

EMPLOYMENT

Does the inconsistent application of the requirements set out in a promotional post advertisement constitute an unfair labour practice?

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ISSUE

Is an employer's failure to consistently apply the requirements set out in a promotional post advertisement an unfair labour practice? If so, what award should be issued?

SUMMARY

An employer's inconsistent application of the requirements set out in the promotional post advertisement constitutes an unfair labour practice. An employee may be awarded compensation calculated with reference to the salary of the position that was applied for.

COURT'S DECISION

In the case of *Public Servants Association of South Africa obo Mvala and another v South African Social Security Agency* [2018] 4 BALR 410 (CCMA), the employer, SASSA, advertised a position of Manager: Admin Support in the Motheo District. The advertisement for the post mentioned that preference would be given to candidates with a disability and African females. A total of 109 candidates applied for the post. The final shortlist of the post comprised of eight candidates, seven of whom were females and one African male. The candidate who the post was initially offered to, an African Female, declined it. The only African male on the final shortlist, was then appointed in the post. The applicants in this case had applied for the post and were both African males. They argued that they were not shortlisted because they did not meet the Employment Equity target of the post. The employees referred an unfair labour practice dispute to arbitration, submitting that their exclusion from the shortlist constituted an unfair labour practice.

The Commissioner gave effect to the Labour Appeal Court's decision in *City of Cape Town v SA Municipal Workers Union obo Sylvester and others* (2013) 34 ILJ 1156 (LC), where the court held that in deciding whether the employer acted fairly in failing or refusing to promote the employee, it is relevant to consider the following:

1. whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer;
2. whether the employer's decision was arbitrary, or capricious or unfair;
3. whether the employer's decision not to promote was discriminatory;
4. whether there were unsubstantial reasons for the employer's decision not to promote; and
5. whether the employer's decision not to promote was based upon a wrong principle.

The Commissioner acknowledged the decision in *Noonan v Safety and Security Sectoral Bargaining Council and others* [2012] 33 ILJ 2597 (LAC), where the court held that there is no right to promotion, but only a right to be given a fair opportunity to compete for a post. Any conduct that denies an employee such an opportunity constitutes an unfair labour practice.

The Commissioner held that the decision of the employer to appoint an African male, while excluding the two applicants, being from the same race and gender and having similar qualifications and experience, rendered the decision arbitrary, capricious, unfair and possibly discriminatory and wrong on principle.

The Commissioner concluded that the employer committed an unfair labour practice against the employees by excluding them from the shortlist for the post and awarded each employee compensation equal to six months of the bottom value of the salary scale of the position for which they applied.

IMPORTANCE OF THIS CASE

An employer should be cautious when shortlisting candidates for a post. An employer should apply the same set of requirements to all applicants, as an inconsistent application may constitute an unfair labour practice. This may result in a compensation award based on the salary of the promotional post.



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