

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

JOHANNESBURG

CASE NO JR 1223/02

DATE 2005-01-09

In the matter between

THE PUBLIC SERVANTS ASSOCIATION OF
SOUTH AFRICA (on behalf of JJ Venter)

Applicant

And

AP LAKA N.O.
GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL

1st Respondent

2nd Respondent

DEPARTMENT OF LAND AFFAIRS

3rd Respondent

JUDGMENT

REVELAS, J:

- [1] The applicant, a trade union, acting on behalf of Mr JJ Venter, one of its members, seeks to set aside an award made by the first respondent (“the arbitrator”) in terms whereof the unfair dismissal dispute referred to the second respondent (“the council”), was dismissed. In addition, the applicant seeks to substitute the award with a finding that Mr Venter’s dismissal by the third respondent (“the Department”) was unfair and that he

be reinstated or compensated. The application for review is brought out of time and the applicant has brought an application for condonation.

[2] When Mr Venter was dismissed by the Department on 28 February 2001, he had been in the employ of the latter since 1 December 1976 as an officer of the Public Service and at the time of his dismissal he held the post of Deputy Director: Internal Audit.

[3] A disciplinary enquiry was held on 21 and 24 November 2000 into several allegations of misconduct with which Mr Venter was charged. He was found guilty of three counts of misconduct. They were the following:

1. Insubordination, in that he failed to return a cell phone to the Department and kept it in his possession, despite an instruction from the Department's Human Resources director to return it. The sanction imposed for this charge of misconduct was a written warning with counselling.
2. The second charge was one of using information obtained in the course of his official duties for personal gain. The facts relied on in this charge were, that the applicant attempted to obtain a 10% commission fee on an amount of approximately R280 000.00 (unpaid value added tax) which he discovered was owing (and later paid) by a firm called F Systems Technology, to the South African Revenue Services, as a result of his discovery and report, and as part of his official duties. Also in respect of this charge, a warning and counselling was imposed.
3. Thirdly, Mr Venter was charged with fraud (in that, on or about six occasions over a period of twenty months' between 21 October 1998 to June 2000, Mr Venter fraudulently presented the Department with claims for accommodation expenditure which exceeded the amounts actually spent in respect of such expenditure. In other words Mr Venter misrepresented his expenses incurred and defrauded the Department during the aforesaid period in an amount of R7 455.00. In respect of this charge of misconduct the chairperson of the disciplinary hearing imposed suspension without pay for three months.

[4] The Director General of the Department felt that particularly the third sanction imposed, was "shockingly inappropriate". Mr Venter was invited to submit representations as to why he should not be dismissed or discharged from the Public Service in terms of section 17 of the Public Service Act 103 of 1994, as amended ("the PSA"), in view of the

seriousness of his actions.

[5] The applicant (or “Union”) responded on 18 December 2000, stating (briefly) that it would be unfair to expect Mr Venter to provide further reasons as to why he should not be dismissed as that would constitute “double jeopardy” or a second enquiry for the same charge of misconduct. In the same letter it was pointed out that the chairperson or presiding officer followed a fair procedure and a sanction in terms of the applicable disciplinary code was imposed.

[6] In turn, the Department responded on 6 January 2001, stating that it was normal practise for all serious cases of misconduct to be submitted to the Director-General (as indeed happened in this case through an internal memorandum) for a final decision on an appropriate sanction and attention was drawn to the Department’s view that in terms of its own provisions, the disciplinary code (referred to above) was only a guideline and could be departed from in appropriate circumstances.

[7] The Department made the point, or submitted, that the request for reasons from Mr Venter as to why he should not be dismissed, did not amount to a second enquiry, but a revision of the sanction imposed by the chairperson. The request for reasons was repeated in this letter.

[7] The Union reiterated its concerns about the legality and fairness of the Director-General’s intervention in further correspondence, and the Department presented Mr Venter with a final, third opportunity to furnish reasons as to why he should not be dismissed. The Union stood by its view that the furnishing of such reasons would indeed constitute an unfair, second enquiry for the same misconduct.

[8] On 20 February 2001, recommendations to the Director-General of the Department, to the effect that Mr Venter should rather have been dismissed than suspended, were accepted. A letter from the Department was then forwarded to the Union advising that Mr Venter was dismissed with effect from 1 March 2001.

[9] The Union then referred a dispute to the second respondent (the Bargaining Council), based upon the allegation that the employer (the Department) changed the sanction of the chairperson of the disciplinary hearing (a suspension of three months’ without pay) to one of dismissal. A dispute concerning the interpretation of a collective agreement was also included.

[10] The matter was set down for an arbitration hearing to be heard on 25 January 2001, after conciliation had failed: Prior to the arbitration hearing, the parties reached an agreement in terms of which no oral evidence was to be lead (Mr Venter had pleaded not guilty at the disciplinary hearing but did not appeal against the three findings of guilty) or the sanctions imposed in respect of them.

[11] The arbitrator found that in terms of section 17 of the PSA, the Director-General was empowered to interfere and that such interference was not tantamount to a rehearing of Mr Venter’s case.

[12] The arbitrator further found that section 17 of the PSA should take precedence over the negotiated code and procedures for the Public Service, despite the conflict between the Resolution of the Bargaining Council on the one hand, and the PSA on the other.

[13] In addition the arbitrator held that that even if the intervention of the

Director-General amounted to a re-hearing (which he did not find was the case) such a re-hearing was admissible in the circumstances of the case, and in any event, Mr Venter had deliberately declined the opportunity to state his case, when requested to do so when the question of sanction was revisited.

[14] Finally, the arbitrator upheld the view that the sanction imposed by the chairperson of the hearing was inappropriate, given the seriousness of the misconduct and found that dismissal was the appropriate sanction in the circumstances.

[15] The applicant on behalf of Mr Venter submitted that the arbitrator's award ought to be reviewed on the basis that there was a defect in the arbitration proceedings, or alternatively that the arbitrator did not apply his mind to the evidence before him and that his conclusions were irrational or unjustifiable given the facts before him. It was further submitted, in the alternative, that the arbitrator's conclusions were grossly unreasonable, in view of his reasoning that when there was a conflict the Code and Procedures and the PSA, the Act should prevail.

[16] The first question to be determined in this case is whether section 17 of the PSA indeed empowered the Director-General to act as he did, given the existence of the collective agreement. If answered in the affirmative, the next question is whether dismissal was the appropriate sanction or whether the dismissal was fair.

[17] According to the Department, the collective agreement had no legal effect on section 17 of the PSA, since the latter was an Act of Parliament, whereas a collective agreement was not, and despite the provisions of such an agreement, the Director-General retained the power to dismiss in terms of section 17 of the Act. Secondly, it was argued that the interference by the Director-General was not a disciplinary rehearing, but the exercise of an administrative statutory power, and thirdly, that the dismissal was not unfair in any event.

[20] The above submissions were also what the arbitrator had, in essence, found in his award.

[21] The collective agreement does make provision for a disciplinary code and procedure. Those procedures were in fact followed in this case. There is no specific provision in the collective agreement which seeks to circumvent or oust the powers conferred upon the Director-General by section 17 of the Act.

[22] In my view, the fact that a collective agreement is or could be interpreted to be at variance with the PSA, does not render the provisions of the latter automatically as *pro non scripto*, as the argument of the Union would suggest.

[23] Clearly in some circumstances, parties (an employer and a trade union) would conclude a collective agreement wherein there are provisions which do not

coincide with the provisions of the Labour Relations Act 66 of 1995, as amended (“the Act”) or, as in this case the PSA. The reasoning behind such a divergence from an Act would be that in respect of certain matters, particularly of mutual interest, between the parties, it may be more expedient for their labour relationship, to make their own rules rather than to resort to or follow the provisions in a statute.

[24] An example of the aforesaid would be where the parties agree on a procedure to be followed prior to the employees embarking on a strike. Often such a collective agreement would make provision for a “cooling off” period, which is absent from the Act, but some parties would enter into such an agreement because the particular industry they operate in, may require such a procedure, or they could make rules for any reason which may facilitate disputes between them.

[25] Section 17(1)(a) of the PSA reads as follows:

Discharge of officers

(1) (a) Subject to the provisions of paragraph (b), the power to discharge an officer or employee shall vest in the relevant executing authority, who may delegate that power to an officer, and the said power shall be exercised with due observance of the applicable provisions of the Labour Relations Act, 1995 (Act 66 of 1995).

[Para. (a) substituted by s. 14 (a) of Act 47 of 1997.]

(b) Notwithstanding paragraph (a), the power to discharge an officer, excluding a head of department, in terms of subsection (2) (e), shall be vested in the head of department.

[26] The necessity of such a provision in the public sector is abundantly clear. It is in the interests of sound public policy that the disciplinary sanctions imposed by a government body, should be second-guessed by someone other than the decision maker or delegate of the head of the Department (such as the chairperson of a disciplinary enquiry). This is so because the

Government is accountable to its citizens for what it does with its taxes.

[27] Mr Venter was a public officer. The third charge related to instances where Mr Venter, in the scope and course of his duties was required to make use of hotel or other accommodation as he had to attend to duties away from his own residence. The Department was liable to reimburse him for the expenses he had incurred in this regard. He managed to qualify for special rates which were cheaper than the usual rates offered where he stayed. Instead of claiming from the Department, the special rate, he claimed the higher rate and appropriated the difference for himself, thus making a profit for himself at the expense of the Department and ultimately the taxpayers of this country. That is fraud. It is quite trite that for offences of dishonesty, dismissal is the appropriate sanction, even in cases where the misconduct is a first offence.

[28] The Department, as most other Governmental bodies, had adopted a “zero tolerance” policy towards fraud. It has done so for a reason. Millions of Rand are

lost annually through the fraudulent conduct of some governmental officials. This scourge will never be rooted out if there is no scrutiny of the sanctions imposed for fraud committed by officials.

[29] A collective agreement such as the one in question, does not prevent the Director-General to intervene and overturn an inappropriate sanction. The Director-General's intervention did not amount to a re-hearing of the matter. No new facts were relied on.

[30] At the arbitration hearing there was evidence that some of Mr Venter's subordinates followed the same practices when claiming subsistence expenses from the Department, but had done so on the advice of Mr Venter, their supervisor. The Department viewed these cases as less serious because the employees in question acted on Mr Venter's advice. There was also evidence that in some seven cases the Department had dismissed officers and employees for misconduct amounting to dishonesty and insubordination, which ruled out the argument for inconsistency on the part of the Department in applying discipline.

[31] Part of Mr Venter's responsibilities as Head of Internal Audit was to prevent financial mismanagement and by committing fraud for personal gain he abused a position of trust and set a bad example to his subordinates. Even though his misconduct was regarded as a first offence, it is of importance to note that the several fraudulent claims he lodged, were claimed over a twenty month period and were detected only because of an anonymous letter which was sent to the Department.

[32] The arbitrator's conclusion that a collective agreement is not capable of overriding an Act of Parliament or prevailing over it, is neither illogical, irrational or incorrect. The terms of the collective agreement itself declares the collective agreement to be a guideline only.

[33] The Labour Appeal Court has cautioned against having a second disciplinary enquiry in circumstances where second enquiry is *ultra vires* the employer's disciplinary code and held that save in exceptional circumstances a second enquiry would probably be unfair.

[34] See: BMW SA (Pty) Ltd Van der Walt (2000) 21 ILJ 113 (LAC) paragraph 12. In the same judgment it was also held that the principles of *auterfois acquit* and *re juidictata* ought not be imported into labour laws as fairness and fairness alone is the yardstick.

[35] As a matter of law therefore, it can not be said that proceedings under a collective agreement raises a bar to the exercise of a statutory power contained in section 17 of the PSA. The question is whether it was unfair to change the sanction imposed to a harsher one.

[36] The arbitrator held that Mr Venter's dismissal was not unfair. Given the circumstances outlined above, such a finding is not irrational or disconnected to the evidence before him. Mr Venter was guilty of three serious counts of misconduct (insubordination, using official information for personal gain and fraud). These were all offences for which dismissal was in each case, a justifiable

sanction.

[37] Mr Venter elected not to make use of the opportunities given to him to put any further mitigating circumstances before the Director General. He was subjected to one proper hearing only, and it was a fair one.

[38] In the circumstances, I find no reason to set aside the arbitrator's award.

Condonation:

[39] The application for review was brought out of time. The degree of lateness was in dispute and the explanation for the delay was that Mr Venter had sought legal advice. Given the poor explanation for the delay and the lack of prospects of success as shown above, condonation for the delay is not granted.

[40] The application for review is dismissed with costs.

E.REVELAS

REPORTABLE: YES/NO
REPORATABLE

DATE OF HEARING: 17 MARCH 2005
DATE OF JUDGMENT: 5 OCTOBER 2005

ON BEHALF OF THE APPLICANT: The Public Servants Association of
South Africa

ON BEHALF OF THE RESPONDENT: State Attorney