

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA01/2019

In the matter between:

CITY OF CAPE TOWN

Appellant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNIONS

Obo A DAMONS

Respondent

Heard: 27 February 2020

Delivered: 18 May 2020

Summary: Unfair discrimination based on disability – policy setting out requirements for advancement not discriminatory when disabled employee not capable of meeting the inherent requirements of the job.

Coram: Davis and Sutherland JJA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

[1] This case concerns whether an employee who suffers a disability was subjected to unfair discrimination, whether direct or indirect, as a result of an employment

policy or practice which was in breach of s 6 (1) of the Employment Equity Act 55 of 1998 ('EEA'). The facts relating to the dispute are in the main common cause. Mr Adam Damons, who is represented by respondent, was employed by appellant as a firefighter on 1 February 2001. During 2010, he suffered a permanent injury while on duty. The injury constitutes a disability for the purposes of the EEA, in that it is a long terms physical impairment which resulted in his inability to perform the duties of an active firefighter.

[2] On 23 January 2013, Damons was accommodated by way of being placed in an alternative post because of his disability. He was transferred to a position in the Finance and Billing section in Goodwood, Western Cape. Thereafter, he was placed in a position which he still occupies, in the Fire and Life Safety Education Section in Bellville. His current position does not require any intensive and physical exercise. His obligations are administrative and educational. Notwithstanding the position into which he was posted after his disability, he has continued to retain the designation of firefighter and is paid at the appropriate salary level for a firefighter, including a 22.8% standby allowance. It is common cause that he is no longer able to perform the core functions of a firefighter in that, owing to his disability, he cannot perform the physical activity associated therewith.

[3] On 1 April 2009, appellant published the City's Fire and Rescue Advancement Policy ('the Policy'). It applied to the advancement of permanent staff members actively involved with operational firefighting as well as rescue activities and any other functions delegated in terms of the Fire Brigade Services Act which include candidates from Learner Firefighter to Firefighter and to Senior Firefighter.

[4] In order to be advanced from the rank of Firefighter to that of Senior Firefighter, the Policy requires:

1. The recommendation of the Chief Fire Officer; and the approval from the Director Emergency Services

2. four years of continuous firefighting experience;
3. an accredited firefighter to SAESI certificate;
4. an accredited HAZMAT Operations certificate;
5. a basic ambulance service certificate;
6. a valid Code C 1 drivers licence with PrDP
7. C 1 response driver and pump operator;
8. successfully undergone a practical (physical) assessment as per service order – 6 NO2.

[5] According to appellant, Damons is unable to complete the practical assessment as a result of his disability. He is also unable to meet the inherent requirements of a firefighter.

[6] Damons claimed that the policy precluded him from advancing to the position of Senior Firefighter. Therefore, he contended that the Policy and its implementation constituted an act of unfair discrimination in breach of the EEA. Accordingly, he approached the court *a quo* for relief.

[7] In finding in favour of respondent and therefore Damons, Rabkin-Naicker J, sitting in the court *a quo*, rejected the argument of appellant, based on 'the inherent requirement of the job', namely that Damons was unable to continue as an active firefighter. In the view of the learned judge, the fact that appellant had decided to continue to employ Damons in the Fire and Rescue Services, albeit in a position that did not require active fighting, undermined its argument. In the view of the learned judge, the way in which appellant had applied the policy to Damons prevented him from advancement as a result of his disability and its conduct amounted to an act of unfair discrimination.

The appeal

- [8] On appeal, counsel for appellant emphasised that central to appellant's statement of defence from the outset was the inherent requirement of the job of a firefighter. In this connection, he referred to the statement of defence where the following appears:

'The job purposes of a Senior Firefighter is described in the Job Description Form as "perform[ing] a variety of task associated with responding to and dealing with fires and emergency situations, supervisor of junior ranks, rendering basic medical care and participating in fire safety work and training exercises as well as upholding station and equipment maintenance to ensure the delivery of effective and efficient emergency services in order to protect lives and property of the citizens of Cape Town in accordance with the Fire Brigade Service Act".

...

In order to ensure that all firefighters are physically fit, they must successfully complete an annual physical fitness assessment and where required routine physical drills. The applicant is not physically fit and able to perform the physical requirements of a firefighter. He accordingly does not meet the inherent requirements of a firefighter and senior firefighter.'

- [9] To the extent that there was any doubt that this was appellant's case, the pre-trial minute records as follows:

'Since the inception of the Policy, no firefighter has been advanced without having successfully completed the practical assessment referred to in sub paragraph 11.8 above.

The practical assessment requires a firefighter to present theoretical knowledge in a lecture and to be able to demonstrate the application of his or her theoretical knowledge physically.

Damons is unable to complete the practical assessment due to his disability. He is also unable to meet the alleged inherent requirements of a firefighter.'

[10] It is also recorded in this Minute that one of the issues which the court *a quo* was required to determine was 'whether the inherent requirement for physical fitness for a firefighter precludes his advance to the position of Senior Firefighter and further 'whether the Policy constitutes justifiable and unfair discrimination in as much as some distinguishes between persons on the basis of the inherent requirement of a job.'

[11] In the evidence of Mr Ian Schentler, the Chief Fire Officer of appellant, which evidence was not contested, the following was stated with regard to the requirements for advancement:

'It's extremely important in terms of being able to physically carry out the operations and being able to master the types of equipment and to be operationally be prepared through those three levels because the percentage of time spent doing those activities is the majority of the time spent, in terms of percentage-wise it would be between 80 and 90% of the time you would be doing those physical activities with that type of equipment on a daily basis.'

[12] Mr Schentler also informed the court about the background to the unfortunate accident suffered by Mr Damons and the implications thereof:

'Mr Damons joined the service around 2001 and was an operational firefighter and around 2010 he suffered an injury on duty which he was transferred from the station at which he suffered the injury to another fire station that was Milnerton to Brackenfell Fire Station and as a result of his injury he went through an incapacity process as he was ... he indicated and he was unable to do the operational aspects of the firefighters duties and though his incapacities ranged between 2011 through to if I recall the final incapacity on the ... between 2013 where he was first placed at finance and billing and then after which he was placed in the Fire and Life Safety Education section and he has been in the Fire and Life Safety Education section since 2013.'

[13] It is clear from this evidence that appellant raised the defence of the inherent requirements of the job in respect of the possible advancement of Damons to the

position of Senior Firefighter. Furthermore, since 2009, that is before Mr Damons' unfortunate accident had produced the Policy, that is on 1 April 2009. The Policy contained a specific requirement that before a Firefighter could be promoted to a Senior Firefighter there was a need to undergo a practical physical assessment which Mr Damons could not pass, owing to his disability.

Inherent requirement of a job

[14] In *Imatu and another v City of Cape Town* (2005) 26 ILJ 1404 (LC), the Labour Court, in dealing with the duties of a Firefighter, accepted that physical fitness was an inherent requirement for the job and further said at para 17 of its judgment 'it was accepted by all the witnesses that Murdock had the necessary state of physical fitness to perform the task of the job'. In a different context, but nonetheless relevant to the present dispute, this Court in the *TDF Network Africa (Pty) Ltd v Faris* [2019] 2 BLLR 127 (LAC) at para 37, in dealing with whether a requirement is inherent or incapable of the performance of a job, said:

'[T]he requirement must be rationally connected to the performance of the job. This means that the requirement should have been adapted in a genuine and good faith belief that it was necessary to the fulfilment of a legitimate work – related purpose and must be reasonably necessary to the accomplishment of that purpose.'

[15] The court *a quo* correctly noted that appellant, following Mr Damons' disability, engaged in a 'painstaking series of incapacity investigations' and ultimately placed him in position that did not require active firefighting. It is difficult to see how this conclusion can justify the further one reached by the court *a quo*, namely that Damons' disability which prevented him from being advanced amounted to unfair discrimination. To the extent that there is a differentiation between Damons and active firefighters, who are considered for promotion, this is justified both by the rational requirements contained in the Policy and by the inherent requirements for the position of a Senior Firefighter. In this connection, although again in a different context, the following *dictum* of this Court in *South*

African Airways (Pty) Ltd v GJJVV [2014] 8 BLLR 748 (LAC) at para 54 is relevant:

'The contention on behalf of the appellant that the age of a pilot was an inherent requirement of the work of a pilot was not convincing at all. It is so that if the appellant had established as a fact that there first respondent had been discriminated against on the basis of his age, because age was an inherent requirement of the job of a pilot it might well have discharged its onus, because in terms of s 6 (2) (b) of the EEA it is not unfair discrimination to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.' However, in this case, there was no evidence by the appellant that age was an inherent requirement of the job of a pilot...'. (my emphasis)

- [16] Significantly, Item 6.5.1 (b) of the Code of Good Practice and Employment of Persons with Disabilities (Government Gazette 9 November 2015) provides that 'employers should reasonably accommodate the needs of persons with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.'
- [17] Item 7.5.1 (b) of this Code then provides 'that an employer may not retain employees who become disabled, on less favourable terms and conditions than employees doing the same work, for reasons connected with the disability.'
- [18] These provisions indicate that a disabled employee cannot be discriminated against other employees who do the same work and, to that specific extent that the doctrine of reasonable accommodation applies. A policy must be designed to reduce the impact of the impairment of the person's capacity to fill the essential functions of the job. But in this case, it is not possible for Damons to perform the essential requirements of an active firefighter nor could it possibly be in the public interest to have firefighters who are not capable of dealing with the outbreak of fires which, in the area of jurisdiction of the appellant, are notoriously frequent.

[19] In my view, there was no basis to conclude that either the contents of the Policy or its application to the present dispute constituted unfair discrimination in terms of s 6(1) of the EEA.

[20] Given the nature of this case and the implications for the EEA it would not be appropriate to make an adverse costs order.

[21] For all of these reasons, the following order is made:

1. The appeal is upheld.
2. The decision of the Labour Court of 20 April 2018 is set aside and replaced with the following:

‘The application is dismissed.’

Davis JA

Sutherland JA and Murphy AJA concur.

APPEARANCES:

FOR THE APPELLANT:

FOR THE RESPONDENT: