IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1358/2010

In the matter between

NORMAN MOOLMAN	1st Applicant
and	
EDUCATION LABOUR RELATIONS COUNCIL	1st Respondent
COEN HAVENGA *N.O.*	2nd Respondent
GAUTENG DEPARTMENT OF EDUCATION	3rd Respondent

JUDGMENT

LAGRANGE, J

Introduction

1. The applicant seeks to set aside an arbitration award by the second respondent issued on 26 February 2010 under case number PSES 413-08/09.

2. Before the application could be considered two condonation applications had to be determined. The first was for the late filing of the applicant's review application and the second for the applicant's non-compliance with the time limits in the directions of the court to finalise the filing of the necessary documents in the review application Both these applications were granted. Reasons for granting these applications will be filed in due course.

3. When the matter came before this court on the previous occasion on an urgent basis, both parties were present. At that hearing the matter was postponed to be heard on the ordinary opposed roll, subject to directions for the parties to file the necessary pleadings to make it possible to finalise the review application. The applicant did what was required of it, though late and the third respondent could still have filed any opposing affidavit within the ordinary time limits before the hearing on 4 November 2010. No opposing affidavit was filed and the third respondent did not attend the hearing.

Merits of the review

4. The applicant has been a teacher at a number of schools since 1980. In May 2002 he was charged and found guilty of misconduct at one school. Despite appealing against the sanction a penalty of R 2000-00 was imposed, which the applicant accepted under protest. In 2004 he successfully applied for the post of a Deputy Principal. In the course of applying for the position he had to reply to two written questions on forms he filled in relating the application, which read:

   "Convicted of misconduct/criminal offence ? Yes/No"

   "Have you been charged with professional misconduct in the public service?"

5. Both questions the applicant answered in the negative notwithstanding the disciplinary action taken against him in 2002. He was subjected to a disciplinary enquiry and dismissed for gross dishonesty in September 2005 on account of his answers to these questions. At the enquiry he claims he had been advised to plead guilty to the charge by his union representative because it would result in more lenient treatment. He then appealed to the Gauteng MEC.

6. The MEC upheld the appeal on 10th July 2006 on the basis that he had pleaded guilty. She then replaced sanction of the chairperson of the enquiry with a final written warning and demotion from a post level 3 educator to post level 2. The demotion resulted in a reduction in his salary in line with his lower post level. The applicant then lodged a grievance against the new sanction, claiming now that he did not understand the questions posed in the application

form. The MEC dismissed the grievance finding his new defence at odds with his previous guilty plea.

7. Next, the applicant inititated an unfair labour practice claim against the sanction imposed by the MEC in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ('the LRA'), which deals with disputes over the fairness of disciplinary action short of dismissal. The matter was heard by the second respondent who produced a detailed and carefully argued award of some 22 pages. The parties did not give oral evidence but each submitted written stated cases and arguments. For the most part the facts were common cause.

8. For the purposes of this review only a few salient features of the award need to be mentioned. The arbitrator believed he had to consider if the sanction of dismissal imposed by the chairperson of the internal inquiry was fair. He then analysed the sanction imposed on appeal by the MEC, which replaced the original sanction. After considering the test for a fair dismissal in terms of the criteria set out for substantive fairness in dismissals for misconduct in Schedule 8 of the LRA, the Code of Good Practice for Dismissals, he found that the chairperson's decision to dismiss the applicant was fair. However, he found that demotion as part of the sanction imposed by the MEC was in breach of the requirement to obtain an employee's consent before a demotion could be imposed as an alternative penalty to dismissal and that the imposition of this sanction amounted to an unfair labour practice

9. Under item 9(5) of the Employment of Educators Act ('the EEA'), the powers of the MEC or Minister on appeal are to uphold the appeal, amend the sanction or dismiss the appeal. The power to impose a sanction of demotion in terms of the clause 8(2) of Schedule 2 of the EEA is subject to the requirement that it can only be imposed as an alternative sanction to dismissal and the educator must consent to it. Therefore, if the employee does not consent to the alternative sanction of demotion, the normal consequence will be that the sanction of dismissal will then apply.

10. Given that he found that the sanction of demotion to have been procedurally unfair, the arbitrator found that it would be the appropriate and logical course of action to revert back to the stage before such action occurred by reinstating the sanction which applied prior to the MEC's decision, namely the sanction of dismissal, which he had considered and found to be

13.

fair. Consequently, he found the sanction of demotion imposed on the Applicant to constitute an unfair labour practice, which was unenforceable and therefore the sanction of dismissal remained valid and enforceable.

Grounds of Review

11. I only address two of the grounds of review raised by the applicant, as the first provides sufficient ground for setting aside the award, and the second is relevant to the appropriate relief.

12. Firstly, the applicant takes issue with the arbitrator making a finding on the fairness of the original dismissal on the basis that he had no jurisdiction to pronounce on the fairness of a dismissal decision when deciding an unfair labour practice dispute under section 186(2)(b) of the LRA which is confined to challenging disciplinary action short of dismissal only. This jurisdictional attack, though sound, is somewhat disingenuous given that the applicant himself specifically singled out this sanction as one of the objects of his complaint before the arbitrator. Nevertheless, it is clear that an arbitrator acting under s186(2)(b) cannot pronounce upon the fairness of dismissal as a sanction, and it was not open to the arbitrator to determine that, even if he believed that it was a consequence of overturning the MEC's decision that the decision of the disciplinary enquiry chairperson still stood. His jurisdiction was confined to considering the fairness of the MEC's alternative sanction and having decided it could not stand, should have considered how to best to remedy the fact that a decision on appeal had not been properly taken, resulting in unfairness to the applicant. On this jurisdictional basis alone, the arbitrator's award stands to be set aside under section 145(2)(a)(iii) of the LRA.

13. The applicant also criticizes the arbitrator for failing to consider the final written warning which was part of the sanction imposed by the MEC together with the demotion. It would seem that having decided that one component of the MEC's sanction was defective, the arbitrator did not consider it necessary to consider the remaining part. The arbitrator cannot

13.

really be criticized for not embarking on a further enquiry which could not alter the fact that the MEC's sanction could not stand. The applicant appears to be of the view that the arbitrator ought then to have considered whether the remainder of the MEC's sanction, being the final warning, could stand. With respect, this would have been an exercise which was not only futile but also artificial. The MEC was considering whether a sanction less severe than dismissal should apply and decided on a two pronged sanction comprising a demotion and a final warning: it makes no sense to assess the fairness of the balance of the sanction in isolation when the final warning was part and parcel of one sanction package.

Appropriate remedy

14. Section 193(4) of the LRA sets out the remedial powers of an arbitrator when determining an unfair labour practice dispute, as follows:

> "*An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, <u>on terms that the arbitrator deems reasonable</u>, <u>which may include</u> ordering reinstatement, re-employment or compensation.*" (emphasis added).

15. In ***Booysen v SAPS & another*** **[2008] 10 BLLR 928 (LC)** at 933, [21], Cheadle AJ noted that unlike the list of remedies for an unfair dismissal which is closed the list of remedies for unfair labour practices is not. It seems reasonable to infer that one reason for the divergent approach to the remedies for dismissals and unfair labour practices is that the legislature recognized that the variety of conduct which might constitute unfair labour practices in the context of parties who are still in an employment relationship might sometimes require remedies other than the three specifically mentioned.

16. In this instance, it is possible for the court to consider what sanction the MEC might reasonably have imposed when considering the applicant's appeal against the sanction of dismissal. However, given that the original decision was flawed mainly because of a misunderstanding of the pre-requisites that must be met before demotion could be imposed as part of an alternative sanction, it seems reasonable that the office bearer who is entrusted

13.

with determining appeals, and who ought to be better acquainted with the standards which are normally applied by the third respondent in cases involving this type of misconduct, should reconsider the question of an alternative sanction. Moreover, as the material facts of the matter or not very complicated and are largely common cause it ought to be relatively easy to decide the appeal without much delay.

17. Accordingly, in this instance, in substituting the decision of the arbitrator, the court believes the appropriate remedy in this instance is to remit the determination of the appeal to the MEC.

Costs

18. As it might happen that an employment relationship between the parties could be resumed, it would not be suitable to make an order as to costs in this instance.

Order

19. In the light of the findings above, an order is made in these terms:

    19.1. The arbitration award of the second respondent is reviewed and set aside, save for his finding that the imposition by the third respondent of a sanction entailing demotion on the applicant as part of an alternative sanction to dismissal, without obtaining his consent to such demotion, constituted an unfair labour practice.

    19.2. Within 30 calendar days of service of this judgment on the third respondent, the Member of the Executive Committee for the third respondent must reconsider and decide the applicant's appeal against the sanction of dismissal imposed by the chairperson of the disciplinary enquiry.

    19.3. No order is made as to costs.

ROBERT LAGRANGE

13.

JUDGE OF THE LABOUR COURT

Date of hearing: 4 November 2010

Date of judgment: 5 November 2010

Appearances:

For the applicant: Ms A Groenewald

No appearance for the third respondent.

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