

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO:

C828/01

14-2-2002

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED Applicant
WORKERS UNION

and

MEDICOR (PTY) LIMITED t/a VERGELEGEN Respondent
MEDI CLINIC

JUDGMENT

LANDMAN J:

1. The National Education Health and Allied Workers Union ("NEHAWU") and Medicor (Pty) Ltd t/a Vergelegen Medi Clinic

accumulated some four disputes connected with the outsourcing of the laundry division at the clinic. Eventually the parties decided to consolidate the disputes and to refer the consolidated dispute to the Labour Court. This decision was taken during a conciliation meeting at the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

2. The parties agreed that the director of the CCMA would be requested to refer the consolidated dispute to this Court. I need not deal with the validity or desirability of this strategy for NEHAWU has abandoned three of the disputes. NEHAWU referred the fourth dispute, the principal dispute, being the alleged unfair dismissal on 31 May 2001 of its individual members who were employed by Medicor. This Court of course, has jurisdiction to entertain disputes relating to the alleged unfair dismissal of employees for operational reasons. It is, however, Medicor's contention that the referral of the dispute to this Court was premature.

3. Medicor's principal submissions are the following. The contracts of employment of NEHAWU's members terminated on 31 May and the members left the services of Medicor on 31 May 2001. The date of

dismissal as defined in section 191 of the Labour Relations Act 66 of 1995 was 31 May 2001. NEHAWU referred this dispute to the CCMA on 15 May 2001, this is common cause. It is submitted that this was premature and that the referral to conciliation was therefore invalid. As a consequence a jurisdictional fact for this Court to entertain the present application is lacking and the application should be dismissed.

4. Mr Whyte, who appears for NEHAWU, submits that the date of dismissal in terms of section 190(1) of the LRA was about 26 April 2001. He submitted that NEHAWU's members' services were terminated on 26 April. They received one month's notice which was to end on 31 May 2001. In terms of the retrenchment agreement they were not required to work this period of notice. Mr Whyte points out that the members had been suspended on 30 March 2001 and had not worked since their first dismissal which took place in August 2000. It is submitted that Medicor's reliance on 31 May as the date of termination confuses termination of contracts with the termination of the services of NEHAWU's members. It is pointed out that these members performed no service after August 2000 and certainly none

after 26 April 2001.

5. Mr Whyte relies on section 190(1) of the LRA which provides that the date of dismissal is the earlier of:
 - (a) the date on which the contract of employment terminated; or
 - (b) the date on which the employee left the services of the employer.

Mr White is entirely correct in saying it is not entirely clear what the legislature meant by the expression "left the services of the employer". It is also submitted that on a literal interpretation of section 190(1) the Court should find that the individual members left the services of Medicor on the date that they were advised of their dismissal, that is 26 April 2001. He submitted that this is the date on which their services were terminated in terms of the common law.

6. Section 190(1) of the LRA contemplates, most peculiarly, that the date of dismissal could pre-date the date on which the contract of service terminates. Although there may be unfortunate circumstances and various anomalous situations which could arise, on the plain meaning of section 190(1) the date of dismissal of the individual applicants in this case was either 26 April 2001 or 15 May

2001. On NEHAWU's version it is possible that the date of dismissal could even have been earlier. However NEHAWU are prepared to accept 26 April 2001 as the date of dismissal.

7. In most cases the leaving of their service is an incomplete act and does not constitute the deemed date of dismissal until the contract of employment is terminated. I leave aside of course the situation relating to employees as defined in the LRA who do not provide services in terms of a contract. It follows, in my view, that the referral to conciliation which took place on 15 May 2001 was a valid referral and it constitutes the jurisdictional fact which entitles this Court to entertain the present application which is based on the alleged unfair dismissal of the individual members for operational requirements.
8. It follows that the point *in limine* relating to the premature referral of the dispute falls to be dismissed.
9. This brings me to the next point *in limine*, namely that NEHAWU has not exhausted its internal remedies before referring the dispute for conciliation. It is Medicor's contention that the union withdrew prematurely from the consultation process. This may be so, but it

does not bar the institution of this application. It may damage NEHAWU's case but that is a risk which the union runs, assuming of course that consultation was still ongoing. I am not required to express any opinion on this and I do not do so. This point *in limine* must also fail.

11. Finally something was made of the union's alleged failure to draft the statement of case in accordance with Rule 6(1) of the Rules of Court. Other than a complaint that Medicor had to search for the essence of the union's case, Medicor does not set out the instances in which the statement of case fails to comply with the rule. In the absence of a specific complaint and taking into account that Medicor was able to plead over, it would be inappropriate for me to rule against the union on this issue.
10. In the circumstances the points *in limine* referred to above are dismissed with costs.

Signed and dated at BRAAMFONTEIN this 26th day of February
2002.

AA Landman

Judge of the Labour Court of South Africa