IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO573/04

In the matter between

THE PUBLIC SERVANTS ASSOCIATION **Appellant**

and

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE **Respondent**

CORAM: **HOWIE P, STREICHER, NUGENT, LEWIS JJA et MAYA AJA**

Date Heard: 1 November 2005

Delivered: 25 November 2005

Summary: **Police employment regulations – retention of incumbent of upgraded post in terms of reg 24(6) – despite permissive language of subregulation, Commissioner obliged to retain incumbent if requirements of subregulation met. The order of the Court appears in para [22].**

J U D G M E N T

HOWIE P

HOWIE P

[1] In the employment regulations promulgated under the South African Police Service Act 68 of 1995 (the Act)[1] reg 24 deals with the grading of posts and effect of grading on remuneration. Reg 24(6) says this:

'(6) If the National Commissioner raises the salary of a post as provided under subregulation (5), she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent –

(a) already performs the duties of the post;

(b) has received a satisfactory rating in her or his most recent performance assessment; and

(c) starts employment at the minimum notch of the higher salary range.

[2] On the basis that uncertainty prevailed as to whether the subregulation afforded the National Commissioner a discretion to continue to employ the incumbent in the higher-graded post, or imposed an obligation to do so, he applied in the High Court at Pretoria for a declarator. The order sought was to the effect that continuation of the incumbent's employment in the

[1] The South African Police Service Employment Regulations, 1999 Govt Notice R.389 of 14 April 2000.

upgraded post was a matter for the Commissioner's discretion. Seven respondents were cited. Only the first two respondents opposed. The Court (Ponnan J) granted the declarator and subsequently gave the second respondent, the Public Servants Association, leave for the present appeal. (It was the only party to seek leave.) For convenience I refer from here on to the parties on appeal as 'the appellant' and 'the Commissioner' respectively.

[3] The appellant is a registered trade union. As its name indicates, its members are drawn from the national public service. The Commissioner is the executive commander of the South African Police Service ('the Service')[2], whose duties include maintenance of an efficient service.[3]

[4] Regulation 24 reads in full –

'24. **GRADING AND REMUNERATION**

(1) The National Commissioner must determine the grade of a post to correspond with its job weight and set the commencing salary of an employee on the minimum notch of the salary range attached to the relevant grade, unless the salary proves inadequate under the criteria in subregulation (3).

(2) If the job has a weight that applies to more than one salary range, the National Commissioner must determine which of the relevant salary ranges to use.

(3) The National Commissioner may set the salary for a post or an employee above the minimum notch of the salary range indicated by the job weight –

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[2] S 6(1) of the Act read with s 216(2)(a) of the Interim Constitution, Act 200 of 1993.
[3] S 218(1) of the Interim Constitution.

(a) if she or he has evaluated the job, but cannot recruit or retain an employee with the necessary competencies at the salary indicated by the job weight; and

(b) she or he shall record the reason why the salary indicated by the job weight was insufficient.

(4) If the job weight demonstrates that a filled post is overgraded or undergraded, the National Commissioner must either effect changes to the work organisation or regrade the post according to the job weight and the relevant collective agreements as provided for in subregulations (5), (6) and (7).

(5) The National Commissioner may increase the salary of a post to a higher salary range in order to accord with the job weight, if –

(a) the job weight as measured by the evaluation system indicates that the post was graded incorrectly; and

(b) the budget of the service and the medium-term expenditure framework provide sufficient funds.

(6) If the National Commissioner raises the salary of a post as provided under subregulation (5), she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent –

(a) already performs the duties of the post;

(b) has received a satisfactory rating in her or his most recent performance assessment; and

(c) starts employment at the minimum notch of the higher salary range.

(7) If the National Commissioner determines that the salary range of an occupied post exceeds the range indicated by a job weight, she or he must –

(a) if possible –

(i) redesign the job to equate with the post grade: or

(ii) transfer the incumbent to another post on the same salary range; and

(b) abide by relevant legislation and collective agreements.

(8) As far as possible, the National Commissioner must set the salary of a part-time, sessional or temporary employee proportional to the salary of an equally graded full-time employee.'

[6] The focus in this case is essentially on subregs (4) to (7). They are aimed at regulating the consequences of a filled 'post' having been incorrectly 'graded'. What those words mean appears from the definitions in reg 2 and a reading of the ensuing regulations. Suffice it to say that the work which a member of the Service does is his or her job. 'Post' is the name or description of that job. Each job has a job weight. This is a numerical value assigned to the job by a job evaluation. A grade is the relative value of a job as reflected by the job weight. Each grade is linked to a salary range. A salary range comprises a range of notches – minimum to maximum. Similarly, all the salary ranges in the Service – minimum to maximum – make up its salary scale.

[7] Subregulation (4) gives the Commissioner a choice when the job weight of a filled post shows that the post is wrongly graded. Broadly, correction is achieved either by altering the post's workload up or down, or regrading the post, again, up or down. Subregulations (5) and (6) concern an upgrade and subreg (7) a downgrade.

[8] The court below decided, particularly in the light of the regulations dealing with recruitment[4] and promotion,[5] that the matter fell to be decided broadly as follows. Upgrading created, notionally at least, a new vacant post. Vacant posts could normally be filled only after advertising them. Continuation with the incumbent in a subreg (6) situation was in effect to promote him or her. Generally, promotions also had to follow only after advertising. Transparency demanded that advertising should be the rule and dispensing with it, as subreg (6) permitted, should rather be the exception. This meant that the Commissioner had, in line with the use of the word 'may' in the subregulation, a discretion whether to advertise or to retain the incumbent in the upgraded post without advertising.

[9] At first blush it might too readily appear that the drafter's use of 'must' and 'may' signifies consistently an intended difference between peremptory and permissive provisions in the regulations. That impression

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[4] Reg 36.
[5] Reg 38.

could well be reinforced by instances where, for example in reg 24(1), (2) and (3), ‘must’ and ‘may’ correctly indicate that difference. Furthermore, it does not seem that ‘must’, wherever it is used in the regulations, has anything but an imperative connotation. The crucial enquiry, however, is whether ‘may’, even if unquestionably constituting permissive provisions elsewhere in the regulations, has, in subreg (6), the permissive connotation found to be the case by the learned Judge in the Court below.

[10] The thrust of the appellant’s argument was that if the upgraded post were advertised and the incumbent employee were not appointed to it the latter would be liable to lose his or her employment. The profound unfairness of that outcome, so the argument continued, was highlighted by the irony that subreg (6) postulated that the incumbent was, at the relevant time, not only performing the duties of the upgraded post but doing so well enough to have achieved a recent satisfactory rating. By contrast, subreg (7) required, if possible, that the incumbent of an overgraded, and thus overpaid post, would remain in the service. The fate of the displaced incumbent referred to in subreg (6) was therefore in conflict with the Constitutional values of equity and reasonableness and in particular with the right to fair labour practices.

[11] The heads of argument for the Commissioner did not address the fate of the displaced erstwhile incumbent. They proceeded on the basis that the Commissioner's alternatives were retention of the employee in accordance with subreg (6) or reduction of the workload of the undergraded post in terms of subreg (4), neither of which would involve any unfairness. Pressed in argument, however, with the gravamen of the appellant's argument as summarised above, counsel for the Commissioner were driven to submit that if the former incumbent responded to the Commissioner's advertisement but were not appointed, the only resort of such person would be an action for whatever compensatory relief would be appropriate. The concession was that the employee concerned could indeed lose his employment if his post were upgraded.

[12] There can be no doubt that on the Commissioner's approach that concession was unavoidable. If the Commissioner decided to advertise and the former incumbent were not appointed, the latter would be left without a job. The post that he or she had occupied having become upgraded, there would be no post left behind to which such person should then, as a matter of course, be transferred. In this regard I disagree, with respect, with the Court *a quo* that a new vacant post would be created. What I have so far referred to as displacement would in truth become dismissal if the employee

could not be accommodated in another post. Naturally it might be possible in practice to avoid the drastic result of dismissal if there were an existing vacant post to which the person in question could be transferred without loss of employment, status or pay. But the availability of existing vacant posts would no doubt be more likely at the lower end of the Service's employment scale. The problem of incorrect grading with which reg 24 is concerned is, as a matter of probability, going to occur in the case of higher and more specialised posts. Accordingly, the issue we have to decide is not to be resolved by assuming the existence of possible vacant posts.

[13] Comparison of the provisions of the Act with those of the regulations discloses the following situation in so far as dismissal is concerned. The Act deals with conditions and termination of service in sections 27 to 49. It refers to dismissal as 'discharge'. Discharge is the subject of sections 35 to 37. Only s 35 is presently of importance and only paragraphs (a) and (b) of that section:

'35 **Discharge of members on account of redundancy, interest of Service or appointment to public office**

The National Commissioner may, subject to the provisions of the Government Service Pension Act, 1973 (Act 57 of 1973), discharge a member –

(a) because of the abolition of his or her post, or the reduction in the numerical strength, the reorganisation or the readjustment of the Service;

(b) if, for reasons other than the unfitness or incapacity of such member, his or her discharge will promote efficiency or economy in the Service, or will otherwise be in the interest of the service; …'

[14] Chapter VII of the Regulations is headed 'PROCEDURES FOR APPOINTMENT, PROMOTION AND TERMINATION OF SERVICE.' It encompasses regulations 34 to 40. Nothing they contain deals either with discharge as meant in any section of the Act or any circumstances which involve or approximate to the job loss to which, as the present case reveals, reg 24(6) could give rise on the Commissioner's approach. The only termination situation referred to is automatic resignation [6] and that is presently irrelevant. No other regulation deals or purports to deal with dismissal. But the employment is also governed by the Labour Relations Act 66 of 1995, which confers a right (in s 185) not to be unfairly dismissed. A dismissal is unfair if the reason for the dismissal is not a 'fair reason' that is either related the employee's conduct or capacity or is based on the employer's operational requirements. (s188(1). I doubt very much that the dismissal of an employee – which would be inevitable if he could not be placed in an alternative post – merely because the post was regraded so as to link it to a higher salary can be said to be a 'fair reason' for the dismissal.

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[6] Reg 39.

[15] The conclusion is unavoidable, therefore, that the drafter of the regulations had no intention that upgrading in terms of reg 24 would expose an incumbent who is satisfactorily performing the function to dismissal. It is equally clear that, ignoring the already mentioned possibility of transfer to an existing vacant post, the only way in which the incumbent would retain employment would be in the upgraded post. It must follow that if the circumstances in subreg (6)(a) and (b) obtain, the drafter's intention was that the Commissioner had to continue to employ the incumbent in the upgraded post and for that reason he was permitted not to advertise it.

[16] The scheme of reg 24 does offer the Commissioner some choice. That choice is afforded by subreg (4) and only if the funds referred to in subreg 5(b) are available. Upgrading and its consequences can certainly be avoided by resorting to reducing the workload of the overgraded post. But once the Commissioner chooses to upgrade he has two obligations. The first, as I have said, is to continue with the incumbent in the upgraded post. The other is to increase the incumbent's salary in terms of subreg (5).

[17] I mention the latter obligation because it serves to disclose another instance in which the drafter's use of the word 'may' is inapposite. Salary increase under subreg (5) is subject to two circumstances. One is the availability of funds. Obviously, without the necessary money subreg (5)

cannot be resorted to. The other is the fact of incorrect grading coupled with the decision to regrade. Plainly this refers to an undergraded, not overgraded post, otherwise a salary increase would not be called for. Given those circumstances it is not for the Commissioner to choose to increase the salary attaching to the post. Reg 2 defines 'grade' to mean

'the relative value of a particular job as reflected by the job weight which is linked to a salary range in a salary scale used in the Service'.

Consistently with that definition reg 24(1) speaks of a salary range being attached to the relevant grade and para (c) of subreg (6) refers to 'the higher salary range' to which the upgrade would apply. Consequently, increasing a grading must inevitably lead to increasing the accompanying salary range. There is no room for a discretionary choice.

[18] The next point to bear in mind is that, in contrast with the word 'may' in subregs (5) and (6), one finds in subreg (7) the use of 'must'. (Admittedly subreg (7) also contains the qualification 'if possible' but that is no different in effect than the qualification in subreg (5) that there has to be enough money, and the qualification in subreg (6) that comprises the provisions in paras (a), (b) and (c).) The position is that when correcting an overgrade the Commissioner must keep the incumbent in the Service. As I have said, there is no reason to think that 'must' has been inappropriately used anywhere in

the regulations. If retention of the employee is required in the case of an overgrade there is every reason to require retention in the case of a satisfactorily performing employee who has been significantly underpaid.

[19] Next, if the drafter's intention had indeed been to confer a discretion in subreg (6) there are no indications as to how it was to be exercised. Naturally the Commissioner is not bound to retain the incumbent if the requirements in paras (a) and (b) are not met but once they are, the expected indications are lacking. That being so, it is unlikely that the drafter intended to confer a discretion.[7] Despite the incumbent's performing all the duties attaching to the post satisfactorily, should the emphasis be on trying, in the interests of the Service, to get somebody even better or should it be on adherence to fairness seeing that the incumbent's performance is acceptable?

[20] Finally, if subreg (6) did give the Commissioner a discretion its exercise could lead to the earlier mentioned disparity between (speaking loosely) the upgraded incumbent and the downgraded incumbent. The stark unfairness inherent in the difference in their respective outcomes was rightly stressed by the appellant. The employment of the incumbent of an overgraded post is unendangered by regrading. Incorrect grading would be cured either by a workload adjustment or transfer to another post on the

[7] See *South African Railways v New Silverton Estate Ltd* 1946 AD 830, 842-3.

same salary scale. The incumbent of the upgraded post, on the other hand, who happens to be coping with all the duties of the 'new' post and doing so satisfactorily, would lose his or her employment if somebody else were appointed to it. This would infringe the incumbent's right to a fair labour practice and right not to be unfairly dismissed and be manifestly inequitable particularly seeing that in subreg (7), and elsewhere in the regulations, the Labour Relations Act and collective agreements between the service and its employees are acknowledged and, by inference, respected.

[21] To sum up, there are two approaches to the issue raised. The first is that the Commissioner's interpretation could lead to job termination and the drafter could never have intended that consequence. The second is that on a proper interpretation of reg 24(6) it is not, after all, permissive. On either approach I am drawn to the conclusion that the subregulation does not confer a discretion on the Commissioner. Provided the requirements of paras (a) and (b) are met the Commissioner is not only empowered to retain the incumbent in the upgraded post without advertising it but under a duty to do so and to do so at the salary prescribed by para (c). Accordingly, the application to the Court below ought to have failed.

[22] The appeal succeeds, with costs. The order of the Court *a quo* is set aside. It is replaced by the following:

‘The application is dismissed, with costs.’

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CT HOWIE
PRESIDENT

CONCUR

NUGENT JA
LEWIS JA

STREICHER JA:

[23] I have read the judgment of my colleague, Howie P, but, for the reasons that follow, I do not agree that the appeal should succeed. The issue to be decided in this appeal is whether reg 24(6) of the regulations promulgated under s 24(1) of the South African Police Service Act 68 of 1995 (‘the Act’) conferred a discretion on the National Commissioner of the Police Service (‘the Service’), in the event of a post being upgraded, to continue to employ the incumbent of the post in the upgraded post without advertising the post or whether it imposed an obligation on him to do so notwithstanding the use of the word ‘may’ in the subregulation.

[24] ‘[C]lauses [in empowering legislation] couched in permissive language have often been construed as making it the duty of the person in whom the power is reposed to exercise that power when the conditions

prescribed as justifying its exercise have been satisfied'.[8] Whether or not it should be so construed depends on the language used and the general scope and objects of the empowering legislation.[9] In *Jaga v Dönges NO* 1950 (4) SA 653 (A) Schreiner JA said in this regard at 664E-F:

'Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context.'

[25] Regulation 24 is quoted in full in the judgment of Howie P and need not be repeated here. Subregulation (1) read with subreg (3) provides that the National Commissioner 'must' determine the grade of a post to correspond with its job weight[10] and set the commencing salary of an employee on the minimum notch of the salary range attached to the relevant grade, unless the salary proves inadequate, by reason of the fact that an employee with the necessary competencies at the salary indicated by the job weight cannot be recruited or retained. In the latter event the National Commissioner 'may', in terms of subreg (3), set the salary for a post or an employee above the minimum notch of the salary indicated by the job weight.

[8] Per Tindall JA in *South African Railways v New Silverton Estate Ltd* 1946 AD 830 at 842.
[9] Loc. cit.
[10] Job weight means workload.

[26] If the job has a weight that applies to more than one salary range the National Commissioner 'must', in terms of subreg (2), determine which of the relevant salary ranges to use.

[27] If, having regard to the job weight, a filled post is either overgraded or undergraded the National Commissioner, in terms of subregulation (4), 'must' either effect changes to the work organisation i.e. increase or decrease the job weight or regrade the post according to the job weight.

[28] If a post is undergraded and if the budget of the Service and the 'medium-term expenditure framework' provide sufficient funds the National Commissioner, in terms of subreg (5), 'may' increase the salary of the post in order to accord with the job weight i.e. he 'may', in these circumstances elect to upgrade the post.

[29] Subregulation (6) provides that if the National Commissioner elects to raise the salary of a post he 'may' continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent –

(a) already performs the duties of the post;

(b) has received a satisfactory rating in her or his most recent performance assessment; and

(c) starts employment at the minimum notch of the higher salary range.

[30] If a post is overgraded i.e. if the salary range of an occupied post exceeds the range indicated by the job weight the National Commissioner 'must', in terms of subreg (7), if possible, redesign the job to equate with the post grade or transfer the incumbent to another post on the same salary range and must abide by relevant agreements and collective agreements.

[31] In terms of subreg (8) the National Commissioner 'must' as far as possible set the salary of a part-time, sessional or temporary employee proportional to the salary of an equally graded full-time employee.

[32] I agree with Howie P that when 'must' is used in subregs (1), (2), (4), (7) and (8) it has an imperative connotation. I also agree with him that when 'may' is used in subreg (3) it has a permissive connotation.

[33] Section 24(5) reads:

'The National Commissioner may increase the salary of a post to a higher salary range in order to accord with the job weight, if –

(a) the job weight as measured by the evaluation system indicates that the post was graded incorrectly; and

(b) the budget of the Service and the medium-term expenditure framework provide sufficient funds.'

If the subregulation is to be read: ‘Having upgraded the post the National Commissioner may increase the salary of a post to a higher salary range in order to accord with the job weight . . .’ I would agree with Howie P that ‘may’ has an imperative connotation. I do, however, not think that it would be a correct reading of the subregulation. A ‘grade’ is by definition linked to a salary range. To increase the salary of a post to a higher salary range is to upgrade the post to a higher-graded post. The subregulation, therefore, in effect, deals with the circumstances in which a post may be upgraded. The intention could hardly have been that the post may be upgraded without having regard to the requirements of (a) and (b) but that the salary may only be increased if those requirements are met. The phrase ‘may increase the salary of a post to a higher salary range’ in subreg (5) is, therefore, in my view, but another way of saying ‘may regrade the post to a higher-graded post’. If that is so ‘may’ has a permissive connotation. In terms of subreg (4) the National Commissioner must either effect changes to the work organisation or regrade the post according to the job weight if the filled post is overgraded or undergraded. In terms of subreg (5) he may select the upgrading option instead of the work organisation option if the requirements of (a) and (b) thereof are met. There is no reason to think that it was the intention that the National Commissioner should be obliged to select the

upgrading option and not the work organisation option if there were sufficient funds available.

[34] The language used in reg 24 indicates an intention to distinguish between what the National Commissioner 'must' do and what he 'may' do. The draftsman had no compunction about telling the National Commissioner what he was obliged to do and there would seem to be no reason why he would not have said that the National Commissioner was obliged to continue to employ the incumbent employee in the higher-graded post if that was the intention. The question now is whether there are indications, having regard to the scope and objects of the regulations, that the draftsman, notwithstanding the use of the word 'may' in contradistinction to the word 'must', should be understood to have used the word 'may' in subreg (6) in an imperative connotation.

[35] Regulation 24 forms part of the employment regulations of the Service and is contained in Chapter V, which deals with employees' remuneration for services rendered. The object of the sections forming part of chapter V is described in reg 22(1), which is headed 'Principles', as follows:

'Remuneration in the Service must aim, within fiscal constraints, to support –

(a) efficient and effective service delivery and provide appropriate incentives for employees; and

(b) equal pay for work of equal value and other labour standards.'

[36] The procedures for appointment and promotion of employees in the Service are dealt with in Chapter VII, regulations 34 to 40. Regulation 34 provides as follows:

'**PRINCIPLES**

Employment practices must ensure employment equity, fairness, efficiency and the achievement of a representative Service. Affirmative action must be used to speed up the creation of a representative and equitable Service and to give practical support to those who have been historically disadvantaged by unfair discrimination to enable them to fulfil their maximum potential. Employment practices must maximize flexibility, minimize administrative burdens on both employer and employee, and generally prevent waste and inefficiency. . . '

[37] When a post is upgraded the existing post is abolished. The incumbent employee does not, however, lose his employment as a result of the abolition of his post as was submitted by the appellant. Section 35 of the Act provides that the National Commissioner may, subject to the provisions of the Government Service Pension Act 37 of 1973 discharge a member because of the abolition of his post. A discharge upon the abolition of a post is, therefore, not automatic and the regulations did not and could not provide otherwise. The National Commissioner has a discretion to dismiss an

employee when his post is abolished. But, in terms of s 31(2) of the Act, for as long as the employee remains in the employ of the Service, his salary may not be reduced without his consent, except in certain circumstances which are not presently relevant. The National Commissioner also has a discretion in terms of reg 36(2)(e) to appoint the member whose post is abolished to a post of equal grading to the one that had been abolished, without advertising the post.

[38] I did not understand the respondent to concede that an incumbent employee would lose his employment when his post is abolished. I understood his argument to be that the National Commissioner would in those circumstances have a discretion to appoint him in the upgraded post or to appoint him in another post or to retrench him for being redundant. He submitted that should the incumbent employee, who qualifies for appointment in the upgraded post, not be appointed in that post he may in appropriate circumstances be entitled to a review of the decision of the National Commissioner.

[39] I agree that it may in certain circumstances be unfair or not in the best interests of the Service not to continue to employ the incumbent employee in the higher-graded post. That will, however, not necessarily be the case. It may for example only be possible to upgrade some of a number of similar

posts which need to be upgraded in order to correspond with their job weights. In these circumstances fairness may require that all the incumbent employees, who had been performing the duties of the post satisfactorily, be allowed to compete for the upgraded posts. In deciding whether or not the incumbent employee should be appointed in the higher-graded post the National Commissioner will have to adhere to the employment practice of the Service which, according to reg 34 is, inter alia, to ensure fairness. Should the decision be unfair it would be the exercise and not the conferring of the discretion which is unfair.

[40] The position is different when the salary range of an occupied post exceeds the range indicated by the job weight. Should the National Commissioner in those circumstances elect to increase the job weight the existing post is not abolished and a new post is not created. The National Commissioner is obliged, in the case of a reorganization of the workload within the post, to either retain the incumbent employee in that post or to transfer him to another post. The employee is not promoted to a higher-graded post with a higher salary scale. It is, in my view, fallacious to argue that because an employee is retained in a post in those circumstances, it must have been the intention, in the event of an upgrading of the post, that the incumbent employee should be appointed in the upgraded post. It is clear

that that was not the intention in the case where the incumbent employee performed the duties of the post satisfactorily but was employed at a salary notch higher than the minimum notch of the higher salary range. Unless such an employee is prepared to accept a reduction in salary he would, like an employee who had not received a satisfactory rating in his most recent performance assessment, lose his post as a result of the regrading of the post, the post will have to be advertised and the incumbent employee will have to compete with other applicants for appointment to the newly created upgraded post. That being the position of an incumbent employee who does not qualify for appointment to the higher-graded post without the post being advertised I cannot see any reason to infer that it was not the intention that the National Commissioner should have a discretion not to appoint an incumbent employee, who does qualify for such appointment.

[41] I, therefore, agree with the submission by the respondent that upon the upgrading of a post the National Commissioner has a discretion to continue to employ the incumbent employee in the higher-graded post with or without advertising the post. Should he not be employed in the higher-graded post he may, in the circumstances mentioned in subreg 36(2), without the post being advertised, be appointed to a post similar to the one that had been filled by him and he may also be discharged in terms of s 45. Although reg 24(6) does

not contain any guidance as to how the discretion is to be exercised such guidance is to be found in reg 22(1), which, in my view, requires that the discretion be exercised with due regard being had to the requirements of efficient and effective service delivery and the provision of appropriate incentives for employees. It is also to be found in reg 34 which, in my view, requires that the discretions referred to be exercised in the light of the principle that employment practices must ensure employment equity, fairness, efficiency and the achievement of a representative Service.

[42] Being administrative actions the decisions taken by the National Commissioner would in appropriate circumstances be reviewable.[11] Furthermore, should the incumbent employee in the particular circumstances of the case have a legitimate expectation to be appointed to the higher-graded post the administrative action will have to be procedurally fair.[12] Should it not be administratively fair it would likewise be reviewable.[13]

[43] For these reasons I would have dismissed the appeal with costs including the costs of two counsel.

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STREICHER JA

CONCUR:
MAYA AJA

[11] Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
[12] Section 3(1) of PAJA.
[13] Section 6(2)(c) of PAJA.