LABOUR BULLETIN

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

elrc
EDUCATION LABOUR RELATIONS COUNCIL

Nelson Mandela Metropolitan University
for tomorrow

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In this Issue:

1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its September 2017 issue of the *Labour Bulletin*. The *Bulletin* contains articles that are relevant to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. Transcripts – Hearsay evidence of a special type

A case note on Minister of Police v M and Others (JR56/14) [2016] ZALC JHB 314; (2017) 38 ILJ 402 (LC) (Delivered on 19 August 2016)

Introduction

In terms of the Law of Evidence Amendment Act, 45 of 1998 ('the Act), hearsay evidence is defined as *"*evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence"
Section 3 (1) of the Act[1] provide the principled grounds upon which hearsay evidence shall be admitted. Section 3 (1) (i) *states "*subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence unless:

(a) Each party against whom the evidence is to be adduced, agrees to the admission thereof;
(b) The person upon whom the credibility and the probative value of such evidence depends, himself testifies at such proceedings;
(c) The court having regard to:
    (i) the nature of proceedings;
    (ii) the nature of the evidence;

[1] Act 45 of 1998

(iii) the probative value of the evidence;
(iv) the purpose for which evidence is tendered;
(v) the reason why the evidence is not given by the person whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor….. the court believes… to be in the interest of justice"[2]

Evidently certain pre-conditions must be met before hearsay evidence is admitted to any proceedings. More often than not, arbitrators and courts of law are cautious to admit hearsay evidence and even when admitting same, exercise caution with regard to the weight to be attached to this type evidence in the broader scheme of all evidence presented at a hearing. This approach is, perhaps, understandable, when considering the potential prejudice hearsay evidence could have on any opposing party given the inherent limitation of testing the authenticity, reliability and credibility of such untested evidence. To this end, we are all too familiar with the proverbial description of at least one type of hearsay evidence being that "documents do not speak for themselves".

Hearsay evidence would take the form of either, the tendering oral evidence by a witness who does not have a first-hand account of the information he/she is testifying about or, evidence which is tendered in the form of documents (affidavits, letters, etc) in the absence of the oral testimony to corroborate such evidence.

In the case of *Minister of Police v M and Others (JR56/14) [2016] ZALC JHB 314; (2017) 38 ILJ 402 (LC)*[3] the labour court had to decide on the, weight and value that ought to have been accorded to admitted hearsay evidence of a different type. It concerned the tendering of evidence in the form of transcripts of a disciplinary hearing at a subsequent arbitration hearing, without the benefit of oral evidence of the witness who testified at the disciplinary enquiry.

Whilst the findings of this judgment would apply to labour disputes in general, it would no doubt, over time, bear significant relevance to disciplinary enquiries/arbitration hearings relating to sexual misconduct in the education sector, particularly those involving learners.

As such it is necessary to draw the attention of readers to this judgment as arbitrators / courts of law when confronted with disputes involving sexual misconduct cases would, in the future and factual circumstances permitting, be enjoined to enforce the legal principle established in this judgment.

Facts of the case

The full text of this judgment presents a comprehensive factual background relating to some information of a sensitive nature. What follows hereunder, is a brief exposition of the factual background but only to the extent that it was necessary to relate the factual background to the legal principle regarding transcript evidence which was ultimately determined by the labour court.

The first respondent in this case was employed by SAPS. He was subsequently charged both, criminally and with misconduct by SAPS for allegedly raping his daughter.

The alleged victim testified against her father (1st Respondent) at the internal disciplinary hearing at which the 1st Respondent was subsequently found guilty and dismissed. The internal enquiry was digitally recorded. Following an unsuccessful internal appeal, the 1st Respondent lodged an unfair dismissal dispute with the Safety and Security Services Bargaining Council (SSSBC).

At the commencement of arbitration, and for some reasons or the other, the employer could not secure the attendance of the alleged victim to testify at the arbitration hearing.

Left with no other option and, given the gravity of the offence for which the 1st respondent had been found guilty and dismissed, the employer relied on provisions of the Act[4] to introduce at arbitration, the transcript evidence of the disciplinary enquiry, with the primary intention of using the evidence tendered by the alleged victim.

The arbitrator admitted the transcript evidence but accorded minimal weight to this evidence in the absence of corroboratory evidence in the

[2] Ibid
[3] Judgment delivered on 19 August 2016

form of further documents and the oral testimony of witnesses, the one obvious witness being the alleged victim herself. The 1st Respondent's dismissal was subsequently found to be substantively unfair. The respondent then sought to review and set aside the decision of the arbitrator.

The findings and reasoning of the court

The essence of the Applicant / Employers' challenge was that the arbitrator committed an error in law by not sufficiently applying her mind to the evidence before her, specific reference being to the minimum weight attached to the admitted transcripts of the disciplinary enquiry which contained the elaborate testimony of the alleged victim. Put simply it was the applicant party's claim that the transcript bore extensive and reliable testimony of the alleged victim in rendering facts which implicated the 1st respondent.

After carefully assessing the evidence, the court made the following observations / findings:

(i) the internal disciplinary hearing was conducted fairly and in a professional manner. The court noted that the chairperson of the disciplinary enquiry was particularly patient and accommodating when the 1st Respondent (charged employee) tendered his evidence. To this end, the court felt that the 1st Respondent / employee could not lay claim that he had been unfairly treated during the disciplinary enquiry.

(ii) the transcripts of the internal disciplinary enquiry had been professionally prepared and that there could be no doubt about its quality and authenticity when it had been presented at the subsequent arbitration hearing.

(iii) the commissioner was in the first instance, commended for her decision to admit hearsay evidence presented in the form of transcript evidence.

(iv) However, and central to this judgment, the court found that the Commissioner had committed a reviewable error in law by not attaching relevant weight and importance to the transcript evidence.

It is important to cite verbatim, the necessary paragraphs or at least, important sections thereof, which embody the findings and reasoning of the court:

" [35] …, the remaining question was what *weight* this hearsay should be afforded. The Commissioner ruled that the transcript's weight was "minimal" because there was no other evidence before the SSSBC to substantiate the claims made in the transcripts. I have some sympathy for the approach adopted by the Commissioner. She trod a well-established labour law path in readily admitting the hearsay, but not being prepared to ascribe significant weight to it unless the transcripts were corroborated by other pieces of hard evidence making up the rest of the factual jigsaw.

[36] **Just as an error or irregularity in which a Commissioner gives hearsay evidence too much weight may be unreasonable, the opposite is also true. Not giving hearsay evidence sufficient weight may also constitute a material error or irregularity. If this error has a distorting effect on the end result, the award is then reviewable.**

[37] …, the Commissioner did not seem to realise that the transcripts before her were no ordinary hearsay. **The transcripts were hearsay of a special type.** Considered in full, they comprised a bi-lateral and comprehensive record of earlier proceedings in which K's evidence against RM *was* indeed corroborated by S and D; in which this substantiation survived competent testing by way of cross-examination; and in which RM's own defence was ventilated and exposed as being implausible. (K refers to victim and RM to 1st Respondent / accused employee)

[38] In referring to the transcripts, I am not referring to the ruling on guilt or sanction made by the internal chairperson, which is irrelevant and detachable. I refer solely to the evidence of witnesses in the internal hearing which, once admitted, should have been considered holistically

to ascertain what weight it had. In my view, reading the transcripts would convey to a reasonable Commissioner that K's testimony was credible and persuasive. This impression is conveyed not simply by K's rendition of events in evidence-in-chief, but by the way her version **withstood competent cross-examination by the employee's representative and questions by the presiding officer. Seen properly, the transcripts constituted a different order of hearsay in comparison, for example, to a witness statement handed up to an arbitrator during the course of a hearing….**

[39] On the other hand, **the transcripts showed that RM had given a particularly poor account of himself in his internal hearing**. His denials were weak and the conspiracy theory he advanced was vague and unpersuasive. The employer may not have led any other pieces of evidence substantiating K's allegations at the SSSBC but the transcript does show that the last time RM put forward a defence to the charges, it was implausible and contradictory.

[40] **It seems to me that transcripts, such as the ones in this case, must be afforded greater intrinsic weight than simple hearsay (such as witness statements) because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties…**

[41] The main argument against affording weight to hearsay is that it cannot be subjected to cross-examination and is thus prejudicial to the party against whom the hearsay would be tendered. Counsel for RM puts it thus: "Hearsay is inherently weak because the reliability of the evidence depends on the credibility of the *source* that is not present to be cross-examined regarding same". **However, this begs the question: what if the content of the hearsay is a record of the *source* actually being cross-examined on in earlier quasi-judicial proceedings?**

[42] Naturally, a witness statement simply handed up in an arbitration leaves an accused employee at a distinct advantage. Absent other hard evidence to back it up, it should assume very little weight. However, this is not the essence of the prejudice caused to RM when the transcript of his *properly conducted* internal disciplinary hearing is admitted in a subsequent arbitration. His prejudice is reduced to that he is deprived of a *second* and perhaps different kind of cross-examination of K than was earlier performed.

[43] **I do not mean to suggest that transcripts take the place of live witnesses or that arbitrations should not function as hearings *de novo*. The issue is that *in appropriate factual circumstances*, a single piece of hearsay, such as a transcript of a properly run internal hearing, may carry sufficient weight to trigger the duty in the accused employee to rebut the allegations contained in the hearsay.**"[5]

Principles which emerge from this judgment which have a bearing on cases dealt with in the education sector

Whilst a hearing *de novo* commences afresh/ anew, there does exist an important *nexus* between evidence tendered at a disciplinary enquiry and any subsequent proceedings, be it in the form of a tribunal (arbitration) or, even the formal courts of law. (Labour Court, Labour Appeal Court)

In pursuit of justice, the legal framework provides for the determination of the dispute through an elevated system - from the pronouncement of a presiding officer (internal enquiry) to an outside adjudicator in the form of an arbitrator/ court of law.

However, more often than not, and barring certain exceptions, the evidence gathered at an earlier proceeding passes as a 'common thread' between the initial and any subsequent hearing/s. To cite this case in point, the court was even prepared to attach no weight at all to the fact that the evidence of the alleged victim at the internal enquiry was not tendered under oath.

It is therefore of utmost importance that the presentation of cases (by both parties) is

[5] *Minister of Police v M and Others (JR56/14) [2016] ZALC JHB 314; (2017) 38 ILJ 402 (LC*

preceded by thorough investigation and preparation at the initial disciplinary enquiry. This is especially crucial in cases involving sexual misconduct, which does often span over a significant period of time before it is ultimately concluded and, of the stark reality that witnesses could become unavailable at subsequent hearings (sometime for obvious reasons such as the alleged victim not wanting to confront the alleged perpetrator, the ongoing and detrimental psychological effects of re-opening 'old wounds/scars', and, even witnesses for the accused employee becoming unavailable or having vague recollection of events).

Arbitrators / courts of law, should not as a matter of course, accept (circumstances permitting) hearsay evidence in the form of transcripts and attach little or no significance to such evidence. If anything, this court ushered in a new approach to the extent that this type of evidence (circumstances permitting) could become the main body of evidence base, which would influence the outcome of a hearing.

Evidently, the court in this case balanced the competing rights of the parties and came to the conclusion that the evidence contained in the transcripts revealed testimony of the alleged victim, which had had been already "tested through cross-examination" during the internal enquiry and thus setting it apart from the conventional type of documentary hearsay evidence (affidavits letters, etc).

The court went on to find that the 1st respondent was therefore, not prejudiced in presenting his defense against the backdrop of the transcript evidence.

Finally, and in the spirit of appreciating the value of this judgment like any other form of law which is intended to serve first and foremost as a deterrent, this judgment proverbially stated, serves as a real 'eye opener' of the extent the court was prepared to go to in setting the parameters for arbitrators/courts of law, to mete out justice in matters involving sexual assault/misconduct.

Mr. Dolin Singh
Provincial Manager (PELRC KZN Chamber)

3. Questions & Answers

Dear General Secretary

Question:

I would like to enquire about basic working conditions. I understand that all educators fall under the Employment of Educators Act. My question is: The non-teaching staff at schools, do they also fall under the same Act or must they comply with the Basic conditions of Employment? When I refer to the non-teaching staff, I am talking about the admin staff, hostel staff and general assistants.

I would really appreciate it if you can please assist me with this query.

Anonymous

Dear Anonymous

Kindly note that the Basic Conditions of Employment Act covers all employees in private and public employment relationship. The Employment of Educators Act on the other side only covers educators (teachers) who are appointed by the Department of Education. In your case, I would assume that you will be covered by the Public Service Act, if you are employed by the Department. Your dispute will therefore fall within the jurisdiction of the GPSSBC or else if employed by the School Governing Body (SGB), your dispute will fall within the jurisdiction of the CCMA.

…….

Dear General Secretary

Question:

Please advise me on the following: I was suspended without pay on 16 November 2016 up until 03 May 2017 for misconduct on 11 November 2016. I was summoned for a hearing on the 21 December 2016 but no hearing was held, and again I was summoned for a second hearing on the 03 April 2017, but the Employer walked out. I reported the matter to CCMA and my suspension was to be uplifted immediately as of 03 January 2017 with back pay.

Now that I am back at work the Employer wants to proceed with the hearing again, the time frame has lapsed, can he still proceed with the same hearing?

Anonymous

Dear Anonymous

You have not indicated whether or not you are an educator, considering that you have indicated that you referred your matter to the CCMA.

Nevertheless, the Department still has the right to continue with the disciplinary hearing to prove their case and you, on the other side, must prove your innocence. The upliftment of the suspension does not waive the employer's right to continue with the disciplinary hearing. This is in short what we can say without going into the legalities as we do not want to prejudice yourself and/or the department in this regard. Should you be an educator, we are the right forum to refer your dispute, if you are dissatisfied with the outcome of the disciplinary hearing.

…….

Dear General Secretary

Question:

My son, aged 5 is attending a departmental pre-school institution in Potchefstroom. I want him to be placed in a certain class/with a certain teacher next year. The head mistress will not allow it because my ex-husband was in a relationship with the teacher over a year ago. They remain friends and there are no bad feelings. It makes no sense as the teacher's best friend's daughter was placed in her class. Do they have a right to refuse my request for my son to be placed with the teacher?

Anonymous

Dear Anonymous

Please contact the Department of Education for this matter as it falls within their competence.

Ms NO Foca, ELRC General Secretary

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton.

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