PROMOTION: UNFAIRNESS CLAIMS

The previous employee relations article provided tips for building sound and healthy employee relations in the workplace. However, it is given that there will be instances in which employees are not happy with some employment-related decisions either in relation to employment or promotion which could result in labour disputes.

It is thus appropriate to indicate that the purpose of the Labour Relations Act 66 of 1995 as amended (LRA) is to provide for, amongst others; the effective resolution of labour disputes. In that regard, Section 186(2) of the LRA refers to an 'unfair labour practice' as any unfair act or omission by the employer towards an employee relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation), or training of an employee or relating to the provision of benefits to an employee. Disputes between employers and employees regarding promotions have been dealt with by various forums. The said forums are the Commission for Conciliation, Mediation and Arbitration (CCMA); Bargaining Councils; Labour Court; and Labour Appeal Court. Consequently, certain principles relating to promotions have been developed. For instance, in *Ngcobo v Standard Bank of South Africa and Others (D439/12) [2013] ZALCD 33 (25 September 2013)*, reference was made to *SAPS v SSSBC, Robertson NO and Nooven*, in which Cheadle AJ summarized the principles relating to promotion as follows:

- There is no right to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post*, e*xcept when there is a contractual or statutory right to promotion.
- Any conduct that denies an employee a fair opportunity to compete for a post constitutes an unfair labour practice.
- If the employee is not denied the opportunity to compete for a post, the only justification for scrutinizing the selection process is to determine whether the appointment was arbitrary or motivated by an unacceptable reason.
- The corollary of this principle is that as long as the decision can be rationally justified, mistakes in the process of evaluation do not constitutes unfairness justifying an interference with the decision to appoint*/promote*.
- Because there is no right to promotion in the ordinary course, the appropriate remedy, as a general rule, is to set aside the decision and refer it back with or without instructions to ensure that a fair opportunity is given. Since the interest is the fair opportunity to compete, it follows that that should be the appropriate remedy rather than appointing*/promoting* the applicant to the post (or to a post on equivalent terms) or to compensate (there being no loss). There are two exceptions. This principle does not apply to discrimination or victimization cases in respect of which different and compelling constitutional interests are at stake. It also does not apply if the applicant proves that but for the unfair conduct (that is, if it was not for the unfair conduct), she would have been appointed.

The exact similar position was confirmed in *Department of Justice v CCMA & others (2004) 13 LAC* where it was stressed that there is no right to be promoted, but only a right to be treated fairly in the process of promoting or appointing an employee to a post. Again, the normal recruitment and selection requirements, very importantly, the requirement of fairness and objectivity was emphasized.

Promotion-related disputes normally arise from when an applicant for a higher post has acted in the said post for a certain or extended period of time. They normally claim that, by virtue of having

performed/acted satisfactorily in the said post, a legitimate expectation was created that they would be promoted to the post in question should it be advertised. However, in *Swanepoel v Western Region District Council & another [1998] 19 ILJ 1418 (SE)*, it was held that acting in a higher position does not confer a right to promotion to that post or grade irrespective of whether the applicant's immediate supervisor was impressed with her diligence, trustworthiness and all-round abilities. The exact same position was confirmed in *Ga-Segonyana Local Municipality v Venter N.O. and Others (JR961/13) [2016] ZALCJHB 391 (11 October 2016)*, and in *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others*. Similarly, Nicolene Erasmus (from the South African Labour Guide) asserts that the applicant's reference to a legitimate expectation is, in fact, nothing more than the applicant's own expression. In fact, in *Ga-Segonyana Local Municipality v Venter N.O. and Others* supra, and in *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others*, it was held that that expectation should be assessed within the context of a normal recruitment process, (i.e. the normal recruitment process must be followed).

Acting allowance prescripts particularly indicate that no legitimate expectation must be created in respect of a person acting in a higher position. After all, the employer does pay the employee acting in a higher post an acting allowance during the said period subject to meeting the requirements prescribed in the said/relevant prescript. For instance, in the General Public Service, the payment of an Acting Allowance is provided for by the GPSSBC Resolution 2 of 2002. This Resolution stipulates, amongst others, that the fact that an employee has been appointed in an acting capacity does not create a right or legitimate expectation to be appointed when the vacant post is advertised. Nevertheless, promotion-related disputes persist in the Public Service as is the case also in the Private Sector. For instance, in *Ngcobo v Standard Bank supra*, it was confirmed that it is within the employer's prerogative to promote and appoint an employee, and that the only determination that needs to be made is whether the employer acted unfairly, and whether had it not been for the unfairness, the employee would have been promoted or appointed. Furthermore, in *Ga-Segonyana Local Municipality v Venter N.O. and Others* supra, it was held that **"central to appointments or promotion of employees is the principle that courts and commissioners alike should be reluctant, in the absence of good cause, to interfere with the managerial prerogative of employers in making such decisions"**. This clearly demonstrates, therefore, that courts and commissioners will not willy-nilly (haphazardly) interfere with the employer's employment and promotion related managerial prerogative.

In conclusion, the fact that 'promotion' is covered by section 186(2) of the LRA does not, by any means, create a right to promotion. It only implies that an employee (i.e. applicant for a position) has a right to be fairly considered for a promotion (or appointment). In fact, it fundamentally confers a legal right to fair labour practice with respect to appointments and promotions of employees/officials, which is, a right to be treated fairly in the process of promotions or appointments (of employees to positions). In that regard, employers must ensure that fairness and objectivity always prevail when appointing and promoting employees to vacant positions/posts. After all, the overall test in these cases is one of fairness (*Ga-Segonyana* supra).

(An opinion from the labour desk.
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MH Ngcobo