



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

C756/2013

In the matter between:

JULIE ARRIES

Applicant

And

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

RETIEF OLIVIER N.O.

Second Respondent

DEPARTMENT OF EDUCATION:

WESTERN CAPE

Third Respondent

Date heard: 9 October 2014

Delivered: 5 February 2015

JUDGMENT

RABKIN-NAICKER J

- [1] The applicant seeks to review a condonation ruling by the second respondent (the arbitrator) made on the 27 May 2013. The ruling in question refused condonation in the light of what the arbitrator regarded as an excessive delay and lack of a reasonable explanation for the delay. The arbitrator made a finding that the referral of applicant's dispute was 13 months late.

[2] The applicant had been employed as an educator by the first respondent as of 1994 at ParkDene primary school. He was dismissed on 17 January 2012 and he then lodged an internal appeal, which was rejected on 29 February 2012. The applicant then referred the matter through his union (SADTU) to the first respondent on 26 April 2012. The union was of the understanding that the matter was referred in time and did not apply for condonation.

[3] The arbitrator deals with the issue of the late referral in the following manner:

“The application was more than 13 months late (out of 30 days), considering the fact that the ELRC received the condonation application on the 19 April 2013 and the applicant alleged in that application that he was dismissed on 29 February 2012.

The applicant stated the reason for the delay that he submitted a referral to his union SADTU on the 28th April 2012 . They submitted it to the ELRC. He made numerous enquiries with SADTU and that they stated they had submitted it within the required time limits. The ELRC indicated however that the matter was out of time and that he had to submit a condonation application. SADTU could not provide proof that it was submitted in time and he referred the matter to an attorney.”

[4] The applicant submits that the ruling stands to be reviewed in that the arbitrator committed a gross irregularity. The question for this court to determine is whether the arbitrator an error of law in that he equated the delay in making an application for condonation, with the delay in referring the matter to the Council. Section 191(1) and (2) of the LRA provide:

“191 Disputes about unfair dismissals and unfair labour practices

(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-

(i) a council, if the parties to the dispute fall within the registered scope of that council; or

(ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within-

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired."

[5] In **Gianfranco Hairstylists v Howard & others**¹ this court considered the wording of section 191(2) of the LRA² as follows:

"As a general principle, an application for condonation must be made as soon as the employee becomes aware that condonation must be sought. This would usually be before the hearing of the conciliation proceedings. In my view, the use of the words 'at any time' was intended to cater for, inter alia, the contingency that the need for condonation is brought to the notice of the employee only at the conciliation...."

[5] In **Weltevrede Kwekery (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others**² this court per Pillay J considered a matter in point as follows:

[13] I agreethat s 191(2) allows an employee to apply for condonation at any time.....

[16] The second prayer sought is the review and setting aside of the condonation ruling. The commissioner calculated the period of delay to be two days, ie from 28 April to 30 April, and concluded that it was negligible. He rejected the applicant's contention that the referral was 63 days late. The applicant's explanation for this calculation, which was

¹ (2000) 21 ILJ 361 (LC)

² (2006) 27 ILJ 182 (LC)

not offered to the commissioner, is that the delay must be calculated up to the time when the condonation application was made. The contention, as I understand it, is that a late referral is no referral until it is accompanied by an application for condonation.

[17] In my opinion, such a construction is contrived. The standard application for condonation form is worded thus under the heading:

'Degree of lateness.

2.1 The referral is days late . . .

2.3 Applicant signed the referral form on. . . .'

The commissioner's mind is directed to the degree of lateness of the referral, not the condonation application. The referral and the condonation application are distinct documents and processes. The timing of the application for condonation could be relevant. However, that must also be weighed against s 191(2) of the LRA permitting condonation applications to be brought at any time."

[6] Given the above authority, I find that the arbitrator committed a gross irregularity of the latent type when he calculated the length of the delay based on the date that the condonation application was referred to the Council. As a result of this he conducted the enquiry in the wrong way.

[7] This review application was brought some 16 weeks late. Although this is substantial, given the prospects of success in the review, I exercise my discretion to condone its late filing. In the circumstances, I make the following order:

Order:

1. Condonation is granted for the late filing of the review application.
2. The ruling under case number P.S.E.S. 721314 WC is reviewed and set aside.
3. The application for condonation is remitted to the first respondent for hearing before an arbitrator other than second respondent.

4. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: ILUSO

Third Respondent: Adv. S. Seria instructed by the State Attorney