Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C154/2021

In the matter between:

SOLIDARITY OBO TALIEP Z	Applicant
And	
PERISHABLE PRODUCTS EXPORT CONTROL BOARD	First Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
REGAN JACOBS N.O.	Third Respondent

Date of Hearing: 6 July 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 July 2022

Summary: Demotion as sanction for misconduct. Consent to demotion imposed as a sanction does not permit an arbitrator to decline jurisdiction in an unfair labour practice claim merely because of consent to the demotion. Builders Warehouse (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2015] ZALAC 13 discussed and applied. Nor can consent by itself make a demotion fair. Valid demotion not possible in law without agreement. Factors to be considered in determining the fairness of a demotion where the employee's consent is imposed under threat of dismissal.

JUDGMENT

KAHANOVITZ AJ

Introduction

[1] Was there a fish rotting in a container when the applicant inspected it? If so, was he to blame for failing to discover the rotting fish and was he in consequence fairly demoted?

[2] This is an opposed review where the applicant seeks to set aside an award made by the Third Respondent under case WECT2612-20 finding that he had not been subjected to an unfair labour practice when the respondent demoted him.

Background

[3] The first respondent failed to attend the arbitration and the evidence of the applicant was therefore uncontested.

[4] Mr Taliep, a member of the trade union Solidarity ("the applicant"), was employed by the first respondent ("respondent" or "the company") as a senior cold chain inspector at a remuneration of R 318 911 per annum.

[5] On 30 September 2019 he was sent to inspect the cleanliness of a container at a depot in Salt River which had been washed down with a high- pressure water gun. and was then inspected by the applicant. If a container passed inspection it was sealed with a yellow seal indicating that it was suitable for export. That seal is intended to satisfy the inspector at the loading point that the container is safe for use.

[6] When a different inspector 30 days later re-inspected the same container a rotting fish was discovered. The applicant testified that he was certain that the container was indeed clean and free of fish when he inspected it. Although he could only speculate on how the rotting fish might have appeared in the container after his inspection what he could say was that he was sure he was not to blame.

[7] These events resulted in him being disciplined on 18 December 2019 and subsequently demoted.

[8] At the disciplinary hearing the applicant was found guilty on the charges of gross negligence and misrepresentation. The charge read as follows " *it is alleged that you have committed gross negligence and misrepresentation, in that you passed containers that did not comply in terms of the AW106 container cleanliness inspection requirements on : 30 September 2019 container BMOU 073 2880 yellow seal number 095 4343 were [sic] found with rotten fish inside as it was rejected at the loading points in Cape Town at SAFT Killarney."*

[9] He was found liable to pay damages in the amount of R3056.00 and was demoted from a senior cold chain assessor to a cold chain assessor. He was also issued with a final written warning valid for 12 months. The final warning and demotion were described as an alternative sanction to dismissal.

[10] The applicant challenged the demotion outcome in the CCMA. He denied being guilty of the charges and in unfair labour practice proceedings in terms of section 186(2)(a) he asked the commissioner to rescind the final warning, rescind the damages decision and order that he be paid back the difference between his pre-demotion salary and his post demotion salary from the time of his allegedly unfair demotion.

[11] At the time of the CCMA proceedings under review he was still in the employment of the company. He was subsequently dismissed for reasons not relevant to or challenged in these proceedings. His dismissal was finalised on 21 January 2021. The fact of his dismissal is relevant to the nature of the relief sought in the event of substituted relief being granted.

The demotion process

[12] How the demotion came about is apparent from the transcript of the CCMA proceedings read together with the documentary evidence produced by the applicant.

[13] After being found guilty the applicant was offered an option of (a) dismissal or (b) a demotion with a final written warning and repayment of damages. The damages

were incurred by the employer's client Horizon Fruit Logistics. It is not explained in the papers how these damages were sustained or how the amount was calculated.

[14] After the guilty finding a document dated 31 December 2019 was placed before him for his signature headed "*acknowledgement of debt and written consent to make deductions from my salary"*. In terms of this document, he undertook to pay the amount of R3056 in three instalments. A second document handed to him is headed *"demotion as an alternative sanction to dismissal following a disciplinary hearing."* It says: "*purpose of this letter is to advise you of the decision for you to be demoted as a disciplinary measure and as an alternative sanction to dismissal. Due to mitigation factors, the employer decides not to dismiss you but to demote you and issue you with a final written warning. The details for demotion[for] you are as follows..."*

[15] The letter continues: "*therefore, you are given the opportunity to accept the alternative sanction or if you refuse a demotion, then you would be dismissed*." He is advised in the letter that he has the right to appeal against the sanction within five working days. The letter does not provide for the explicit consent of the employee but for a signature under the inscription; *"this serves to acknowledge that I received this letter and accompanying documents*." It was signed by the employee on 31 December 2019.

[16] The employee signed a further document on 28 January 2020 dealing, inter alia, with his remuneration package for the tax year 2019/2020. He signed as follows: *"I hereby accept the new package as structured*." The following was added to the document in handwriting; "I *hereby give my consent to demotion as stated in the sanction with reduction from C1 to [illegible] ... All my rights remain reserved. Without any other changes to the terms and conditions of employment to be made*." This additional note is also signed by the employee.

The Arbitration Award

[17] The arbitrator commenced by listing the factors usually taken into consideration to decide if a demotion was unfair. One of these was whether or not the applicant agreed to the demotion

[18] He then noted that the applicant had agreed to the demotion as an alternative sanction to dismissal.

[19] The arbitrator noted that the applicant claimed to have agreed to the demotion under duress. The arbitrator commented that duress was a high mountain to climb. He stressed that the agreement was not the applicant's only option *"though I am not ignorant to the fact that none of the options would be easy to choose*." He found that had he accepted dismissal instead of demotion he could have challenged it.

[20] The question to be answered by the arbitrator was, so he held, this: *"whether it is necessary for the Commission to intervene when applicant and respondent have agreed to a sanction short of dismissal. Given that signing the agreement to accept demotion and the acknowledgement of debt were not the applicant's only options and the applicant failed to establish the existence of duress, the Commission need not intervene in the agreement made between the parties*." Accordingly, held the arbitrator, the respondent did not commit an unfair labour practice.

The submissions made by the parties

[21] The applicant submitted that implicit in the Commissioner's findings was a finding of guilt in circumstances where no prior determination was made on the evidence before him on whether the applicant was guilty as charged. It was submitted by the applicant that a reasonable Commissioner would however have concluded that the applicant was not guilty of an offence and that any consideration of sanction was therefore moot.

[22] The applicant also submitted that the Commissioner came to the erroneous conclusion that the only question to be asked was whether he should intervene in the sanction as opposed to determining the wider question of whether a demotion was fair in the circumstances.

[23] Applicant submitted that the Commissioner was required to make a finding on the charges instead of treating the sole question to be determined as to whether the

Commissioner should intervene in the face of the agreed sanction. In other words, he submitted that the Commissioner misconceived the nature of the enquiry.

[24] The relief sought is substitution with a finding that an unfair labour practice was committed. The original relief sought was reinstatement into the pre-demotion post, but this prayer was amended in the light of the subsequent dismissal. The agreed practice note states that the relief now sought is that the employer should compensate the applicant for the difference in income between a senior cold chain assessor and a cold chain assessor for the period from implementation to his date of dismissal; also, that he should be refunded the amount of R3056.00 that was deducted from his remuneration.

[25] Applicant stressed that his factual evidence at the hearing was not in dispute and that this evidence included allegations of bias on the part of the chairperson. He said that the presiding officer and the initiator went to a depot to conduct in loco and he was not invited and nor was he present at the in loco inspection. The initiator had addressed the presiding officer on his interpretation about why the applicant was guilty without applicant being present.

[26] He and his representative were given no opportunity to challenge what had been said and this conduct he perceived as bias on the part of the chairperson. His evidence in this regard was also not challenged at the arbitration.

[27] Respondent's counsel contended that the essence of the case before the Commissioner was to determine whether the agreement to consent to demotion was decisive. She submitted that the agreement signed by the applicant was "unassailable" due to the absence of duress and because it was preceded by disciplinary process. Accordingly, the finding that the first respondent did not commit an unfair labour practice is both reasonable and correct.

[28] Respondent's counsel also submitted that the commissioner could not determine the applicant's guilt or otherwise of the applicant as this fell beyond the scope of the unfair labour practice dispute. To succeed, so argued the respondent, the applicant would have to prove that the agreement or contract to consent to the demotion as an

alternative to dismissal was concluded under duress. In the absence of duress, the commissioner had no power to interfere with the agreement. It is in this context that the commissioner had stated that it was not necessary for the commission to intervene when the applicant failed to establish the existence of duress.

[29] The applicant testified that the only reason that he had agreed to the demotion was that if he had not done so he would have been unemployed in circumstances where he had a family to look after. In other words, by agreeing to demotion he could keep his job and then challenge the sanction later that the CCMA.

[30] Respondent submitted that the alleged duress subsisted in the pressure which the applicant felt to consent to demotion because of financial need and that this financial pressure was not a sufficient basis for a contract to be set aside on the oft-cited grounds listed by Corbett J in Arend and another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298.

[31] Respondent accordingly relied on the factors needed to prove duress to set aside a contract under the common law and submitted that this was the standard of proof required to set aside the consent to demotion on the grounds of duress. Respondent submitted that this standard of proof was not satisfied and therefore the review application was lacking in merit.

The Builders Warehouse Case

[32] Builders Warehouse (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (PA 1/14) [2015] ZALAC 13 (5 May 2015) concerned an employee with a history of absenteeism and poor performance. She was subjected to an incapacity hearing and found guilty. Dismissal was recommended with demotion as an optional alternative. She then accepted demotion but subsequently referred the case to the CCMA as an unfair labour practice claim.

[33] The Commissioner held that the CCMA did not have jurisdiction to hear her claim because of the demotion agreement between the parties.

[34] The LAC however held that the CCMA was not being asked to set aside the contract but to decide on the existence of unfair conduct relating to demotion. This was a wider question and the agreement, although relevant factual matter on fairness questions, was not decisive on jurisdiction. The LAC accordingly remitted the finding on the unfair labour practice for determination by a different arbitrator.

[35] The applicant relies on the Builders Warehouse decision as authority for the proposition that an unfair labour practice can be found to exist notwithstanding an agreement by the employee concerned to the demotion.

Discussion

[36] It is clear that in this case the arbitrator did not make the error made by the arbitrator in Builders Warehouse. He did not decide or decline jurisdiction because of the agreed demotion. What he instead found was that the agreement meant that the demotion was indeed fair. Builders Warehouse does not discuss when despite an agreement to demotion notwithstanding the demotion can be found to be an unfair labour practice.

[37] The applicant argues that the employer to justify the fairness of a demotion must prove the charges and the sanction as would be required in a rehearing in a dismissal case.

[38] Mere consent would not be sufficient to satisfy the requirements of fairness, especially where the demoted employee claims that consent was given under threat of dismissal. On the facts of this case, it is not necessary for me to definitively answer the question of the quality of the evidence which an employer would be required to produce to justify the sanction of demotion. Here the evidence of the applicant was uncontested, and his un-controverted evidence is that as he was not guilty of any misconduct no sanction was justified.

[39] Whether justifying demotion constitutes a lesser burden than justifying dismissal is a question I leave open but at the very least if the commission of misconduct is disputed then the employer must produce sufficient evidence to show that

misconduct was indeed committed. Difficult questions about onus may arise in a different case to this but as there is only one version in this case that question does not arise.

[40] In Builders Warehouse the LAC said this about the relevance of consent to the question of fairness: *"the determination of whether demotion took place, unlike the determination of dismissal, does not require an arbitrator to determine if there was consent or not. It is true that will be an issue which will be relevant, and may well be decisive, in determining the fairness of the demotion, but it is not a jurisdictional prerequisite for entertaining the unfair labour practice claim*." (At paragraph 11). The court also noted that conceivably the unfairness could encompass something more than the act of demotion itself. The LAC was not required by the facts in that matter to elaborate on the fairness test. Unqualified consent to demotion may conceivably provide a full and complete answer to any claims of unfairness but the facts of this matter do not require this point to be decided.

[41] Respondent referred me to Towu obo Malan v Commuter Handling Services Pty Ltd 2006 (3) BALR 327 (CCMA) which discusses the requirements for a procedurally and substantively fair demotion. If a demotion is the sanction for misconduct, it was found that it should be preceded by a disciplinary hearing and the misconduct procedures which are normally applicable. If it is an alternative sanction to dismissal it stands to reason that the procedural standards for a hearing prior to dismissal should also be complied with where the outcome is demotion The arbitrator also expressed the view that because dismissal is the sanction of last resort employers should however not be discouraged from using demotion as an alternative to dismissal. The arbitrator in Towu said the onus of however proving that a demotion is unfair lies on the employee because this is the incidence of the onus in unfair labour practice proceedings.

[42] The situation that arose in this case should not be confused with a so- called plea-bargain. For example, in Muller v Special Investigation Unit and Another (D1196/2013) [2014] ZALCD 28 (27 June 2014) the employer and the employee agreed to a plea and sanction and in consequence of that agreement the disciplinary

hearing did not go ahead.[1] The facts of this matter however do not demonstrate that the employee agreed to waive any rights to subsequently challenge the outcome. The agreement he signed explicitly reserved his right to challenge the outcome.

[43] One also needs to consider that as a matter of common law demotion cannot be implemented unilaterally and without consent. See Egerton and Mangosuthu Technikon (2002) 23 ILJ 2111 (CCMA) which discusses why prior consent is required for a lawful demotion. It is thus impossible in law to unilaterally demote, and consent is required. If every consent to demotion precluded a subsequent fairness challenge, then it would not be possible to challenge the fairness of any legally valid demotion.

[44] It would thus be very far-reaching to hold that consent to demotion implied waiver of the right to challenge the fairness of demotion as a sanction.

[45] Had the employer attended the arbitration they could no doubt have cross-examined the applicant to ask him why if he had agreed to demotion, he now claimed that it was unfair.

[46] He was in either event asked this very question by the Commissioner and his answer was that he wished to keep his job and challenge the sanction later.

[47] This is not a case where the employee is attempting or needs to prove duress in order to set aside an agreement as the agreement does not preclude him from challenging the fairness of the sanction.

[48] I accordingly agree with the applicant that the arbitrator's finding that succeed the applicant bore an onus or was even required to prove duress is reviewable.

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[1] In that matter after the employer - now advised by new counsel that the plea-bargain was unlawful - thereafter attempted to reconvene the disciplinary hearing. The employee subsequently successfully interdicted the hearing, and the employer was bound by the agreed outcome. If the plea-bargain is not unlawful both parties will obviously be bound.

[49] The case was effectively treated by the arbitrator as if applicant was endeavouring to escape the terms of a contract or a settlement agreement. He was not.

[50] Had the Commissioner applied his mind to the question of the fairness of sanction he would have been driven to conclude that the finding was unfair because the only evidence before him was that of the applicant which was that:

50.1 he had not acted negligently.

50.2 the chairman's conduct gave rise to an inference of bias.

[51] Applicant unchallenged evidence was that he had not been negligent. On the question of bias, he said that the conduct of the chairperson gave rise to a reasonable apprehension that the chairperson had failed to conduct himself an impartial manner by discussing the case and inspecting the container in his absence. This uncontested evidence satisfies the reasonable apprehension of bias test.[2]

[52] Accordingly, and on the evidence which he gave about why the sanction was unfair his qualified consent to demotion could not in itself render the sanction fair.

Remedy

[53] The applicant is no longer employed by the respondent. It was put on record at the hearing he was subsequently dismissed on 21 January 2021 for reasons not canvassed in the papers in this case. In the event of a ruling that applicant was subjected to unfair labour practice the court was asked to award compensation and not to remit the matter for consideration afresh of the question of compensation. To do so would unnecessarily draw out the matter.

[54] If the demotion was unfair, then he is entitled to be compensated. I was asked to award him the difference between his pre-and post-demotion salary from

[2] SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC); (2000) 21 ILJ 1583 (CC) at para 15.

implementation to his date of dismissal in the amount of R130 039. [3] Although I am mindful that this is not damages claim this seems to be a reasonable way to assess the amount of compensation in all the circumstances. For similar reasons it was argued that the amount of R3056.00 was unfairly deducted from the salary and he is

entitled to be refunded this sum as part of the compensation order. I am satisfied that it would be fair to do so.

[55] As far as cost is concerned no party raised any special circumstances which might warrant the making of a costs order. [4]

Conclusion

[56] In the circumstances I make the following order:

Order:

1. The award made by the Third Respondent under case WECT2612-20 finding that he had not been subjected to an unfair labour practice when the Respondent demoted him is reviewed and set aside.

2. The award is substituted with a finding that the sanction of demotion was an unfair labour practice;

3. Respondent is required to pay the Applicant R138 095 as compensation.

4. There is no order as to costs.

Kahanovitz AJ

Acting Judge of the Labour Court of South Africa

Representatives –

[3] It is also not in dispute that if he was entitled to be paid the difference between his pre-and post-demotion salary for the relevant period the amount payable would be R130 039.
[4] See Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others (2021) 42 ILJ 2371 (CC)

For the Applicant: Herman Perry, Legal Officer, Solidarity

For the Respondent: Adv V Barthus instructed by Werksmans attorneys (ref: A. Van Heerden)