



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Not Reportable

Case no: CA07/2017

In the matter between:

PUBLIC SERVANTS ASSOCIATION o.b.o. EL THORNE

Appellant

and

DEPARTMENT OF COMMUNITY

SAFETY (WESTERN CAPE)

First Respondent

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Second Respondent

JACQUES BUITENDAG N.O.

Third Respondent

Heard: 08 May 2018

Delivered: 08 June 2018

Summary: Unfair labour practice – employee’s appointment for the advertised post fell through because she did not have the requirement NQF qualification with 320 credits – employee having a level qualification but with 120 credits – employee contending unfair labour practice that but for her qualification she would have been appointed.

Held: In the setting of appointment criteria in relation to the requirements of a post, the Department is allowed to set an educational standard which it

believes is reasonable for the requirements of the post. The employee's argument attaches insufficient significance to the number of credits assigned to a qualification. The goal of professional merit in the public service confers a managerial prerogative to require a three-year or 360 credits qualification at NQF Level 6 for the post of a Deputy Director; and hence it may reasonably be held, as the arbitrator did, that this is what the Department meant in the job advertisement by an appropriate tertiary qualification at NQF Level 6. It might have been better to have stipulated the number of credits required for the post in the advertisement, but the condition of an appropriate qualification was broad enough to include the Department's prerequisites of 360 credits for eligibility and appointment. There is accordingly no merit in the appellant's submission that the Department amended the advertised criteria. Labour Court judgment's upheld – Appeal dismissed.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals (on behalf of its member, Ms Thorne) against a decision of the Labour Court (Matyolo AJ) dismissing its application to review the arbitration award of the third respondent ("the arbitrator") which held that the first respondent, the Department of Community Safety ("the Department") had not committed an unfair labour practice¹ by refusing to promote Ms Thorne to the post of Deputy Director: Security Support Services, Strategic Planning and Knowledge Management. The appellant appeals with the leave of the court *a quo*.

[2] On 27 January 2014, the Department advertised the post of Deputy Director: Security Support Services, Strategic Planning and Knowledge Management. The job advertisement stipulated three minimum requirements: i) an

¹ As contemplated in section 186(2)(a) of the LRA

appropriate tertiary qualification at NQF level 6; ii) a minimum of three years' management experience; and iii) a valid driver's licence.

- [3] Ms Thorne, an Assistant Director: Security Support Services in the Department applied for the post during February 2014. She had acted in the post between 1 August 2007 and September 2014, and thus in effect sought promotion to the post she had occupied in an acting capacity for seven years.
- [4] Ms Thorne was shortlisted and then interviewed for the post on 11 June 2014 by the Department's selection panel. Subsequent to scoring Ms Thorne and a colleague, Ms Lutz, the same, the selection panel nominated Ms Thorne to the post as their preferred candidate.
- [5] After the selection panel's recommendation of Ms Thorne as the preferred candidate, her documentation was sent in accordance with the prescripts of the advertisement to a service provider to conduct checks for verification purposes. After confirmation that Thorne indeed held the relevant qualification, as indicated in her *curriculum vitae*, further checks were conducted to determine its level. It then came to light that Ms Thorne had not met the requirements of the post. Ms Thorne's Advanced Certificate qualification at NQF level 6 comprised only 120 credits. The Department maintains that as such her qualification fell below the minimum of 360 credits required for the post.
- [6] An NQF level 6 tertiary qualification may be a diploma or an advanced certificate. An advanced certificate has 120 credits while a diploma may have 240 or 360 credits. Ms Thorne has an Advanced Certificate in Management Studies, which is a tertiary qualification at NQF level 6 with 120 credits.
- [7] Ms Thorne was informed on 30 September 2014 that she had been unsuccessful in her application for the position. She lodged a grievance against her non-appointment on 10 October 2014. The Department determined the grievance on 3 December 2014 and addressed a letter to Ms Thorne as follows:

'Your grievance dated 9 October 2014, has reference.

After careful consideration of all the relevant facts and information at the Department's disposal, it was found that your grievance relating to the recruitment and selection process followed in the post of Deputy Director: Security Support Services [SL 11], within the Department of Community Safety (CS 4/2014), is unsubstantiated for the reasons as set out below.

One of the minimum requirements as per the advertisement of the said post was for applicants to have an appropriate tertiary qualification at a NQF level 6.

During the verification process, it was found that you had successfully completed an Advanced Certificate in Management Studies at the Management College of Southern Africa (MANCOSA). This qualification meets the requirements of the South African Qualifications Authority (SAQA) as a National Qualifications Framework (NQF) level 6 certificate with 120 NQF credits. You have therefore only obtained 120 NQF credits towards the required 360 NQF credits attached to a NQF level 6 tertiary qualification.

You could not be appointed in the post as you did not obtain the minimum tertiary qualification at NQF level 6 as stipulated in the advertisement.

In light of the above, your grievance is unsubstantiated.'

[8] Ms Thorne thus has completed an Advanced Certificate in Management Studies at MANCOSA which met the requirements of the South African National Qualifications Authority (SAQA) as a National Qualifications Framework (NQF) Exit Level 6 certificate with 120 minimum total credits.

[9] The only material issue in dispute during the arbitration proceedings was whether her qualifications met the minimum requirement set by the advertisement of an appropriate qualification at NQF 6 level. It was common cause that she met the other minimum requirements and in fact would have been appointed but for the dispute over her qualifications.

[10] The Department's case, as appears from the letter of 3 December 2014, and persisted with in the arbitration, is that Ms Thorne's qualification only constituted 120 NQF credits of the required 360 NQF credits which it alleged was required in order to constitute a NQF level 6 qualification. Her

qualification was a one year as opposed to a three-year tertiary qualification. Mr Human, an Assistant Director: Talent Sourcing Unit, testified on behalf of the Department that the appropriate tertiary qualification for this post was one with a minimum of 360 credits. Ms Thorne referred to the gazetted NQF² to substantiate her contention that 120 NQF credits was sufficient to qualify one for a NQF exit level 6 qualification. Her case was that the Department had unilaterally and unfairly increased the minimum entry requirements beyond what was encompassed in the advertisement. She alleged that but for this change, she would have been appointed to the advertised position.

[11] The arbitrator found that the Department had not committed an unfair labour practice. His essential reasoning was as follows:

'From the onset... it was never in dispute that the Applicant has the ability to perform the duties of the advertised position... The Respondent also trusted her to act in this position for several years and nominated her for appointment. I must however hasten to add that acting in a position does not create an automatic right to be appointed....The only reason for the Respondent not to appoint the Applicant was because, according to the Respondent, she did not meet their minimum qualification requirements for appointment as Deputy Director.....

The Applicant and the Respondent have different interpretations of what an appropriate tertiary qualification at NQF level 6 is. The Respondent claims that the Applicant's one-year qualification with 120 NQF credits are towards a required 360 NQF credits attached to a NQF level 6 tertiary qualification. The Applicant on the other hand argues that her one-year advance certificate of 120 NQF credits is indeed a NQF level 6 qualification

From Mr. Human's testimony it is clear that the Respondent always considered the minimum qualification requirement for appointment to this position being a three-year qualification with 360 NQF credits and not a one-year qualification worth 120 NQF credits. The fact that the advertisement did not clearly state a three-year tertiary qualification, similar to the wording in the advert for the Deputy Director: Security Advisory Services position (annexure

² GG 36797 30 August 2013

J1 of the Applicants bundle), does not mean that the Respondent amended the qualification criteria or acted dishonest or unethical in the process (*sic*)...

However, the three spheres of government, which include Provincial Government, must be allowed to set reasonable minimum academic qualifications for appointment into certain senior positions. I cannot find that a minimum qualification standard of a tertiary three-year (360 NQF credits) for appoint (*sic*) as a Deputy Director Deputy Director: Security Support Services, Strategic Planning and Knowledge Management is unreasonable or unfair. To put it differently, I do not believe that I can intervene when an employer has set reasonable minimum academic requirements for appointment.

The Applicant had a fair opportunity to compete for the post and I have no doubt that if she had a tertiary three-year 360 NQF credit qualification she would have been appointed. I cannot find bad faith on the part of the Respondent for not appointing the Applicant and its conduct was not motivated by any unacceptable reasons..."

[13] In its review application, the appellant contended that the arbitrator's award was unreasonable because Ms Thorne met the requirements of the post and the Department had accordingly acted unfairly by denying her promotion. It submitted that the arbitrator committed a gross error of law by effectively finding that the Department had an overriding discretion to make a promotion based on its subjective (and allegedly erroneous) views as to what the qualification criteria were.

[14] The Labour Court held that the decision of the arbitrator was reasonable and not vitiated by a gross error of law. It found that the Department had not changed the requirement that a candidate must be in possession of an NQF level 6. Rather there are various credit levels within NQF level 6 and the evidence established that in this case the requirement was a NQF level 6 qualification with 360 credits. The fact that the number of credits was not in the job advertisement, the Labour Court held, could not justify the appointment of an employee who otherwise did not meet the minimum requirements. It concurred with the arbitrator's finding that the government enjoys a prerogative to set reasonable standards or levels of qualifications for

senior positions provided it is not driven by prejudice or wrong principle. There was moreover no evidence of bad faith or improper motive. Thus, the award of the arbitrator was not so unreasonable that no reasonable arbitrator could have made it. It accordingly dismissed the application for review.

[15] Section 186(2)(a) of the LRA defines an unfair labour practice to include any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion of an employee.

[16] When evaluating the suitability of a candidate for promotion an employer must act fairly. A promotion decision is however not a mechanical process and there is a justifiable element of subjectivity or discretion involved. Thus an arbitrator typically will interfere only where the decision is starkly unreasonable, improperly motivated or *mala fide*.³ The employee bears the *onus* to prove the alleged unfairness.

[17] The merits of the appellant's case must be evaluated against the backdrop of the Higher Education Qualifications Framework (HEQF), and the revised Higher Education Qualifications Sub - Framework (HEQSF). The HEQF was published on 5 October 2007⁴ by the Minister of Education as a policy in terms of the Higher Education Act, 1997.⁵ The implementation date of the HEQF was 1 January 2009. The Council for Higher Education reviewed the HEQF in October 2010. The Higher Education Qualifications Sub-Framework (the HEQSF) was approved as a revised policy by the Minister of Higher Education and Training in terms of the National Qualifications Act.⁶

[18] The HEQSF took effect in January 2013.⁷ The framework applies to all higher education institutions, both public and private, and to all qualifications that purport to be higher education qualifications and is an integral part of the NQF. It consists of level descriptors, the qualification routes, the main qualification types and their descriptors, qualification standards and

³ *Ncane v Lyster NO and Others* (2017) 38 ILJ 907 (LAC) at para 25.

⁴ Government Gazette, Vol 508, No. 30353.

⁵ Act 101 of 1997.

⁶ Act 67 of 2008.

⁷ Notice 1040 of 2012; Government Gazette No. 36003 of 14 December 2012.

designators for designated variants and qualifiers for qualification specialisations. It recognises credits as the measure of the volume of learning required for a qualification, quantified as the number of notional study hours required for achieving the learning outcomes specified for the qualification. The volume of learning required for a qualification is specified in terms of the total number of credits required, and in terms of the minimum number of credits required at its specified exit level on the qualifications framework. An average full-time equivalent student is expected to study for a 40-hour week, thus requiring a minimum credit load of 120 credits per academic year for Certificates, Diplomas and Bachelor's Degrees.

- [19] The NQF has 10 levels. Higher education qualifications occupy six levels of the NQF, namely levels 5 to 10. Levels 5 to 7 comprise undergraduate qualifications (with the exception of the professional Bachelor's degree at Level 8) and levels 8 to 10 refer to postgraduate qualifications.
- [20] The HEQS specifically provides that the positioning of two or more qualifications on the same NQF level indicates only that the qualifications are broadly comparable in terms of the general level of learning achievements. It does not indicate that they have the same purpose, content or outcomes, nor does it necessarily demonstrate equivalence of qualifications or credits.
- [21] The erstwhile HEQF provided for an advanced certificate with 120 minimum total credits and a diploma with 360 minimum total credits at NQF Exit Level 6. There were no variants within the diploma qualification during 1 January 2009 to January 2013 when the HEQF was in force. The HEQSF now provides for an advanced certificate with 120 minimum total credits and for two variants of diplomas with either 240 or 360 minimum total credits.
- [22] Despite both qualifications being at the same NQF Level 6, the advanced certificate (120 credits) differs significantly from a diploma (360 minimum total credits under the old HEQF and 240 or 360 minimum total credits under the HEQSF) in the volume of learning as specified in terms of the total number of credits required for these qualifications.

- [23] Ms Thorne's certificate is thus recognised as a qualification at NQF Level 6 with 120 minimum total credits. At the time that the advertisement was placed in January 2014, the HEQSF was already in operation and the variance (240 or 360 credits) within the diploma qualification at NQF Level 6 was applicable.
- [24] In the setting of appointment criteria in relation to the requirements of a post, the Department is allowed to set an educational standard which it believes is reasonable for the requirements of the post. The appellant's argument attaches insufficient significance to the number of credits assigned to a qualification. The goal of professional merit in the public service confers a managerial prerogative to require a three-year or 360 credits qualification at NQF Level 6 for the post of a Deputy Director; and hence it may reasonably be held, as the arbitrator did, that this is what the Department meant in the job advertisement by an *appropriate* tertiary qualification at NQF Level 6. It might have been better to have stipulated the number of credits required for the post in the advertisement, but the condition of an appropriate qualification was broad enough to include the Department's prerequisites of 360 credits for eligibility and appointment. There is accordingly no merit in the appellant's submission that the Department amended the advertised criteria. Nor, given the level and responsibilities of the post, was it illegitimate, irrational or unfair to insist on the highest qualification (360 credits) at Level 6 and to interpret the threshold requirements in the advertisement accordingly.
- [25] Counsel for the appellant, Mr van der Riet SC, however, contended that there was in fact no policy requiring 360 credits for the post. He submitted that the evidence of Mr Human was insufficiently credible and reliable in that regard.
- [26] It is clear from the award that the arbitrator accepted the evidence of Mr Human that there was such a policy even though Mr Human could not point to any documentary evidence in support of it. Mr Human was nonetheless adamant that a 360 credit qualification was the minimum. His stance is borne out by the facts of this case. Ms Thorne had acted in the position for 7 years, she was the preferred and initially selected candidate, and was only disqualified after a due diligence exercise revealed that her certificate fell short of the 360 credits. Those facts lend some support to a reasonable

inference that the alleged policy was in place. But even had the arbitrator erred with regard to the existence of the policy, such error would not distort the outcome so as to render the award unreasonable. The arbitrator identified the issues correctly and considered the evidence fully. He weighed the managerial prerogative to impose higher qualifications for senior professional staff against Ms Thorne's legitimate career ambitions, and struck a reasonable equilibrium by deferring to the requirement of higher standards in the public service. In so doing he acted reasonably, and the Labour Court consequently did not err in concluding that the award was not reviewable.

[27] As regards costs, Ms Thorne has reasonably sought to vindicate her rights in the face of an admittedly ambiguous job advertisement for the post she occupied for seven years. In the circumstances, there should be no award of costs against her.

[28] In the result, the appeal is dismissed.

JR Murphy AJA

I agree

B Waglay JP

I agree

K Savage AJA

APPEARANCES:

FOR THE APPELLANT:

Adv van der Riet SC

Instructed by Cheadle, Thompson and
Haysom

FOR THE FIRST RESPONDENT:

Adv M C Solomon

Instructed by: The state attorney

LABOUR APPEAL COURT