IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Reportable

CASE NO: JR2885/08

In the matter between:

J. H. STANDER	Applicant
AND	
THE EDUCATION LABOUR RELATIONS COUNCIL	1st Respondent
R I MACGREGOR N.O.	2nd Respondent
DEPARTMENT OF EDUCATION:	
NORTH WEST	3rd Respondent

JUDGMENT

MOLAHLEHI J

Introduction

[1] On the 2nd June 2010, this court reviewed and set aside the arbitration award of the second respondent issued under case number PSES 878-07/08 NW made on the 5th November 2008. The court further ordered that the matter be remitted back to the first respondent to be arbitrated *de novo*. The reasons for this order are set out below. The review application was unopposed.

Background facts

[2] The background facts that particularly led to the dismissal of the applicant are generally common cause.

[3] The applicant who had been an educator with the third respondent, the department of education (the department) for over thirty years was dismissed for an assault of a learner. On the particular day of the incident the applicant slapped a seventeen year old grade 11 learner. His explanation for this conduct was that the learner had severely provoked him. His defense was that in slapping the learner he acted involuntarily in circumstances of "semi automatism." He further stated that he could not recall the incident.

[4] The applicant was dismissed after a disciplinary process that took a period of two years. In his founding affidavit the applicant says that the chairperson of the disciplinary hearing found him guilty of assault with intention to do grievous bodily harm, and that he was dismissed without affording him an opportunity to lead evidence in mitigation.

[5] The dispute was referred to the first respondent, the Education Labour Relations Council (the bargaining council) for resolution. The final step in the resolution of the dispute was the arbitration hearing which commenced on the 7th July 2008. The department called a number of witnesses to testify against the applicant. The applicant testified on his behalf and submitted as further evidence the medical report from his doctor. It was agreed between

the parties that there was no need for the applicant to lead an expert witness regarding his medical condition. They further agreed that the arbitrator would have regard to such medical reports as submitted by the applicant in his consideration of the dispute. This meant that the medical report constituted uncontested evidence.

Grounds for review

[6] The applicant raised several grounds of review. The three main grounds being that the commissioner committed misconduct, gross irregularity and exceeded his powers. The applicant further contended that the decision of the commissioner was in the circumstances of this case not to reasonable. As concerning the evidence which was presented the applicant contended that the arbitration award was unjustifiable. The arbitration award was said to be unjustifiable because the uncontested evidence, including that of the medical practitioner was disregarded by the commissioner.

[7] The commissioner in his analysis of the evidence refers to several court cases where it had been held that proof in cases of misconduct is based on the balance of probability. The commissioner then quotes from a case of ***Electrical and Allied Workers Trade Union and Another v The production Castings Company (Pty) Ltd*** (***1998) 9 ILJ 702 (IC) at page 708.*** The

portion of that judgment which seems to had a significant influence in the reasoning and the conclusion of the commissioner reads as follows:

> *"… As far as misconduct is concerned I belief that if the employer is of the bona fide view that as a result of the employee's conduct which has come to the attention and which he has investigated to such an extent that would exclude any grounds that he has acted arbitrarily, the relationship between him and the employee has become intolerable for commercial or public interest reasons, he will be entitled to dismiss the employee….. If an employer for instance mistrust an employee for reasons which he must obviously justify… and he can show that such mistrust, as a result thereof certain misconduct of the employee, is counterproductive to his commercial activities or public interest (where appropriate), he would be entitled to terminate the relationship."*

[8] As concerning the delay prosecuting the disciplinary hearing, the commissioner found the dismissal not be unfair particularly having regard to the fact that the postponements were agreed to by both parties and the applicant also contributed to the delay.

[9] Regarding the substantive fairness of the dismissal the commissioner found that the applicant was aware of the rule, that the rule was reasonable and that

the applicant obeyed the rule for over a period of thirty years. The commissioner correctly rejected the argument about the findings of the criminal process which had been instituted against the applicant. He also seem to have rejected the testimony of the physiatrist for the same reasons i.e. that the evidence of physiatrist was only required for the purposes of the criminal proceedings. On this aspect I do not agree with the commissioner. I will revert later to this issue in my evaluation and consideration whether or not the commissioner's approach was reasonable in this regard. The commissioner proceeded to reason as follows:

> *"The question however is not so much about the guilt, it is whether the employment relationship has been damaged and whatever the continuation of the relationship can be contemplated."*

The commissioner goes further to say:

> *"It is common cause that the applicant did slap the learner. He therefore misconducted himself in terms of the rules of the school and the Department of the Education…. It is not in the public interest to expose learners to this kind of tension and as the Applicant cannot guarantee that he will not repeat the behavior, there would seem to be no other alternative but to remove the Applicant from the environment, where he will not be subjected to the ill discipline of*

learners, the bad manners of learners, the problem of the school and the deteriorating standard of respect at school."

[10] And towards the end of his arbitration award the commissioner says the following:

"*The headmaster testified that they tried to resolve the matter internally and only reacted when formal complaints were laid. While this is poor management practice and one that should be changed, it does not provide a reason not to deal with assaults in the work place in an appropriate manner."*

Evaluation

[11] In my view the proper analysis of the commissioner's award is that he decided the dispute not so much on whether the dismissal was in the circumstances of that case fair or otherwise. He in his consideration and decision of the matter before him, differed to the decision of the employer. His inquiry did not go beyond the "bona fide belief" of the employer that he employee had committed a misconduct and as a result of that misconduct the employment relationship had to be terminated "because it was intolerable for commercial and public interest". The commissioner's approach in my view, failed to take cognizance of the fact that in addition to determining the commission of the offence a further enquiry that needed to be conducted was whether the dismissal was in the circumstances of this case fair or otherwise.

It is because of that misconceived approached by the commissioner that the arbitration award stands to be reviewed. In this respect, it is further my view that the proper analysis of the commissioner's award reveals that the commissioner failed to appreciate the task given to him by the provisions of s 188 the LRA. Section 188 (1) and (2) of the LRA reads as follows:

> *"(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
>
> *(a) that the reason for dismissal is a fair reason-*
>
> *(i) related to the employee's conduct or capacity; or*
>
> *(ii) based on the employer's operational requirements; and*
>
> *(b) that the dismissal was effected in accordance with a fair procedure.*
>
> *(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."*

[12] Section 188 has to be read with schedule 8 of the Code of Good Practice: Dismissal which at item 2 therefore reads as follows:

"(1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.

[13] In essence the approach adopted by, the commissioner failed to appreciate that the enquiry he needed to conduct was not limited only to investigating whether the employee had the intention to commit the offence or not. He needed to consider all the facts and circumstances before him and determine whether the dismissal was fair or otherwise. The evidence of the physiatrist doctor in particular in relation to the mental condition in which the applicant was when he committed the offence, is an important aspect in the assessment of the fairness or otherwise of the dismissal. The facts which I belief had the commissioner applied his mind properly would have found tilted the scales of the fairness in favor of the applicant are the following:

1. The applicant did not deny that the commission of the offence.

2. The applicant accepted that what he did was wrong and subjected himself to a further medical assessment and treatment.
3. The offence was as a result of provocative behavior on the part of the learner which has not been disputed.
4. At the work place the view that the relationship had not broken down and that this was a matter which could be resolved through facilitation. It would appear from the version of the school that disciplinary action was only taken because of pressure from outside the school.

[14] It is not clear what the commissioner means when he says that the applicant could not guarantee that he would not commit the offence in the future. Conversely, the objective facts are that the chances of a repeat by the applicant are remote. The applicant is a person who has dedicated his life to teaching for a period in excess of thirty years. There is no evidence that he had in that period committed a similar offence. He has in a scientific manner identified the cause of his reaction to provocation by the learner on that particular day and has subjected himself to medical treatment which is the only objective basis upon which the commissioner could have determined the possibility of the repeat of the misconduct. The medical report which as

indicated above was rejected by the commissioner was also important to in the assessment of the repeat of the misconduct. The commissioner in failing in his duty rejected the evidence on the basis that it is only required in criminal proceedings.

[15] It was for the above reasons that I reviewed, set aside and remitted the matter back to the bargaining council for determination by a commissioner other the second respondent.

MOLAHLEHI J

Date of Hearing: 02 June 2010

Date of Judgment: 5th November 2010

APPEARANCES

For the Applicant: Mr F Van Tonder

Instructed by: Bosman & Bosman Attorneys

For Respondent: No appearance