



CONSTITUTIONAL COURT OF SOUTH AFRICA

Solidarity and Others v The Department of Correctional Services and Others

CCT 78/15

Date of hearing: 18 November 2015

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 18 November 2015 at 10h00 the Constitutional Court will hear an application for leave to appeal against an order of the Labour Appeal Court (LAC). The dispute concerns whether the decisions of the Department of Correctional Services (DCS) not to appoint or promote the individual applicants to certain positions constituted unfair discrimination and unfair labour practice.

Solidarity, the first applicant, is a trade union and the second to eleventh applicants are individual members of the union and employees of the DCS (Western Cape). They are five coloured females, four coloured males and one white male. Prior to 2010 these members applied for appointment or promotion within the DCS and were shortlisted and identified as the “strongly preferred” candidates for their respective positions. However, none were appointed or promoted as their race and/or gender were considered “over-represented” within the said department and their appointment would have been inconsistent with the Department’s equity plan.

The applicants instituted action in the Labour Court (LC) against the DCS for unfair discrimination and unfair labour practice, alleging that their races and/or genders were used to assess them and to deny their appointment or promotion. The LC found that the employment equity plan (EEP) did not adequately implement affirmative action measures contemplated in section 6(2) of the Employment Equity Act (EEA) by not requiring that regional demographics be taken into account. Without setting the EEP aside, the Court

ordered the DCS to take immediate steps to ensure that both national and regional demographics were taken into account when setting its equity targets. Unhappy with the decision not to grant individual relief, Solidarity appealed to the LAC while the respondents cross-appealed against the order that the implementation of its EEP constituted unfair discrimination.

The LAC dismissed the appeal as well as the respondents' cross-appeal and rejected the argument that the targets created quotas in contravention of the EEA and the Constitution. The Court, however, agreed that the targets, by failing to take regional demographics into account, fell short of legitimate affirmative action measures. The LAC refused to grant the appointment and promotion of the applicants for their failure to show, in an instance where regional demographics would have been considered, that they would have been selected.

In this Court, the applicants seek an order of appointment and promotion pursuant to findings that the implementation of the EEP constituted unfair discrimination. The respondents argue that both the LC and the LAC applied the wrong test in finding that the DCS unfairly discriminated against the applicants. They contend that their decisions were rationally connected with the restitutionary measures under the Constitution, and its use of national demographics to achieve equitable representation in its workforce did not equate to unfair discrimination as the DCS is a national department which recruits its workforce nationally.