

IN THE LABOUR COURT OF SOUTH AFRICA not reportable
HELD AT CAPE TOWN

Case No: C36/2010

In the matter between:

DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

Applicant

And

CARLTON JOHNSON *N.O.*

First Respondent

PUBLIC SERVANTS ASSOCIATION OBO H CILLIERS

Second Respondent

PUBLIC SERVICE CO-ORDINATING
BARGAINING COUNCIL

Third Respondent

Date of hearing : 11 May 2011

Date of judgment :

JUDGMENT

VAN VOORE AJ

1. This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside an arbitration award (the award) of the second respondent (the commissioner). The application is opposed. The applicant is the Department of Justice and Constitutional Development (the Department). The Department seeks, *inter alia*, an order reviewing and setting aside the commissioner's

arbitration award and further substitution of that award with an order of this Court.

2. The further order sought is that this Court makes an order that it deems appropriate in the event that the commissioner's arbitration award is reviewed and set aside.

3. Mr H Cilliers (Cilliers) is employed by the Department of Justice and Constitutional Development as an office manager at the Vredenburg Magistrates Office. In this capacity Cilliers is in charge of administration, finances, staff and general management duties. Cilliers has been employed by the Department since the later part of 1978. During 1995 Cilliers developed 'heart related problems'. It appears that Cilliers's ill-health continued or recurred. Cilliers applied for temporary and permanent disability leave. In the ordinary course the Department receives and considers such an application in accordance with the Department's processes, procedures and/or policies. Those processes, procedures and/or policies include Resolution No. 7 of 2000, being a collective agreement concluded between the Department and various trade unions in the Public Service Co-ordinating Bargaining Council (the bargaining council).

4. Cilliers made a number of applications for temporary and permanent disability leave.

5. Paragraph 7.5 of Resolution No. 7 of 2000 provides as follows:

“7.5 Disability Management leave:

7.5.1 Temporary Disability Leave

(a) An employee who's normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave on full pay provided that:

- i) His or her supervisor is informed that the employee is ill; and
- ii) A relevant registered medical practitioner and/or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow.

(b) The employer shall, during 30 working days, investigate the extent of inability to perform official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10 (1) of Schedule 8 in the Labour Relations Act of 1995.

(c) The employer shall specify the level of approval in respect of applications for disability leave.

7.5.2 **Permanent Disability Leave:**

(a) Employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalized the process set out in (b) and (c) below.

(b) The employee shall, within 30 working days, ascertain the feasibility of:

- i) Alternative employment; or
- ii) Adapting duties or work circumstances to accommodate the disability.

(c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at his or her level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996.”

6. Cilliers’ medical condition cannot be reversed but can be controlled and treated through medicine and indeed surgery. Over a period of time Cilliers submitted a number of applications for temporary incapacity leave, totaling 9. It took the Department some time to consider Cilliers’ second application for incapacity leave. Whereas clause Resolution 7 of 2000 contemplates a period of 30 days, it took the Department 11 months to consider the application. However, it is not in dispute

between the parties that the processes, take much longer than the 30 day period. Cilliers was informed that the Department had declined his application for temporary or permanent incapacity leave and he was required to return to work. Cilliers returned to work on 27 December 2007.

7. The period of his absence was regarded by the Department as unpaid leave and was treated as such. Cilliers took issue with this and informed the Department that he considered its actions to be unfair. The Public Servants Association, on behalf of Cilliers, referred a dispute to the bargaining council. The dispute referred to the bargaining council concerns the interpretation or application of a collective agreement, Resolution No. 7 of 2000.

8. In the arbitration award the commissioner records the issue in dispute as follows:

“The issue in dispute

3. I must decide whether the Respondent had improperly exercised its discretion by declining the applicant’s application for temporary incapacity leave.”¹

9. Further, and at paragraph 15 of the arbitration award the Commissioner writes the following:

“15. In terms of Resolution 7 of 2000 an employee who’s normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be

¹ Arbitration award, paragraph 3

absent from work due to disability which is not permanent, may be granted sick leave on full pay under certain conditions. The employee must inform the employer that he/she is ill and a relevant registered medical practitioner should certify such a condition in advance as a temporary disability. For the Applicant to succeed with this application he must prove that the Respondent did not apply its mind when it considered the leave application for incapacity leave.

...

16...The onus is on the Applicant to prove that HRM had failed to exercise its discretion in a fair and reasonable manner.”²

10. Furthermore, and in debate with Cilliers’ representative during the arbitration proceedings, the commissioner has the following to say about the dispute before him:

“COMMISSIONER:

I just want to say to the record, Mr Adams, my understanding of this dispute is whether the discretion to grant or not to grant the temporary incapacity leave was exercised fairly, properly, objectively and judicially. In other words, what I’m saying is that, although the background and all of these facts is important and in terms of the deductions and all of that, ultimately I have to interpret the collective agreement in as far as whether the exercise of that power has been done properly and fairly. Okay. So if I can just maybe direct – and also for the other party in terms of their questions to the witness, I am focusing on that, you know, focusing on whether they had the facts, they had XYZ facts before them, they looked at the facts, and I’ve got to decide whether they’ve reasonably and fairly exercised that discretion in terms of the collective agreement. I do

2 Arbitration award, paragraph 15 and 16

understand that there are obviously financial implications for the Applicant in terms of processes, but ultimately those things will only come into play if I find that they have unfairly exercised their discretion. And obviously then I have the right to remedy the situation in a manner that is prescribed by the collective agreement.”³

11. In the result, the commissioner, and in relation to the issue in dispute made the following finding:

“In had fairly and reasonably exercised its discretion.”⁴

12. Moreover the commissioner goes on to find as follows:

“19. I accept without reservation that the Applicant’s medical condition is serious. However, this is not the issue I am required to decide. I must decide whether at the time of considering the application for temporary incapacity leave, HRM had exercised its discretion fairly and reasonably. The fact that the Applicant’s medical condition had deteriorated further in the weeks before the arbitration, is irrelevant. The question is whether the delegated authority had at the time exercised its discretion fairly. As arbitrator I must decide the present dispute on the basis of the information that served before the delegated authority when it exercised its discretion. In this regard I find no evidence that HRM had acted unfairly or arbitrarily. It is important to take cognizance that employees are not entitled to temporary incapacity leave.

The resolution merely provides employees with the right to make an application for such leave. In the circumstance I

³ Transcript lines 2 – 22, page 58

⁴ Arbitration award paragraph 18

find that Applicant has failed to prove that HRM had unfairly exercised its discretion, when it declined the application for temporary incapacity leave.”⁵

The review grounds

13. The Department contends that the commissioner exceeded his power as contemplated in section 145 of the LRA. It is the Department’s case that the issue in dispute before the commissioner was whether it had fairly and lawfully exercised its discretion in deciding to decline Cilliers’ application for temporary incapacity leave. The Department contends that in awarding that it should credit Cilliers with a 151 working days in respect of temporary incapacity leave, the commissioner exceeded his powers and ‘acted outside the parameters of the issues to be decided’.

14. Having found that the Department fairly exercised its discretion, that ought to have been the end of the matter. The commissioner had correctly summarized the issue in dispute before him. Having concluded that the Department had fairly exercised its discretion when it declined Cilliers’ application for temporary incapacity leave, there was nothing more for the commissioner to do in relation to the dispute before him. The Department is understandably troubled by the commissioner’s further findings and the award that it credits Cilliers with a 151 working days in respect of temporary incapacity leave.

15. In the matter of *Le Roux v CCMA & Others*,⁶ the Court held that:

⁵ Arbitration award, paragraph 19
⁶ [2000] 6 BLLR 680 (LC)

“In terms of section 145(2)(a)(iii) an arbitration award is reviewable if the award was one which exceeded the commissioner’s powers. One must not be misled by the use of the word “exceeded”. It does not mean that an award can only be set aside under this section if what is awarded is greater than that which can permissibly be awarded. It simply means that if the award made is one which the commissioner had no power to make then it falls to be set aside as an award in excess of the commissioner’s powers.”

16. Cilliers be credited with a 151 working days in respect of temporary incapacity leave falls outside the limits of the issue in dispute and accordingly the commissioner had no proper authority to make that award. In this respect the commissioner did indeed exceed his powers as contemplated under section 145 of the LRA and the arbitration award falls to be reviewed and set aside.

18 The approval or indeed non-approval of leave, whether a 151 days or more or indeed less, formed no part of the dispute referred to the bargaining council. Accordingly, the commissioner did not have authority to determine a dispute not before him. In the circumstances, the commissioner did indeed exceed his powers. Accordingly, I make the following order.

1. The arbitration award of the First Respondent is reviewed and set aside and is remitted back to the Third Respondent for determination before an arbitrator other than the First Respondent.

2. The Second Respondent is ordered to pay the Applicant's costs.

VAN VOORE AJ

Appearances:

For the Applicant : Adv R Nyman

Instructed by : The State Attorney

For the Respondent : Adv K Allen

Instructed by : Adams & May Attorneys