

REPUBLIC OF SOUTH AFRICA



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case: C994/11

In the matter between:

TIMOTHY VISSER

Applicant

and

**DEPARTMENT OF HEALTH, PROVINCIAL GOVERNMENT
WESTERN CAPE**

Respondent

Heard: 13 December 2011

Delivered: 14 December 2011

JUDGMENT

LAGRANGE, J:

[1] The applicant is pursuing interim relief in this application for an order lifting his suspension by the employer so that he can return to work. On the return day he seeks an order giving effect to an arbitration award in his favour reinstating him and awarding him compensation. He is currently on suspension without pay. It is not in

dispute that in August 2011, 60 days expired since his precautionary suspension in terms of section 7.2 of the Disciplinary Code and Procedure of the Public Service ('the code'), without a disciplinary enquiry being held. The enquiry is only scheduled for later this month.

[2] In the arbitration award dated 21 November 2011, the arbitrator found that the suspension was unfair and ordered the applicant's immediate reinstatement and payment of R 50,000-00 in compensation. The respondent has refused to give effect to the award pending a decision whether to review it or not. It contends it should be given the full six week period to make up its mind on this issue before the applicant can seek to enforce the order which was the other relief the applicant originally sought in this application.

[3] The applicant now relies on the code which is binding on the employer and forms part of the applicant's contract of employment. He effectively claims his continued suspension is unlawful in terms of clause 7.2 of the code. He argued that he is bringing this application now because even though he has made a second referral of an unfair labour practice dispute also arising from the employer's non-compliance with the regulation, the bargaining council has no jurisdiction to deal with the matter of the unlawfulness of the suspension.

[4] He did not act earlier because if he succeeded in his original unfair labour practice claim he fully expected to be reinstated, as indeed he was. However, the employer has declined to give effect to the award pending the possible exercise of its right of review. The employer does not dispute it is currently acting in breach of the regulations.

Brief findings

[5] I accept that the failure of the employer to give effect to the award, has the effect of prolonging his unlawful suspension. He could reasonably have expected that if he was successful he would be reinstated forthwith, and it is not reasonable to expect him now to wait a further six weeks until the employer decides whether or not to review the award. Furthermore, the applicant's contractual right to return to work

envisaged in clause 7.2 is one that can only effectively be fulfilled by specific performance. An unfair labour practice claim can only seek to retrospectively place a monetary value on the past non-compliance, which is not in truth an alternative remedy to one of specific performance.

[6] However, in as much as the applicant says he cannot obtain immediate relief for the unlawful suspension by waiting for the outcome of his second unfair labour practice referral, that was equally true at the time of his referral of the first unfair labour practice dispute on 14 August 2011. Any urgency relating to the exercise of his entitlement not to be unlawfully suspended existing then. In other words, the same problem he now presents as the reason he must seek relief from the court now, is one that already existed at the time he made the original referral in August. Consequently, I cannot find he has acted with the requisite degree of urgency, notwithstanding that he has a clear right to exercise.

[7] Although, I am striking this matter off the roll for lack of urgency, I am directing that the applicant may re-enrol the matter for determination of the final relief sought in prayer 1.2 of his notice of motion on a date to be determined by the registrar during the week of 23 January 2011.

[8] As there is still currently an ongoing relationship and the application has great merit except for the question of urgency which might have been clouded in the applicant's mind by the original unfair labour practice referral, no order is made as to costs.

Order

[9] The application is struck off the roll for lack of urgency.

[10] No order is made as to costs.

[11] The applicant may re-enrol the matter for determination of the final relief sought in prayer 1.2 of his notice of motion during the week of 23 January 2011, on a date to be determined by the registrar. If the applicant intends to proceed with an application for final relief, he must file any supplementary affidavit by 11 January

2012 and the respondent must file any supplementary answering affidavit by 18 January 2012.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

APPEARANCES:

FOR THE APPLICANT: W Field of Bernadt Vukic Potash & Getz

FOR THE SECOND RESPONDENT: B Joseph instructed by the State Attorney