



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C352/2015

Not Reportable

In the matter between:

**PREMIER, WESTERN CAPE
(DEPARTMENT OF THE PREMIER,
WESTERN CAPE GOVERNMENT)**

Applicant

and

**NATIONAL UNION OF PUBLIC SERVICE
(NUPSAW) obo KHANIYSA KIM PIETERSEN**

1st Respondent

JACQUES LEF PIENAAR N.O.

2nd Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

3rd Respondent

Heard: March 24 2016

Delivered: October 13 2016

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to review an arbitration award under case number GPB513/13. The second respondent awarded the applicant an amount of R239 381.80, being an amount equal to six months remuneration, having found that she had been subject to an unfair labour practice.
- [2] Ms Pietersen (Pietersen) began her employment with the applicant in December 2007 as a deputy director on post level 12. She received a 'Precautionary Suspension' letter dated February 12, 2013 informing her of her suspension with immediate effect on the grounds of being:
- “guilty of disruptive actions within the workplace and also undermining the authority of your employer by:
- (a) Making unfounded allegations about your superiors pertaining to discrimination and corrupt activities;
 - b) Preventing the Directorate Employee Relations to efficiently and effectively performing their responsibilities; in that you undermined their processes by supplying information and/or advice to employees in matters against the Department; and

- c) Inciting staff members of the Directorate: Employee Relations to stand in solidarity by praying for those officials for whom the Department has decided to take disciplinary action against, after a thorough investigation...”

[3] The letter of suspension concluded as follows:

“Due to the seriousness of the alleged offences, the Department has decided to place you on precautionary suspension with immediate effect for the duration of the disciplinary investigation. Notwithstanding this, you are afforded the opportunity to provide written reasons to Mr EM Southgate, Chief Director: Human Resource Management..... Before close of business on Friday, 15 February 2013 as to why the Department should not proceed with your suspension.

You are further instructed not to contact any member of staff within the Provincial Government, or enter the Provincial Premises at any time.”

[4] On 15 February 2013, Pietersen’s attorney set out a number of reasons why her suspension should be lifted immediately. In reply to this letter the Director General of the Department of the Premier (the Department) stated that the Department was considering the request and would revert by 26 February 2013.

[5] On the 1 March 2013, Pietersen’s suspension was lifted and she was put on ‘precautionary transfer’ and required to report to the Chief Directorate: Organisational Development pending the finalisation of her disciplinary enquiry. On the 4 March, she referred a dispute to the bargaining council, ticking the box in the referral form which reads “Suspension/other disciplinary action short of dismissal”.

[6] On 14 March 2013, Pietersen lodged a grievance in which she objected to her “temporary placement as a measure alternate to suspension’. The grievance form filled in by Pietersen records what she is aggrieved about as follows:

“I have been placed in the Directorate Organisational Development as of 4 March 2013. Since this temporary placement as a measure alternate to suspension, I

have not been placed in a conducive working environment. I have no computer to work on, no telephone to make use of. My access card has been locked and the internet access has been denied. Honestly I do not know why I am in this environment except to be frustrated.”

- [7] On 6 March 2013, the third respondent issued a certificate of non- resolution of the dispute referred by Pietersen. The arbitration proceedings in respect of this dispute took place on the 19 and 28 January 2015. The Arbitrator described the issue to be decided in his award as follows:

“Whether the applicant has proved on a balance of probabilities that her suspension on 13 February 2013 and her subsequent removal from her post as deputy director, Employee Relations, to the Chief Directorate Organisational Development, constitutes an unfair labour practice i.e. an unfair act or omission short of dismissal, as defined in section 186(2)(i) of the Labour Relations Act 66 of 1995 (LRA), and if so, the relief, if any, to be afforded to the applicant, as allowed in terms of section 193(4) of the LRA.”

- [8] The grounds of review include that the arbitrator did not understand the nature of the dispute that he was required to determine, in that the award took account of both the precautionary transfer and the precautionary suspension. It was submitted that he did not enjoy jurisdiction to consider the precautionary transfer. In submission reference was made by the applicant to the referral form and conciliation notice. This ground stands to be rejected. Not only on a factual basis, in that the said documents do deal with the precautionary transfer, but also on a legal basis given that the characterisation of a dispute by an employee cannot determine the true nature of a dispute.¹ Moreover a notice of non-resolution and its characterisation of a dispute has no legal import other than being a document issued by a commissioner or arbitrator stating that, on a particular date, a dispute referred to the CCMA or bargaining council remained unresolved.² I further note

¹ National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others (2014) 35 ILJ 954 (LAC) at para 17

² Bombardier Transportation (Pty) Ltd v Mtiya NO & others (2010) 31 ILJ 2065 (LC) at para 14

that the witness for the applicant at the arbitration, Ms Mohammed, who was the complainant in respect of the disciplinary charges brought against Pietersen, stated at those proceedings that: "The suspension was being lifted and then she was transferred as part of the disciplinary process, so I don't think the suspension was treated unfairly in anyway."

- [9] It was further submitted that the Arbitrator erred in law when he relied on section 186(2)(b) of the LRA in his summary of the dispute, when such definition applies to suspensions and not transfers. The section in fact provides that an unfair labour practice means: "the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee." A Precautionary Transfer in terms of paragraph 7.2 of the applicable Collective Agreement 1 of 2003, provides that:

"7.2 Precautionary suspension

- a. The employer may suspend an employee on full pay or transfer the employee if:
 - (i) the employee is alleged to have committed a serious offence; and
 - (ii) the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property.
- b. A suspension of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.
- c. If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing with a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement."

- [10] It is evident from the clause above that an employer such as the applicant may elect to suspend or transfer as a pre-cautionary measure in circumstances set out

in the clause. Both of these actions are a disciplinary measure short of dismissal and may amount to an unfair labour practice if the employee establishes that the employer's conduct was unfair.

[11] The Award contains a summary of the salient evidence given by Pietersen in particular the following:

"[15] As deputy director she was part of the management structure, two assistant directors and four labour relations officers reporting to her.....

[16] On 13 February 2013 her working day started as usual. She was called to the office of her supervisor, Ms Mohammed who accompanied by Mr Roy Jansen, gave her a letter, saying that the Director General has decided to suspend her. As Mr Jansen was said to be present to be a witness, she also needed a witness who came to sign. By the time the witness arrived security was already present, she was not given the courtesy to read the letter. Security and a lady from personnel took her possessions. The applicant had to leave her office and she had never been back to her office. There was no prior notice or indication that she was to be suspended. She was called to Ms Mohamed's office at 11.00 and by 11.15 her possessions had been taken from her and she was out of the building.

[17] The applicant claimed that the issue of the letter of suspension was procedurally irregular, inter alia because Mr Southgate, against whom she had also made a complaint, should not have been involved in the suspension, and as the letter of suspension issued by the Director General should not have been issued on a letterhead of Mr Southgate.

[18] There was no investigation. Her lawyer asked for an investigation report, but it was never presented. At the disciplinary hearing Ms Mohammed and Mr Eugene Southgate said that there was no investigation. She was not given an opportunity to say why she should not be suspended, nor was she given an opportunity to make representations about her so-called transfer.

[19] On March 2013 when she arrived at the office to where she was transferred, she was given no work tools, no telephone, no access card. This continued until she filed a grievance on 14 March 2013. She was not given an office allocated to middle management as before; she was placed in an open plan space. She had no staff reporting to her. She was reporting to a level 9 staff member who reported to a level 11 staff member. The respondent's response was that the grievance was not substantiated, but she has seen a letter from the public service commission stating that her grievance was substantiated."

[12] The Arbitrator further recorded the cross-examination of Pietersen inter alia as follows:

"It was put to the applicant that her suspension was uplifted on 1 March 2013, as stated in the respondent's letter signed by the Director General, and the applicant's response was that it was never uplifted, claiming that it was a sham, a pretext that it was uplifted. She has a legal qualification and when she came back to work after her suspension, they could have placed her in a legal environment, such as legal services where her skills could have been utilised."

[13] The applicant takes issue with the arbitrator's finding on procedural fairness, in particular, that contained in paragraphs 59 and 60 of the Award as follows:

"[59] The "Guidelines on the Management of Suspensions 2002" form part of the Regulatory Prescripts that are to be followed in cases of transfer or suspensions, on full pay. In terms of paragraph 6.4 the respondent should have scheduled the meeting with the applicant before a decision to transfer/suspend was made, where the applicant should have had the right inter alia to be "offered the opportunity to make representations why she should not be suspended".

[60] The applicant was not given the opportunity to attend such meetings as prescribed and the suspension and transfer were effected contrary to the applicable prescripts."

[14] It was submitted that the arbitrator's finding that these guidelines applied to the dispute amounted to an error of law, in that the Guidelines were not part of an applicable collective agreement and thus not binding. I do not agree. Guidelines issued by the Public Service and/or contained in the Senior Management Service Handbook are not made irrelevant simply because a collective agreement is also applicable to a dispute. In referring to the Public Service Commission's Guidelines, the arbitrator did not make an 'error of law'. He considered these in his assessment of whether the conduct of the employer was on the facts of the matter before him, unfair.

[15] Reliance is placed by the applicant on the LAC decision in **Member of the Executive Council for Education, North West Provincial Government v Gradwell**³ and in particular the following:

"[44] The proposition that all suspensions should be procedurally fair to avoid the stigma of an unfair labour practice, on the other hand, requires some qualification. Fairness by its nature is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration. The SMS Handbook for example imposes a 60-day limitation. And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined

³ (2012) 33 ILJ 2033 (LAC)

by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness.”

- [16] Pietersen was given the opportunity to make representations in respect of her precautionary suspension through her attorney. It is submitted by the applicant that the Arbitrator failed to take into account that this complied with the flexible approach to procedural fairness reflected in *Gradwell*. However, it appears from the award that it was the length and nature of the precautionary transfer that significantly weighed with the Arbitrator in considering the fairness of the disciplinary action taken by the applicant. In paragraph 61 of the Award, he states:

“[61] The sojourn of the applicant at Organisational Development for almost two years, was humiliating and demeaning to the applicant. It may be that in certain spheres of the Public Service it is not unusual for an employee to be transferred for period of some years, but it still remains a situation that should not be allowed, and be curtailed. When Ms Mohammed was asked about the inordinate period for which the applicant had been transferred, she showed little, if any, empathy or concern for the applicant’s plight. The applicant’s evidence about her treatment during her period at Organisational Development stands uncontradicted, and the respondent had every opportunity to lead contradictory evidence after the applicant’s evidence had been concluded and the arbitration was adjourned for a week, but no such evidence was led. The respondent’s actions were humiliating to the applicant, but she came across as an articulate professional lawyer, and a credible witness. Her evidence about her treatment from the time she was suspended is accepted, as well as where in conflict with the evidence of Ms Mohammed. The “Upliftment” of the suspension was indeed a sham

to get rid of the applicant as an employee falling under Ms Mohammed's wing."

- [17] Ms Nyman for the applicant submitted that the arbitrator's finding that the suspension/transfer was for an unreasonable period as a result of the delay in finalisation of the disciplinary proceedings, with the unstated and unsupported conclusion that it was the Applicant who was responsible for such delay, is not supported by the evidence before him.
- [18] The transcript of the proceedings reflects that Pietersen did give evidence in chief that the disciplinary hearing began in November 2014, and she had given her evidence in chief after the employers' evidence, but was still to be cross examined at the time of the arbitration hearing. She also referred to the Guidelines on the Management of Suspensions issued by the Public Service Commission in 2002 in that Clause 7.1 provides that: "Where the initial 30-day period of transfer/suspension has to be extended as a result of the fact that a hearing was not held within the said period, the transfer/ suspension should be reviewed at regular intervals, e.g. weekly or monthly." It was her testimony that since the 13 February 2013 there was no review of her suspension or transfer.
- [19] In any event, the arbitrator's finding on the conduct of the employer is not premised on the protracted nature of the disciplinary proceedings although he does refer to the principle of the speedy resolution of disputes. He states in paragraphs 63 to 65 of the Award as follows:
- "[63] The applicant has proved on a balance of probabilities that her suspension and subsequent removal from her post as Deputy Director, Employee Relations, to the Chief Directorate Organisational Development, constituted an unfair labour practice.
- [64] In any event, the treatment meted out to the applicant, despite grievances raised by her, is inexcusable. There is no reason why the applicant could not have been placed in a post where her labour law expertise could have been gainfully

used, giving her the opportunity to further develop her skills and gain further experience.

[65] After the applicant was placed at the new department, no effort was taken to review the situation as required by the 2002 Guidelines, while the disciplinary hearing was dragging on. Should it be said that the 2002 Guidelines are not relevant, paragraph 7.2 of the collective agreement should at least have alerted the respondent to the fact that suspensions or transfers are not to be allowed to remain hanging over the head of employees, but that the processes are to be dealt with expeditiously. The respondent's lack of taking such steps had been ongoing for about two years, and is indicative of its non-committal approach to end the process as soon as possible."

[20] I do not find that the grounds of review relied on by the applicant persuasive, as reflected in my consideration of these above. The applicant has referred to the test set out in **Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA)**:

"[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[21] The arbitrator did not misconstrue the nature of the enquiry before him, nor on the evidence before him, can the outcome of the Award be considered unreasonable. Further, there is no basis established by the applicant for this court to interfere with

the quantum of compensation awarded. As the LAC has stated in **Kukard v GKD Delkor (Pty) Ltd** ⁴:

“[35] the court's power to interfere with the quantum of compensation awarded by an arbitrator under s 194(1) of the LRA is circumscribed and can only be interfered with on the narrow grounds that the arbitrator exercised his or her discretion capriciously, or upon the wrong principle, or with bias, or without reason or that she adopted a wrong approach. In the absence of one of these grounds, this court has no power to interfere with the quantum of compensation awarded by the commissioner. An appeal court will, furthermore, not interfere merely because it would come to a different decision.”

[22] In view of the above, the application stands to be dismissed. I see no reason why costs should not follow the result. I make the following order:

Order

1. The review application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: R. Nyman instructed by State Attorney

Respondent: Ndumiso Voyi Inc

⁴ (2015) 36 ILJ 640 (LAC)

Labour Court