

Short notes on:

PRINCIPLES THAT COULD SERVE AS GUIDELINES TO DETERMINE DISPUTES ABOUT PROMOTION

Introduction

Promotion is an essential characteristic of the employment relationship, and it involves the process of advancing an employee from position to another position or job that may have a higher salary range, a higher status or job title and often to more responsibility in the workplace. A promotion is often viewed as desirable by employees because of the impact it has on pay, authority and responsibility. But what happens when an employee feels aggrieved when overlooked or being rejected when applying for promotion?

In terms of the Labour Relations Act (“the Act”),¹ every employee has the right not to be subjected to unfair labour practice.² An unfair conduct by the employer relating to the promotion of the employee constitutes an unfair labour practice.³ Therefore the employee can refer the matter to the CCMA on the grounds of unfairly labour practice within 90 (ninety) days of the act or omission that allegedly constituted the unfair labour practice.⁴

Dlamini v Toyota SA Manufacturing CCMA(KN5341-03)

In 1994, Mr Dlamini was employed by Toyota SA Manufacturing as an Industrial Engineer. He applied for a promotion post in February 2001. His application was unsuccessful after he underwent a psychometric test. on May 2001, as a result of having been unsuccessful in his previous application for a promotion, he applied for another position but was again unsuccessful. He referred the matter to the CCMA on the grounds on the of unfair labour practice based on the employer's failure to appoint or promote him. His claim was based on submissions that he exceeded the minimum requirements for the post; he was the best candidate, most qualified applicant, had a long service record, and the employer did not act in accordance with its own employment equity policy.

In the CCMA, the commissioner suggested the following principles be applied when determining the dispute:

¹ Act No. 66 of 1995.

² Section 185 (b) Act No. 66 of 1995.

³ Section 186(2)(a) Act No. 66 of 1995.

⁴ Section 191(1)(b)(ii) Act No. 66 of 1995.

1. Where an employer failed to promote an employee, the CCMA and Courts should be hesitant to interfere with the exercise of management's decision in the absence of gross unreasonableness;
2. The legislature did not intend that arbitrators should assume the role of employment agencies;
3. The commissioner's function is not to ensure that the employer chooses the best candidate for promotion but to ensure that employers do not act unfairly towards candidates;
4. When it appears that the 'best' or 'most worthy' candidate was not promoted, the relative inferiority of a successful candidate is only relevant in so far as it suggests that the superior candidate was overlooked for some unacceptable reason including a reason listed in section 6 of the EEA / discrimination;
5. The legislature did not intend commissioners to concern themselves with the reasons the employer declined to promote the employee rather, it is the process which led to the decision not to promote the employee that is of concern.
6. Therefore, the reasons for the decision to overlook an employee when selecting a candidate for promotion are relevant only in so far as they shed light on the fairness of the process.

Conclusion

An employee may claim an unfair labour practice against an employer in terms of the Act, especially when they feel aggrieved by the unfair conduct of the employer. For an employee to succeed with a claim for unfair labour practice based on promotion, he/ she must prove that the employer refused to promote him/her, and the onus is on the employee to also prove that the refusal was unfair.

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