



LABOUR BULLETIN



**Nelson Mandela
Metropolitan
University**
for tomorrow

Education Labour Relations Council
in association with the
Labour and Social Security Law Unit of the
Nelson Mandela Metropolitan University

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1. From the Editor

The Labour and Social Security Law Unit (LSSLU) which is a sector at the Law Faculty of the Nelson Mandela Metropolitan University has joined forces with the ELRC in order to bring the Labour Law Bulletin to you quarterly. The intention is to provide up to date information on topical labour law developments in South Africa with particular reference to the Education Sector.

We trust that you will find the information interesting.

In addition to important case law development we also bring to you summaries of some arbitration awards of the ELRC. An in-depth discussion on a particular labour law issue will be included in each edition as well.

We would like to hear from you, and comments and suggestions on how to improve the Labour Law Bulletin can be e-mailed to Adriaan.vanderwalt@nmmu.ac.za. Any question or issue you wish to have addressed may also be emailed and we will attempt to address these issues in future editions.

A judgment of utmost importance was handed down in the Supreme Court of Appeal in *Transnet v Chirwa*. The Court held that dismissals of public sector employees for misconduct, incapacity or operational requirements and un-

fair labour practices do not constitute administrative action reviewable under the Promotion of Administrative Justice Act 5 of 2000 (PAJA). In addition, it was held that the Labour Court has exclusive jurisdiction to entertain disputes involving public servants, if such disputes are specifically covered by the LRA. This judgment is significant and will have the effect of limiting the significant number of cases emanating from dismissals that are referred by public service employees to the High Court.

In *Rustenburg Platinum Mines v CCMA* the Supreme Court of Appeal held that the Promotion of Administrative Justice Act (PAJA) applies to reviews of arbitration awards issued under the auspices of the CCMA and it accordingly extended the grounds of review available to parties in CCMA arbitrations. The Court also held that when commissioners consider the appropriateness of a sanction in dismissal for misconduct cases, they should show a degree of deference to the sanction imposed by the employer, because the latter has the right to spell out the standards that will be applied in its organisation.

In *CWIU v Latex Surgical Products (Pty) Ltd* it was held that a retrenchment was substantially unfair because the employer did not show that there was a reason to downsize the organisation substantially and, in addition, used subjective selection criteria. An outside consultant rated

each employee on a number of issues, viz, qualifications, special skills, performance and disciplinary record, years of service, willingness, interview performance and job evaluation, and according to the rating, employees were selected for retrenchment. This process, the Court held, led to the adoption of unfair selection criteria.

In *Sigwala v Libanon*, the Labour Court held that non-union members were bound by a collective agreement that compelled them to retire at a certain age because the agreement was concluded with a majority union and they were identified therein.

In the first arbitration award referred to in the bulletin, *APEK obo Moodley v The Department of Education*, the crisp, but important point made, is that an employer (including the Department of Education) must disclose information of applicants to a position advertised, to an employee who challenges the fairness of not being appointed to the particular position. The personal information of applicants contained in *curriculum vitae* should, however, not be disclosed.

In the second arbitration summarized, an ELRC arbitrator refused to allow a trade union, SADTU, to represent both an applicant and a second respondent, in an unfair labour practice proceeding regarding promotion. The applicant was the aggrieved employee and the second respondent was appointed to the promotional position by the employee. It was the arbitrator's view that the conflict of interest that arose, was so significant that the employees' interests would be seriously prejudiced if SADTU were allowed to represent both.

The case of *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee*, handed down by the Supreme Court of Appeal, is one of the first in a line of cases that establishes the law on legal representation in disciplinary inquiries. The case clearly establishes that there is no absolute right to legal representation, but that the chairperson of a disciplinary inquiry has an overriding discretion to allow disciplinary legal representation, even if legal representation is not allowed in the applicable procedure.

The case note was originally published in *Obiter*, an accredited law journal, and permission to reproduce it is acknowledged with gratitude.

Adriaan van der Walt
Editor

2. From the General Secretary's Desk

Training of Dispute Resolution Practitioners on the CCMA Conciliation and Arbitration Skills

The General Secretary of the ELRC has activated the training of dispute resolution practitioners from both employer and employee parties, by using the CCMA training programmes on conciliation and arbitration processes.

This training explains and teaches the parties the appropriate circumstances in which to use conciliation and arbitration and how to present cases at conciliation and arbitration hearings.

Some 240 officials enrolled and it is the view of the General Secretary and the ELRC that this training will be an innovative and hands-on opportunity for every delegate to pro-actively participate in this process, and to emerge with the knowledge and practical skills to apply in the workplace with confidence.

3. Recent Developments in Labour Law

Dismissed Employees in the Public Sector Should make use of the LRA and not the PAJA

Transnet Ltd v Chirwa
(2007) 11 BLLR 10 SCA

The respondent employee, Ms Chirwa, was dismissed for unsatisfactory work performance following an enquiry. She did not participate in the enquiry, because she alleged that the presiding officer was biased.

Ms Chirwa challenged her dismissal in the High Court and alleged that the dismissal violated her constitutional right to fair labour practices. The High Court found in her favour, on the basis that

the applicant employer, had not complied with the *audi alteram partem* principle, resulting in the reinstatement of Ms Chirwa. The present case concerned an appeal to the Supreme Court of Appeals against this judgment of the High Court.

Two issues were raised on appeal. The first, was whether the dismissal was a matter which fell to be determined exclusively by the Labour Court in terms of section 157 (1) of the Labour Relations Act 66 of 1995 (LRA).

Regarding this issue, the Court held that the allegation was that the employer had breached Ms Chirwa's right to administrative action that is lawful, reasonable and procedurally fair – a constitutionally entrenched right under section 30 of the Constitution of the Republic of South Africa 1996. Section 157 of the LRA provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any fundamental right entrenched in Chapter 2 of the Constitution (the Bill of Rights).

The Court accordingly concluded that the Labour Court had concurrent jurisdiction with the High Court and that the latter correct court had jurisdiction to entertain this case.

The Court then turned to the second question, namely whether the termination of Ms Chirwa's contract of employment had in fact violated her right to administrative action that is lawful, reasonable and procedurally fair.

Mthiyane JA (Jafta JA concurring) held that Transnet was an organ of State and the question was whether the dismissal had constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), because that Act gave expression to the constitutional right to fair administrative action. He held that it was no longer permissible to avoid the provisions of PAJA by appealing directly to the constitutional right to which PAJA gives expression.

Whether conduct is "administrative action" depends on the nature of the power exercised. That a State organ derives power to conclude contracts from statute does not mean that decisions to terminate them involve the exercise of public power. Ordinarily, an employment contract has no public element and is not governed by administrative law. Transnet's power to dismiss was not to be found in statute, but in contract. The PAJA was therefore not applicable. The common law cases decided

before the promulgation of the PAJA, which held that dismissals of public servants were reviewable, were no longer applicable.

Conradie JA also upheld the appeal, but handed down a separate judgement. He noted that Ms Chirwa originally referred a dispute to the CCMA under the LRA, but that the referral had come to naught. She had thereafter "shopped around" for another forum, and had chosen the High Court. Because she could not bring her claim before the High Court by virtue of the provisions of section 157(1) of the LRA, she had changed her cause of action from an unfair dismissal to a claim of unfair administrative action under the PAJA or, alternatively, a violation of her constitutional right to fair administrative action. The interpretive difficulties to which the provisions of the LRA and PAJA had given rise, can only be resolved by a holistic approach. Even if the dismissal did constitute administrative action, the important question was whether the structure of the legislation permits dismissals in the public sector to be dealt with as administrative acts. Since the advent of the LRA, the answer must be no. To permit public sector dismissals to be litigated in either the High Court or the Labour Court, did not fit in with the legislature's desire for a comprehensive scheme of labour regulation. It would be incorrect if PAJA, were to effectively repeal the Labour Court's exclusive jurisdiction over matters covered by the LRA, without stating it expressly, in the case of public servants - particularly in respect of dismissals and unfair labour practices.

(The minority judgment (per Cameron JA, Mpati DJP concurring) held that the respondent's dismissal did constitute administrative action, which was unfair because the presiding officer at her disciplinary inquiry had been patently biased, and that the PAJA applied. However, the minority would not have upheld the court order by the High Court reinstating the respondent retrospectively to the date of her dismissal. The proper remedy would simply have been to set aside the dismissal, so that the matter could be remitted for a proper hearing.)

The effect of the majority judgment is accordingly that public sector employees who challenge dismissals and unfair labour practices are limited to the remedies of the LRA and that the High Court would not be a forum to approach under PAJA.

Adriaan van der Walt
LSSLU

Reviews of CCMA Arbitration Awards

Rustenburg Platinum Mines Ltd v CCMA [2006] 11 BLLR 1021 (SCA).

Introduction

That this case should have a profound impact on the outcome of reviews of arbitration awards, cannot be doubted. The highest court in the country outside of constitutional matters, the Supreme Court of Appeal (SCA), has held that the Promotion of Administrative Justice Act (PAJA), applies to arbitration awards issued under the auspices of the CCMA. It has found that the grounds for review of arbitration awards stated in s 145(2) of the Labour Relations Act (LRA) have been overridden by PAJA. It held that the extended grounds for review were previously accepted by the Labour Appeal Court (LAC), but have since been eroded by subsequent judgments of the LAC which have been influenced by policy considerations rather than by the law.

Facts of the case

The facts of the case are as follows: In June 2000 the mine dismissed the third respondent (the employee) who was a security guard, for negligence and failure to follow established search procedures on anyone, including employees, entering and exiting the mine.

Thence showing that it was suffering huge losses from pilferage, that the employee was employed to prevent theft and that under surveillance he conducted only one proper search. The mine also maintained that the employee was "in a high integrity position of high trust". His failure to properly carry out his job led to a breakdown in the trust relationship, according to the mine. Hence his dismissal.

The employee challenged the fairness of his dismissal with the CCMA. The commissioner ruled that the dismissal was procedurally fair but substantively unfair in that the sanction for dismissal was too harsh. His reasoning to support this finding was that:

- (a) the mine had suffered no losses;
- (b) the violation of the rule was "unintentional" or "a mistake";
- (c) the "level of honesty of the employee is something to consider", and

- (d) the type of offence committed by the employee does not go to the heart of the trust relationship.

The commissioner ordered then that the employee be reinstated, be given the equivalent of 3 months wages as compensation and be issued with a written warning.

The mine challenged this order by way of review proceedings in the Labour Court (LC). It pointed out that the evidence before the commissioner unequivocally showed that it suffered losses as a result of theft, and that, as the employee was employed to prevent such theft, his failure to properly carry out his duties left it with no option but to dismiss him. The failure of the commissioner to appreciate this evidence meant that his award was not justifiable as there was no rational link between the conclusions he reached and the evidence before him. The mine argued that he had committed a misconduct by being grossly careless in not taking into account the evidence before him; that by failing to apply his mind, no proper hearing had occurred, resulting in his committing a gross irregularity; and, that the absence of a rational connection between the evidence before him and his conclusions meant that he exceeded his powers.

The LC and the LAC's approach

The LC rejected the contentions of the mine. The LC found that the issue should have been adjudicated in terms of poor performance rather than misconduct. It also found that the decision of the commissioner to reinstate the employee and issue him with a warning did not induce a sense of shock and, therefore, did not call for intervention from the LC. The mine appealed to the Labour Appeal Court (the LAC). The LAC rejected three of the commissioner's reasonings, viz (a), (b) and (c) listed above. The LAC remained non-committal on the commissioner's fourth reason. The LAC, however, rejected the appeal on the grounds that there were other reasons in the commissioner's award that justified his findings and which were rationally connected to the evidence before him. The mine appealed to the SCA.

The SCA's approach

The SCA restated the test applicable to reviews by reiterating the findings of the LAC in *Carephone (Pty) Ltd v Marcus NO*, which underlined the fact that the CCMA was an administrative body, and that arbitration awards issued under its auspices constituted

administrative action. As such the review test to be applied in terms of the administrative justice provisions of the 1993 Constitution (*Carephone*, it will be remembered, was decided in terms of the provision to fair administrative action in the 1993 Constitution) was applicable to reviews undertaken in terms of s 145(2) of the LRA. Since *Carephone* the 1996 Constitution was enacted and its provisions did not differ materially from the provision in the 1993 Constitution. However, the legislature, in compliance with this new Constitution, had subsequently enacted PAJA. PAJA had considerably extended the grounds of review found in the LRA.

The SCA found that by necessary implication PAJA applied to reviews of arbitration awards issued under the auspices of the CCMA, and, more importantly, it extended the grounds of review available to parties to CCMA arbitrations. The constricted formulation of s 145(2) of the LRA has been overridden by PAJA, says the SCA. This conclusion, according to the SCA, is no different from that of *Carephone*. In any event, the most important point for all practitioners of labour law is that arbitration awards under the auspices of CCMA are subject to a very wide review test. Whether this is applicable to arbitration awards issued under the auspices of bargaining councils, such as the ELRC, has not yet been decided by the SCA - although according to the LAC there is no difference in the tests to be applied.

The SCA found that the LAC had not applied the review test by refusing the appeal of the mine. The LAC found that, as there were other grounds upon which the commissioner's award could be justified, the application for review had to fail.

In the present case, the four reasons (a), (b), (c) and (d) above), supplied by the commissioner for reaching the conclusions he did were bad, "and bad reasons cannot provide a rational connection to a sustainable outcome". The commissioner's decision was, therefore, not rationally connected to the evidence before him; "once the bad reasons played an appreciable or significant role in the outcome, it is ... impossible to say that the reasons given provide a rational connection to it". The SCA also found that the commissioner did not appreciate the ambit of his duties under the LRA and, therefore, incorrectly approached his task. This made his award vulnerable to review. Finally, it said that as far as appropriate sanction was concerned, commissioners must examine whether the

sanction imposed by the employer is fair and in so doing they must show a degree of deference to the sanction imposed by the employer as the employer has a right to spell out the standard that will be applied in its business. In the present case the commissioner failed to do this, which exposed his award to review.

The SCA went further and said that the attempts by the LAC to narrow the test for review, while understandable, were not grounded in law. These might be founded in good policy reasons, but not acceptable in law.

Conclusion

No doubt, the LAC will be bruised by the SCA's findings in this case. There are at least four explicit occasions in the judgment where the LAC was told that it had committed a basic error and strayed from the approach of some of its earlier judges.

Substantive Fairness in Dismissal for Operational Reasons Cases

CWIU & others v Latex Surgical Products (Pty) Ltd

[2006] 2 BLLR 142 (LAC)

This case involves dismissals for operational reasons. The company gave the Union notice on 18 June 1998 of possible retrenchments because of poor trading conditions. It informed the Union that it would need to downsize its operations and reduce the number of employees if it were to avoid being wound-up. From 18 June 1998 to 16 February 1999 the company and the Union met several times. During this period the Union indicated, in no uncertain terms, that it was not prepared to engage the company on the issue of possible retrenchments of employees until or unless the issue of wage increases was settled. The parties had commenced with negotiations on wage increases but failed to settle. The employees embarked on a legal strike from 16 November 1998 until early January 1999.

In the meantime the company continued to engage the Union on the issue of possible retrenchments. During the period of the strike the company engaged casual employees to cope with the strike. The Union sought the dismissal of these casual employees before it could earnestly engage the company on the possible retrenchments. The process vacillated in this way for some time, until the company engaged outside consultants to evaluate each

employee for purposes of ensuring that the retrenchment exercise was a fair one. The Union participated in the evaluation exercises which included rating the employee on a number of issues, viz, qualifications, special skills, performance or disciplinary record, years of service, willingness, interview performance and, if need be, job evaluation. The eventual rating of each employee was done by the outside consultant. The evaluation report of the consultant was used to determine which employees were to be retrenched. The Union was afforded the opportunity of discussing the evaluation report but failed to take advantage of that opportunity.

On 16 February 1999 the company issued dismissal letters, effective 19 February 1999, to the employees selected to be retrenched, in terms of the evaluation report. Soon after dismissing the employees the company employed casual and contract employees. The Union challenged the dismissals. The Labour Court (LC) found that the dismissals were both procedurally and substantively fair. The Union appealed.

The Labour Appeal Court (the LAC) found that the evaluation exercise suffered from a number of defects, most importantly it was found to have suffered from a high degree of subjectivity and arbitrariness: in particular the weight allocated to each criterion was arbitrarily decided.

The LAC was faced with three questions: was there a fair reason to dismiss the employees?

Were the selection criteria used to select the individual employees fair? And,

were the Union and the employees consulted with regard to the real reason for the dismissals of the individual employees?

On the issue of fair reason to dismiss employees the LAC pointed out that there were two relevant aspects: the actual reason to dismiss (the general aspect) and the reason to dismiss the specific employee (the specific aspect). On the general aspect the LAC took the view that the fact that the company employed casual and contract employees soon after the dismissals was significant. It found that, as the company had employed casual and contract employees soon after the dismissals it meant that the company failed to show that there was a need to downsize its operations. Furthermore, on the question of the specific aspect, the LAC found that the company did not

show that the work that was done by the contract and casual employees could not be done by the dismissed employees. Accordingly, the LAC found that there was no fair reason for the dismissal. In short, the company did not show that there was a reason to downsize, and that there was a reason to select the specific employees. The dismissals were, therefore, substantively unfair.

The LAC went on to examine the selection criteria used by the company to select the employees to be retrenched. It said that in terms of s 189(7) of the LRA, the company was obliged to use selection criteria that were agreed upon between the parties (regardless of whether the criteria were subjective or not), and in the absence of an agreement to this effect it was obliged to use criteria that were fair. As regards the latter, the criteria had to be objective to be fair. The LAC found that in the present case the company used selection criteria that were subjective and, therefore, unfair.

In the light of its findings that there had been no fair reason for the dismissals and that the selection of the individual employees had been unfair, the LAC found it unnecessary to examine whether there had been proper consultation with the Union.

On the question of appropriate relief, the LAC found that, as there was no fair reason for the dismissals, and that the employees would have enjoyed the benefits of their employment for all this time had they not been dismissed. The LAC held that the onus was on the company to lead evidence showing that the reinstatement was not an appropriate remedy, should it hold this view. In the present case the company did not discharge this onus. However, the Court exercises a discretion on whether or not the reinstatement should be with retrospective effect and for how long. The discretion, of course, has to be judicially exercised. There is, however, a limit to the retrospectivity: it is restricted to 12 months in ordinary dismissal cases. The order is to be made as at the date of the Labour Court order (or arbitration award - if the case went to arbitration). In the present case, the Labour Court gave judgment on 19 June 2002. Hence the LAC ordered the reinstatement of the dismissed employees as from 19 June 2001. Given that the LAC gave judgment in 2006, this order is certainly bound to weigh heavily on the company.

COLLECTIVE AGREEMENTS

Sigwali v Libanon (a Division of Kloof Gold Mine) (2000) 21 ILJ 641 (LC)

In the past 10 years of democracy we have seen an intensification of union rights in South Africa. The culmination of the magnitude of the unions' power and strength is demonstrated in the formation of collective agreements. In terms of the Section 213 of the Labour Relations Act 66 of 1995, a collective agreement must contain the following elements:

1. It must be a written agreement;
2. it must deal with terms and conditions of employment or any other matter of mutual interest;
3. it must be concluded by one or more registered trade unions, on the one hand, and one or more employers or one or more registered employers' organisations on the other hand.

It is important to bear in mind that collective agreements are not only concluded between employers and registered trade unions at a specific business only, but are also established for specific industries.

If such an agreement meets the above definition of Section 213, all the members of that employers' organisation and the members of the union are bound by the agreement if it regulates the terms and conditions of employment or the conduct of employers in relation to employees. In a certain set of circumstances, the Act also allows it to be binding on non-members. A collective agreement could, however, only bind non-members if-

- It is expressly stated that the agreement binds them as well;
- the employees that are non-members are identified in the agreement; and
- the registered trade union represents the majority of the employees in the workplace.

In the present case, the Labour Court held that non-union members were bound by a collective agreement (which compelled them to retire at a certain age) in terms of section 23(1) (d) of the Labour Relations Act, as the agreement was

concluded with a majority union and they were identified therein.

There are two specific types of collective agreements, namely an agency shop agreement and a closed-shop agreement that are important to note. An agency shop agreement is when a majority union, or two or more unions acting jointly, that represent the majority of the employees in the workplace, would be able to negotiate an agreement with the employer, and could deduct an agreed agency fee from the wages of employees who are not members of the union and who are identified in the agreement.

In a closed-shop agreement, every employee of the employer must belong to the particular representative trade union. The union is regarded as the sole bargaining agent of these employees. In many such agreements, a provision is normally made for a period during which a new employee would get the opportunity to join the trade union. If the new employee fails to become a member of the particular union or if the union refuses to allow him/her to join the union, his/her services must be terminated.

The agency shop agreement differs from the closed-shop agreement in that there is no onus on the non-members to join the trade union in terms of an agency shop agreement. It is advisable that new employees, as well as existing employees, take careful note of the collective agreements that exist in the specific industry or business that they find themselves in, as one may be bound by the agreement and would have to adhere to it.

Should you have any query regarding the above, please do not hesitate to get in touch with the writer at 012-3429895 or e-mail Lesley@legaledge.co.za.

**Lesley Ramulifho of
Petzer, Du Toit & Ramulifho**

4. Arbitration Awards from the ELRC

Disclosure of Information Relating to a Promotion

APEK obo DR M. MOODLEY vs THE DEPARTMENT OF EDUCATION

Background and Issues

The issue related to an alleged unfair labour practice, in relation to an appointment. The hearing, however, dealt only with an interlocutory issue relating to the extent of the Respondent's obligation to make available certain documents to the Applicant.

Submissions by Parties

It was submitted by the applicant's representative, that despite the applicant's fulfilment of every requirement for the post, the applicant still failed to be short-listed. This resulted in the request by the union for certain documents, i.e. disclosure of information in order to ascertain the basis for this decision.

It was, however, averred by the respondent that the referral forms did not indicate the reasons as to why the documents ought to be released to the applicant.

The issues over which the parties had reached agreement, encapsulated in the pre-arbitration minute, appeared to be much wider than those reflected in the referral form. These included issues such as whether the respondent had properly applied the specific criteria as well as the employment in its short-listing of candidates.

Analysis of Submissions

The arbitrator stated that in regard to issues such as disclosure of documents in civil litigation, it would be the purpose of judicial or quasi-judicial proceedings, to provide a forum where the truth and correctness of certain allegations could be properly tested. As a result of this transparency and openness, a document must be handed over where the other side is not only aware of that document, but also needs it in order to advance its case.

It was held by the arbitrator, that despite the fact that the Labour Relations Act only permits the

disclosure of all documents with the exception of those that may cause substantial harm to the disclosing party in the context of collective bargaining or over issues of retrenchment, this position was similar to a position of unfair labour practice.

It was also pointed out that the state encourages transparency and openness in the promulgation of its laws as is illustrated by the enactment of the Promotion of Access to Information Act.

It was held further that, if the appointment by the respondent of the incumbent employee was proper and correct, taking into account the principles of procedural and substantive fairness, the respondent should have nothing to hide.

On the grounds of the applicant's qualifications, it was alleged that the failure to shortlist her was irregular. In seeking to properly prosecute her dispute at arbitration, the disclosure of the following documents was requested:

- The criteria which were specific to the post.
- The minutes of the short-listing meeting.
- The score sheets of the Applicant and of the short listed candidates.
- The names and designations of the interview committee members.
- The current employment equity plan.

Owing to the fact that the documents go to the very heart of the dispute, there was no rational reason to prevent them from being put before the arbitrator.

This is true, especially in regard to the determination of a person's qualifications, in which case, the employee's curriculum vitae is of central importance. Such information should, however, only be disclosed once appropriate steps have been taken to prevent disclosure of non-relevant personal information.

Finally, in the adjudication of an unfair dismissal, an arbitrator must ensure that the employer has followed its own procedures and that these procedures are fair. In doing so, it must be established as to whether or not the appointment of a candidate was based on justifiable and rational grounds.

Ruling

The Respondent was ordered to make available the information and documentation referred to above, provided that the curricula vitae submitted were to be properly edited to exclude any personal information but not as to exclude

relevant information. Additionally, the curricula vitae were to be used exclusively for the purposes of the arbitration and was to be made available as soon as possible.

Comment

In his ruling, the arbitrator took a balanced approach and ordered the Respondent to disclose the information requested by the applicant, but edit the curriculum vitae's of the other candidates to exclude any personal information, and include the persons' experience, qualifications and career progress. The importance of the outcome in this case is that the arbitrator indicated clearly that the Department should be transparent in regard to the information of all candidates applying for posts in the case of a challenge based on an unfair labour practice regarding promotion. Only personal information on curricula vitae should be withheld from the employee challenging the promotion. For this reason the award is of significance.

Peter Kituri
Student NMMU
Luvuyo Bono
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Representation at Arbitration Proceedings

SADTU obo T Reddy v Department of Education, KZN T.T Mthembu

In this matter, an alleged unfair labour practice concerning promotion, a trade union, SADTU, represented both the applicant as well as the second respondent, the employee appointed to the challenged position.

The arbitrator was not willing to allow one organization, SADTU, to represent two conflicting interests in the dispute. SADTU rejected this position and requested the arbitrator to reduce to writing this position in the form of a ruling. The arbitrator thereupon entertained submissions by the parties. SADTU argued that both the applicant and second respondent were members of SADTU and were accordingly entitled to representation by it. It would be unfair if one individual remained unrepresented. Secondly, it was contended that SADTU had in the past been permitted to represent both applicant and second respondent in similar unfair labour practice disputes

pertaining to the expedited dispute resolution process, which was a special process collectively agreed upon.

The arbitrator held that SADTU's obligation arose out of a purely membership relationship between the trade union and its members and did not enter the employment relationship. The union's reliance on its obligation to its members fell peculiarly within such membership relationship, which was a private relationship outside the employment relationship. It was faced with an untenable situation within such a membership relationship where it had two members tangled in a single dispute with conflicting positions. The resolution of that dilemma lay internally with the trade union and ought not to affect the present process.

Regarding the previous practice, the arbitrator opined that it was common cause that such previous practice was specially provided for in a special instance by duly concluded agreements between the parties concerned; and a previous practice can arguably be allowed to maintain, provided that there is nothing irregular in the practice. In the case in point, one could not allow the perpetuation of what was plainly an irregular practice.

It was the arbitrator's view that the interests of the applicant and second respondent would be seriously compromised and jeopardised if it was allowed that representatives from one trade union were allowed to represent opposing interests. The arbitrator referred to a situation where two attorneys from one firm, sought to represent opposing parties and pointed out that it would not be allowed in a civil court. The prohibition was the same in the present matter.

Ruling

The arbitrator ruled accordingly that SADTU was not permitted to represent both the applicant and the second respondent and could only be allowed to represent one of the afore-said parties to the dispute. SADTU had to make its own internal decision as to which one of the two members it wished to represent, and the other had to be advised that, because of an irresolvable conflict of interests, it could not act for the other member who had to be advised to seek representation elsewhere.

5. THE RIGHT TO LEGAL REPRESENTATION WHEN APPEARING BEFORE A DISCIPLINARY ENQUIRY

Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee
2002 7 BCLR 756 (SCA)

1 Introduction

Given the present work climate in South Africa, it can no longer be assumed that after having completed tertiary education, a graduate is automatically assured of employment in his or her field of study. Opportunities are scarce and the supply generally outweighs the demand. It is therefore no surprise that any future candidate for the job market would prefer to keep his or her education record clean.

The possible consequences of a disciplinary enquiry have the potential to impact on the record of the student concerned. Such a student will put up the strongest possible defence at such an enquiry, and the question arises as to whether or not the student should be entitled to acquire the services of a legal representative to serve his or her best interests.

At the same time, seen from the viewpoint of a tertiary institution, the preference may well be to keep the enquiry a domestic affair and not allow the intervention of an outsider who may cause the enquiry to be prolonged, or show the chairperson or initiator of the enquiry, often a layperson, to be inadequately skilled when compared with a legal practitioner.

The question of the right to representation at a disciplinary enquiry of an employee arises for similar reasons, and it happens more often (see *e.g.*, *David's v ISU C (Pty) Ltd* (1998) 5 BALR 534 (CCMA) and *Lamprecht and Nissan SA (Pty) Ltd v McNeillie* (1994) 11 BLLR 1 (A)).

In the present constitutional dispensation it cannot be assumed that the right to legal representation at disciplinary enquiries is only established by contractual agreement (individual or collective), or by an express provision in some legislative enactment, or even that such agreement or enactment may lawfully prohibit legal representation at enquiries.

In the recent judgment in *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (*supra*; hereinafter

“Hamata”) handed down by the Supreme Court of Appeal this issue of legal representation at disciplinary enquiries was considered and addressed.

2 Facts

The first appellant in the present case was a journalism student at the Peninsula Technikon (hereinafter “the Technikon”). During this time he co-authored an article which was published in a national newspaper, the *Mail and Guardian*, concerning the fact that prostitution was prevalent at the Technikon and that the institution had failed to take any action against it. The Technikon took exception to the content of the article, and regarded it as defamatory and an abuse of the right to freedom of expression of the student concerned. Whether he was the source or originator of the content of the article or not, he had knowingly reported false and damning statements about the institution without taking any reasonable steps to verify the truth thereof. The student was subsequently brought before an internal disciplinary committee on a charge of conduct calculated to bring the Technikon into discredit.

Realizing the potential seriousness of a decision of the Internal Disciplinary Committee, the student requested the right to be represented at the enquiry by an attorney. The request was refused on the basis of “the representation rule” of the Technikon. This rule reads:

“The student may conduct his/her defence or may be assisted by any student or a member of staff of the Technikon. Such representative shall voluntarily accept the task of representing the student. If the student is not present, the Committee may nonetheless hear the case, make a finding and impose punishment.”

In considering the above rule, the Committee came to the conclusion that it had no discretionary right to consider representation of the student by an attorney who was not a member of staff, and refused the application.

The student objected to being deprived of such legal representation and consequently did not present himself at the enquiry. It was held in absentia and the Committee found the student guilty of the charge and he was expelled from the Technikon. This finding was then reconsidered by internal appeal bodies at the institution, who in turn confirmed the sanction of expulsion.

The student, first appellant in the present case, took the matter to the High Court on review, where the application was dismissed. With leave

to appeal such dismissal, the first and second appellants (the latter the publisher of the Mail and Guardian newspaper) approached the Supreme Court of Appeal to set aside the findings of both the Internal Disciplinary Committee and the High Court.

3 Legal question and decision of the court

The Court restricted its consideration to the question of the right of the student to have legal representation before the domestic tribunal, namely the Internal Disciplinary Committee hearing.

With reference to *inter alia* the Constitution (Act 108 of 1996, hereinafter “the Constitution”), the court concluded that, as far as administrative and quasi-judicial tribunals were concerned, the right to legal representation is not in itself an absolute right. Other than in a court of law where the matter to be decided concerns an alleged offence, and where it is accepted that the accused is entitled to legal representation in order to ensure a fair trial, proceedings before other forums as referred to above, and applicable in this instance, do not give rise to the entitlement to legal representation purely on the basis that such representation is sought. Before such tribunals, legal representation is not in all instances a *sine qua non* for a procedurally fair hearing.

The Court considered the question as to whether the Disciplinary Committee had a residual right of discretion to consider allowing legal representation in certain instances, having regard to the facts of each individual case. The conclusion reached was that the facts of each case had to be considered on an *ad hoc* basis and in instances where procedural fairness is dependent upon legal representation, it is an enforceable right.

The Court concluded that the Internal Disciplinary Committee had erred in refusing to even entertain the right to legal representation based on its interpretation of the applicable rule of representation. Failure to exercise this discretion resulted in the vitiation of the proceedings at the hearing, and all subsequent proceedings. The decision of the Internal Disciplinary Committee and other forums of appeal were accordingly set aside.

4 Reasoning of the Court

Considering the rule of representation that was relied upon in the disciplinary enquiry, the Court

pointed out that there were three possible objects which this rule could achieve, namely:

- (a) to prohibit absolutely any form of representation other than that for which provision is made in the rule; or
- (b) to grant tacitly an absolute right to be represented by a lawyer of one’s choice and to extend expressly the right to representation to encompass representation even by a non-lawyer, provided only that such non-lawyer is a student or member of staff of Technikon; or
- (c) to grant an absolute right to be represented by a student or member of staff of the Technikon irrespective of whether such a person is a lawyer; to deny an absolute right of representation by a lawyer of one’s choice if the latter is neither a student nor a member of the staff of the Technikon; but to allow the Disciplinary Committee, in the exercise of its discretion, to permit representation by such a lawyer.

The Court referred to the common law rules of presumption which have to be followed when interpreting a written document. Included in these was the presumption that fair administrative procedure depended upon the facts of each individual case.

The Court highlighted the fact that under any circumstances the law of South Africa was subordinate to and bound by the principles of the Constitution of the country. Special reference was made to section 35 of the Constitution – but the Court came to the conclusion that the right to a fair trial which every accused person has is restricted to the right of an alleged offender in a criminal case. The Court saw no reason to presume that the same principle extended to the right of representation in a disciplinary hearing. If the legislature had intended to extend this right to administrative action or a quasi-judicial administrative action, this would have been done expressly. Neither the Schedule nor the Bill of Rights recognized an absolute enforceable right to legal representation outside the criminal law sphere.

With reference to the Promotion of Administrative Justice Act (3 of 2000), the right to a lawful, reasonable and procedurally fair administrative action is recognized and accepted. However, it is not imperative that the request for outside legal representation be

allowed in all cases. The right to such representation is to be applied with flexibility on an *ad hoc* basis, namely with reference to the circumstances of each case and where procedural fairness will only be attained where such representation is permitted. In such a case the right to legal representation is imperative.

Although it is understandable that the Technikon preferred to keep disciplinary hearings of its students within its own domain and thus a “closed” affair as far as outside third parties were concerned, it was clear that the facts of a particular case might demand the intervention and services of an attorney in order to ensure the attainment of procedural fairness. In such an instance the option of outside legal representation for the student could be the only acceptable interpretation of the rules of the institution itself, and the Committee would have to exercise its residual discretion in determining whether the case before it fell into this category.

In the present case the Committee had felt itself bound by the obligation supposedly imposed on it to keep the enquiry within “the family” of the Technikon and as such felt that it was not within its power to exercise any discretion to determine otherwise. The court held that this was a fatal error of interpretation of the rule and as such the proceedings that followed and the decisions reached were of no force or effect.

Legal representation may be granted at the discretion of the chairperson of a disciplinary enquiry. The Court observed that the parties had argued the matter on the premise that the disciplinary bodies at the Technikon had been engaging in administrative action as contemplated by the Constitution (765D-E).

Considering the provisions of the Constitution as well as section 3 of the Promotion of Administrative Justice Act it is abundantly apparent that a discretion to allow legal representation exists and that disciplinary enquiries are regarded as administrative action as contemplated.

5 Discussion

5.1 *No absolute right to legal presentation*

It is important to establish clearly at the outset that the Supreme Court of Appeal (760E-761A) stated in no uncertain terms that, while the Bill of Rights expressly spells out “the right to choose, and to consult with a legal practitioner”

(s 35(2)(b) of the Constitution) it does so only in the context of an arrest for allegedly committing an offence (s 35(1) of the Constitution) and the right to a fair trial that every accused person has (s 35(3) of the Constitution).

Moreover, in the national legislation enacted (the Promotion of Administrative Justice Act) as required in section 33 of the Constitution to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to be given written reasons where rights have been adversely affected by an administrative act, there is no reference to an absolute right to legal representation. This “can only be construed as a deliberate omission to account or recognize such a right” (761B-C).

Instead, section 3(2)(a) of the Promotion of Administrative Justice Act recognizes that a fair administrative procedure depends on the circumstances of each case. Section 3 makes provision for legal representation only in a serious and complex case in which, in order to give effect to procedurally fair administrative action, an administrator exercises discretion and decides to grant an opportunity to obtain legal representation. There is also a definite contrast between certain rights spelt out in section 3(2)(b) which *may* be given and the opportunities provided by the Constitution and the Promotion of Administrative Justice Act.

But, does the discretion exist in disciplinary enquiries that fall outside the ambit of the Constitution and the abovementioned Act? This question is important because it is likely that disciplinary enquiries in the private sector fall outside the ambit of such administrative action. Marais JA (who delivered the unanimous judgment in *Hamata*) answered this question in the affirmative. He was satisfied that an application of the principles of the common law in existence in the pre-constitutional era also led to the same conclusion. He held as follows:

“They too, require proceedings of a disciplinary nature to be procedurally fair whether or not they can be characterized as administrative and whether or not an organ of State is involved” (765 F-G).

From this conclusion it follows that this discretion applies to disciplinary enquiries of any sort, including those involving employees and students, and including the public as well as the private sector.

5 2 *Exercising the discretion*

It was the Court's view that in order to achieve procedural fairness in a particular case, legal representation might be necessary and a disciplinary body should exercise its discretion accordingly.

Factors that will influence the discretion include the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers among the student-staff body, and the fact that the initiator might be legally trained. Where an employer retains a legal practitioner to prosecute a disciplinary hearing, the same right should be accorded to the employee: see for example *Blaauw v Oranje Soutwerke* [1998] BALR 254 (CCMA) 267A-E). In addition, any other factor relevant to the fairness or otherwise of confining the accused to the kind of representation provided for by the applicable representation provisions will be relevant in exercising this discretion (764I-765B).

In *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho intervening)* (2001 3 SA 1151 CC 1184E) Chaskalson CJ summarized the position as follows:

"Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made and the consequences resulting from it."

Regard may also be had to the rules of the Commission for Conciliation, Mediation and Arbitration where a similar discretion to allow legal representation in arbitration proceedings involving the dismissal for misconduct or incapacity is exercised. Factors to consider in the exercising of this discretion are the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of opposing parties or their representatives to deal with the dispute (Rule 25 of the Rules for the Conduct of Proceedings before the CCMA).

5 3 *Can the discretion to allow legal presentation be excluded?*

Marais JA stated that "a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and

unambiguously been deprived of such discretion. If it has, the validity in law of the deprivation may arise ..." (765G-H).

Since it was held that the disciplinary body in *Hamata* had not been so deprived, the issue was not taken much further in the judgment. This is of course of great importance and needs to be investigated and considered carefully. A few provisional remarks follow.

It is submitted that the provisions of the Constitution and the Promotion of Administrative Justice Act which give effect to the constitutional imperatives regarding fair administrative action are clear in regard to the retention of a discretion to allow legal representation. An agreement, conditions of service, policy or even a subordinate legislative enactment suggesting that the discretion is removed, cannot be enforced in the face of this Act and the Constitution.

Any other Act of Parliament that seeks to do so can only be enforced if it is found to be in compliance with section 36 of the Constitution (the "limitations clause").

In regard to disciplinary enquiries of *employees* in the private sector who may be regarded as being excluded from the operation of administrative action as understood in terms of the Constitution and the Promotion of Administrative Justice Act, it is submitted that the constitutional right to fair labour practices (in s 23 of the Constitution) demands equally that any agreement, conditions of employment and policy that purport to exclude the discretion to allow legal representation be regarded as unconstitutional and therefore unfair.

It is accordingly submitted that the discretion to allow legal representatives in a particular disciplinary enquiry cannot be excluded – both in instances where administrative law applies as well as disciplinary enquiries in the private sector.

6 Conclusion

In *Hamata* the Supreme Court of Appeal established clearly that, although the right to legal representation is not absolute in disciplinary enquiries, a discretion to allow legal representation, where procedural fairness demands it, exists both in enquiries covered by the Promotion of Administrative Justice Act, as well as those that fall outside the scope of that Act. It is submitted, in conclusion, that the discretion cannot be excluded by an internal

rule, policy or agreement, and a legislative attempt to enforce the exclusion will be subject to the limitations clause contained in section 36 of the Constitution.

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