



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1893/2012

JR 1882/2012

In the matter between:

KOKETSO PRUDENCE NGOBE

APPLICANT

and

J.P. MORGAN CHASE BANK

FIRST RESPONDENT

DINAH MOJA-SIBIYA N.O

SECOND RESPONDENT

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

THIRD RESPONDENT

Heard: 12 August 2015

Delivered: 17 August 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award made by the second respondent, to whom I shall refer as 'the commissioner'. In her award, the commissioner held that the applicant's dismissal by the first respondent was substantively fair but procedurally unfair, and awarded the applicant the equivalent of two months' salary as compensation. The basis of the review application is that the third respondent, the CCMA do not have jurisdiction to hear the dispute, the matter being one of a claim for automatically unfair dismissal based on the employee's pregnancy.
- [2] The first respondent has filed across review in which it challenges the commissioner's finding on procedural fairness and the award of compensation.

Background facts

- [3] The material facts are recorded in the commissioner's award and I do not intend to repeat them here. For present purposes, it is sufficient to say that the applicant was employed as a data base administrator in the first respondent's global technology infrastructure team when the first respondent commenced with a restructuring exercise. The applicant, the first respondent's human resources manager (Surendra) and manager of the GTI team (Naidu) met on 11 November 2011 to discuss the proposed restructuring. The applicant was invited to apply for a new position in the applications development team. On 28 November 2011 a meeting was held between Surendra and the applicant. On 2 December 2011, the applicant was informed of the vacancy in the AD team. On 7 December 2011,

she enquired regarding the first respondent's policy on moving positions and roles across different divisions and suggested that the position in the AD team was not substantially different from the current position. A Mr Burbridge respondent on 9 December 2011 stating that those persons involved in the consultation process would respond to her concerns regarding the differences between the two positions. On 29 December 2011, the applicant was interviewed by Mr Ebrahim, the application's delivery manager in the team. Her application was unsuccessful. The applicant was ultimately retrenched on 13 January 2012.

- [4] The applicant disputed the fairness of her dismissal dispute that was ultimately referred to arbitration before the commissioner. Prior to the arbitration, they held a pre-arbitration conference at which a pre-arbitration minute was concluded. The minute sets out, amongst other things, the facts that were common cause, the facts in dispute, the legal issues to be decided by the commissioner and the reasons why the applicant contended that the dismissal was substantively and procedurally unfair. The minute specifically records that there were no preliminary points to be determined, and that the commissioner was required to determine whether the dismissal was procedurally and substantively unfair. The applicant was represented by an attorney and indeed, over the course of a four-day arbitration, the parties were both legally represented throughout. At the hearing, the first respondent called Surendra, Ebrahim and Niadu as witnesses; the applicant gave evidence and did not call any witnesses.

The award

- [5] For present purposes, the relevant part of the arbitration award under review is the finding on procedural fairness. In this regard, the commissioner held that although the parties had held consultation meetings on 11 and 28 November 2011 the first respondent had failed adequately to consider alternatives to dismissal, and that this rendered the procedure adopted by the first respondent unfair. What is significant is that the commissioner does not reject the evidence of any of the first respondent's witnesses; on the contrary, and particularly in relation to the evidence concerning the new position created, the commissioner

specifically accepted their evidence that the new position was substantially different from the applicant's existing position, that the applicant did not have the experience in some of the duties relevant to the new position and that the first respondent legitimately rejected, is now genitive to the retrenchment, the applicant's proposal that she be trained for the new position.

[6] The arbitrator's reasoning appears to be that recorded in paragraph 50 of the award. The commissioner says the following:

'If one looks at the specific matter, after the respondent had introduced its models that led to the restructuring process, the question is what alternative did it look at with regard to the affected employees that occupied the affected positions but for dismissal. As already mentioned, other than an undertaking made in the latter (sic) dated 31 October 2011 no mention has been made of whether or not alternatives were considered...'

And in paragraph 52:

'I therefore find that the failure of the respondent during the consultation process to consider alternative to dismissal of the applicant rendered the procedure for the dismissal for operational requirements unfair.'

[7] Also relevant for present purposes is that part of the record in which the fact of the applicant's pregnancy is raised. The applicant are testified that the effect of the pregnancy may have irritated against her appointment to the alternative position, at least to the extent that it would result in a delay in any required training and her appointment to that position. The relevant exchange that took place during the course of cross-examination between the applicant and the first respondent's representative is the following:

Respondent representative: now I understand your case your case here today is not that you didn't get this position because you were pregnant and Mr Ebrahim do not appoint you because of that that's not your case, right?

Applicant: the case here from your last question is the urgency of the role being filled and if unfortunately the urgency here becomes an issue to me now as you

raised it because to me from what you saying it was urgent for the role to be filled and I was in no position to fill that role urgently.

Respondent representative: the question is your case is not that you were not appointed to this position because of your pregnancy

Applicant: I certainly wouldn't say not all yes what I'm saying is that an urgency is a matter here now from what you've asked me that arises me to ask a question of the urgency of the role to be filled for the fact that I was going to come back in June that already defeats the urgency itself.

Respondent representative: this taken as a point you were never told by anyone that the reason you are not appointed had to do with your pregnancy, correct?

Applicant: I was never told that yes...

Commissioner: the case it has been referred to CCMA only some having a wrong file

Respondent representative: yes

Commissioner: was an issue of retrenchment

Applicant: yes

Commissioner: and if it's an issue of pregnancy this was another [inaudible] so let's move on?...

Let's not deviate from the disputed hand, there was a comment that was done by the third witness of the respondent Mr Ebrahim in the reference to the pregnancy far remember correctly was the fact that the matter could not be resolved as soon as possible because they was complications or issues the applicant had complications with her pregnancy not that the postal the position or whatever was happening had anything to do with the pregnancy so let's leave it for now because it will be another point that the art have to deal with something else that is outside my hands, if that is to be brought to the table...

Grounds for review

- [8] The applicant contends in these proceedings that it was incumbent on the commissioner to identify what she refers to as the true dispute before her, namely that the reason for her retrenchment was based on her pregnancy and that she had accordingly been discriminated against. Since the CCMA has no jurisdiction to entertain disputes concerning dismissals effected for reasons that are alleged to be automatically unfair, the applicant avers that the commissioner's award is reviewable on the basis that she lacked jurisdiction.
- [9] The cross-review is based on the application of the reasonableness threshold – in particular, the first respondent avers that the decision to which the commissioner came is one to which no reasonable decision-maker could have come on the available material.

Analysis

- [10] The challenge to the commissioner's jurisdiction in the application for review ignores the fact that the applicant was *dominus litis* in the CCMA, that she was assisted by her attorneys of record throughout, that she failed to raise any jurisdictional issue during the course of the arbitration and that more fundamentally and she agreed in the pre-arbitration minute that there were no preliminary points to be determined unless these were raised if need be. This is despite the commissioner's confirmation, prior to any evidence being led, that she was seized with a dispute consequent on the retrenchment of the applicant and that the applicant disputed both the substance and procedure of her dismissal. The record discloses, as indicated above, that the applicant pursued a dispute concerning her dismissal on the grounds of operational requirements throughout and that even when the commissioner raised the evidence relating to the applicant's pregnancy and in doing so, made a jurisdictional challenge possible, there was none.

- [11] In short, the applicant, with the advice of the attorneys of record, made an election to rely on a course of action that is capable of being determined by the CCMA and she remains bound by that election.
- [12] The applicant's case appears, to some extent at least, to rest on the assumption that it was somehow incumbent on the commissioner to intervene in the process and herself to decide that the real dispute between the parties was one that concerned a dismissal on account of pregnancy. There is a trend in the CCMA for commissioners to intervene on this basis and to halt arbitration proceedings and refer a dispute to this court when the commissioner forms the view that he or she has no jurisdiction on the basis that the real dispute between the parties concerns a reason for dismissal that is listed as automatically unfair. This is an unfortunate trend. A party referring a dispute to the CCMA must stand or fall on the merits of that dispute. If it is clear from an initial interrogation of the dispute that the applicant has erred in referring a dispute concerning an automatically unfair dismissal to the CCMA, there can be no harm done in advising an applicant of that fact and that the matter ought appropriately to be referred to this court for adjudication. However, where as in the present instance, the parties make conscious decisions to run a case in an arbitration process in full appreciation of the jurisdictional consequences of their election, it is not appropriate for commissioners to intervene by abandoning the proceedings, thereby dictating to parties what he or she thinks their real dispute is and how it should be litigated.
- [13] Insofar as the cross-review is concerned, it is well-established that the failure by a commissioner to have regard to particular evidence or to place weight on the evidence that is not relevant, is not in itself a ground for review. What matters is the reasonableness of the outcome. In the present instance, there was uncontested evidence before the commissioner that the first respondent did not consider viable to maintain the status *quo*, and that the applicant was informed when the section 189 (3) notice was issued that she would be considered for the vacant positions. The applicant was considered for the AD position. The

possibility of training was given consideration throughout and found not to be a reasonable possibility. The applicant accepted, the evidence, that the status quo could not be retained and that apart from the new position, there were no other vacancies at the first respondent. I fail to appreciate how the commissioner, the circumstances, could reasonably have come to the conclusion that the first respondent had failed adequately to consider alternative to the applicant's retrenchment. That is never the applicant's case, the record of the proceedings before the commissioner does not sustain such a conclusion and, on the contrary, indicates that the first respondent did indeed consider the applicant for the alternative position and as an alternative to her retrenchment. In my view, even failing to have regard to the evidence, the commissioner committed a reviewable irregularity which had the consequence of her coming to a decision that was unreasonable in the circumstances. Her finding of procedural unfairness accordingly stands to be reviewed and set aside. There is little point in remitting the matter for rehearing. The record is before the court and it is in the interests of both parties that finality be reached. I intend therefore to substitute the commissioner's award with a ruling to the effect that the applicant's dismissal was substantively and procedurally fair.

Costs

[14] The court has a broad discretion in terms of s 162 of the Act to make orders for costs on the basis of the requirements of the law and fairness. The court is traditionally reluctant to penalise individual employees who *bona fide* pursue grievances against their employers. Despite the applicant's misguided reliance on a ground for review that is clearly an afterthought (some might consider it to be opportunistic), I am unable to find on the papers before me that the applicant's conduct is *mala fide* or that these proceedings were frivolously instituted. I intend therefore to make no order as to costs.

For the above reasons, I make the following order:

1. The application to review and set aside the second respondent's award is dismissed.
2. The cross-review is upheld and the second respondent's award is substituted by the following:

'The applicant's dismissal was substantively and procedurally fair'.
3. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. L Pillay instructed by Mothuloe ATTORNEYS

For the Respondent: Mr. I Gwaunza, Edward Nathan and Sonnenbergs