



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C30/15

In the matter between

Nehawu obo Obakeng Victor Tilodi

Applicant

and

COMMISSIONER T NDZOMBANE

First Respondent

DEPARTMENT OF HEALTH

Second Respondent

**PUBLIC HEALTH & SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

Third Respondent

Heard: 23 November 2017

Delivered: 2 February 2018

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number PSHS335. The applicant seeks the setting aside of the award in as far as the remedy is concerned. The first respondent (the Arbitrator) found as follows:

“48. I find that the applicant’s dismissal was procedurally fair but substantively unfair. I order the respondent, Department of Health- Kwazulu Natal, to pay the applicant Mr Tilodi an amount of R50 083.33 [fifty thousand and eighty three rand and thirty three cents] by no later than 31 October 2014.”

- [2] The Court is asked to substitute the award with an order that the applicant be re-instated. Condonation is also sought for the late launching of the review on the 21 of January 2015, some six weeks late. The reasons given for the delay are reasonable and I will grant condonation and deal with the merits of the application.

- [3] The second respondent has raised a point in limine based on the doctrine of peremption. Its answering affidavit and annexure reflect that on 10 February 2015 it transferred the amount of the award, less tax, into the bank account of the applicant. It submits that despite proceeding with the application, the applicant accepted the funds and has not returned them to his employer. The founding affidavit makes no mention of the acceptance of the compensation awarded. No replying affidavit was filed. In submission the applicant argues that the doctrine does not apply as the second respondent unilaterally decided to pay the money into the applicant’s bank account after the application had been launched, and conscious of the fact that it had been launched.

- [4] I am not satisfied that the stringent test for the doctrine has been met in this case given the following dictum of the Constitutional Court:

“Dabner articulates principles that govern peremption very well in these terms:

‘The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.’

The onus to establish peremption would be discharged only when the conduct or communication relied on does ‘point indubitably and necessarily to the conclusion’ that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.”¹

[5] Given that the application was launched before the payment was made, I do not find that the applicants conduct was unequivocal and inconsistent with any intention to challenge the award. The question for this Court therefore is whether the result of the award, taking into account all the material before the arbitrator, is one that a reasonable decision-maker could not reach,

[6] The applicant was found guilty in a disciplinary hearing on the following charges:

“It is alleged that on or about 29 November 2011 you were disrespectful towards your District Manager, Ms Hayward in the workplace in that you demonstrated abusive and or insolence(sic) behaviour towards her in the presence of other managers.

It is alleged that you made discriminatory and/or derogatory and/or threatening remarks towards on your face book page on or about 3 February 2012 in that you stated “..stupid manager pissed me off, fucken racist bitch. Her days are numbered...” and communicated this to other staff through social media.”

[7] The background to the dispute from the applicant’s perspective is recorded by the Arbitrator as follows:

¹ See SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others (2017) 38 ILJ 97 (CC) referring to Dabner v SA Railways & Harbours 1920 AD 583 at paragraph 36

“3. The applicant was employed by the respondent on 21 February 2008 and placed at EMS in Pinelands Depot as Emergency Care Practitioner. He earned a yearly salary of R300 500.00 [three hundred thousand and five hundred rand] prior to his alleged unfair dismissal. He was dismissed on 7 July 2012. He believes that his dismissal was unlawful and unfair on the basis that the respondent did not follow an audi process prior to subjecting to the disciplinary hearing. Moreover, the respondent took six months before charging him was unfair as the actions of the respondent were not prompt and fair in the circumstances. He denied that the utterances which were posted on his face book page were directed to Ms Hayward. At the later stage of these proceedings he also charged the respondent actions in that it was not consistent in applying its rules as Ms Almazen was not disciplined and she still works for the respondent even though she anticipated and attributed derogatory remarks as well.” (sic)

[8] The applicant did not deny that he posted the utterances in question but, as the Arbitrator records, “he denies they were directed to Ms Hayward. If it is found that the words were directed to Ms Hayward why then Ms Almazien was not disciplined as she participated in that conversation. He stated that it was unfair to selectively discipline him alone. If he is successful with his dispute he requests to be re-instated with full back pay as he was still unemployed.”

[9] The arbitrator in essence finds that the dismissal of the applicant was substantively unfair on the following basis:

“45. The respondent was aware that Ms Almiazen had committed an act of misconduct as per charge 2 but elected not to do anything where the offence it considered serious was committed. Logic dictates that any employer would at least have subjected Ms Almiazen to a disciplinary process which the respondent has failed to do so. I find it strange how the respondent appreciate and reconcile this anomalism. Moreover there was no rationale differentiation as to why she was not disciplined instead of the applicant alone. Even though I am of the view that Commissioner's need to be flexible when it comes to inconsistency but this

one does not allow me not to interfere with the sanction of the respondent. Both employees were involved in an act of uncivilized derogatory tirade in the public domain about their manager but one employee is disciplined but when it comes to the other no actions are taken without any reasons to the effect. If indeed the actions of these employees are considered to be so serious in nature it is absurd that only one employee was disciplined. The information was at the disposal of the respondent to charge the other employee by elected not to do so.

46. It is clear that the respondent was involved in an act of unfairness by selectively discipline one employee and elects to do nothing to the other one knowing that both were equally involved in an act of misconduct.

47. The applicant requested to be re-instated to his original position even though I found that the respondent was inconsistent in applying its rules which conclusion borders around substantive fairness. I have taken into account the fact that the applicant had threatened his manager and did not want to own up to his mistake by acknowledging that he made a mistake. That to me would have been a sign of remorse. Moreover the applicant used to act in the capacity of managerial position which places a big responsibility on him to act at all times with respect. The seriousness of the charge and the fact that the trust relationship between himself and Ms Haywood described it as irretrievable broken down I have also considered the fact that Ms Almiazen is still working, the seriousness of the transgression by the applicant, the degree of unfairness by the respondent and the fact that the applicant is still unemployed. I therefore award the compensation of R50083.33 [fifty thousand and eighty three rand and thirty three cents] which is equivalent to two months' salary to the applicant which is just and equitable in the circumstances."

- [10] The applicant has underlined the lack of rationality in the award in submitting that it stands to be reviewed. Indeed, the reasoning of the Arbitrator is not a model of clarity. But this is not the test that the Court must apply. The correct test set out in, inter alia, **Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others (2012) 33 ILJ 2812 (LAC)** bears recording:

[20] The formulation of the test for review for reasonableness in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The aim of the test as formulated by the Constitutional Court is to give effect to the constitutional right to fair labour practices and the right to administrative action which is lawful, reasonable and procedurally fair. Section 145 of the Act must therefore be read in such a way as to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair. The Constitutional Court in *Sidumo* emphasized that the distinction between appeals and reviews continues to be significant in scrutinizing a decision based on reasonableness and that 'a judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'. This means that in order to assail an award of the commissioner of the CCMA on the *Sidumo* test, it is incumbent on the party also to assail the result of the award and not the reasons of the commissioner only. Put differently, the focus is on whether the result of the award falls within a range of reasonable results and not whether it is in fact the correct one. The question is whether there is justification for the decision on the material before the commissioner."

- [11] In this case, the Arbitrator's granting of a solatium equivalent to two months compensation for what he considered to be a substantively unfair dismissal due to inconsistent disciplinary action, was well within the range of reasonable results in all the specific circumstances of the case. The specific circumstances are as summarised in paragraph 47 of the Award set out above. In the Court's view, taking account all of the material before the arbitrator, the decision to award compensation rather than reinstatement is not susceptible to review. The discretion on the quantum of compensation is one that this Court will rarely disturb².

² *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at paragraph 35

[12] In all the circumstances therefore, the application to review the award must fail. I do not intend to make a costs order given the ongoing relationship between applicant's union and the second respondent. I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

H RABKIN-NAICKER

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Union Representative

For the Second Respondent: Jerome Ven Der Schyff instructed by the State Attorney

LABOUR COURT