REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2498/13

In the matter between:

Micheline PRETORIUS	**Applicant**
and	
G4S SECURE SOLUTIONS (SA) (PTY) LTD	**First Respondent**
Themba HLATSWAYO	**Second Respondent**
CCMA	**Third Respondent**

Heard: 29 October 2015
Delivered: 24 November 2015
Summary: Review – ULP – demotion – LRA s 186(2)(a).

JUDGMENT

STEENKAMP J

LABOUR COURT

Introduction

[1] The applicant, Ms Michelene Pretorius, was employed as a security officer by G4S at the Rand Refinery site. She earned R12 000 per month. As a result of her alleged negligence G4S redeployed her to another site, resulting in a reduction of her monthly salary to R 3 872. She referred an unfair labour practice claim to the CCMA. The arbitrator (the second respondent) found that the actions of G4S did not fall within the meaning of unfair labour practice. He dismissed her claim. She seeks to review that finding.

Background facts

[2] The employee was a "grade A" security officer.[1] The first respondent, G4S, placed her at the site of Rand Refinery. G4S paid her R 12 000 per month. Her contract of employment stated:

> "The employee's basic salary specifically for Rand Refinery shall be R 12 000, 00."
>
> And, in an addendum:
>
> "It is specifically recorded that the parties agree that:
>
> Pretorius has been employed to a specific site namely Rand Refinery in the capacity of grade A security officer.
>
> For the duration of the period that Pretorius remains at Rand Refinery in the capacity of grade A security officer she will and a fixed gross monthly salary of R 12000, 00.
>
> This is only applicable for the period Pretorius works in the capacity of grade A at Rand Refinery and falls away immediately should Pretorius be posted to any other G4S client service contract for any reason whatsoever including but not limited to those listed below that:
>
> - the client request [*sic*] that the employee be transferred from the site for any reason whatsoever;
> - in the event of G4S losing the service contract;

[1] Subsequent to this dispute, she was dismissed for operational requirements. That dismissal does not form part of this application.

LABOUR COURT

- a reduction of the manpower requirements at Rand Refinery;
- a transfer to another site in accordance with company policies and procedures.

All other conditions of employment as set out in your contract of employment shall remain in force and fully binding on both you and the company."

[3] The employee allegedly lost a set of keys. It is also alleged that she falsely claimed that she had handed the keys over to another security officer. Rand Refinery demanded that she be removed from its site. G4S redeployed to another site and issued her with a final written warning valid for six months. As a result of her redeployment, she no longer earned R12 000 per month but reverted to the minimum grade A salary prescribed in the sectoral determination of the private security sector which was almost two thirds less, viz R 3 872.

[4] The employee referred an unfair labour practice dispute to the CCMA. It was conciliated but remained unresolved. She referred it for arbitration. The "primary issue" was reflected as: "s 186(2)(a) - unfair conduct – promotion/demotion/probation/training/benefits".

The award

[5] The arbitrator initially correctly identified the dispute as relating to an unfair labour practice. He briefly summarised the evidence of the respective parties. He then phrased the question before him thus:

> "Foremost, let me deal with whether or not the act of removal of the applicant from Rand Refinery site falls within the meaning of unfair labour practice."

[6] Although the arbitrator noted that he had been referred by the employee's attorney to the Labour Appeal Court judgement in *Apollo Tyres*[2], he did not discuss the question whether the employee had acquired a benefit as

LABOUR COURT

[2] Apparently a reference to *Apollo Tyres SA (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC); (2013) 34 *ILJ* 1120 (LAC), although the arbitrator did not provide any citation.

envisaged in s 186(2)(a) of the LRA[3] any further, other than blithely stating his disagreement with higher authority:

> "I do not share the idea that the Labour Appeal Court ruled that the term benefit will necessarily include remuneration. The Labour Appeal Court had, on the contrary, drawn a distinct basis on which benefit will be interpreted to be over and above the normal remuneration."

[7] The arbitrator also did not consider whether the reduction in salary amounted to a demotion.

[8] Instead, the arbitrator accepted that the employer has a prerogative to deployed employees on different sites based on its operational requirements (although it was common cause that the employee had been removed due to her alleged misconduct). He further found that the employee was advised why she was being removed; that "the removal from site was inextricably linked to the adjustment of salary"; and that "there was therefore no need for the [company] to engage the applicant in terms of a formal enquiry." On the basis of the employer's prerogative, he then simply found that its actions "do not therefore fall within the meaning of unfair labour practice as envisaged by section 186(2)(a) of the LRA."

[9] After expressing his disagreement with the finding of the LAC in *Apollo Tyres*, the arbitrator concluded:

> "Given the submissions made before me, I conclude on a balance of probabilities that the respondent's actions do not fall within the meaning of unfair labour practice."

<u>Review grounds</u>

[10] Mr *Roets* argued that the conclusion of the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. The main thrust of his argument concentrated on the question of demotion, although, as I understood it, he did not abandon the question of whether the employee had been deprived of a benefit, thus constituting an unfair labour practice.

[3] Labour Relations Act 66 of 1995.

LABOUR COURT

Evaluation / Analysis

[11] It may seem at first blush that the arbitrator's ruling is a jurisdictional one, and that the reasonableness test does not apply on review. As the LAC reiterated in *Apollo Tyres*[4]:

> "The court *a quo* however found that the second respondent's ruling that the scheme was a benefit that falls within the purview of section 186 (2) (a) of the Labour Relations Act 66 of 1995 (the Act) is a decision that fell within the band of reasonableness. The court *a quo* further said that the 'debate about which of the decisions of this court is (sic) correct or is to be preferred on what constitutes benefits as is embarked upon by the applicant belongs to an appeal and not a review'. In my view, the *court a quo* misinterpreted the appellant's argument. The argument was that the CCMA does not have jurisdiction to adjudicate the dispute because the scheme is not a benefit as contemplated in Section 186 (2) (a) of the Act. The question is therefore not whether the second respondent acted reasonably or reached a conclusion that a reasonable commissioner could not reach but whether his finding is wrong or right. Put differently the enquiry ought to be whether the second respondent was correct in ruling that the CCMA had jurisdiction to adjudicate the dispute. See *City of Cape Town v SAMWU obo Jacobs and Others*.[5]

[12] But in this case, the commissioner correctly assumed that he had to decide whether or not G4S had committed an unfair labour practice. Although he decided that it had not, that conclusion was not a jurisdictional one, but a conclusion on the merits (whether right or wrong). The test on review remains, therefore, the reasonableness test set out in *Sidumo*[6] and subsequent authorities.

Unfair labour practice: LRA s 186(1) (a)

Section 186 (2) (a) of the Act reads as follows:

> 'Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

[4] *Supra* para [17].

[5] [2009] 9 BLLR 882 (LAC) at paragraph 28.

[6] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

LABOUR COURT

> Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;'

Demotion?

[13] Mr *Roets* argued that the arbitrator never considered whether the redeployment of the employee from Rand Refinery amounted to a demotion. There is merit in that argument.

[14] It is common cause that the employee's salariy was reduced by two thirds as a result of her redeployment. A reduction in salary can be a demotion, although it does not always necessarily follow. And even without a reduction in salary, a transfer may in itself constitute a demotion.[7] Yet the commissioner never even considered this possibility. Instead, he simply assumed that it was the employer's prerogative to redeploy her at the insistence of Rand Refinery.

[15] Similar contracts relating to the dismissal – as opposed to the redeployment – of employees at the insistence of a client have been held to be invalid by this court. In *Mahlamu v CCMA*[8] Van Niekerk J held:

> "In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in section 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.
>
> This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event…

LABOUR COURT

---

[7] Cf *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* [2008] 12 BLLR 1179 (LAC) para [88] (per Zondo JP); *SAPS v Salukazana* [2010] 7 BLLR 764 (LC); (2010) 31 *ILJ* 2465 (LC).

[8] (2011) 32 *ILJ* 1122 (LC) paras [22] – [25]. See also *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* [2015] ZALCJHB 129.

> Although neither party referred to the decision, Boda AJ recently held that any clause in a contract of employment that allows a labour broker's client to undermine the right not to be unfairly dismissed is against public policy. The facts of that case are distinguishable, since it did not concern a situation where the respondent's client no longer required the employee's services for economic reasons. However, the principle that was recognised and applied by Boda AJ is consistent with the principle applied in the present instance, and I associate myself with his reasoning.
>
> It follows that by finding that the applicant's contract had terminated automatically when Bombela advised the third respondent that the applicant's services were no longer required, the commissioner committed a material error of law. His award therefore stands to be reviewed and set aside (see *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* [2002] 3 BLLR 189 (LAC)), and substituted by a ruling to the effect that the termination of the applicant's employment constituted a dismissal for the purposes of the LRA."

[16] In my view, similar considerations apply to this case. The commissioner simply accepted the "employer's prerogative" to redeploy the employee at the insistence of Rand Refinery, without considering whether it amounted to a demotion. In so doing, he misconceived the nature of the enquiry.

Benefit?

[17] As I mentioned above, the arbitrator disregarded the authority of the LAC in *Apollo Tyres.* In so doing, he committed a gross irregularity that directly influenced his resultant conclusion. G4S argued that the extra amount it paid to the employee while she was placed at Rand Refinery was an allowance. That an allowance can be seen as a benefit in the context of s 186(2)(a) of the LRA should be clear in the light of *Apollo Tyres.* I shall refer to the pertinent parts of that judgment:[9]

> "[25] The distinction that the courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to

LABOUR COURT

[9] Paragraph numbers as in the original.

include wages, salaries and most, if not all extras or benefits. Remuneration is defined as:-

'Remuneration means any payment in money or in kind made or owing to any person in return for that person working for any other person, including the State, and remunerate has a corresponding meaning.'

"[36] In *GS4 [sic] Security Services (SA) (Pty) Ltd v NASGAWU and Others*, an unreported judgment of this Court which was delivered on 26 November 2009, after the *Department of Justice v CCMA and Others* matter, the approach set out in *Hospersa* was unconditionally accepted. The Court quoted paragraphs 9 and 10 of *Hospersa* and concluded as follows:

'My understanding of what Mogoeng AJA is inter alia saying is that, in order for respondents to bring a successful claim under item 2(1)(b) of Schedule 7 they have to show that they have a right arising ex contractu or ex lege. It is only then that having established the right, that the commissioner would have jurisdiction to entertain the dispute as a dispute of right.'

[37] It is unfortunate that the Court in *GS4 Security Services* did not consider what was said in both the majority and minority judgments in the *Department of Justice v CCMA* matter. In both judgments it is categorically stated that item 2(1)(b) creates a right not to be treated unfairly in relation to promotion, demotion, disciplinary action short of dismissal, training and the provision of benefits.

"[41] Mr *Pretorius* argued that the majority was guilty of circular reasoning. I disagree. It is also clear from the reasoning in the majority and minority judgment and the judgment of *Scheepers* that the unfair labour practice dispensation creates rights and that an employee has an *ex lege* right created by section 186 (2)(a) not to be treated unfairly in relation to promotion, demotion, training and the provision of benefits.

[42] Section 23(1) of the Constitution provides that: 'everyone has the right to fair labour practices'. It has been said that our Constitution is unique in constitutionalising the right to fair labour practices and that the concept is incapable of precise definition. It was further stated that:

'The concept of fair labour practice must be given content by the legislature and thereafter left to garner meaning, in the first instance, from the decisions of the specialist tribunals including the Labour Appeal Court and

LABOUR COURT

> the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to section 23(1).'
>
> [45] The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit schemes. In many instances employers enjoy a range of discretionary powers in terms of their policies and rules. The Labour Court further pointed out that section 186 (2) (a) is the legislature's way of regulating employer conduct by super imposing a duty of fairness irrespective whether that duty exists expressly or implicitly in the contractual provisions that establishes the benefit. The court continued and stated that the existence of an employer's discretion does not by itself deprive the CCMA of jurisdiction to scrutinize employer conduct in terms of the provisions of the section. It concluded that the provision was introduced primarily to permit scrutiny of employer discretion in the context of employee benefits. I agree with this conclusion.
>
> [46] I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit."

[18] In the light of these dicta, the arbitrator should have applied his mind to the question whether the extra payment or allowance coupled to the placement at Rand Refinery constituted a benefit in terms of s 186(2)(a); and whether its deprivation amounted to an unfair labour practice. It should also be noted that in the earlier case of *MITUSA v Transnet Ltd*[10] the LAC [per Zondo JP] held that a dispute of right is not excluded from the ambit of an unfair labour practice.

Conclusion

[19] The CCMA has jurisdiction over unfair labour practice claims referred to it in terms of s 186(2)(a). That is the claim that the employee referred to it.

[10] (2002) 23 *ILJ* 2213 (LAC).

LABOUR COURT

The arbitrator failed to deal with the question whether her redeployment amounted to a demotion or the deprivation of a benefit. He misconceived the nature of the enquiry before him. That led to an unreasonable result.

[20] The result is that the award must be reviewed and set aside. However, this Court is not in a position to substitute it. It should be remitted to the CCMA for another commissioner to hear evidence and argument on these aspects, and to decide whether G4S had committed an unfair labour practice; and if so, what the appropriate sanction would be.

[21] That has the result that the dispute has not come to an end. In those circumstances, taking into account the principles of law and fairness, I do not consider a costs award to be appropriate.

Order

[22] I therefore make the following order:

22.1 The arbitration award of 11 November 2013 under case number GAJB 12834-13 is reviewed and set aside.

22.2 The unfair labour practice dispute is remitted to the CCMA for a new arbitration before a commissioner other than the second respondent.

22.3 There is no order as to costs.

LABOUR COURT

____

Steenkamp J

APPEARANCES

APPLICANT: J C M Roets of Roets & Du Plessis.

FIRST RESPONDENT: W J Hutchinson
Instructed by Moodie & Robertson.

LABOUR COURT