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EMPLOYMENT

WHERE A FAILURE TO CONDUCT JOB GRADING DEPRIVES AN EMPLOYEE OF BENEFITS IT MAY AMOUNT TO AN UNFAIR LABOUR PRACTICE

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ISSUE

Whether the failure to implement a performance management system in relation to job grading and job evaluation systems amounts to an unfair labour practice where the effect of such failure deprived employees of benefits.

SUMMARY

Where the failure of an employer to evaluate employees on performance based contracts deprives such employees of salary increases, an unfair labour practice may have been committed.

FACTS

In the matter of ***National Tertiary Education Union obo Mahomana and Another v University of Fort Hare*** [2019] 10 BALR 1102 (CCMA) the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") dealt with the above issue. The facts of the matter are briefly as follows:

The Applicants, Bulelani Mahomana and Charles Hanyani, were employed as sport officers at the University of Fort Hare ("**the Respondent**"). They were initially employed on a one year fixed term contract which expired on 1 January 2016. The Applicants referred an unfair labour practice to the CCMA which was settled on the following terms:

- The Respondent agreed to employ the Applicants on a permanent basis with effect of 1 September 2016 and retrospectively from 1 January 2016;
- The Applicants' one year contract would convert to a five year performance based contract with effect of 1 September 2016 to 31 December 2020; and
- The Applicants would receive back pay from 1 January 2016 on 22 September 2016.

The Respondent did not comply fully with the terms of this settlement agreement by not upgrading and evaluating the Applicants' job performance for a period of three years. This occurred even though there was a performance management system in terms in respect of which the Applicants were expected to sign a performance agreement. The Applicant's referred the matter to the CCMA.

At arbitration, the Applicants asked that their jobs be evaluated and upgraded with effect from the date of their appointments. They alleged that the Respondent had violated its own policy relating to benefits. The Applicants sought six months' compensation if it was found that the Respondent indeed committed an unfair labour practice.

In support of their case, the Applicants stated that they were absorbed by the Respondent in 2016 and employed as sports coaches. The Applicants had indicated to management that they were unhappy about their employment conditions. Nothing came of this and after exhausting all internal options, they referred the dispute to the CCMA.

Evidence, in the form of correspondences from management, was presented which proved that the Respondent committed to evaluating their job performance in accordance with the employment contracts. The Respondent had failed to do so. The Applicants unsuccessfully

lodged grievance letters with management but did not receive performance appraisals for three years.

The Respondent argued that the Applicants did not follow the correct reporting lines in order to have their jobs evaluated. It was confirmed that the Applicants' job grading and evaluation had not been completed as the Respondent was awaiting documentation from the human resources department. With regard to the grievances submitted by the Applicants, it was argued that this was not finalised due to incorrect reporting lines.

COMMISSIONER'S EVALUATION

Section 186(2)(a) of the LRA defines an 'unfair labour practice' as "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 reasons relating to probation) or training of an employee or relating to the provision of benefits to an employee." (Emphasis added)

The Commissioner held that it was common cause that the Applicants' contracts of employment were performance based contracts and that they had not been graded or evaluated. This omission deprived the Applicants of a salary increase and the further benefits enjoyed by other employees for three years.

It was held that there may be many forms of unfair conduct by an employer, but section 186(2) of the LRA confines itself to specific acts. An employee thus bears the onus of proving that the employer's conduct falls within the ambit of section 186(2) of the LRA.

The Commissioner found that the Applicants' recourse lay in their employment contracts. The Commissioner found that the Respondent committed an unfair labour practice when it failed to upgrade and evaluate the performance of the Applicants. This deprived them of benefits and salary increases for a period of three years and was accordingly unfair.

The Commissioner awarded the Applicants six months' remuneration and ordered that the Respondent upgrade and evaluate the Applicants' job performances in terms of their employment contracts and the evaluation policy within 30 days of the date of the award.

IMPORTANCE OF THE CASE

Where an employer fails to grade an employees post, in circumstances where there is a requirement to do so, and such employees are deprived of benefits as a result thereof, this could result in an unfair labour practice having been committed.



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