BEGIN DEUR 'N "HEADER" TE MAAKSneller Verbatim/JduP
IN THE LABOUR COURT OF SOUTH AFRICA
BRAAMFONTEIN CASE NO: JR241/03
2003.10.24

In the matter between
J M MARUMO Applicant
and
CCMA AND OTHERS
Respondents

J U D G M E N T

MBENENGE, A.J: This is a review application brought in terms of section 145 of the Labour Relations Act, 66 of 1995(the LRA).

The applicant was dismissed from the employ of the third respondent, due to a complaint that he had performed his duties poorly, and after he had been found guilty of misconduct. He challenged the dismissal on the basis that it had been substantively and procedurally unfair. The matter went on arbitration, and the arbitrator (second respondent) found that the dismissal had indeed been substantively and procedurally unfair. He further awarded the applicant compensation which was the equivalent of eight months' remuneration, calculated at the applicant's monthly salary, the *quantum* of which was R18 632,72. The applicant seeks an order reviewing and setting aside the award only in so far as it relates to the *quantum* of compensation awarded to him. The applicant had been dismissed in November 2001, and the arbitration proceedings were finalised on 31 January 2003 when the award was handed down.

The applicant's grounds of review, as I see them, are the following.

1. The award was made on the erroneous factual basis that he earned R2 329,09 per month, whereas he earned R2 758,88 per month.
2. The arbitrator did not exercise his discretion properly in that, having found that the dismissal was both substantively and procedurally unfair, he should have awarded more compensation.

For his assertion, the applicant relies on section 194(3) of the LRA, which deals with compensation awarded to an employee whose dismissal is automatically unfair. I hasten to say the applicant's conclusion regarding the applicability of section 194(3) is wrong in law. Because his dismissal was found to have been both procedurally and substantively unfair, section 194(1) applied. Most importantly, in his founding affidavit the applicant says:

"I don't know how the Commissioner came to the 8 months' remuneration."

Other than raising a point *in limine*, which was not pursued at the hearing of the application, the upshot of the third respondent's contention is that the applicant's case does not fit into any of the grounds adumbrated in section 145. This is couched in the following terms at paragraph 11.3 of the answering affidavit:

"I further deny that the grounds for review as alleged by the applicant exist herein. I further dispute that the allegations made in the applicant's affidavit are tantamount to misconduct on the part of the first or second respondent as contemplated in the very provisions of the Labour Relations Act, 66 of 1995, relied upon by the applicant, and submit that the first or second respondent's decision to dismiss the applicant's application amounts to a legal conclusion which is rationally connected to the circumstances and facts placed before the first/second respondent at the time."

Miss de Jongh, who appeared for the third respondent, pursued the same line of argument, but conceded that compensation was awarded on the basis of a wrong monthly salary. The record is clear in this regard. The applicant's monthly salary was R2 758,88. It would indeed have been the simplest of things for the applicant to approach the commissioner for a correction of the award on the basis that there had been a patent error regarding his basic monthly salary. The matter is now before this court for a determination. I would not put form over substance by remitting the matter to the third respondent solely on the basis of the patent error. More so in the light of the view I take of the entire matter.

The real issue is whether other than the wrong reference to the applicant's basic salary there are other entertainable grounds of review.

The record reveals that the applicant was, during September 2002, in the employ of Real Workers Union. The second respondent found as much in his award. He states:

"It was further indicated by the respondent that should I find in favour of the applicant. I take into consideration that applicant was employed by Real Workers Union shortly after his dismissal. The applicant indicated that he was employed only during September 2002 by Real Workers Union."

The applicant was thus out of employment for sixteen months, less the month during which he was employed by Real Workers Union. The record and the award do not support Miss de Jongh's submission that the applicant was employed beyond September 2002. Furthermore, no version gainsaying that of the applicant is contained in the answering papers. All one finds in this regard is a bald denial by the third respondent.

After finding that the applicant *"was employed only during September 2002 by Real Workers Union"* the second respondent could not have come to court championing a different view. Therefore, Miss de Jongh's submission in this regard is, with respect, without merit. It

now remains to consider whether the applicant has made out a case for a reviewal and setting aside of the compensation award.

In my view he has: Firstly, it was incumbent on the arbitrator, after finding that the dismissal was both substantively and procedurally unfair, to have resorted to the provisions of section 194(1) of the LRA and make a just and equitable compensation award, not more than the equivalent of 12 months' remuneration, calculated at the applicant's monthly rate of remuneration on the date of dismissal, i.e. R2 758,88. Having recourse to the fact that the applicant was out of pocket for 15 months, the award is surprisingly silent regarding why the maximum of 12 months was not granted. It would be overly technical of me not to find in the circumstances that there was no rational basis for awarding compensation on the basis of 8 months' salary. When a dismissal is both substantively and procedurally unfair the proper approach is that set out in section 194(1) of the LRA.

Even assuming that the applicant had been employed beyond September, and still is in the employ of another entity, it would have been incumbent on the second respondent to give consideration to whether or not it was just and equitable to award compensation on the basis of 9 months' salary. Therefore, the sole reason given for the compensation award is incomprehensible in my view (***Abdull & another v Cloete NO & others*** 1998(19) ILJ (LC) at 802F-G). The failure to properly invoke section 194(1) of the LRA prevented the applicant from obtaining a just and equitable compensation award. The applicant's challenge regarding *"how the commissioner came to 8 months' remuneration"* is, in my view, a proper ground of review.

I am satisfied that the matter does not fall to be remitted to the second respondent in view of the lapse of time and the need to dispense speedy justice, and that there should be no order of costs. Furthermore, I deal with this matter purely on the understanding that the applicant did not receive the original amount awarded by the second respondent, namely R18 632,72.

O R D E R

In the result:

1. Paragraph 2 of the award of the second respondent dated 31 January 2003 is hereby set aside.
2. The following is substituted for paragraph 2 of the award:
   "That the respondent pay to the applicant the equivalent of 12 months' remuneration calculated on the basis that on the date of dismissal the applicant earned R2 758,88 per month. [Therefore, R2 758,88 times 12 is equal to R33 106,56.]"
3. The amount of R33 106,56 is to be paid to the applicant within 14 days from the date of service of this order on the third respondent's attorneys.
4. There shall be no order of costs.

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