



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D552/2013

NUPSAW obo THAMI ANTHONY MTSHALI

Applicant

and

JOSEPH MPAPHULE N O

First Respondent

PUBLIC HEALTH & SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

DEPARTMENT OF HEALTH –KZN

Third Respondent

Heard: 6 August 2015

Delivered: 25 August 2015

Summary: Review. Applicant dismissed. Subsequent to dismissal is granted early retirement (with the concomitant benefits) and resigns. Application dismissed.

JUDGMENT

GUSH J

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1996 (LRA) to review and set aside a jurisdictional ruling issued by the first respondent on 28 March 2013 under case number PSHS 739 – 12/12.

- [2] The first respondent under the heading “Jurisdictional Ruling” found that “the alleged unfair dismissal dispute had no basis in law or fact and stood to be dismissed” and ruled that: “the application for the alleged unfair dismissal dispute is dismissed for lack of substance”.¹
- [3] The applicant seeks a declarator on behalf of its member (hereinafter the employee) that the second respondent does have jurisdiction to arbitrate the unfair dismissal dispute declared by the employee and that the matter be remitted to the second respondent for arbitration within 30 days.

Common Cause Background

- a. The employee was employed by the third respondent as the Chief Executive Officer of the Madadeni Provincial Hospital.
- b. During January 2012, the third respondent served a notice to attend a disciplinary enquiry on the employee. The enquiry commenced on 3 February 2012. The disciplinary enquiry was concluded on 23 November 2012. The outcome of the enquiry was that the employee’s services were to be summarily terminated. The third respondent directed a letter to the employee dated 30 November 2012 advising him of the termination of his services.
- c. On 8 October 2012, the employee, before the conclusion of the disciplinary enquiry, submitted an application to the third respondent for early retirement.
- d. In addition to the employee’s application for early retirement and before the conclusion of the disciplinary enquiry and the outcome thereof, the applicant also, on 19 November 2012, wrote to the third respondent on behalf of the employee in which letter, the applicant applied for employee to be granted

¹ Award; Pleadings page 20.

early retirement (in the face of the alleged misconduct) “as he has just reached the qualifying age of 55 years”.²

- e. The decision of the disciplinary enquiry viz that the employee be summarily dismissed was signed on 30 November 2012. The decision and letter of dismissal was however only delivered to the employee on 18 December 2012. When handed the letter, the employee refused to leave the third respondent’s premises and indicated that he intended challenging his dismissal.
- f. Despite receiving the letter of summary dismissal and commensurate with his stated intention to challenge his dismissal, the employee continued to report for duty and tender his services. The third respondent accepted the employee’s tender of services and continued to remunerate the employee in accordance with his contract of employment which remuneration the employee accepted.
- g. On 20 December 2012, the employee referred a dispute concerning his dismissal to the second respondent.
- h. On 21 December 2012, the third respondent advised the employee that his application for early retirement submitted on 8 October 2012 had been approved.
- i. Pursuant to this decision, the employee addressed a letter dated 28 December 2012 to the third respondent in which letter he tendered his resignation to take effect in accordance with his early retirement on 31 January 2013.
- j. The employee continued to render services to the third respondent and was remunerated until his resignation took effect on 31 January 2013.

² Supplementary bundle of documents page 62.

- k. On enquiry from the court, the applicant's and the third respondent's counsel confirmed that the employee had been paid an early retirement benefit in accordance with the acceptance of his application. Mr Ngulwana, who appeared for the applicant however suggested that as this information was not contained in the pleadings, the court should not take it into account. I disagree. It is information that is pertinent to the proper resolution of the dispute before the court and should have been disclosed in the pleadings.
- [4] Despite the fact that the employee and the third respondent had agreed on the early retirement and that the employee's employment had "terminated" in accordance with this agreement, the employee persisted with the dispute referred to the second respondent after having received the letter of dismissal.
- [5] The dispute was conciliated on 15 February 2013 after the employee had left the third respondent's employ in accordance with his agreement regarding early retirement. A certificate of outcome was issued in which the dispute was referred to as S191(5)(a) – dismissal related to misconduct. In the referral form, the relief the employee sought was "reinstatement and maximum compensation".
- [6] The employee referred the matter for arbitration and it was set down by the second respondent to be heard by the first respondent on 25 March 2013.
- [7] The record of the arbitration reflects that the first respondent dealt with two issues namely, firstly whether the employee had been dismissed and secondly whether the third respondent was entitled to legal representation at the arbitration.
- [8] At the conclusion of the arbitration, the first respondent indicated that he would firstly decide on the issue of dismissal and only in the event that he found that the second respondent had jurisdiction would he then deal with the issue of legal representation.
- [9] Subsequently, the first respondent issued a "Jurisdictional Ruling" in which ruling, the first respondent concluded that "the alleged unfair dismissal dispute had no

basis in law or fact and stood to be dismissed.” And ruled that “the application for the alleged unfair dismissal [be] dismissed for lack of substance”.

[10] The facts placed before the first respondent are set out in paragraph 4 above. The only additional issues placed before the first respondent during the arbitration were the following:

- a. The employee is recorded as having given the following explanation to the first respondent. The employee, having explained that he had received the letter of dismissal (18 December 2012) and the letter approving his early retirement (21 December 2012) and that he had resigned in writing on 28 December 2012, went on to explain his response thereto:

‘Shortly after the letter retirement that was granted and we decided to say let us discuss the matter with the Department again. We said what if you resign? They said no it is fine and it was granted by the district. How can you give 3 letters to the person saying that you are dismissed? After the dismissal you are granted permission to retire.’³

- b. The record reflects that the employee intimated to the first respondent that the reason he had agreed his early retirement with the third respondent was simply for the purposes of establishing that the third respondent wanted to get rid of him at all costs. This is not borne out by the sequence of events or the evidence.

[11] At no stage during the proceedings before the first respondent did the employee disclose the benefits he had received as a result of his agreed early retirement nor did he provide any evidence to establish his intimation that the negotiated and agreed early retirement was concluded for any other purpose other than a settlement regarding the termination of his employment. These background facts were basically the facts that were placed before the first respondent that led to the jurisdictional ruling the applicant seeks to review and have it set aside.

³ Record of proceedings indexed page 38 lines 10 – 18.

[12] Despite counsel's suggestion that the court should not take into account the fact that the employee had received the early retirement benefit in accordance with his application, it is a relevant consideration in determining whether the second respondent has jurisdiction to consider the alleged unfair dismissal.

[13] The facts and sequence of events are simply that:

- a. During the course of the disciplinary enquiry instituted by the third respondent against the employee, both the employee himself and the applicant applied for the employee to be granted early retirement as he had reached the age at which such applications could be considered.
- b. The applicant's application for early retirement had not been determined by time the disciplinary enquiry concluded.
- c. The outcome of the disciplinary enquiry was that the employee was to be dismissed with immediate effect and that the notice of the termination of the employment was served on him on 18 December 2012.
- d. The employee refused to accept his dismissal and to all intents and purposes remained an employee of the third respondent, tendering his services and accepting his salary until his eventual departure at the end of January 2013.
- e. On 21 December 2012, the employee received notification from the third respondent that his application for early retirement had been approved.
- f. On his own admission, the employee, having received the approval of its application, engage the third respondent and agreed that he would take early retirement. Accordance with this agreement, the employee resigned on 28 December 2012 to take effect on 31 January 2013.
- g. The employee received his early retirement benefit and ceased his employment with the third respondent at the end of January.

- h. Before agreeing the early retirement, the employee had referred a dispute to the second respondent regarding his dismissal. Despite having agreed with the third respondent that he would take early retirement subsequent to the letter of dismissal, the applicant persisted with the employee's dispute.

[14] In the circumstances, I am satisfied that whilst the decision to dismiss the employee was taken by the third respondent, the subsequent agreement between the employee and the third respondent had the effect of settling any dispute that may have existed regarding his dismissal. After the agreement reached between the employee and the third respondent, there could be no dispute regarding his dismissal particularly in the absence of anything indicating the contrary. That being so it is clear that no dismissal was established by the applicant and the second respondent does not have jurisdiction to determine the dispute.

[15] In its answering affidavit, the third respondent raised the issue of the late filing of the applicant's review application on the grounds that it had been filed outside the six week period provided for in the LRA in respect of reviews in terms of section 145 and accordingly was not filed within a reasonable time. I am persuaded that taking into account the circumstances of this matter, the applicant in this matter is entitled to condonation for the late filing of the review.

[16] There is no reason in law or fairness why costs should not follow the result.

[17] For the reasons set out above, I make the following order:

The applicant's application is dismissed with costs.

D H Gush

Judge of the Labour Court of South Africa
Johannesburg

APPEARANCES:

FOR THE APPLICANT:

Advs V Ngulwana SC; N Mothapo

Instructed by Ndomiso Voyi Inc

FOR THE 3rd RESPONDENT:

Z Luthuli: A P Shangase and Assoc