disputed that the Applicant has a permanent hearing impairment due to deafness in his left ear. As a result, he could not cope in a noise inherent primary school environment which affected his balance. All his attempts to engage the Second Respondent on his disability were in vain. In paragraph 4 of his founding affidavit initiating the proceedings before the Equality Court, he states the following:

“I went to the Labour Court in October 2005 for the first time and requested that the First Respondent must attend to my EMPLOYMENT EQUITY ACT - DISABILITY CLAIM. The employees in the employ of the First Respondent refused to ACT. The State Attorney, obo of the First Respondent, reassured Judge Francis that they will settle the disputes with me, the Applicant. This was a BIG FAT LIE. This never happened.”

[53] I have no reason to doubt that the Applicant's hearing impairment had an adverse effect on him as a teacher. Even though he conceded that he could perform his teaching functions, he was adamant that because of loss of balance consequent to noise, he was a danger to himself and the learners. Also, it is common cause that in 2005 the applicant was disqualified from receiving a pay progression due to poor performance which he attributed to his hearing impairment.

[54] The Second Respondent clearly ignored all the signs that highlighted the seriousness of the Applicant's plight as person with

disability. The report compiled by the principal of Yeoville Community School, Nagalingam Moodley, dated 26 May 2005 brought to

light the extent of the Applicant's challenges. Therein the following is recorded:

"Mr DC Senekal, Persal Number 143230087, had arrived at the School on 23rd August 2004 and was introduced to me and re-introduced to the other members of the School Management, by Dr V.S Richard the I.D.S.M, who also informed that Mr Senekal will be part of the staff again, after not being at the School for about 4 years, during which time he had been at an ABET Centre.

It was agreed that Mr Senekal would require some time and guidance in adjusting and orientating into the Primary School environment,

This does not seem to have been easy for Mr Senekal, as he has stated that he is not comfortable in the class with learners, as he is accustomed to the ABET environment.

He has not been able to become sufficiently orientated into the requirements of the School and has thus often, not been able to produce and or perform the required duties and tasks, on time or at all. This leads to a variety of disruptions within the planned outcomes of the School's schedule of activities, duties and tasks.

He has recently stated to the School Management Team, that he does not wish to be at a School, but would rather prefer to be at an ABET centre.

This seems to be the reason that he has been absent so often, and most of the time, without informing the School of his absence. At most times, his reasons for absence, goes beyond the leave determination schedule and is unacceptable and could have a negative impact on other Staff at the School. His absenteeism certainly has a very negative impact of the progress of learners."

[11] [55] I, accordingly, take a deem view of the manner in which the Second Respondent's officials handled the Applicant's grievances

and subsequent litigation. As difficult as it may have been to deal with the Applicant since he is a man who is not shy to put his thoughts on paper on every issue, at least they should have honoured the commitment to settle the Applicant's grievances they undertook before Judge Francis. On the contrary, they disappeared into the impenetrable bureaucratic systems for almost two years, leaving the Applicant with no option but to withhold his services due to the intolerable working environment and at the cost of his employment.

[56] In the premises, the Applicant successfully showed that he was discriminated against on the ground of disability.

Was the discrimination fair?

[57] The Code of Good Practice: Key Aspects on the Employment of People with Disabilities (2002) ("the Code"), is an important guide for employers and employees on key aspects of promoting equal opportunities and fair treatment for people with disabilities as required by the EEA. In its preamble, the Code underscores the importance of fair treatment of people with disabilities 'since disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation is provided, people with disabilities can contribute valuable skills and abilities to every workplace, and contribute to the economy of our society'.

[58] Article 2 of the UN Convention on people with Disabilities, 2007 defines discrimination on the basis of disability as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.^[12]

[59] Item 6 of the Code deals with reasonable accommodation of people with disabilities and provides that:

"6.1. Employers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.

6.2. Employers may adopt the most cost-effective means that are consistent with effectively removing the barrier to a person being able to perform the job, and to enjoy equal access to the benefits and opportunities of employment.

6.3. Reasonable accommodation applies to applicants and employees with disabilities and may be required:

- (i) during the recruitment and selection processes;
- (ii) in the working environment;

(iii) in the way work is usually done and evaluated and rewarded; and

(iv) in the benefits and privileges of employment.

6.4 The obligation to make reasonable accommodation may arise when an applicant or employee voluntarily discloses a disability related

accommodation need or when such a need is reasonably self-evident to the employer.

6.5. Employers must also accommodate employees when work or the work environment changes or impairment varies which affects the employee's ability to perform the essential functions of the job.

6.6. The employer should consult the employee and, where practicable, technical experts to establish appropriate mechanisms to accommodate the employee.

6.7. The particular accommodation will depend on the individual, the impairment and its effect on the person, as well as on the job and the working environment...”

[60] In *Hoffmann v South African Airways*[13] the Constitutional Court endorsed the description of unfair discrimination as enunciated in *President of the Republic of South Africa v Hugo*[14] where it was held that ‘at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution

all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person

discriminated against’.

[61] In *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*,[15] this Court held that the conduct of a bank in dismissing an employee on the ground of incapacity constituted unfair discrimination under EEA for failure to provide reasonable accommodation.

[62] In the present matter, it is common cause that the Second Respondent failed to reasonably accommodate the Applicant. As a result, the Applicant was subjected to intolerable working conditions which led him to respond by withdrawing his services out of desperation. I have no doubt that the conduct of the Second Respondent affronted the Applicant’s fundamental dignity hence I find it to constitute an unfair discrimination.

[63] The Applicant also testified that the Second Respondent failed to consider him for promotion in a school that would have reasonably

accommodated him. Even though the employee is no longer seeking promotion as a relief, that claim serves to prove that the Second

Respondent was in a position to reasonably accommodate the Applicant in a manner that would not have imposed an undue burden.

[64] The Respondents did not even attempt to justify the Second Respondent's conduct in unfairly discriminating against the Applicant, prudently so, as the conduct of the Second Respondent falls outside the purview of Section 6(2)(b) of the EEA.

Relief

[65] In terms of Section 50(2)(a) of the EEA, the Court may make 'any appropriate order that is just and equitable in the circumstances, including...payment of compensation by the employer to that employee'. As such, I have considered, as appears from what I have said earlier, the unconscionable manner in which the Second Respondent's officials dealt with the dispute from the beginning; the fact that people with disabilities need a special protection since they are vulnerable; and the muddled manner in which the Applicant approached this litigation. It is my view, therefore, that a compensation equivalent to 12 months remuneration is just and equitable.

Costs

[66] The Applicant is also seeking costs even though he was not represented during the hearing of these matters. Still, I deem it fair to award costs for all the instances in which he was legally represented.

Order

[67] In the circumstances, I make the following order covering both matters:

1. The application for condonation is granted.
2. The claims for medical aid contribution; cash bonus; pay progression; Employment Equity Plan and Reports; and compliance with the OHSA are dismissed.
3. The Second Respondent unfairly discriminated against the Applicant on the ground of disability.
4. The Second Respondent is ordered to pay the Applicant an amount equivalent to 12 months' remuneration, calculated at the rate of his remuneration on 31 December 2007, the date of his dismissal.
5. The Respondents are ordered to pay costs.

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

In person

FOR THE RESPONDENTS:

Adv S Baloyi

Instructed by:

The State Attorney

[1] In NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home

[2004] 10 BLLR 979 (LAC) the LAC noted that the EEA incorporates section 136(1) of the LRA by reference. That provision sets a deadline of 90 days from the date on which a certificate is issued for a party to refer a dispute for arbitration.

[2]

[2015] 2 BLLR 137 (LAC) at para 17.

[3] See page 7 of bundle 2.

[4] Centre for Child Law v Minister for Justice and Constitutional Development and Others 2009 (6) SA 632 (CC) at para 106.

[5]

[2004] ZACC 15; 2004 (7) BCLR 687 (CC) at para 72.

[6]

[2005] 11 BLLR 1084 (LC).

[7] 1998 (1) (SA) 300 (CC) paras 78 - 81.

[8] Above n 5 at para 81.

[9] Above at para 89.

[10] See the Preamble to the EEA.

[11] See page 26 of bundle 2.

[12] Article 2 of the UN Convention on people with Disabilities, 2007. This definition has been incorporated into the amended Code.

[13]

[2000] 12 BLLR 1365 (2001 (1) SA 1) (CC).

[14]

[1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC).

[15] Standard Bank of South Africa v CCMA & others [2007] ZALC 98; [2008] 4 BLLR 356 (LC).

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