

NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

CASE NO **J6086/99**

DATE 2001/08/10

In the matter between:

THE PUBLIC SERVANT'S ASSOCIATION OF
SOUTH AFRICA

o.b.o. J SCHLEBUSCH AND C BRUCKNER

Applicant

and

DEPARTMENT OF HEALTH

Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE JUSTICE PILLAY
ON 6 AUGUST 2001**

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J U D G M E N TPILLAY J

- 1) This review proceeds on behalf of the third and fourth respondents only. On 28 March 1998 the second and third respondents had been dismissed, or, as the applicant department described it, "relieved" from their positions as Director: Medicines Administration and Deputy Director: Medicine Administration respectively. The first respondent commissioner found that the dismissals were procedurally unfair. (Page 34 of award). The department did not challenge this in these proceedings by the department (Page 34 of award). When discussions to secure their reinstatement into their positions failed, they were reinstated into the positions of Director: Health Technology Management and Deputy Director: Policy Planning and Pharmaceutical respectively on 11 August 1998.
- 2) The second and third respondents challenged their reinstatement to the new positions which they considered to be a demotion. This was subsequently confirmed by the commissioner and was also not challenged in these proceedings. Following an arbitration the commissioner reinstated them to their former positions respectively.
- 3) This is, firstly, a review of the commissioner's award and secondly an application to make the award an order of court.
- 4) The first ground of review is that the commissioner was sympathetic towards the respondents and demonstrated bias in their favour. This perception of bias was created by:
 - a) The commissioner, after having allowed the second and third respondents' representative to make an opening statement, proceeded to accept the statement as proven facts.

- b) The commissioner described the department's challenge against the validity of the subpoena issued against the Minister as "technical".
 - c) The commissioner was prepared to deny the department the right to argue the validity of the subpoena because it would delay the second and third respondents in the prosecution of their claim.
 - d) As the subpoena had been issued against the erstwhile Minister of Health the commissioner should have, but did not, attach any or sufficient weight to the validity of the subpoena and the circumstances under which it was attacked.
 - e) The commissioner was irritated by the department's witnesses' responses to questions.
 - f) The commissioner regarded the answers of the department's witnesses as irrelevant.
 - g) During cross-examination of the department's witness, Dr Roberts, the commissioner chastised the respondents' representatives for asking questions that he "thought to be detrimental to the case of the respondents".
- 5) On the basis of the foregoing the department perceived the commissioner to be biased. Despite that perception arising at an early stage of the proceedings and the fact that it had been represented by counsel at the arbitration, the department did not apply for the commissioner's recusal. Be that as it may. Each of the grounds of alleged bias will be examined to assess whether the inference of bias drawn from them and, consequently, the perception of bias is reasonable.
- 6) The department has not, by reference to the record, indicated on what basis it alleges that the commissioner accepted the respondent's representative's argument as fact. As will be

discussed more fully below, the commissioner's findings are based substantially on the weaknesses in the department's case.

- 7) The matter of the subpoena arose only because the second and third respondents' request for the supplementary report of the Ministerial Review Task Team had been refused. The report was the instrument that was used to substantiate the initial dismissal of the second and third respondents. The department's objection to the subpoena was that it described the document as "a supplementary report". This was allegedly inadequate for the purposes of identifying the report. If the department was able to refuse to give a copy of the report to the second and third respondents, it must have known what report was being sought.
- 8) The commissioner was entirely correct in adopting a robust and pragmatic approach to the subpoena, having found that the grounds of privilege, confidentiality and potential harm relied upon by the department were not true. This finding too was not challenged in this review by the department.
- 9) The further complaint about the weight to be attached to the subpoena against the Minister must fall away. Whatever weight the commissioner attached to the subpoena would not affect his findings above. As it transpired, the department did supply the report.
- 10) The department has not referred to those parts of the record on which it relies to substantiate that the commissioner was irritated by the answers of the witnesses of the department. It was also not the department's case that its witnesses' responses were entirely reasonable and that the commissioner's irritation was therefore unwarranted. The department's complaint is

pitched purely at the superficial level of the commissioner's irritation leading to a perception of bias. The commissioner denied having been emotional during the arbitration.

11) Having failed to establish that the commissioner's reaction to the witnesses' answers was unreasonable, the perception by the department's representatives of bias on his part is also unreasonable.

12) The award does not bear out the allegation that the commissioner found the department's witnesses to be irrelevant. The commissioner analysed the evidence of each of the witnesses. He explained, for instance, why the evidence of the second and third respondents and the witness, Professor Peter Fogg, was to be preferred instead of the evidence of Dr Suzanne Hill, a member of the Task Team who prepared the report. (Discussion on Communication on page 13 of the award.)

13) The commissioner made important findings of fact which are not challenged in this review. For example, he found:

- a) that no evidence had been led to the effect that the second and third respondents were conservative and inflexible (Page 14 of the award).
- b) that it had been conclusively shown in the cross-examination of the department's witnesses that the positions to which the second and third respondents had been reinstated were "far inferior" (Page 5 of the award).
- c) that Precious Matsoso's evidence was vague and contradictory, that Precious Matsoso contradicted her evidence (Page 21 of the award),
- d) that Dr J H O Pretorius was an extremely poor witness (Page 19 of the award).

- e) that Mr Bada Pharasi found it "very difficult and really bad" to carry out the instruction to escort the second respondent to his office on his departure.
- f) that despite testifying that the views of the Review Task Team were not based solely on the evidence relating to the so-called Mohamed and Tigere issues, Dr Hill could not name a single other person or incident upon which the report was based (Page 16 of the award).
- g) that Helen Tigere's evidence was not very coherent and that she was a bitter individual whose judgment could not be relied upon (Page 27 - 28 of the award).
- h) that Dr T D Wilson's evidence did not concern the dismissal or demotion of the second and third respondents.

14) As it happened the commissioner seems to have found the evidence of the witnesses for the department highly relevant for it was substantially in their cross-examination that they made the case for the second and third respondents. For this reason, and having discredited the report which had led to the dismissal of the second and third respondents, the commissioner was able to award in favour of the third respondent without her testifying. There was no basis for him to insist on her testimony or have made an adverse finding against her for failing to testify. The applicants criticism that he found in favour of the 3rd respondent without her testifying or without any or adequate evidence being led on her behalf was unfounded.

15) The commissioner's exasperation with the department was also not unfounded. After twelve days of the arbitration the jurisdiction was challenged on the basis that the arbitration referral was signed by an official of the fifth respondent and not the applicant. He nevertheless investigated the issue and recited authority for his decision to dismiss the point.

- 16)The commissioner has explained that his intervention when the second and third respondents' representative was cross-examining a witness was aimed at expediting the process as the cross-examination had become repetitive and tedious. I was not referred to any part of the record to disprove this explanation. The explanation is reasonable and accepted.
- 17)The commissioner also approached the witness for the 2nd and 3rd respondents with caution. Despite finding that Professor Fobb was a man of great character and distinction the commissioner also observed that he may have been embittered by his own dismissal as chairperson of the Medical Control Council (MCC).
- 18)The award of costs for defending the matter in a frivolous and vexatious manner is also not challenged in this review (Page 38 of the award).
- 19)In these circumstances the perception of bias by the applicants representatives is not reasonable.
- 20)The second objection raised at the arbitration and the second ground of this review was that the commissioner lacked jurisdiction to award reinstatement and compensation. The basis on which the commissioner dismissed this point is succinctly captured in the award at pages 33 to 34. They do not warrant repeating here.
- 21)Awards must be viewed wholistically. In this case such parts of the award that remain unchallenged must stand. They are sufficient to found a rational basis for the commissioner's decision.

22) In considering the remedy of reinstatement the commissioner applied his mind to the relationship difficulties that militated against reinstatement. He also seems to have weighed that against the unceremonious removal of the second and third respondents from their office and the department having treated them like criminals (Page 36 - 37 of the award). The possibility of a financial settlement ensuing if continued employment proved untenable was another consideration. In the circumstances the commissioner manifestly exercised his discretion judiciously and on the basis of all the relevant material properly before him. In all the circumstances the application for review is dismissed with costs.

23) The second application for consideration is the application to make the award an order of Court in terms of section 158(1)(c) of the Labour Relations Act No 66 of 1995.

24) In this application the point was raised *in limine* on behalf of the department that the second and third respondents were not cited as parties to the proceedings. Nor was it pleaded by the fifth respondent, who brought the application, that the application was being brought on their behalf. It was submitted that the application should be dismissed as the second and third respondents had no *locus standi* in this application.

25) The department relied on section 200 which provides:

A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party -

(a) in its own interest;

(b) on behalf of any of its members;

(c) in the interest of any of its members.

26) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."

27) The department sought to cast a restrictive interpretation on this provision by submitting that in terms of subsection (2) the second and third respondents had to be party to the application in order for the fifth respondent to be a party to those proceedings.

28) Sub-rule (2) is not qualified in any way to warrant such a restrictive approach. Furthermore, sub-rule (1) makes clear the circumstances when an organisation may represent its members. Sub-rule (2) allows the organisation to be a party to proceeding only if it also has members who are party to those proceedings. A trade union who does not have members who are a party to proceedings will, therefore, not qualify to be joined as a party to such proceedings. Subsection (1) and (2) must be read together to give effect to the purpose of the Act, namely to allow litigants to be represented by their respective organisations.

29) There was no dispute that the second and third respondents were members of the fifth respondent. It was abundantly clear that no one but the second and third respondents would derive any practical benefit from the award. There can be no doubt that the application was made on their behalf. The need to make such an allegation was a mere formality. In the circumstances, the point *in limine* is dismissed.

30)As this was the only basis on which the application in terms of section 158(1)(c) was opposed, it now remains for me to dispose of the application on an unopposed basis.

31)The application for review of the award under case No. J910/00 is dismissed, with costs.

32)The application to make the award of the first respondent under Case No GA5134 on 26 November 1999 an order of Court in terms of section 158(1)(c) of the LRA under Case No.6086/99, is granted, with costs.

FOR THE APPLICANTS: ATTORNEY G HIGGINS

INSTRUCTED BY: SAMPSON OKES HIGGINS INC

FOR THE RESPONDENTS: ADVOCATE F. SAINT

INSTRUCTED BY: THE STATE ATTORNEY