

IN THE LABOUR COURT OF LESOTHO

LC44/09(B)

HELD AT MASERU

In the matter between:

PHEKO MAFANTIRI

APPLICANT

AND

LESOTHO REVENUE AUTHORITY

RESPONDENT

JUDGMENT

DATE: 23/04/12

Compensation-Where respondent failed to strictly observe job specifications it had set out in an advert - Court ruled the action unfair to the applicant in an earlier decision - However, Prayers sought by the applicant therein found to be impractical - Applicant is now before Court to seek compensation - Main issue in determining compensation is whether had it not been for the irregularity, the applicant would have been appointed to one of the posts he had applied for - It having emerged that the applicant scored low at the interview stage despite being best academically suited for the positions the Court concludes that he failed to prove a right to be appointed as he claimed, a right which would entitle him to compensation.

INTRODUCTION

1. The applicant is an employee of the Lesotho Revenue Authority, respondent herein. On or about April, 2007, he responded to an advertisement for two positions of Project Management Consultant and Change Management Consultant, respectively. He was unsuccessful in both positions and felt that the procedure adopted by the respondent somehow lacked transparency as the candidates who were appointed did not meet the requirements set out in the specifications as

advertised. He asserted that he was better qualified for the said positions as he squarely met the job specifications. The Court came to the conclusion in LC13/08 that it was irregular for the respondent to have appointed candidates who did not squarely meet the set out job specifications. He had sought an order declaring the respondent's conduct discriminatory; and further directing the respondent to restart the recruitment process in relation to the two positions and prayed in the alternative that the respondent be directed to appoint him to one of the remaining positions. The Court did not declare the action discriminatory as it ruled that the conduct complained of did not fall within the definition of "discrimination" as envisaged by the Labour Code Order, 1992. It ruled further that the prayers sought by the applicant were impractical for the reasons set out in the said judgment.

2. The formal requirements for the two posts as advertised were;

A. Change Management Consultant:

- ***A commercial degree and/or minimum of 2 years of work experience in project management environment roles;***
- ***Experience in developing change management strategies would be an added advantage.***

B. Project Management Consultant:

- ***Post graduate in Business Administration/Management plus formal training in project management and 4 years experience in a related field;***
- or***
- ***Degree in Business studies, management or commerce plus formal project management with 5 years experience in a related field.***

3. In his originating application in LC 13/08 the applicant had alleged that the three candidates who were appointed to the advertised positions did not have the requisite educational qualifications in Business Administration/Management nor a Bachelor of Commerce degree. He further maintained that they did not possess any formal training in project management as at 1st June, 2007, the date of their appointment. It emerged from the evidence tendered that one of the appointees

possessed a Bachelor of Arts degree in Public Administration and Political Science and the two held a Bachelor of Arts degree in Economics when the applicant held a Masters degree in Business Administration (MBA) following a Bachelor of Commerce (B. Comm.) degree. The applicant has now approached the Court seeking compensation in the amount of One and a Half Million Maloti (M1, 500 000.00) for the irregularity of appointing incumbents who did not strictly meet the specifications it had set out for itself in the advertisement. According to him, this amount represented the loss he suffered as a result of the unfair treatment in the form of lost increased earnings and gratuity.

4. The Court observed that it may well have been that those appointed were the most suited for the positions and would have been appointed in any event, but the employer failed to adhere to a criterion it had set for itself by not appointing candidates who had the qualifications specified in the job descriptions as advertised. The problem with some degrees is that courses that are taken towards them tend to overlap with those taken for others, hence in their advertisements employers have to draft their specifications in a manner that caters for a number of related fields. In the advertisements the word “*related field*” seems to have been used only in relation to experience, and the employer did not in LC13/08 contend that the appointed candidates fitted in the category of related field in respect of academic qualifications. Hence, the Court came to the conclusion in LC13/08 that there was somehow a lack of transparency in the appointments leading to the applicant’s allegation of discrimination.

5. Having made this determination, the issue then becomes: what kind of redress is available to the applicant? As aforementioned, a discrepancy arose at the short listing stage in that candidates who did not strictly meet the job specifications had been selected rendering the short listing process somehow deficient. The selection process is a multi-faceted process comprising mainly of advertisement of the post; screening of candidates for short listing purposes and interviews. *In casu*, though the short listing stage appeared irregular, it was not the end of the matter. It emerged in respondent’s answer that the applicant failed the interview. Applicant’s case is that he was better qualified and more suitable for the positions than the candidates who had been appointed. He thereby contended that in the circumstances he was entitled to be appointed to at least one of the advertised posts. He was claiming a right, a right which he has to establish.

6. In response, respondent’s Counsel submitted that the applicant could not be appointed to any of the positions as he had failed both interviews, and besides the appointed candidates there were others who had scored far higher than him. The

results of the interviews were filed of record. This evidence was not challenged by the applicant. Furthermore, the applicant never pointed to any flaws in the interview process, for instance challenging the style or trend of questioning being inclined towards some courses to suit certain candidates.

COMPENSATION AS A CONCEPT

7. The need for compensation derives from an infringement of a right. In its ordinary meaning the term envisages an amount to make amends for a wrong which has been inflicted - See *Camdons Realty (Pty) Ltd & Another v Hart (1993) 14 ILJ 1008 (LAC) 1018G*. The grant of compensation is an exercise of a discretion, which of course must be exercised judicially. In *Commander, Lesotho Defence Force & Others v Thloriso Letsie C of A (CIV) 28/09*, the Court reiterated a well established principle at paragraph 15 that each case must be decided on its own unique circumstances and that the trial judge has a wide discretion to award what he or she considers to be fair and equitable compensation. The Court pointed to the impracticality of the prayers sought in LC13/08 and enquired whether an award of compensation would be more appropriate without insinuating that it was a given. In determining whether or not the applicant deserved compensation the Court still had to determine whether he was entitled to it. The test is whether “*but for*” the respondent’s unfair conduct the applicant would have been appointed to one of the posts that he had applied for. It emerged from the papers filed of record that apart from the successful candidates, there were other candidates who had been short listed and some scored far higher than the applicant in the respective interviews.

8. By virtue of having been unsuccessful at the interview stage, the applicant had failed to prove that he was the best candidate, much as he possessed the relevant academic qualifications for the advertised positions. The principle set out in *Woolworths (Pty) Ltd., v Whitehead (2000) 21 ILJ, 571 (LAC)* and endorsed in *the University of Cape Town v Auf der Heyde (2001) 22 ILJ, 2647 (LAC)* and *National Commissioner of the SAPS v Safety & Security Sectoral Bargaining Council & Others [2005] 8 BLLR, 808 (LC)* is that there must be a causal connection between the act complained of and the prejudice suffered. It was not disputed that there were other candidates besides the applicant and the trio that was appointed. Applying this principle to the case before us, the applicant had to prove not only that he was better qualified and suited for the position of Change Management Consultant or Project Management Consultant than any of the other short listed candidates but also that he was the best of them all regard being had not only to the academic qualifications but to his performance at the interview. To

succeed in his claim for compensation the applicant had to prove that “*but for*” the irregularity committed by the respondent, he would have been preferred over the rest of the candidates.

9. There was no dispute that other candidates scored higher than the applicant at the interviews conducted for both positions, hence he turned out unsuccessful. On this point it appears there is no causal connection between the irregularity in the short listing and applicant’s non - appointment. Despite having been best suited academically for the two advertised positions, he failed to make it at the interviews. The applicant therefore failed to establish a right or an entitlement to one of the advertised positions. He based his claim for compensation on the salary that he would have received had he been appointed and gratuity attached to the said positions. As the applicant was unsuccessful at the interview stage, he cannot claim a right to any of the positions. As no right existed we cannot talk of any infringement thereof. No right has been lost *in casu*. The objective of compensation is two-fold. Besides redressing a harm arising from an infringement of a right, which is not the case in the circumstances of this case, it can also serve as a punishment for an irregularity. The Court feels inclined to offer the applicant compensation equivalent to one month’s salary (current position) for the irregularity committed because of respondent’s unsatisfactory explanation of the discrepancy in the screening process. His salary has just been used as a benchmark in assessing compensation.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 23RD DAY OF APRIL, 2012.

F.M. KHABO
DEPUTY PRESIDENT

J. TAU

I CONCUR

MEMBER

M. MOSEHLE
MEMBER

I CONCUR

FOR THE APPLICANT: ADV. S.S. MAFISA
FOR THE RESPONDENT: ADV. M. DICHABA