



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 37/16

In the matter between

MEMBER OF THE EXECUTIVE COUNCIL

FOR THE DEPARTMENT OF EDUCATION

EASTERN CAPE

Applicant

and

N BANTWINI

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

AMOS BESTER

Third Respondent

Heard: 9 March 2017

Delivered: 1 February 2018

Summary: The arbitrator's decision based on her interpretation of section 14 (1) (a) of the Employment of Educators Act 76 of 1998 which excludes days on which an educator was not required to be at work is correct and reasonable. It is therefore not susceptible to review.

JUDGMENT

LALLIE J

- [1] The applicant seeks an order reviewing and setting aside an arbitration award of the first respondent who will be referred to as the arbitrator in this judgment. This application was filed late and the applicant sought condonation. Initially, the third respondent opposed both the review and condonation applications. However, when this matter was argued, the third respondent did not pursue his opposition of the condonation application. I have considered the submissions made on behalf of the applicant on condonation and I am satisfied that good cause was shown. Condonation should, in the circumstances be granted.
- [2] The factual background to this matter is that the third respondent was employed by the Department of Education of the Eastern Cape Province (the Department) as an educator. He was absent from work from 20 July to 4 August 2015 and the Department terminated his services by invoking provisions of section 14(1)(a) of the Employment of Educators Act 76 of 1998 (the EEA). Aggrieved by losing his employment, the third respondent referred an unfair dismissal dispute for unknown reasons, in terms of section 191 of the Labour Relations Act 66 of 1995 (the LRA) to the second respondent which will be referred to as the ELRC in this judgment. The applicant raised a point *in limine* that the ELRC lacked jurisdiction over the dispute on the grounds that the third respondent was not dismissed but his contract of employment had been terminated by operation of section 14(1) (a) of the EEA. The point *in limine* was opposed by the third respondent. The arbitrator issued a jurisdictional ruling in which she recorded that the third respondent's service contract was terminated in terms of provisions of section 14 of the EEA as 14 consecutive working days had not lapsed when the third respondent reported for duty on 4 August 2015. She found that the Department based the decision that the third respondent had been absent for

14 consecutive days by erroneously including weekends. It, therefore, erred in invoking provisions of section 14(1) (a) of the EEA. She concluded that the ELRC had jurisdiction over the dispute because the third respondent was not required to work weekends. He was therefore absent from work for 12 consecutive working days when the weekends were excluded.

- [3] The applicant seeks to have the arbitrator's ruling reviewed and set aside on the grounds that she committed misconduct by exceeding her powers in issuing the ruling. The nub of the applicant's case is that the arbitrator erred in excluding weekends when calculating the number of days of the third respondent's absence which led to the termination of his contract of employment. The applicant relied on section 4 of the Interpretation Act of 1957 (the Interpretation Act) which provides as follows:

'4 Reckoning of number of days.-When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the term shall be reckoned exclusively of the first day and exclusively also of every Sunday or public holiday'.

- [4] The applicant further relied on *Nedcor Bank Limited and the Master of the high Court (Pretoria), JF Klopper NO, MW Lynn NO, G C Gainsgord NO, S E Lehapa NO, J M Damons NO, P.E Jackson and Various Creditors*¹ where section 4 of the Interpretation Act was given the following interpretation:

"When reckoning days in a statutory provision a court is enjoined to apply the provisions of section 4 of the Interpretation Act unless there is something in the language or context of the particular provision repugnant to such provision or unless a contrary intention appears therein".

- [5] The third respondent's basis for opposing the application was that the arbitrator did not commit any conduct which made her ruling susceptible to review. Her interpretation of section 14 of the EEA was correct. It was argued

¹ Case No. 440/2000 (SCA) delivered date of the – 27 September 2001

that the applicant's interpretation of section 14 of the EEA was wrong as it failed to take into account provisions of the entire section.

[6] The authority the applicant sought to rely on supports the arbitrator's decision that a proper interpretation of the 14 consecutive days of absence from work referred to in section 14(1)(a) of the EEA excludes weekends. The days envisaged in the section are stated in clear and unambiguous language. They are days of absence from work. The arbitrator correctly pointed out that the employee can only be absent from work on those days that the employee is required to be at work. The words "is absent from work" in section 14(1)(a) of the EEA express an intention contrary to the reckoning of days as stipulated in section 4 of the Interpretation Act. As the arbitrator was determining, not just days, but days as qualified in section 14(1)(a) of the EEA, provisions of section 4 of the Interpretation Act were not applicable. The arbitrator's decision based on her interpretation of section 14(1)(a) of the EEA is both correct and reasonable. There is, therefore, no basis to interfere with it. The application can therefore not succeed.

[7] The third respondent sought a costs order against the applicant. I am convinced that the order should be granted as the third respondent cannot be out of pocket for reasonably defending his rights in terms of a ruling in his favour.

[8] In the premises, the following order is made:

Order:

- 1 The late filing of the application for review is condoned.
- 2 The application for review is dismissed.

- 3 The applicant pay the third respondent's costs.

Z Lallie

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Advocate Dala

Instructed by

The State Attorney

FOR THE THIRD RESPONDENT:

Advocate Grobler

Instructed by

Randell & Associates

LABOUR COURT