LABOUR BULLETIN

Education Labour Relations Council
in association with
Nelson Mandela University

NELSON MANDELA UNIVERSITY

SEPTEMBER 2018

In this Issue:

1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its September 2018 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. Temporary incapacity leave

The leave dispensation as determined in the *Leave Determination*, read with the applicable collective agreements, provides for normal sick leave of 36 working days in a sick leave cycle of three years. In circumstances where an employee has exhausted his/her normal sick leave, the employer, may at its discretion grant additional incapacity leave (temporary incapacity leave and where applicable permanent incapacity leave). For this purpose the employer must conduct an investigation into the nature and extent of the employee's incapacity within 30 days. Such investigations must be carried out in accordance with item 10(1) of Schedule 8 of the LRA.

The Labour Court has handed down three judgments in this regard with two opposing approaches. In *PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs*[1] the Labour Court per, Cele J held that an employer's decision, in exercising its discretion in terms of a collective agreement, may not apply retrospectively, as this amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee. However, the Labour Court in the matter *POPCRU obo Mbongwa & Department of Correctional Services & Others,*[2] per Whitcher J stated that the interpretation in the *Gouvea* judgment is not sustainable as in such circumstances, leave has been granted

[1] (D751/09) [2013] ZALCD 3 (26 February 2013)
[2] *(Case D642/15) LC*

provisionally does not translate into an entitlement after the 30 days investigation period lapses. In a subsequent judgment of the Labour Court in *Department of Roads and Transport v Robertson and Others,*[3] Lallie J confirmed the earlier judgment of Cele J in *Gouvea* finding that, in declining applications outside the prescribed period and proceeding to recover remuneration from the employee was in breach of paragraph 7.5.1 (b) of the Resolution.

Gouvea

Ms Gouvea commenced employment with the Department of Land Affairs in June 1991. During the period 7 November 2007 to February 2009 she was continuously ill and consulted a medical practitioner who in turn booked her off-sick. Her sick leave application for the period 7 November 2007 to 3 December 2007 was approved by her employer. Her sick leave for the period 4 December 2007 to 30 June 2008 was approved only after she lodged a grievance. Her employer declined her leave for 1 July 2008 to February 2009, notwithstanding her application for incapacity. Instead, she received a letter from her employer instructing her to report for duty on 1 July 2008, failing which her absence would be treated as leave without pay. She was further advised that her grievance would be referred to a state agency called Soma for a recommendation on her incapacity. A report was subsequently issued by the Health Risk Manager declining the application for the period 4 December 2007 to 30 June 2008. Ms Gouvea referred an unfair labour practice dispute for conciliation and thereafter arbitration. The parties agreed that the facts were common cause and that the dispute essentially turned on the interpretation of a collective agreement (PSCBC Resolution 7 of 2000).

The issue before the bargaining council was therefore whether Ms Gouvea was entitled to temporary incapacity leave and further, whether the Department could recover salary paid for the period up to June 2008 and not authorise payment for the period July 2008 to February 2009. It was the Department's contention that Ms Gouvea did not qualify based on the recommendation received from the Health Risk Manager appointed by the Department to investigate and report on such matter and that the decision was justified based on the advice received. It was Ms Gouvea's submission that she qualified for temporary incapacity in terms of the applicable collective agreement and that her condition was supported by medical advice. The court held that:

> The limited facts of this matter suggest that on 24 June 2008 the third respondent had finalised all investigations and had made its decision, which it communicated to Ms Gouvea by a letter it issued to her on that day. She had to report back at work on 1 July 2008. From the given facts, as I understand them, a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4 December 2007 to 30 June 2008. This report sought to have a retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee. Nowhere in clause 7.5 of Resolution 7 of 2000, is there a suggestion that the employer may not grant further sick leave after the lapse of a 30-day period. On the contrary, as investigations shall be in accordance with item 10 (1) of Schedule 8 of the Act, a further sick leave period may be granted to the employee.[4]

Mbongwa

In *POPCRU obo Mbongwa & Department of Correctional Services & Others,*[5] the employee was employed as a Principal Educationist. The employee was booked off sick for depression from 8 March 2010 to mid-June 2010 after he had exhausted his sick leave. He subsequently made an application for temporary incapacity leave effective from May 2010 and received no response until April 2014. In a letter to the employee, the Department advised the employee that his leave was only partially approved (48 out of 155 days) by the Health Risk Manager.

Three months later, the employee received another letter advising him that he owed the Department an amount of R71 498.46 which represented the monetary value of the leave for the period not approved. The employee was further advised that an amount of R5 958.05 would be deducted from his salary per month. Three months later, the deductions commenced. The employee contended that the deductions were unlawful given that the department failed to take a decision within 30 days as provided for in clause 7.3.5 of PILIR. The department contended that the policy and guidelines warns

[3] [2017] ZALCPE

[4] Para 20

[5] (Case D642/15) LC.

employees that temporary incapacity is conditionally granted and that the employee who takes such leave assumes the risk that the leave might not be granted and that in such circumstances leave will be regarded as annual or unpaid leave. The Labour Court, per Whitcher J held as follows:

> In my view this interpretation of PILIR is not sustainable in light of the fact that an employee applying for temporary incapacity leave has not been granted it yet. A late determination of an employee's application for additional leave, as lamentable as this is, and a subsequent instruction to pay back money to which the employee was not entitled does not produce a decision that retrospectively deprives the employee of a right to the payment in question. An employee seeking additional sick-leave in terms of PILIR has conditionally been paid a salary while their application for additional leave is considered. This consideration should be over within 30 days. However, if the period the employer takes to decide the application exceeds the 30 days set out in PILIR, I do not see how the conditionality of payments to an employee, subject to a medical assessment, hardens into an entitlement after the 30 day investigation period lapses. Nor, in light of clause 7.2.2.2, 7.3.3.2 and note 4 of PILIR, should a reasonable employee *applying* for additional leave assume that, should a medical assessment go against them, even if delayed, they are entitled to be paid for their absence from work. It seems to me that, if the underlying medical condition which prompted an employee to seek additional sick leave, is assessed not to have warranted such leave, this fact must determine what happens to any payments they received while applying and not the employer's delay in attending to the application.[6]

Robertson

Subsequent to the judgments referred to above, the Labour Court, per Lallie J, once again had an opportunity to consider the application of Resolution 7 of 2000 in *Department of Roads and Transport v Robertson and Others.*[7] In this matter, the employee was employed by the Department as a Road Safety Officer and was involved in an accident in 2003 whilst on duty. As a result, the employee was diagnosed with major depression/ generalised anxiety disorder in February 2006. After being diagnosed with major depression/ generalised anxiety disorder by a psychiatrist in May 2009, the employee was hospitalised and as a result, unable to perform her duties for a prolonged period of time. During the period of absence, the employee made three applications for long term incapacity and two for Temporary Incapacity Leave (TIL). The applications were declined by the Department and led to deductions from the employee's remuneration. Applications for TIL are regulated by Resolution 7/2000. The arbitrator confirmed that the Department has discretion to grant or refuse TIL application. However, this discretion must be exercised in compliance with clause 7.5.1(c) of Resolution 7/2000 which in turn provides that the department "shall" conduct an investigation with 30 working days. In this instance, the employee made her applications within the prescribed periods contained in the Resolution, whilst the department's delay ranges from four to eight months. The department also declined the applications outside the 30-day period prescribed by the Resolution. The arbitrator, relying on the judgment in *Gouvea* found that by declining the applications outside the prescribed period and proceeding to recover remuneration from the employee, was in breach of paragraph 7.5.1 (b) of the Resolution. Lallie J held as follows:

> The arbitrator's interpretation of clause 7.5.1 (b) of Resolution 7/2000, which is based on the decision PSA HC Gouvea (supra) cannot be faulted. When exercising the discretion to grant or refuse TIL, the applicant was enjoined by Resolution 7/2000 to take into account provisions 10(1) of Schedule 8 of the Labour Relations Act, 66 of 1995 as amended (the LRA). The interpretation the arbitrator gave to clause 7.5.1 (b) is consistent with the letter and spirit of the LRA. His decision is not based only on giving a peremptory meaning to the word "shall" in clause 7.5.1 (b) of Resolution 7/2000. He therefore conducted the correct enquiry in the correct manner and reached a reasonable decision.[8]

[6] At para 26.
[7] [2017] ZALCPE
[8] At para 7.

CONCLUSION

The leave dispensation in the Public Service as determined in the *Leave Determination*, read with the applicable collective agreements, provides for normal sick leave of 36 working days in a sick leave cycle of three years. In circumstances where an employee has exhausted his/her normal sick leave, the employer, may at its discretion grant additional incapacity leave. Prior to exercising its discretion in this regard, the employer must conduct an investigation into the nature and extent of the employee's incapacity within 30 days. Such investigations must be carried out in accordance with item 10(1) of Schedule 8 of the LRA.

The Labour Court in interpreting the Resolutions applicable to temporary incapacity leave as it applies in the Public Service, handed down three judgments adopting two opposing approaches. In *PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs*[9] the Labour Court per, Cele J held that an employer's decision, in exercising its discretion in terms of a collective agreement, may not apply retrospectively, as this amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee.

However, the Labour Court in the matter *POPCRU obo Mbongwa & Department of Correctional Services & Others,*[10] per Whitcher J stated that the interpretation in the *Gouvea* judgment is not sustainable as in such circumstances, leave has been granted provisionally does not translate into an entitlement after the 30 days investigation period lapses. In a subsequent judgment of the Labour Court in *Department of Roads and Transport v Robertson and Others,*[11] Lallie J confirmed the earlier judgment of Cele J in *Gouvea,* finding that, in declining applications outside the prescribed period and proceeding to recover remuneration from the employee was in breach of paragraph 7.5.1 (b) of the PSCBC Resolution applicable to incapacity leave.

Article by:
Prof Van der Walt and Rasheed Keith Bandath

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[9] (D751/09) [2013] ZALCD 3 (26 February 2013)
[10] *(Case D642/15) LC*
[11] [2017] ZALCPE

A case note on Assmang Limited

Rules of Evidence: "Documents do not speak for themselves" - Nor is it always the duty of the Commissioner to lend a 'helping-hand' by pointing this out during arbitration

A case note on Assmang Limited (Blackrock Mine) v Leon de Beer and others JR 948-14. Date of Judgment 28 February 2018 (unreported) "the Assmang case"

Introduction

An Arbitration hearing is designed to be *quasi-judicial* (meaning 'part' or 'semi' judicial), which aims to facilitate the speedy and expeditious resolution of a dispute. However, q*uasi-judicial* means just that – the proceedings are part judicial aimed at dispensing the dispute with the use of **minimum** legal formalities and that parties are expected to adhere to certain minimum legal formalities (relating to the rules of evidence) at arbitration.

It so happens from time to time that a party may omit to heed this requirement, which can prove to be fatal to their case, as was evident in the *Assmang case.*

This is a recent judgment and is highlighted to keep dispute resolution practitioners abreast with the ongoing development of jurisprudence law regarding rules of evidence, which is obviously common to any arbitration hearing.

Facts of the case

This case concerns the dismissal of an employee who was appointed as a fitter and turner. He was charged for alleged misrepresentation. The actual charge (as it read on the notice to attend the disciplinary enquiry) was: ***failing to declare previous neck injury.*** The employer claimed that this misrepresentation occurred when the applicant completed a 'pre-placement' medical form at the point of taking up employment.

The alleged misrepresentation came to the employer's attention much later whilst the employee was already in their employ.

The employer subsequently charged the applicant, subjected him to a disciplinary enquiry and dismissed him. The employee proceeded to lodge an unfair dismissal dispute at the CCMA.

The commissioner found that the employee's dismissal was unfair because the employer failed to lead evidence to prove the charge against the employee. The commissioner found that by merely tendering the pre-placement medical form as evidence (to denote the omission / failure of the employee to declare the information) that all the employer relied on under oath, was to show that the employee did not specify the reason for his hospital admission on the form.

Evidently, this also brought into focus, the manner in which the charge had been framed and the type of evidence led by the employer in support of the charge. (This is an important consideration and is raised below, under the findings of the court).

The Employer was unhappy with the finding of the arbitrator and subsequently sought to review and set-aside the award on the following grounds:

i. The commissioner arrived at a decision that no reasonable decision maker could have made in finding that the employee had not failed to disclose his pre-existing medical condition before commencing employment. In holding this view, the employer argued that it had led sufficient evidence at arbitration to prove their case.

ii. The applicant's reinstatement was not appropriate remedy *(this article does not focus on this ground of the employers challenge. It suffices to say that the court found that the arbitrator had correctly granted the reinstatement of the employee)*

iii. In supplementing above grounds, the employer further argued that the commissioner had committed an irregularity in that he failed to inform the employer's representative on the need to provide more evidence. So went the employers argument – that the omission of leading corroboratory evidence in support of the omission on the pre-medical testing form could have been avoided had the commissioner adopted the 'helping hand' approach and informed the employer's representative during proceedings, that more evidence was required.

Finding of the court and reasons therefore

<u>On failure to lead sufficient evidence of witnesses to corroborate the documentary evidence (the pre-placement medical form)</u>

The court found that the employer's representative had *"pinned all of his hopes of proving that the dismissal had been fair on an interpretation of the pre-placement form itself without leading any evidence to support his interpretation of that form"*

To this end, the court found that the employer could not merely point out that the employee failed to properly complete the form and then expected the commissioner to *"assume that such error of technicality must automatically amount to a material misrepresentation without leading actual evidence in this regard."*

In amplifying its reasoning, the court stressed the point that *"it is trite that documents which a party seeks to rely on for the purpose of legal proceedings, no matter how crucial or self-evident a document may seem to be, can only have evidentiary value relevant to the extent to which they are contextualized by a witness who talks to the document in question" (add paragraph 8 of judgment)*

By placing exclusive reliance on the pre-placement medical form, without the use of corroborating evidence of a witness, the court found that the employer:

(i) failed to show whether there had been a wrongful intention by the employee aimed at deceiving the employer;
(ii) failed to discharge its responsibility of proving the material extent of the misrepresentation.

On the contrary, the court made the point that had the commissioner found the employee guilty and dismissed him, that that would have rendered the award reviewable because no reasonable decision-maker could have done so on the available evidence.

When answering the question *"was it unreasonable for the arbitrator to find that the employee did not fail to disclose a pre-existing medical condition?",* the court sets out an elaborate reasoning in paragraph 4 of the judgment of how the charge had been couched, the pleadings before court and how all of this had a material bearing on the findings by the

court. It is not necessary to repeat the entire summation *verbatim.* It suffices to summarise the findings of the court as follows:

i) The framing of the charge specifically related to the employee failing to declare his previous neck injury;
ii) This was different from failing to disclose "a pre-existing medical condition" which was how the employer's pleadings had been prepared in support of their review application to support the first ground for review;
iii) The employee's undisputed evidence in rebuttal was that he did have a neck injury and an operation had been performed, which cured the injury. It follows - by the time he was requested to complete the pre-medical test form, that he no longer had a neck injury.

<u>On the failure of the commissioner to lend a 'helping hand"</u>

Whilst the court acknowledged that commissioners are sometimes enjoined to adopt the helping hand approach, this has to be assessed on a case by case situation.

The court was of the view that the duty of the commissioner to provide a helping hand may not prevail in each and every case. In support, the court relied on the dictum **in *Rasimone Platinum Mine v CCMA and Others [2006] 7 BLLR 647 (LC)*** ('the platinum mine case') add paragraph 17 where the court held:

"…whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and….. is a matter to be decided with reference to the particular circumstances of each case. Case should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise, we would be opening the flood gate allowing every lay representative who has bungled his /her case to seek its re-opening by shifting blame to the arbitrator……. Cardinal question is whether the merits of the dispute had been adequately and fairly dealt with in terms of s 138 of the Labour Relations Act".

In the present case the court noted:

i. The employer was placing undue reliance on the helping hand concept when it had been *"wholly inadequate and incapable discharging the burden of proof"*. (add paragraph 23 of judgment)

ii. The employer's representative was found to be competent and experienced. This was evident from the transcript evidence before the court which revealed the formal and legalistic manner in which the employer's representative had conducted cross-examination and led evidence.

The court consequently found that there was no basis to support the employer's claim that the commissioner had erred by failing to expressly inform the employer's representative during arbitration, of the need to lead more evidence to support a claim of misrepresentation.

Conclusion

The basic rules of evidence must be adhered to when leading cases at arbitration. All necessary evidence must be led. In addition, the evidence tendered must speak to and support the precise charge/s as described in the charge sheet.

The failure of an experienced representative (including the applicant in person) to provide sufficient and material evidence in instances where the commissioner does not direct otherwise during the hearing, will not always give rise to a legitimate claim to the failure of a commissioner providing a helping hand.

The CCMA/Bargaining Councils dispute resolution mechanisms are designed to cater for lay persons who appear before commissioners and who are sometimes, unrepresented and exposed to dispute resolution at this level for the first time. It is for this reason that the courts have endorsed the helping hand approach.

Commissioners are expected to guide parties (more often than not, the applicant) so as to ensure that they appreciate and understand the need to tender all necessary evidence, the importance of calling witnesses to testify, the need to challenge opposing version/s when conducting cross-examination of witnesses, the need to provide opening statements / closing arguments etc.

To this end, the law has vested commissioners in terms of **section 138 of the LRA**, the necessary leverage to conduct proceedings as deemed necessary, thus empowering commissioners to at times, 'take charge' by

adopting an inquisitorial approach to conducting proceedings (having regard to the ability of representatives, the nature of the dispute, etc.).

That said, at times there does appear to be a fine line between the need for the commissioner to provide a helping-hand and the risk of him/her unnecessarily descending into the arena of conflict, at the expense of one party. Therefore and whilst commissioners are expected to lend a helping hand whenever necessary, they are nevertheless expected to remain alert on the need for remaining impartial and even-handed at all times.

Returning to this case, it is unclear from the judgment, whether or not the parties had engaged in a pre-arbitration hearing. On speculation, it appears not to have taken place. (Even if not a complete pre-arbitration hearing / signed minute, but at least some discussion and agreement aimed at narrowing down issues before the commencement of the arbitration hearing, so as to assist in expediting proceedings)

The facts of this case serves to highlight the importance and value of conducting some form of a pre-arbitration / narrowing down of issues. Nothing should be left to chance. Had the parties engaged in the narrowing down of issues, then it was likely that some discussion would have ensued on the scope and extent of evidence required at arbitration. (Here, reference is made to that which normally become the subject matter of discussion when parties are directed to determine "the issue/s in dispute" or "matter/s to be decided by the commissioner", witnesses required, documentary evidence. etc.)

It is very likely that the situation could have been avoided had the parties had some engagement before the arbitration hearing. They would have known at the outset what was expected of them.

Turning to the ELRC, pre-arbitration hearings are combined with conciliation proceedings. The pre-arb meeting takes the form of a complete hearing thus providing the parties with sufficient time to prepare ahead of arbitration, hopefully avoiding the situation which occurred in the *Assmang* case.

Mr. Dolin Singh
Provincial Manager (PELRC KZN Chamber)

3. Questions & Answers

Dear General Secretary

Question:

On 18 April 2018 I completed the online application on the GDE Portal.

I took leave from work on 27 April 2018 to submit all the required documentation to the school that I want my daughter to attend next year (Grade 1).

On 03 August 2018 I received a sms informing me that I can log in to my account to view the outcome off my application and that offers not confirmed within seven days will be forfeited.

I logged in, but I was unable to view the outcome, "application still pending".

On 07 August 2018 I received an sms that there are a high number of offers with pending statuses, and that we should be patient, the sms also mentioned that we have time until 16 August 2018 to confirm with the school.

I called the school and was advised to contact the Department of Basic Education.

I called the Department five times on 07 August 2018 but there was no answer and again on 31 August 2018

My concern is that is that today is 03 September 2018, I called the Department of Basic Education and there is still no answer.

Anonymous

Dear Anonymous

Kindly note that the ELRC is a bargaining council administering labour relations disputes of educators. In this instance, the Council lacks the jurisdiction to deal with the issue raised.

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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