REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D497/13

In the matter between:

RAJASHREE MAHARAJ **Applicant**

and

BESS PILLEMER N.O. **First Respondent**

THE COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION **Second Respondent**

DURBAN UNIVERSITY OF TECHNOLOGY **Third Respondent**

Heard: **15 July 2014**

Delivered: **19 September 2014**

Summary: **Application to review and set aside the arbitration award of the First Respondent. Ground of review is that the First Respondent misconstrued the true nature of the enquiry and needed to establish whether the instruction was lawful. From the record and award no basis to conclude that the**

First Respondent misconstrued the nature of the enquiry. Award not reviewable. Application dismissed with costs.

JUDGMENT

HOBDEN,A.J

Introduction

[1] This is an application in terms of Section 145 of the Labour Relations Act No. 66 of 1995 to review and set aside the arbitration award of the First Respondent. The award finds that the dismissal of the Applicant by the Third Respondent is substantively and procedurally fair. The Third Respondent opposes the application.

The background

[2] The Applicant was employed by the Third Respondent from August 1998 as a Senior Lecturer in the Human Resource Management Department. The Applicant's initial employment was with ML Sultan Technikon and this was transferred to the Third Respondent on the merger of ML Sultan Technikon and Technikon Natal in 2002.

[3] At the commencement of employment, the Applicant and ML Sultan entered into a written contract of employment which *inter alia* referred to an obligation to lecture part-time students.

[4] Subsequent to the merger, the Applicant signed a further written contract with the Third Respondent. This contract was not part of the papers in this application, nor was it part of the evidence in the arbitration. It is common cause that the subsequent contract made no specific reference to lecturing to part-time students. It was a

requirement of a senior lecturer to deliver up to twelve lectures in a week.

[5] Subsequent to the merger, all lecturers in the Human Resource Management Department delivered one part-time lecture in a week. Part-time students are lectured in two time slots. The lectures are from 17h10 to 18h30 and from 17h40 to 20h00. They are referred to as the early and the late slot respectively. A course is lectured in the early slot one year and then the late slot the next year. The rotation is to allow students who fail courses to continue with their studies and catch up the following year.

[6] The Applicant did not lecture part-time students from the time of merger until 2009.

[7] The Applicant delivered lectures to part-time students in 2009. The Applicant lectured in the early time slot. This was at least in part due to a departmental decision that there was a necessity for some Lecturers to lecture the full time student and the part-time student course.

[8] In 2010, when the Applicant was due to lecture in the later time slot, she refused. The Head of Department lectured in her stead. The Applicant and a fellow Lecturer, Khumalo, had a run in over her refusal to lecture the late slot. Emanating from this, the Applicant lodged a grievance against Khumalo. A meeting was set up with a Professor Wallace to try and resolve the issue of the late slot but this came to naught when the Applicant's husband insisted on being present in the meeting. The Applicant was issued with a first written warning, a second written warning, and a final written warning relating to her continued refusal. In November 2010, the First Respondent instituted disciplinary processes but this was delayed a number of times.

[9] In 2011, the Applicant again refused to lecture to part-time students. A further final written warning was issued to her in June 2011. The Applicant appealed against this final warning which appeal was dismissed in July 2011.

[10] The Applicant then referred a dispute to the CCMA regarding this final warning. This was never finalised partly due to the fact that the Applicant was unwell on the day of the CCMA hearing in February 2012.

[11] Workloads for 2012 were issued in September 2011 and the Applicant was allocated the earlier part-time slot. The Applicant refused to sign her workload and refused to lecture to part-time students. She was instructed to do so on 3 February 2012.

[12] The Applicant lodged a further grievance on 7 February 2012 relating to the Head of Department harassing her to sign the workload.

[13] The Third Respondent then sought to set up a disciplinary enquiry which was delayed from March 2012 until eventually being run on 30 July 2012. The Applicant's health and the need for a psychiatrist's evaluation delayed the process.

[14] The Applicant and her Union representative ultimately left the disciplinary enquiry. This was concluded and a decision was made to dismiss the Applicant.

The award

[15] The First Respondent found that the Applicant was obligated to carry per part-time workload and her refusal constituted misconduct. This misconduct destroyed the employment relationship and that the dismissal was fair. She further found that the Applicant was unable to provide reasons as to why she should be exempt from her responsibilities for one part-time lecture a week, a demand that in the circumstances was not onerous.

Grounds of review

[16] In argument, the Applicant only persisted with the ground of review set out in its supplementary heads. The essence of this ground is that the First Respondent failed to apply her mind to the critical issue of

whether the instruction was lawful and the refusal to comply with such instruction was unreasonable. The First Respondent therefore misdirected herself as to the true nature of the enquiry.

[17] It was submitted that the onus was on the Third Respondent to prove that the instruction to deliver part-time lectures was lawful and reasonable. The Third Respondent failed to prove that the instruction of the acting Head of Department in 2009 was lawful and that the Third Respondent was contractually obliged to comply with such instructions. In the absence of such obligation, the refusal to follow the instruction could not constitute misconduct.

[18] It was further argued that the instruction given to the Applicant emanated not from an obligation, contained in a contract or policy, but from the Third Respondent's operational need. This effectively amounted to a change to terms and conditions.

[19] The Third Respondent argued that the Applicant's ground of review is simply legal ingenuity. It was never the case of the Applicant in the arbitration proceedings that her refusal to lecture the part-time students was an issue of a change to her terms and conditions. During the course of the arbitration, it was her case that it was overtime which she was unable to work due to the fact that she had two young children and that she had health issues. The First Respondent's finding is therefore unassailable.

[20] The Third Respondent further argued that the Applicant had always been obliged to lecture to part-time students. From the merger until 2009, the Applicant had simply been accommodated. It was significant that the Applicant lectured the early slot in 2009 by agreement but then refused to lecture the late slot in 2010.

[21] The Third Respondent argues that the grievances lodged were simply a subterfuge and the timing was significant in that they were designed to avoid discipline.

Analysis

[22] I am not persuaded that the First Respondent misconstrued the true nature of the enquiry before her. It is apparent from the award that she was alive to the central issue. The First Respondent identified that she needed to determine whether the dismissal of the Applicant was substantively fair and particularly, whether the Applicant was entitled to refuse to deliver part-time lectures. Ms. Naidu referred to the ground of review as subtle but I am of the view that it is merely semantic. The First Respondent did determine whether the instruction was lawful and reasonable.

[23] I am further not persuaded that the finding of the Commissioner was a finding that a reasonable Commissioner could not make. The First Respondent's finding that the Applicant was obliged to carry out lectures to part-time students is reasonable when taking all the evidence that was properly before her into consideration. The First Respondent's determination could not simply be limited to whether the Third respondent could prove a written term in a contract or policy. Whilst the Durban University of Technology contract was not before the First Respondent, the merger involved a transfer of the contract of employment. There was no dispute that the Applicant was obligated to deliver up to 12 lectures per week. There was evidence that Departments worked out their own policies regarding lecture regimes and there was evidence that all the other lecturers carried the same workload, including the part-time lectures. It further emerges from the record that in the years subsequent to the merger, that the Applicant was accommodated by Snyman and Jinabhai on grounds of health and family responsibility. Ms. Naidu argues this evidence had to be excluded as hearsay because neither Snyman nor Jinabhai were called. Louren's direct evidence was not challenged in this regard and the Applicant confirmed this in her own evidence. The Applicant gave evidence that Jinabhai even accommodated her in the mornings because of her health. The record reveals that a combination of

operational demands and other lecturer's unhappiness required the Third Respondent to insist that the Applicant fulfil her obligation to lecture the part-time students.

[24] Ms. Naidu argued that the Applicant's stated reasoning for her refusal to do the part-time lectures was irrelevant; the issue was whether she was legally or contractually obliged. I do not entirely agree. In the particular circumstances of this case, the Applicant's stated reasons and her defence during the arbitration, gives an indication as to what she understood her obligations to be. The reason why the Applicant refused vacillated between it being unfair, that she was unable to do it because of family responsibility and health, to it being unlawful overtime and then to being a unilateral change to terms and conditions. The First Respondent's finding that the Applicant was obliged to give part time lectures was reasonable.

[25] On a consideration of the chronological sequence of events, the First Respondent's finding that the Applicant's grievances were tactical cannot be faulted. Reasonably construed, the Applicant's actions were designed to avoid the obligation of part-time lectures. An analysis of the content of the grievances reveals this. Although the Applicant did not persist with challenging the First Respondent's dealing with a request for a postponement at the arbitration, it is evident that the Applicant's approach in the arbitration seems to have been a continuation of what had occurred internally.

[26] I was referred to *Papane v Van Aarde NO and Others [*2007] 11 BLLR 1043 (LAC) in support of the application. I have considered this and am satisfied that it is distinguishable on the basis that it dealt with the requirement to work overtime in terms of the Basic Conditions of Employment Act 75 of 1997. The dismissal in that matter was held to be fair in circumstances where an Employee refused to work at night after having done so for some years. I do not see that the First Respondent's reasoning to be at odds with this authority.

[27] There are no grounds on which to interfere with the decision. There is no reason why costs should not follow the result.

[28] The order I therefore make is:

1. The Application is dismissed with costs.

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HOBDEN AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For Applicant:	L. Naidoo
Instructed by:	Norton Rose Fulbright
For Third Respondent:	P. Shangase
Instructed by:	Philani Shangase and Associates