IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Heard: 17 May 2010 Reportable

Delivered: 18 May 2010

Edited: 14 June 2010 **D498/08**

In the matter between

DR BERTHOLD LIND APPLICANT

And

KWAZULU NATAL DEPARTMENT OF HEALTH RESPONDENT

JUDGMENT

PILLAY D, J

[1] The parties asked the Court to make a settlement agreement an order. The terms of the settlement were:

> "The respondent is ordered to pay to applicant;
>
> (1.1) an amount equal to 24 months remuneration at the rate that applicant was remunerated as at May 2007;
>
> (1.2) applicant's costs of suit as taxed or agreed".

[2] The Court expressed concerns about the apparent generosity of the settlement. It nevertheless granted the order; however, on reflection it seemed that the settlement might be against public policy. The Court summoned the parties for a hearing as to why it should not *mero motu* rescind the order.

[3] Mr Crampton, who appeared for the applicant employee, urged the Court not to rescind the order as it was not against public policy.

Furthermore, there was also no patent or obvious error or omission in
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the order; consequently, the requirements in terms of section 165 (b) of the Labour Relations Act 66 of 1995 (LRA) for rescission were absent.

[4] Mr Nankan, who appeared for the employer, the Department of Education (the department), attempted to persuade the Court that the agreement was not against public policy in the following circumstances:

(1) The employee was a specialist psychiatrist for 40 years since 1967. Since the 28 March 2000 the employee held the position of acting head of psychiatry.

(2) After he turned 65 the department continued to employ him in terms of annual cessional contracts. Fifteen such cessional contracts were concluded by the time the employee was dismissed on 31 May 2007. Cessional contracts of employment are not full time contracts of employment.[1]

(3) When he was dismissed, the employee was 80 years old. The psychiatric unit in which he worked closed down and his cessional services were no longer required.

(4) This necessitated his retrenchment for operational reasons.

(5) By a letter dated 3 May 2006, Ms HM Findlay, the psychiatric unit manager informed him as follows:

> "Further to the various conversations that we have had over the past weeks, I wish to advise you that permission to

[1] Paragraph 4.2 of the statement of defence, paragraph 26.

> undertake cessions at Edendale is hereby withdrawn. The effective date will be 31 May 2007. This decision is based on the comment made by you when you telephoned myself and advised me that you would not be voluntarily resigning and that I would have to fire you. On behalf of Edendale Hospital, thank you for the enormous contributions you have made to this institution in the field of psychiatry over the 20 years of association. With good wishes and much appreciation".

She copied this letter to Ms Zuma, the district manager, and Doctor Burns.

(6) The employee referred an unfair dismissal dispute to arbitration. The commissioner found from his submissions that the dismissal was for operational reasons and ruled that she did not have jurisdiction. The employee filed a claim on 29 September 2008 for unfair dismissal in the Labour Court on the following grounds:

a. The department made no attempt to comply with the provisions of the Labour Relations Act, 65 of 1995 (LRA) relating to dismissal based on operational requirements.

b. The employee was not told of the reasons for his dismissal.

c. The dismissal was not based on the respondent's operational requirements because the department continued to admit and treat psychiatric patients at Edendale Hospital, despite alleging that it was closing down the psychiatric ward.[2]

[2] Pages 5 and 6 of the bundle, paragraphs 5 of the statement of claim.

(7) In its defence, filed on the 22 August 2008, the department persisted that it complied with the provisions of the LRA in that:

a. The dismissal was for operational reasons.
b. The employee was aware of the reasons for his dismissal.
c. The employee was party to the consultative process that led to the dismissal for operational reasons.
d. The department's servants consulted with the employee before deciding to close down the psychiatric ward.
e. The employee was consulted about the measures to avoid dismissal and minimise the effects of the dismissal.
f. There were no structures within which the employee could be absorbed, given his specialised field of practice.
g. The employee's advanced age militated against his absorption,
h. "Full and proper consultation and due compliance with the provisions of section 189 of the LRA" preceded the dismissal.[3]

(8) The department had not complied with section 189 (1) (d) (2), (3), (5), (6) and (7) of the LRA.

(9) Furthermore, the legal representatives for the department had difficulty securing Ms Findlay's attendance at consultations. The first

[3] paragraph 7.8, page 28 of the bundle, paragraph 7.3 of the defendant's statement of defence.

consultation with her took place on the 7 May 2010, barely 10 days before trial.

(10) As the result of the consultation, the department and its representatives concluded that Ms Findlay would not make a good witness and the department should settle.

(11) The legal representatives received a mandate to settle only on Friday, 14 May 2010, the last court day before trial.

(12) The department attempted to settle the matter earlier in 2008, however, the employee wanted reinstatement and the department was not agreeable to reinstating him. When the pre-trial minute was concluded, the legal representatives did not have a new mandate to settle the dispute. In any event, the employee persisted with reinstatement.

[5] Against these facts, Mr Nankan urged the Court to uphold the settlement. The Court had little choice but to grant the order mainly because it is not obvious to the Court that the settlement was against public policy. The Court does not have a full picture of the strengths and weaknesses of the department's case.

[6] Given the apparent lack of proper supervision and accountability by the department over the employee's supervisors, the Court can also not say with any conviction that the supervisor(s) did not facilitate the employee succeeding in his claim, in other words, whether the supervisor(s) colluded with the employee to the prejudice of the department and the public interest.

[7] Even though the Court does not know, the department must know the

strengths and weaknesses of its case. It should nevertheless be held publicly accountable for its decision to settle on these terms. Consequently, even though the Court allows the settlement order to stand, it calls on the department to respond to the following questions in writing by 30 June 2010:

(a) Did Ms Findlay notify the employee of his retrenchment?

(b) Who supervised Ms Findlay or any other person who was the employee's immediate supervisor who notified him of his retrenchment?

(c) When did Ms Findlay leave the department?

(d) Who supplied the legal representatives with information to plead that the department had complied with the LRA?

(e) Whoever provided such information to the legal representatives to prepare the statement of defence was untruthful, negligent, careless or perhaps even corrupt. What steps have the department taken to call such officials to account for the incorrect information they supplied the department's representatives?

(f) Who mandated the settlement that is made an order of this Court?

(g) On what basis did the department agree to pay 24 months compensation?

(h) Why did the department's officials fear that the Labour Court might reinstate the employee when

(i) the unit had closed down,

(ii) the employee was employed on cessional contracts of not more than a year each time,

(iii) the employee was 80 years old,

(iv) the hospital continued to hold patients for only 72 hours observation before transferring them to Town Hill Hospital?

(i) Why did the department not terminate employment by paying the employee for the balance of the duration of his cessional contract?

(j) Why did the department renew his cessional contract for a year when it had decided in December 2006 to close down the unit which it did in April 2007?

(k) Why was the employee's cessional contract renewed orally?

(l) Is it lawful for the department to renew contracts of employment of public employees orally?

(m) What steps have the department taken to improve its efficiency and accountability to eliminate the kind of waste of public recourses evidenced in this case?

(n) Can the department recover its losses from any individuals and if not, why not?

(o) Why did the department not tender with prejudice to pay the employee a lesser amount when it was instructed to defend the matter or soon thereafter when it commenced settlement negotiations?

[8] The order that I grant therefore is the following:

(1) The order granted on the 17 May 2010 making the settlement agreement an order of court stands

(2) The department is directed to respond to the questions (a) to (o) above by 30 June 2010.

(3) There is no order as to costs.

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PILLAY D, J

APPEARANCES

FOR APPLICANT	:	Adv CRAMPTON
Instructed by	:	Venn Nemeth & Hart Attorneys
FOR RESPONDENT	:	Adv S NANKAN
Instructed by	:	STATE ATTORNEY