

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN**

NOT REPORTABLE

CASE NO: C09/2010

In the matter between:

SOUTH AFRICAN POLICE SERVICE

APPLICANT

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

1ST RESPONDENT

ADV W F MARITZ NO

2ND RESPONDENT

INSPECTOR HATTINGH

3RD RESPONDENT

JUDGEMENT

CHEADLE AJ

Introduction

[1] The applicant seeks to review and set aside an award made by the 2nd respondent (the arbitrator) to the effect that the applicant had made continued employment intolerable for the 3rd respondent (Mr Hattingh) and that it failed to show that his constructive dismissal was fair. The arbitrator awarded compensation in an amount of R129 600 and costs.

[2] The documentation to this application is voluminous. There are three bundles. The first is the pleadings bundle, which will be referred to as PB. The second is the transcript of the arbitration hearing, which will be referred to as TB. The third bundle is a bundle contains what is called the bargaining council's record – primarily consisting of the documents related to the hearing. I refer to this bundle as DP. The page reference follows the bundle reference and, if there is a further reference to a

paragraph or line, they follow the page number. So the arbitrator's background to the dispute is recorded in his award at PB18.5 to 19.14.

Condonation

[3] The applicant filed its application to review 3 weeks late. In that application, it applied for condonation (PB 11.20-16.27). Mr Hattingh opposes the application but does not contest the truth of what is stated in Mr Billet's founding affidavit in support of condonation. The condonation application addresses the critical issues, namely extent of the delay, the explanation of the delay and the prospects of success.

[4] The delay is serious but not excessive. The explanation is that given the understandable need of a national bureaucracy to draw up a report and recommendations, get authority and brief attorneys. This process was expeditiously handled but because Mr Billet who represented the applicant in the arbitration and who drew up the report and recommendations resides in Port Elizabeth, as does the counsel briefed to represent the applicant, it was necessary to transfer the file from the State Attorneys in Cape Town to their offices in Port Elizabeth. As soon as the file arrived, counsel was briefed and papers were prepared with due speed. I accept the explanation. It is clear that there were prospects of success from what follows.

Background

[5] Mr Hattingh was employed as an investigating officer at the Laingsburg police station. During the course of his duty he was exposed to traumatic scenes of vehicle accidents, seriously injured passengers trapped in wrecks and badly mutilated corpses. He was diagnosed with post traumatic stress disorder in September 2003. He applied for and was granted temporary incapacity leave. He remained on leave until he was told to report for duty in July 2006.

[6] On the advice of his psychiatrist, Mr Hattingh applied for ill-health retirement. The application took almost three years to be finalised by the applicant and it was uncontested that the application was inefficiently

handled. The application was refused and he was informed of this on 26 July when he was handed a copy of a letter from the divisional commissioner to the provincial commissioner in which this was stated. The letter also stated that Mr Hattingh should tell to resume duties on or before 31 July.

[7] Although the letter did not specifically require him to report to the Laingsburg police station, Mr Hattingh assumed that that was the case. Although he was advised to report for duty by his psychiatrist, he refused to do so because he feared that the associations with the police station would cause a serious regression in his condition.

[8] Although he was offered a position in the finance section, he decided to resign because the instruction to work at the Laingsburg police station, even in the finance section, made it intolerable for him to work for the applicant – it being a small building and yard accommodating within its precincts the charge office, the administrative offices, the morgue and the area where wrecks from accidents were investigated and stored. It was uncontested that he had suffered a great deal from his condition – leading to alcohol abuse and family tension and that if he went back to work in the environment of the Laingsburg police station there was a high risk of regression.

[9] His letter of resignation was accompanied by a letter from his attorney (the attorney of record) claiming constructive dismissal. Mr Hattingh then referred an unfair dismissal dispute to the 1st Respondent alleging that he was constructively dismissed. After conciliation failed the dispute was referred to arbitration.

[10] Mr Hattingh, his wife and his psychiatrist gave evidence on his behalf. Part of a statement made by Captain Mark Collins was admitted. The applicant closed its case after Mr Hattingh admitted that the station commander at Laingsburg police station offered him a post in the finance section on the day he tendered his resignation.

The arbitration award

[11]After a careful summary of the evidence, the arbitrator came to his conclusion that Mr Hattingh had been constructively and unfairly dismissed for the following reasons:

1. Mr Hattingh was diagnosed with chronic post-traumatic stress disorder, an occupational hazard in the police service (PB24.61 & 26.69).
2. The applicant took steps to minimise exposure to traumatic incidents, put in place policies to treat employees who are permanently or temporarily incapacitated by the disorder, and assisted Mr Hattingh by referring him to a psychiatrist and paying his salary in full while incapacitated (PB25.64-65).
3. Although the letter of 26 July did not specifically state that Mr Hattingh had to report to the Laingsburg police station, the arbitrator found that because he had been a member of the staff of the station, that he had been offered a position in the financial division of the station and an admission in the pre-trial minute to the effect that he was instructed to report to that station (PB25.68).
4. Mr Hattingh's psychiatrist confirmed that there was a real risk of regression if he was to return to the Laingsburg police station (PB26.73). In this regard, the arbitrator improperly relies on the applicant's appointed psychiatrist's report because that report states that his assessment that there was a risk of regression was in relation to ordinary police work – 'soortgelyke traumatise ervarings soos wat deel van polisie werk is'.(PB26.74)
5. The arbitrator accordingly finds that there was a real likelihood that Mr Hattingh's condition would have regressed if he returned to work in the Laingsburg police station even if he worked in the finance section (PB26.75).
6. The instruction to report to Laingsburg police station accordingly constituted a 'strong contributor to making his continued employment intolerable' (PB27.77).

7. Mr Hattingh was not in a poor condition to make sound decisions due to his mental state and the fact that no further medical notes would be accepted on his condition meant that he would no longer be entitled to temporary disablement leave after 31 July.
8. The arbitrator did not accept that the employee should have raised a grievance or insisted on an alternative placement before resigning because of the applicant's inefficiency in processing Mr Hattingh's application for permanent disability (PB29.95 to 30.97). This finding, together with the next, is the crux of the applicant's review and I deal with it in more detail below.
9. The provincial and area commissioner did not properly execute the instructions contained in the 21 July letter in so far as finding a suitable alternative placement is concerned (PB28.84 – 89 & 29.96 - 97).
10. The arbitrator found that the choice of Laingsburg as an alternative post and the failure of the applicant's provincial and area commissioner to properly execute the instruction of the divisional commissioner constituted an objective basis for Mr Hattingh's conclusion that his continued employment was intolerable (PB30.98).

[12] So much turns on the letter of 21 July 2006 (DB140-1) that it requires careful analysis. The letter is written by the Director: Medical Administration in the office of the Divisional Commissioner: Personnel Services. It is written to the provincial and area commissioner but marked for the attention of the Provincial Head: Personnel Services. The letter informs the provincial head that Mr Hattingh's application for ill-health retirement has been refused and with instructions on what to do as a result. Those instructions include the following:

1. The employee (i.e. Mr Hattingh) must resume duties '*in an alternative low-stress post ...which is supportive and best suit (sic) his health status*' on or before 31 July 2006;

2. No further medical certificates for a similar medical condition are to be accepted unless different/medical circumstances emerge. This means that the employee must resume duties before 31 July unless there are different clinical or medical circumstances emerge.
3. The employee must be advised to continue optimizing his treatment and if his psychiatric benefits have been depleted, he should apply for ex-gratia benefits.
4. It is *'the responsibility of the area commissioner in conjunction with the office of the provincial commissioner to identify a suitable alternative placement for the employee'*.
5. *'All endeavours should be made to try to accommodate the employee's health status'*. However, if this is 'impossible a report in this regard should be submitted...for further intervention'.
6. 'The employee must receive support from Employee Support Services.

[13]It is clear that the instructions are to identify a suitable alternative placement for Mr Hattingh in a 'low-stress post' and that in doing so 'all endeavours' should be made to accommodate the employee's health status and contemplates further steps should the commissioners find it impossible to identify a suitable alternative placement.

[14]Although the arbitrator accepted that the instruction to report in the letter of 26 July was not a final one (PB27.79), he finds that the instruction to report to Laingsburg police station, the failure to consult and to endeavour to accommodate his health status constituted a sufficient basis for finding that the applicant had made continued employment intolerable.

Grounds of review

[15]The nub of the applicant's complaint is that the arbitrator incorrectly applied the accepted requirements for proving constructive dismissal, namely-

1. that the employer without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust between employer and employee;
2. that there was no reasonable alternative to resignation; and
3. that the assessment of the threshold of intolerability is objective.

[16]The applicant contends that it did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust. The letter of 21 July indicated that he had to be placed in a suitable post taking into account his medical status. He had been offered a post in the finance department in order to accommodate his condition.

[17]The applicant contends that Mr Hattingh had alternatives to resignation. He could have lodged a dispute with the Public Service Co-ordinating Bargaining Council over the outcome of his ill-health retirement application or filed an internal grievance or lodge a dispute concerning the decision to place him at the Laingsburg police station.

[18]The applicant contends that the arbitrator approached the matter from Mr Hattingh's subjective point of view. Although not clarified on the papers, this ground appears to be directed to the arbitrator's finding that Mr Hattingh made the decision to resign when, due to his mental state, he was in a poor condition to make sound decisions (PB2993).

The first ground: the applicant's conduct

[19]The arbitrator in his assessment appears to take the following into account in deciding that the employer's conduct was likely to seriously damage the trust relationship:

1. Mr Hattingh had been instructed to resume duties at the Laingsburg police station which would have because of its size

and the nature of its operations led to a regression in his condition.

2. Despite being required to identify a suitable alternative placement taking into account his medical condition, the commissioners left it to the station commander to identify the placement.
3. Mr Hattingh had not been consulted on a suitable placement as he should have been.

[20] Given that the applicant did not lead any evidence, it is entirely reasonable for the arbitrator to infer that the commissioners failed in their duty to identify a suitable alternative, leaving it instead to the station commander. It is also entirely reasonable that Mr Hattingh ought to have been consulted on a suitable placement. It is also reasonable to hold that the instruction to resume employment at the police station might lead to a regression in his condition.

[21] But the one step in the logical ladder that is missing is the applicant's knowledge that a resumption of work at the police station might have had the effect that Mr Hattingh and his psychiatrist justifiably feared. Of course, one reason for that ignorance is the commissioners' failure to consult and properly consider where Mr Hattingh should be placed. Nevertheless, there is no evidence that the applicant knew of Mr Hattingh's justifiable fear of returning to the police station and why the offer to work in the finance section was not suitable. Just as events may have turned out differently if the area commissioner had consulted with Mr Hattingh, similarly they may have been different if Mr Hattingh had stated his objections to his placement rather than resigning.

[22] Can it then be said that the applicant conducted itself, albeit negligently, in a manner calculated or likely to destroy or seriously damage the employment relationship? Without knowledge of the applicant's fears, it cannot be rationally inferred that it had conducted itself in this manner, particularly since it had identified what it thought was a placement that

accommodated his medical condition. This is a failure of reasoning. I leave whether this failure constitutes a reviewable irregularity to later.

The second ground: alternatives to resignation

[23]The arbitrator concluded that despite the right to file a grievance or refer a dispute over his placement, the applicant was justified in not regarding those alternatives as reasonable given the applicant's gross mishandling of his application for ill health retirement and the processing of his return to work. There may be some justification for this view but can it be said that he had no other means to avoid the unbearable consequences of being required to resume duties at the Laingsburg police station?

[24]What the arbitrator does not address is why it was necessary to resign rather than to tender his services in any suitable placement in which he would not be subject to experiences that might trigger a regression in his condition. He testified that he would have been prepared to accept a post provided that the stress factors were not present (PB21.36). He or his lawyer could have conveyed this in a letter to the area commissioner or the station commander without him having to report to the police station. It should be borne in mind that he was throughout advised by a lawyer - his letter of resignation was accompanied by a lawyer's letter claiming unfair constructive dismissal.

[25]The decision to resign and to claim unfair constructive dismissal was his and his lawyer's choice but it was one that precluded the applicant from considering an alternative suitable position to the placement at the station taking into account his medical condition, as it was required to do and to which Mr Hattingh and his lawyer had been alerted in the letter of 21 July. It is a failure of reasoning not to have recognised that there was a reasonable alternative to escape the unbearable circumstances of the proposed placement, namely a tender to work in a psychiatrically safe environment together with reasons why the position in the finance department was not a safe environment.

The third ground: the perspective of a reasonable person

[26]The arbitrator in his analysis of the evidence of Mr Hattingh and his wife finds that the refusal of his application for ill health retirement together with the manner in which it and the instruction to return to work was handled placed him under great stress and in a 'poor condition to make sound decisions'(PB29.94).

[27]There are two issues raised by this finding. The first is that it fails to recognise that the decision to resign was a legally informed and calculated decision – the letter of resignation was accompanied by a lawyer's letter claiming constructive dismissal.

[28]The second is that it is a subjective assessment of the decision to resign. The test though is an objective one. It is not clear quite how the arbitrator's assessment factors into the arbitrator's reasoning other than to justify his decision to resign (PB29.93). But to the extent that the arbitrator decided that a reasonable person in the shoes of Mr Hattingh would have acted in the same way, it is open to criticism because it fails to take account of the fact that the applicant was unaware of his reasons for refusing to take up the placement in the financial section of the police station.

The reviewability of these grounds

[29]There is a failure of reasoning in respect of each of the grounds raised by the applicant. The question though is whether those failures constitute reviewable grounds. Although they may individually constitute grounds of appeal, the question is whether they collectively demonstrate such a failure of reasoning that justifies interference on review.

[30]It seems to me that central to each of the three grounds is a failure to take into account that the applicant was not aware of the reasons for why Mr Hattingh could not take up the placement in the finance section of the Laingsburg police station. Until it was so informed, the placement decision was not final and the prospect of the applicant finding an alternative suitable placement had not been closed. That prospect not being closed, it was unreasonable of the arbitrator to have found that his

circumstances were not so unbearable and admitting of no reasonable alternative to escape.

Order

[31]The following order is made:

1. The arbitration award of the 1st respondent dated 28 May 2006 under case number PSSS415-06/07 is set aside;
2. The award is substituted with an order that the 3rd respondent was not constructively dismissed;
3. Each party to pay their own costs.

CHEADLE AJ

Date of Hearing : 14/04/2010

Date of Judgment : 28/05/2010

Appearances

For the Applicant : Adv N Gqamana

Instructed by : State Attorneys

For the Respondent : D.C Le Roux

Instructed by : Murray Fourie & Le Roux Attorneys