



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case No: P 603/09

In the matter between:

ANGRID ELIZABETH HOLBURN

Applicant

and

THE MEMBER OF THE EXCECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION

First Respondent

THE DEPARTMENT OF EDUCATION:

EASTERN CAPE

Second Respondent

Heard: 23 August 2011

Delivered: 9 November 2011

Summary: Application to compel the employer to conduct investigation –

incapacity –ill-health in terms of section 3 of Schedule 1 of Employment of Educators Act. Payment of deduction effected after failure of the application for temporary incapacity leave.

JUDGMENT

MOLAHLEHI J

Introduction

1] The applicant in this matter seeks an order in the following terms:

‘1.1 Directing that the administrative action of the Department of Education, Eastern Cape Province in failing to discharge its duties in terms of Section 3 of Schedule 1 of the Employment of Educators Act 76 of 1998.

1.2 In unilaterally or arbitrarily deducting monies from the Applicant’s emoluments, be judicially reviewed.’

2] The applicant further requires that the respondents be directed as follows:

“2.1 Take such steps as may be necessary in terms of Section 3 of Schedule 1 of the Employment of Educators Act 76 of 1998, to investigate the Applicant’s incapacity in terms of Section 3 (1) thereof and to comply with the provisions of sub-Section (3), (4), (5) and (6) thereof.

2.2 Reinstate the Applicant’s emoluments deducted as aforesaid

3. Directing that the Applicant may be exempted from the obligation of exhausting internal remedies.

4. Directing that the 180 day period referred to in Section 7 of the Promotion of Administration of Justice Act be extended upon such terms as the above Honourable Court may *(deem fit), upon the basis that the interests of justice so dictate.. .’*

3] In essence, the applicant is seeking to enforce what she refers to as, her

constitutional rights, which have been infringed by the respondents because of the failure to, 'discharge certain statutory duties set out in item Section 3 of Schedule 1 of the Employment of Educators Act 76 of 1998.' The claim arises from the contention of the applicant that the respondents ought to have taken steps to investigate her incapacity because of her health condition.

- 4] The applicant did not pursue her contention that the respondents have failed to report her condition to the Commissioner for Compensation for Occupational Injuries, Diseases in terms of section 59 of the Compensation for Occupational Injuries and Deceases Act (COIDA).

Background facts

- 5] The applicant, who has been in the employ of the second respondent for 18 (eighteen) years testifies in the founding affidavit that the school at which she is employed by the respondents has become dysfunctional due to the interference by the school governing body. At one stage, the members of the school governing body locked the gates of the school for about two weeks, preventing educators from performing their duties. Thereafter, the applicant together with other educators had to perform their duties by reporting at the district offices of the second respondent.
- 6] According to the applicant, the school governing body closed the school because they complaint that the educators were not doing their jobs properly.
- 7] The tension at the school persisted even after the school was reopened. In this respect, the applicant refers to an incident where two male teachers were involved in a physical confrontation. Applicant says she broke down and had to be referred to a hospital for medical attention. She received medical treatment. She further states that as a result of the chaotic conditions at the school she suffered from sleep "apnoea" and was also diagnosed with bipolar mood disorder.
- 8] The other point made by the applicant in the founding affidavit is that she is

considering returning to school to perform her duties, but does not believe that she will cope with teaching 40 children in a class room, particularly having regard to the low level of discipline at the school. The applicant, attributes the alleged ill-discipline amongst learners at the school to the fact that they come from 'low socio-economic homes' and further that their parents, 'for the most part, they display a lack of interest or motivation for their children.'

- 9] In as far as her ill-health was concerned, the applicant was apparently granted temporary incapacity leave and on the expiry date the applicant was required by the respondents to obtain a second medical opinion regarding her condition. In this respect, the second respondent has required the applicant who stays in Port Elizabeth to attend medical assessment by Dr Erlacher who is based in Grahamstown. The applicant has refused to undergo the second medical assessment for two reasons. The first reason is that she does not understand why she should be required to travel to snGrahams town when there are other medical practitioners who could perform the same function in Port Elizabeth. The second reason is that she does not believe that Dr Erlacher will provide an objective assessment of her condition because she is not independent, as he is employed by the state. In other words, she does not believe that Dr Erlacher would produce a report favourable to her because of his employment by the state. In this respect of the applicant says:

"I strongly believe that Dr Erlacher will have subjective and biased view regarding my health and my medical condition due to the effect that he is being hired by the Department of Education."

- 10] It was for the above reason that the applicant addressed a letter to the respondent listing a number of other medical practitioners in the Port Elizabeth area who she believed, were competent and would be able to provide an independent report on her medical condition.

The principles governing incapacity of educators

- 11] The procedure to be followed by the employer when faced with incapacity of

an educator due to ill-health or injury is set out in Schedule 1 of the Employment of Educators Act (the EEA).¹ Item 3 of the Schedule 1 of the EEA imposes a duty on the employer to conduct an investigation concerning the extent of the ill-health or injury that may have been suffered by the educator. The conditions that triggers the investigation are the following:

- Poor performance arising from ill-health or injury.
- The employer forming the view that the educator is unable to perform his or her duties due to ill-health or injury or,
- An application by the educator indicating that he or she requires to be discharged from service due to continuous ill-health or injury.

12] An educator acquires the right to be heard on all aspects related to the investigation upon the employer taking the decision to conduct an investigation related to incapacity due to ill-health.

13] As part of the investigation, the employer has in terms of section 7 of the EEA, at the State's expense to examine the affected educator's state of health. The affected educator has the right to nominate any other medical practitioner to be involved in his or her ill-health examination.

14] The medical practitioner appointed by the employer is obliged to submit a report to the employer on completion of his or her ill-health investigation indicating the following:

- the nature and extent of the educator's ill-health or injury and;
- whether the ill-health is temporarily or permanent.

The medical practitioner appointed by the educator may submit a report to the employer, if the educator is not satisfied with the report of the medical practitioner appointed by the employer.

¹ 76 of 1998.

- 15] The next stage in the process, depending on what the medical report(s) submitted to the employer says, is for the employer to:
- determine whether the nature of the ill-health or the injury is of a temporary or a permanent nature and;
 - the period the employee is likely to be away from work.
- 16] Having made the above determination, the employer is to furnish the educator with a written report indicating the results or the findings of the investigation.
- 17] If the ill-health or injury of an educator is of a permanent nature, the employer has to investigate the following possibilities:
- ‘(a) Securing alternative employment for the educator;
 - (b) Adapting the duties or work circumstances of the educator to accommodate the educator’s ill-health or injury; or
 - (c) Consider the termination of the educators service with effect from a date determined by the employer.’
- 18] It would appear from the reading of Schedule 1 of the EEA that failure or refusal by the educator to submit to medical examination at the state’s expense constitute a misconduct for which the educator may be disciplined for. If the employer decides to discipline an employee for refusing to undertake medical examination the general principles governing the substantive and procedural fairness of dealing with a disciplinary hearing would apply.

The nature of the relief sought by the applicant

- 19] Mr Kroon for the respondents contended that the applicant is seeking an order against herself because the consequence of the order if granted is that she would have to be dismissed. In other words this presupposes that the

investigation will lead to an automatic dismissal. He submitted that an individual cannot obtain an order against himself or herself. He in this respect relied on the case of *Thusi v Minister of Home Affairs and Another and 71 Other Cases*² where it was amongst others held that :

‘To sue oneself is an oddity. To ask for and obtain relief against oneself is unprecedented ...’

- 20] It is apparent from the reading of item 3(1) of Schedule 1 of the EEA that two possible scenarios may flow from an employee’s poor performance/or incapacity due to ill-health or injury. The first scenario envisaged by sub-item (1) arises where the employer is of the view that the employee is unable to perform his or her duties due to ill-health or injury. Having formed that view that the employee is unable to perform his or her duties due to ill-health or injury the employer is obliged to investigate the extent of the injury. The second scenario arises in an instance where the educator applies to be discharged from service because he or she believes that he or she is unable to perform the job assigned due to ill-health or injury.
- 21] In both instances, the employer is in terms of item 3(1) of Schedule 1 of the EEA obliged to investigate the extent of the ill-health or injury. The purpose of the investigation is to determine whether the ill-health or injury is of a temporary or permanent nature. I see no reason why failure by the employer to conduct an investigation as to the extent of the ill-health or injury cannot found a cause of action. In my view Schedule 1 to the EEA provides a procedural right to educators faced with incapacity to perform their duties due to ill-health or injury. In the first instance, the right to that procedure may arise where the employer forms a view that poor work performance of a particular educator is due to ill-health or injury. And secondly it may arise where the employee has applied for discharge on the basis of incapacity due to ill-health or injury. The fact that the ultimate outcome of the investigation (in particular if it is at the instance of the educator) may be a dismissal does not detract from the duty of the employer to conduct an investigation or take away the right to

2 2011 (2) SA 561 (KZP).

require the employer to conduct the investigation envisaged in terms of item 3 of Schedule 1 of the EEA. It has to be noted that the fact that the investigation may confirm the incapacity due to ill-health does not mean that dismissal is an automatic outcome. Even in a case where the investigation confirms the ill-health or injury as being permanent, dismissal is not automatic. In that instance, the employer has the duty in terms of item 3(6) to investigate securing alternative employment which may include amongst others a transfer which seems to be one of the desires of the applicant in the present case.

- 22] In the present instance, the applicant seeks an order compelling the respondents to conduct an investigation in terms of item 3(1) of the EEA. In other words, the applicant is seeking a mandatory interdict or *mandamus*. It is trite that in order to succeed in an application of this nature, the applicant has to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. See *Alliance Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*.³
- 23] In my view the view, the applicant in the present instance has failed to satisfy the requirements for a mandatory interdict. The respondents do refuse to conduct the investigation envisaged under item 3(1) of Schedule 1 of the EEA. The respondents have in fact put the process in motion by appointing a doctor in to conduct the investigation. It is the applicant who refuses to cooperate by demanding that the state doctor should be based in Port Elizabeth. The law is clear the prerogative of choosing a state doctor rests with the respondents and does not have to do that in consultation with the applicant. Thus the remedy of the applicant lies in her cooperating with the investigation by attending at Dr Erlacher's surgery in Grahams. The applicant has no right to preempt the findings of Dr Erlacher.
- 24] The remaining issue for determination concerns the complaint concerning the deduction of R2000,00 from the applicant's salary. This was not pursued in the submission on behalf of the applicant. There was however no indication

3 2002 (1) SA 789 (T).

that it was abandoned. This issue turns on the agreement which was concluded between the parties regarding the application for temporary incapacity leave. The temporary incapacity leave was conditional on the outcome of the investigation into the ill-health incapacity of the applicant. It was agreed between the parties that should the application for the temporary incapacity leave fail then the respondents had two options, of either converting the thirty days leave taken by the applicant in either annual leave or unpaid leave. The application for the temporary incapacity leave having been unsuccessful, the respondents convert that leave as unpaid leave. In addition, the deduction was in my view also in line with the provisions of section 38 of the Public Service Act⁴ which entitles an employer in the public service to deduct any amount paid to an employee for which that employee was not entitled to.

- 25] Accordingly, in light of the above, the applicant's application stands to fail in both instances namely the claims of *mandamus* and compensation for the deduction effected by the respondent. I do not however believe that it would be fair to allow the costs to follow the results.

Order

- 26] The applicant's application is dismissed with no order as to costs.

⁴ 103 of 1994. Deductions from salaries are specifically dealt with under section 38(2) which reads as follows:

- “(2) If an officer or employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or scale of salary or awarded to him or her by reason of his or her basic salary—
- (a) . . .
 - (b) been overpaid or received any such other benefit not due to him or her—
 - (i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such installments as the head of department, with the approval of the Treasury, may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner.”

APPEARANCES:

FOR THE APPLICANT: Adv W Grobler instructed by Kirchmanns Inc.

FOR THE RESPONDENT: Adv P N Kroon instructed by Michael Randel
Attorneys.