

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1524/09

In the matter between:

DEPARTMENT OF EDUCATION - NORTH WEST

Applicant

and

BERNARD VAN ECK

First Respondent

GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL

Second Respondent

AM KARODIA

Third Respondent

—

JUDGMENT

—
FRANCIS J

Introduction

1. This is an opposed application to review and set aside an arbitration award issued by the first respondent (the arbitrator) under case number PSGA 394/07/08 after the arbitrator had found that the most likely cause of the termination of the third respondent's employment was for reasons related to the operational requirements of the applicant and ordered that he be paid severance pay.

The background facts

2. The third respondent was employed by the applicant, the Northwest Department of Education as its head of department and was a member of the Senior Management Services (SMS). On or about 22 August 2005, he was suspended from duty as a precautionary measure in terms of Chapter 7, paragraphs 2.7 of the SMS handbook. His

suspension was a result of allegations of serious financial misconduct and mismanagement of property that had been levelled against him. He was offered a number of opportunities to present his case at a disciplinary hearing, but for various reasons, including ill-health, the hearing did not proceed.

3. On or about 23 January 2007, the MEC of the Northwest Department of Education invited him to make representations against his possible discharge in terms of section 17(2)(c) of the Public Service Act (PSA). The MEC recorded in the letter that the third respondent had been called to a disciplinary hearing to answer allegations of serious misconduct including charges relating to:
 - 3.1 improper delegation of authority to the former chief financial officer;
 - 3.2 financial mismanagement as envisaged in the Public Finance Management Act, 1999;
 - 3.3 fruitless and wasteful expenditure; and
 - 3.4 irregular appointments of service providers and a failure to protect the finance of the applicant and to act in its best interests.
4. The letter also recorded the history of the matter, including his apparent unwillingness to submit himself to medical examination by the applicant's doctors and the unavailability of his representatives on the dates the hearing was set down. The letter stated that his conduct had significantly impaired the relationship of trust between the MEC and him. The allegations he faced were serious and he had been unreasonable in the manner in which he responded to the request to attend a disciplinary hearing. His conduct had demonstrated that he held the office of the MEC in contempt. The public interest was

hampered by the lack of finality in relation to the position of head of the applicant. He was invited to make representations about whether the charges against him were correct; whether it was in the interest of the public service for him to be discharged in terms of section 17(2)(c) of the PSA; and any other matter that the MEC should take into account in making his decision on his continued employment with the applicant.

5. He made representations on 25 January and 1 February 2007. He also made oral representations to the MEC on 8 February 2007. In the letter of 25 January 2007, he denied that he had refused to attend a medical examination. He proposed that he be allowed early retirement due to health reasons. His application for early retirement was not approved.
6. The MEC discharged him on or about 16 March 2007 in terms of section 17(2)(c) of the PSA. The MEC gave the following reasons:
 - 6.1 that, as a consequence of the investigator's findings, the MEC convened a disciplinary hearing to afford him an opportunity to explain his conduct; which hearing he failed to attend for spurious reasons;
 - 6.2 he failed to attend an appointment with the applicant's doctors;
 - 6.3 he was uncooperative during the relevant period;
 - 6.4 his conduct was harmful to the interest of the public service as well as those of the public in general; and
 - 6.5 there had been an irretrievable breakdown of trust between the applicant and him.
7. On or about 19 March 2007, the MEC advised him in writing, that his discharge was

based on section 17(2)(c) of the PSA.

8. On or about 2 May 2007, the third respondent referred a dispute to the bargaining council, for conciliation and thereafter to arbitration claiming that his discharge was for reasons based on the applicant's operational requirements, and that, as a result he should be paid severance pay by reason of the provisions of section 41(2) of the Basic Conditions Act (BCEA). He did not challenge the fairness of his dismissal.

The arbitration proceedings

9. The arbitration hearing took place on 10 December 2008. The issue in dispute at the arbitration hearing was whether the third respondent had been discharged as a result of the applicant's operational requirements and was, as a result entitled to severance pay.
10. The applicant's submitted that the MEC had requested the third respondent on 23 January 2007 to make representations against his possible discharge in terms of section 17(2)(c) of the PSA. The MEC referred to some of the allegations of misconduct brought against him, and that he had by then not made himself available for a second medical opinion and his representative's unavailability at the dates upon the hearing was set to continue. He was then invited to make representations whether the allegations raised against him were correct; whether it was in the interest of the public service for his service to be terminated in terms of section 17(2)(c) of the PSA; and any other matter that he wished the MEC to take into consideration about his continued employment. He had denied in his representations that he had refused to attend a medical examination. He also then proposed that he be allowed to go on early retirement due to reasons related to ill-health.

This application for early retirement was not approved and after having considered his representations, his services were terminated on 16 March 2007. His services were not terminated for reasons related to the applicant's operational reasons, but for the specific reasons mentioned in the letter dated 16 March 2007. The question whether these reasons were fair or not was irrelevant, but that the only question to be asked was whether those reasons are for reasons related to the employer's operational requirements as defined in section 41 of the BCEA. The reasons advanced could not be regarded as requirements based on economic, technological, structural or similar needs of the applicant in the sense contemplated in section 41 of the BCEA. The letter makes it abundantly clear that the actual and true reason for the termination was the irretrievable breakdown of the relationship of trust between the employer and the employee and that this had justified the termination of his services in the interest of the public service. The third respondent was not dismissed for reasons related to the third respondent's operational requirements and that, for this reason he was not entitled to the payment of severance pay in terms of section 41 of the BCEA.

11. The third respondent's submitted that the crux of the reason why the MEC had requested him to make representations about why his services should not be terminated in terms of section 17(2)(c) of the PSA, was that the disciplinary process took too long to finalise; that it was allegedly not in the public interest or the public service, that there should be lack of finality about his employment status; and that he was on fully paid suspension for a period in excess of twelve months. Despite the various representations made as well as the application for early retirement due to his ill-health, he was summarily dismissed on 16 March 2007. The reasons for this decision were that he had cited spurious grounds for

failing to attend the disciplinary enquiry over a prolonged period of time; that he had failed to make himself available for a second medical opinion regarding his ailment; that he had been uncooperative in the process; that his conduct was harmful to the interests of the public service and that of the general public; and that, as a result, there has been an irretrievable breakdown in the trust relationship. His application for early retirement for ill-health was never considered and that dismissals for reason based on operational requirements had indeed been performed in terms of section 17(2)(c) of the PSA. The most likely cause for his termination was due to the applicant's operational requirements and that he should, as such, be entitled to the payment of severance pay.

The arbitration award

12. The arbitrator has set out the parties submissions in his award. It is not necessary to repeat this. He then proceeded to deal with the issue raised by the third respondent. He said that both parties were *ad idem* that an inquiry should first be made into the true or actual reason for the third respondent's termination and that this should not be determined by the label attached there and he was going to deal with the applicable legislation.
13. He said that section 213 of the Labour Relations Act 66 of 1995 (the LRA) defines 'operational requirements' to mean the requirements based on the economic, technological, structural or similar needs of an employer. Section 17(2) of the PSA before its amendment, read as follows:

"Every officer, other than a member of the services or an educator or a member of the Agency or the Service, may be discharged from the public service -
(a) on account of continued ill health;

- (b) *owing to the abolition of his or her post or any reduction in or reorganization or readjustment of departments or offices;*
- (c) *if, for reasons other than his or her own unfitness or incapacity, his or her discharge will promote efficiency or economy in the department or office in which he or she is employed, or will otherwise be in the interest of the public service;*
- (d) *on account of unfitness for his or her duties or incapacity to carry them out efficiently;*
- (e) *on account of misconduct;*
- (f) *to (i)..... ”*

14. The arbitrator then dealt with the MEC’s invitation to the third respondent to submit representations why his services should not be terminated in terms of section 17(2)(c) of the PSA. After setting out the history of the matter and referring to the third respondent’s alleged frustration of the disciplinary process and to undergo a second medical examination, the MEC proceeded in paragraph 8 of his letter to state that it was neither in the public interest nor the interest of the public service that there should be lack of finality about his employment status. The applicant stated in paragraph 9 of the letter that:

“your conduct which led to the institution of charges of misconduct against you and subsequent to the charges being laid against you has significantly impaired the relationship of trust between you and myself. I have in considering this matter taken into account the following factors:

- 9.1 *The allegations which you currently face are serious and involve allegations of*

dishonest conduct. It is, however, imperative that you are afforded a fair chance to make representations in your defense;

9.2 *You have been unreasonable in the manner in which you have responded to the request to attend a disciplinary enquiry;*

9.3 *Your conduct subsequent to the institution of the charges also demonstrates that you held the office of the MEC in contempt. You have for instance informed the Acting Head of Department that you did not believe that his acting appointment would last; and*

9.4 *The public interest is harmed by lack of finality in relation to the position of the Head of Department.”*

15. The third respondent was in the same letter requested to make representation about whether or not the charges served on him in October 2005 were correct; whether or not it was in the interests of the public service that he should be discharged from his position in terms of section 17(2)(c) of the PSA; any other matter that the MEC should take into account in making his final decision about his continued employment by the applicant and whether or not there was any manner in which the current dispute should be put to finality.

16. The arbitrator said that it was obvious from a reading of the letter that the MEC was wholly upset about the fact that the said disciplinary hearing had taken so long to be finalised and also the third respondent's perceived conduct during the proceedings. It was also clear that the so-called harm to the trust relationship that the MEC had referred to, was solely as a result of the third respondent's alleged acts of misconduct and his

perceived conduct during the applicant's attempts at bringing the matter to conclusion. The MEC believed that the public interest was being harmed by the lack of finality in the matter, clearly indicating that the issue pertained solely to the disciplinary hearing and the frustrations the third respondent had met in attempting to finalise the matter. The MEC had requested him to make representations on the correctness of the charges and the public interest clearly indicated that this matter solely pertained to the institution of disciplinary charges against him. It was further also clear that the only reason why the applicant had sought for him to undergo a second medical examination, was solely to determine whether the delay in finalising the disciplinary hearing was justified.

17. The arbitrator said that in determining the true or actual reason for the termination of the third respondent's services, the third respondent was correct in his assessment that the only question that should be asked, is whether the provisions of section 17(2)(c) of the PSA would have been invoked, had the disciplinary hearing proceed been finalised prior to 23 January 2007 when the said letter was served on him. If the answer to this question was yes then the third respondent could not claim to have been dismissed for reasons related to the applicant's operational requirements. Conversely, if the answer was no, then it must follow that his services were terminated as a result of the applicant's operational requirements. The arbitrator said that this was so, as he had been on paid suspension for a period of approximately 17 months and someone else had been paid an acting allowance to replace him at work.
18. The applicant, in referring to the dictum contained in *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2008] BLLR 635 (LAC) submitted that ultimately any decision to

dismiss an employee involved the employer's 'operational requirements' in the broadest sense. The commissioner said that although he agreed with the passage, the applicant had missed the point altogether. The third respondent was not claiming to have been retrenched in the 'broad sense' merely because his services were terminated, but he was basing his claim on a specific section in our law. As such, the applicant's argument in this respect was wholly unconvincing.

19. Furthermore, and in referring to the third respondent's letter of termination, the applicant submitted that the actual reasons for the termination was contained in paragraph 3 thereof which reads as follows;

"The reasons for my decision are contained in my letter dated 23 January 2007. In summary, the reasons are the following.

- 3.1 *As a consequence of the findings of the investigators, I convened a disciplinary enquiry against you to afford you the opportunity to explain your conduct, which leads to the finding made by the investigators. You failed to attend such an enquiry citing spurious grounds. I have already set out the history of this matter in my letter of 23 January 2007. I do not intend repeating same herein.*
- 3.2 *Having stated the above, I, however, wish to remind you of the fact that upon you informing me of your ailment, I requested you to avail yourself to doctors appointed by the Department for a normal, in such circumstances, second opinion. I received from you, as a response, various explanations, objections and conditions culminating in you not availing yourself to the said doctors, to date.*
- 3.3 *Your interaction with me during the period under review bars me from the use of the word cooperative.*

3.4 *Your conduct is harmful to the interests of the public service and indeed those of the public in general. The fact that you have been on paid suspension for a substantial period of time and are failing to attend the enquiry is also harmful to the interests of the service and those of the public in general.*

3.5 *For the reasons cited above and in my letter of 23 January 2007, I have lost trust in you. I do not believe that it is in the interests of the public service to continue employing you when the relationship of trust has broken down irretrievably.”*

20. The arbitrator said that with all the reasons cited, including those of the public interest and the interest of the public service, as well as the reasons for the breakdown in the trust relationship, only related to the institution of the disciplinary action against the third respondent and his alleged conduct throughout the process. The applicant could not as such now claim that the actual true reason for the termination of the third respondent’s services was due to a breakdown in the trust relationship between the third respondent and the applicant. The so-called loss of trust was based upon the institution of disciplinary charges against the third respondent and the applicant’s view that he was uncooperative in the finalisation of the matter. The commissioner said that it was important to note further that the MEC had not terminated his services as a result of the alleged misconduct or his alleged medical incapacity. The public interest, yet again, was weighted directly against his alleged acts of misconduct and his conduct throughout the process.

21. The commissioner said that all in all, and taking into account all the relevant factors, he found that the termination of the third respondent’s services were directly as a result of

the fact that disciplinary charges had been instituted against him and that such disciplinary hearing did not come to a speedy finality. Had the disciplinary process been concluded before 23 January 2007, the applicant would have had no need to institute the process of requesting the third respondent to make representations about his possible dismissal in terms of section 17(2)(c) of the PSA. It was noteworthy that the MEC in his letter informing the third respondent of the termination of his service, made specific reference to the fact that he was on paid suspension for a considerable period of time as well as the financial repercussions thereof, must then surely have played on the MEC's mind.

22. The arbitrator said that on a purposeful reading of section 17(2)(c) of the PSA, it was clear that the MEC must have had in the forefront of his mind the promotion of 'efficiency or economy of the department', as he had been on paid suspension and his disciplinary hearing had still not been finalised nearly some 19 months later. Similarly, the MEC, who holds public office, was expected to act in the best interest of the public service and the general public at large. As such, he would have been criticised for the quite costly delay in the finalisation of the disciplinary hearing and therefore it would, quite naturally, have been in the public interest, as well as in the interest of the public service, to bring this matter to finality by one way or the other. He found that the most likely cause of the termination of his employment was for reasons related to the operational requirements of the applicant. He found that the third respondent was entitled to the payment of severance pay in terms of section 41(2) of the BCEA in the amount of R486 144.87.

The grounds of review

23. The applicant brought the review application on the grounds that the award be set aside because the decision was not one that a reasonable decision-maker could have reached on the evidence before the arbitrator. He exceeded his powers in the sense contemplated in section 145(2)(a) of the LRA. The award suffers from numerous material misdirection and defects in relation to the assessment of the evidence and interpretation and application of the law. The various factual conclusions reached are irrational and unreasonable on the basis of the evidence before the arbitrator or the reasons given for them. He acted unreasonably, committed a gross irregularity and exceeded his powers.

Analysis of the evidence and arguments raised.

24. The parties concluded a pre-arbitration minute and reached an agreement on the agreed facts. It was common cause that the third respondent had 27 years continuous service in the public service at the date of termination of his employment, i.e. on 16 March 2007. He was employed as the superintendent general (head of department) at the date of the termination of his service. His services were terminated by the MEC in terms of section 17(2)(c) of the PSA. His remuneration as contemplated in section 35 of the BCEA was R936 279.00 per annum. He was suspended from duty with effect from 22 August 2005 in terms of clause 18 of chapter 8 of the SMS handbook. His disciplinary hearing was scheduled for 2 November 2005, but did not proceed after he successfully applied for the recusal of the chairperson of the hearing. A new chairperson was appointed for the disciplinary proceedings which had subsequently been convened to take place on 28 November 2005 but was postponed due to the unavailability of documents requested by the third respondent. During February 2006 he was diagnosed with cancer of the lymphatic system (grade 2 non-Hodgkin's lymphoma) and started undergoing

chemotherapy. The disciplinary that was scheduled for 3 April 2006 was postponed *sine die*. The applicant did not proceed with the disciplinary hearing, either in the absence of the third respondent or otherwise.

25. On or about 23 January 2007, an undated request was delivered to the third respondent in which he was invited to make representations about why his services ought not to be terminated in terms of section 17(2)(c) of the PSA. A written response to the above stated notification was submitted on 25 January 2007 and 1 February 2007 respectively and on 8 February 2007 orally by the third respondent acting personally. He submitted on 15 February 2007 an application for early retirement due to ill health with effect from 30 June 2007 with the applicant's department based on the above stated illness contracted by him. The applicant through the acting head of department on 20 February 2007 acknowledged receipt of the application and indicated that a response would be given to his lawyers in due course. On 16 March 2007 the MEC in writing notified him that he was terminating his services with immediate effect in terms of section 17(2)(c) of the PSA. Mr H M Mwelu, at the time a chief director, was appointed as acting head of department with effect from 22 August 2005 by the MEC and received an acting allowance as acting head of department. Mr A B Seakamela, the deputy director general in the department, was not appointed as acting head of department during the suspension of the third respondent. Mwelu was subsequently appointed permanently as superintendent general (head of department of the applicant).
26. Section 17(2) of the PSA recognises the termination of an employee's services for various reasons. These would include misconduct, continued ill health, abolition of his

post or readjustment, incapacity or unfitness for his duties or his discharge would promote efficiency or economy in the department. It is apparent that the old section 17(2) of the PSA unlike the amended section made no reference to the operational requirements of the employer.

27. The third respondent's services were terminated in terms of section 17(2)(c) of the PSA. This is where his discharge would promote efficiency or economy in the department or office in which he is employed or will otherwise be in the interest of the public service. Section 213 of the LRA contains a similar definition of 'operational requirements' as that contained in section 41(1) of the BCEA which means the requirements based on the economic, technological, structural or similar needs of an employer. The Public Service Regulation G.41 in Part (vii) of Chapter 1 of the Public Service Regulations, 2001 provide as follows:

"G.4 Operational Requirements

G.4.1 An executing authority may discharge employees for operational reasons of the discharge complies with -

- (a) Sections 17(2)(b) and (cc) of the Act and sections 189 and 190 of the Labour Relations act; and*
- (b) Any applicable collective agreement that determines benefits for employees to be so discharged."*

A department is not permitted to have an employee act in another post for an uninterrupted period exceeding 12 months.

28. The arbitrator was required to identify the dominant reason for the dismissal. The arbitrator followed the approach prescribed in *SACWU and Others v Afrox Lt* (1999) 10 BLLR 1005 LAC where it was held that the enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal would merely be one of a number of factors to be considered. The arbitrator had regard to the common cause facts and documents presented to him in arriving at his finding.
29. It is apparent that the third the respondent was employed as the head of department when he was suspended on full pay pending the outcome of the disciplinary hearing. This went on for about 17 months. An acting head of department was appointed and he was paid an acting allowance. The applicant could not proceed with the disciplinary hearing and it was not in the public interest for this to continue. It is clear that the third respondent's services were not terminated for ill health or incapacity but to promote efficiency or economy and it was in the public interest to do so.
30. In order to decide whether an award was reviewable the question to be asked is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach.
- The applicant has failed to establish that the decision of the arbitrator falls outside the bounds of reasonableness as contemplated by the Constitution. None of the grounds for review as contained in section 145 of the LRA have been proven by the applicant. Given the common cause facts and documents placed before the arbitrator and his application of the relevant decision of the Labour Appeal Court and statutory enactments to the common cause facts, it is clear that the award is one that a reasonable decision-maker

could have reached in the circumstance. The award is well reasoned and it is clear that the arbitrator in finding that the most likely cause of the determination of the third respondent's employment was for reasons related to the operational requirements of the respondent as contemplated in section 41 of the BCEA. He considered the reasons stated by the MEC for the third respondent's dismissal and duly interpreted the provisions of the BCEA, the PSA and the LRA and case law to which the parties had referred him to. He adopted the test and methodology as set out in *SACWU & Others* in order to determine both factual and legal causation. He had asked whether or not the non-finalisation of the disciplinary proceedings constituted a sine qua non for the dismissal and thereafter determined the dominant or proximate or most likely cause of the dismissal.

31. It was a reasonable conclusion drawn by the arbitrator based on the applicant's disavowance of any reliance on misconduct or incapacity as a reason for the dismissal and perceived operational need to finalise the employment status of the third respondent urgently that it finally had resorted to a no fault dismissal as contemplated by section 17(2)(c) of the PSA read with section 41 of the PSA.
32. The application stands to be dismissed.
33. There is no reason why costs should not follow the result.
34. In the circumstances I make the following order:
 - 34.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : L KUTUMELA OF BOWMAN GILFILLAN

FOR THIRD RESPONDENT : M HITGE INSTRUCTED BY NIENABER &
WISSING

DATE OF HEARING : 14 SEPTEMBER 2010

DATE OF JUDGMENT : 17 DECEMBER 2010