

IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Cape Town)

•Case No: C
310/98

In the matter between :

Applicant

and

THE COMMISSION FOR CONCILIATION,
First Respondent

and

Second Respondent

Third Respondent

J U D G E M E N T

Revelas J:

[1] This is an application for the review of an arbitration award made by the second respondent in favour of the third respondent. The applicant seeks an order that the second respondent's award

reinstating the third respondent in the employ of the applicant and ordering the applicant to pay the third respondent compensation in the amount of R 21 213-16 be set aside.

[2] The application is brought under section 145 of the Labour Relations Act, No 66 of 1995 ("the Act") and the application is unopposed. A Mr Wagiet, purporting to represent the third respondent, has filed an affidavit and so has the third respondent. However there is no notice of opposition. There was also no appearance for the third respondent, although he was present in court. Mr Wagiet also stated that he abides by the court's decision. I consequently treat the matter as if it were unopposed.

[3] The third respondent was employed by the applicant during July 1993. In his letter of appointment the relevant paragraph under the heading "Retirement" reads as follows:

“Retirement on attaining the age of 63 is compulsory.

However an extension of your employment may be negotiated with management, which agreement will be confirmed in writing.”

[4] According to the applicant, the age of 63 years is also the retirement age provided for in the applicant’s pension fund scheme rules.

[5] The applicant alleges that the third respondent’s date of retirement was 1 March 1998.

[6] The applicant explains that in exceptional circumstances of mutual need, and subject to managerial approval, some employees have been re-employed by the applicant subsequent to having been retired at age 63. This arrangement were it has occurred in the past, apparently occurs only by mutual agreement and that the applicant had no right to insist that any employee stays on past retirement age and nor has any employee the right to insist that he or she remains in employment

with the applicant, after retirement age.

[7] If such exceptional circumstances exist, then a new employment contract is entered into, after the employee has received a pension or provident fund benefits to which he or she has become entitled to on retirement, and the terms and conditions of such employment will vary in each case.

[8] It is common cause that the third respondent did not wish to be retired at the age of 63 and requested the applicant to retain his services beyond this age. Consultations took place and a dispute arose. The applicant was of the view that there were no exceptional circumstances which required the retention of the third respondent's post, whereas the third respondent believed that his services should be retained.

[9] On 5 March the third respondent, before he was retired, and therefore still employed by the applicant, referred a dispute to the Bargaining

Council for the Road Freight Industry. A copy of his referral reflects in paragraphs 3(a) and (b) thereof that the dispute concerns an **unfair labour practice** and related to **Schedule 7 Item 3(1) of the Act**.

[10] Item 3(1) in Schedule 7 of the Act reads as follows:

“any party may refer a dispute about an alleged unfair labour practice in writing to -

(a) A *Council* if the parties to the dispute fall within the registered scope of that *council* or

(b) The commission, if no *Council* has jurisdiction”

[11] The Bargaining Council for the Road Freight Industry held a dispute meeting on 22 April 1998 which remained unresolved and on the day a certificate was issued by the Council reflecting that the dispute remained unresolved and that it concerned an “unfair labour practice” dispute.

The certificate specifically refers to Item 3(1) of Schedule 7 of the Act.

[12] On 24 April 1998 the third respondent submitted a request to the Commission for Conciliation, Mediation and Arbitration (“the CCMA, or “the first respondent”) to arbitrate the following: **“unfair labour practice that led to unfair dismissal. Inconsistency of company policy”**. In the request form (LRA FORM 7.13) requesting an arbitration, the following decision is sought from the CCMA by the third respondent:

“ to be afforded the same opportunity as enjoyed by other employees. Reinstatement. To be granted the same opportunity to work to age 65 years.”

[13] On 7 May 1998 the applicant was notified by the CCMA that the matter had been set down for arbitration on 8 June 1998. On 11 May 1998, the applicant’s attorneys of record sent a letter to the CCMA, averring that what was conciliated

between the parties was not an unfair dismissal, but an alleged unfair labour practice, and that the third respondent was seeking an unconciliated dispute to be arbitrated by the CCMA. The letter further states:

“with reference to the referrals for conciliation and arbitration, it appears as if Mr Obaray is in fact disputing our clients retirement age of 63 years. This clearly does not fall within the disputes referred to in Schedule 7 Item 3(4)(b) read with Item 2 (1)(b) to (d).

Given that the dispute does not involve an alleged unfair dismissal and Mr Obaray on his own version ceased to be an employee by virtue of his retirement on 4 March 1998, he can no longer claim to be an employee within the definition of an ‘employee’ contained in the Act.

Accordingly, is not a party falling within the jurisdiction of the Labour Relations Act, and the CCMA similarly has no jurisdiction to arbitrate this dispute (in so far as it may have otherwise had the power to do so-refer Item 1 above).”

[14] This is still the applicant’s case and one of the

grounds upon which the applicant seeks to review this matter.

[15] On 27 May 1998, a Ms Warwick of the CCMA wrote to the applicant's attorneys, advising them that she was unable to locate the referral for arbitration on the CCMA's computer system and that it may therefore not necessarily have been referred to the CCMA as yet. She was consequently unable to confirm whether or not the CCMA had jurisdiction to arbitrate the matter. She however assured the respondent's attorney's of record that once the referral is found, she would forward the letter of the applicant's attorney's to the allocated commissioner.

[16] On 8 June 1998 an employee of the applicant's human resources department received a telephone call from the second respondent at about 10h00 and the second respondent informed her that the applicant was an hour late for the arbitration. The second respondent was referred to the

correspondence that had passed between the applicant's attorneys of record and the CCMA.

[17] The second respondent apparently did not have this correspondence in his file but promised Mrs Coleman that revert to her fifteen minutes later which he did. The second respondent was then referred to the applicant's human resources director, Mr W Jungschlager as he was the official at the applicant responsible for the matter.

[18] Mr Jungschlager requested the second respondent to postpone the matter. He pointed out to the second respondent that in the light of the letter sent by the applicant's attorney to the CCMA and the CCMA's response thereto, he did not expect the matter to proceed on that day. He also pointed out to the second respondent that he was the only official who was able to deal with the matter on behalf of the applicant, and that he was ill in bed and unable to be present at the CCMA. He reiterated that the applicant had every intention

of opposing the matter and had a *bona fide* defence.

[19] The second respondent adopted the attitude that the notice of set down had been served on the applicant and for that reason the matter would proceed and no postponement would be granted. The following day, the applicant's attorney's of record forwarded a letter to Ms Warwick of the CCMA referring to the previous correspondence and setting out what had transpired between himself and the second respondent.

[20] Mr Jungschlager, pointed out in his affidavit, that contrary to what is contained in this letter he did in fact receive notification of the arbitration proceedings, but felt that in light of the previous correspondence, the notice of set down had been superceded and that the matter would not proceed until further correspondence between his attorneys and the CCMA had been concluded. Mr Jungschlager explained that because Mr Field, his

attorney, had not seen the notice of set down, Mr Field merely assumed, incorrectly though, that no such notice had been sent to Mr Jungschlager.

[21] Ms Warwick of the CCMA did not respond to the letter written by the applicant's attorney, but the second respondent did. He stated the following in his letter:

"Your client was properly and duly served on 7 May 1998. My discussion with your client had nothing to do with service. Your client was raising a jurisdictional issue as a reason for not attending and I advise your client that the issue should have been raised as an *in limine* point at arbitration. The arbitration proceeded in his absence and he will be receiving a copy of the award in due course."

[22] Mr Jungschlager denies that he refused to attend the hearing on the grounds that the CCMA had no jurisdiction to arbitrate the matter. He argues that what he had requested, was a postponement so that at the very least, the applicant might be afforded the right to be heard on the issue of

jurisdiction, which still remained unresolved.

[23] The arbitration proceeded in the absence of the applicant. In his award the second respondent found that there was an unwritten company policy providing for retrenchment at age 65 and furthermore that it had been agreed to, between the applicant and the third respondent that the third respondent would only retire at the age of 65.

[24] The second respondent further found that the applicant, in breach of its own policy, and of the agreement between itself and the third respondent, forced the third respondent to retire at the age of 63.

[25] The second respondent concluded that this conduct on the part of the applicant constituted "a dismissal without a fair reason, or a dismissal for a **reason unknown** (my emphasis) to the employee."

[26] At the arbitration hearing, the third respondent was represented by a Mr Wagiet, who is apparently an official of the Islamic Unity Convention. According to the applicant, the Islamic Unity Convention is not a trade union and it appears that the second respondent accepted, without considering the provisions of section 138(4) of the Act, that the third respondent was entitled to be represented by Mr Wagiet of the Islamic Unity Convention.

[27] The applicant argued that Mr Jungschlager had a good and sufficient reason for not been able to attend the arbitration hearing and that the matter should have been postponed at least to hear the applicant on the question of jurisdiction. The second respondent does not make mention of the fact that the applicant requested a postponement on certain grounds and that the application was refused for certain reasons. No reasons were given for the refusal of the request for a postponement.

[28] In the decision of *CAREPHONE (PTY)LTD V MARCUS NO & OTHERS* [1998] 11 BLLR 1093 (LAC) the trite principle that a postponement is an indulgence, and not a right was upheld. The second respondent stated that he refused the postponement because it was the applicant's decision not to attend the arbitration and the fact that Mr Jungschlager was ill was "coincidental". Factually, this seems the correct observation. Mr Jungschlager was not absent because he was ill, but because he believed the correspondence pertaining to jurisdiction, justified his absence. His belief was illfounded. Jurisdictional issues relating to arbitration cannot be conducted by correspondence or over the telephone.

[29] Even if the applicant wished to object to the jurisdiction of the second respondent, this should have been raised at the arbitration proceedings. Commissioners enjoy a wide discretion with regard to the granting of postponements. The Labour Court will not, and should not interfere with this

discretion, unless there are compelling reasons to do so. Accordingly, I cannot find that the refusal to postpone the matter amounted to an irregularity or to the second respondent exceeding his powers.

[30] The applicant further seeks to review the award on the following grounds:

1. That the CCMA had no jurisdiction to treat the matter as an unfair dismissal case; and
2. That the third respondent was not dismissed, since attaining the ordinary retirement age does not constitute dismissal in terms of the Act;
3. That there is no evidence whatsoever of the commission of residual unfair labour practice as defined in item 2 of Schedule 7 of the Act;
4. That to the extent that the third respondent viewed being granted leave at a time after his stipulated retirement date, and viewed being sent on a computer course as indicative

of an intention on the part of the applicant to retain his services after age 63, which was found by the second respondent, this was a mistake which could be more satisfactorily explained in evidence.

[31] It was further argued that, should I find that the second respondent had jurisdiction to arbitrate an unfair dismissal case, and that the request for postponement was correctly refused then, the finding of the second respondent was irregularly made and not justified by the reasons given for it, on the following grounds:

[32] The third respondent did not allege and nor did the second respondent find that the reason for dismissal related to the third respondent's "conduct or capacity". In this regard I was referred to section 191(5)(a) of the Act. The point was made that, notwithstanding the aforesaid provisions, a finding of unfair dismissal was made by the second respondent. The applicant submitted that unless there is evidence of circumstances

provided for in section 191 (5)(a)(i)-(iii) of the Act, no finding of an unfair dismissal case may be made and submitted further that the jurisdictional facts referred to in the above sections, were not present during the arbitration proceedings.

[33] When the third respondent made a request to conciliate the dispute about an unfair labour practice regarding the alleged application of the company policy relating to the retirements, he was still in the employ of the applicant.

[34] The retirement was to take effect at the end of March 1998. It is therefore understandable that he described the dispute as an "unfair labour practice" in his referral form.

[35] On 22 April 1998, when the conciliation meeting was held, the respondent had already been retired. In my view it would be artificial to argue that the dispute which had been conciliated was solely an unfair labour practice dispute and therefore the third respondent was precluded from referring

an unfair dismissal dispute to arbitration.

[36] The third respondent's case was now that he was retired and he wished to be afforded the same opportunity, as enjoyed by other employees to continue to work until he became 65 years old. Essentially, the same dispute which was conciliated was also arbitrated, and that was the dispute which arose as a result of the retirement of the third respondent.

[37] The difficulty which presents itself in a case such as the one before me is the question as to how to frame the dispute when referring it. According to item 2(1)(d) of Schedule 7 of the Act, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving the "failure or refusal of an employer to reinstate or re-employ a former employee," which would seem to cover the facts of the matter in question. In terms of item 3(4)(b), if such a dispute remains unresolved, then the employee may request that the dispute be resolved

through arbitration.

[38] Section 186 of the Act on the other hand, presents a further problem in that it describes dismissal as follows:

“(a) an employer has terminated a contract of employment with or without notice;

(b) an employee reasonably expected the employer to renew a fixed term of contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; (my emphasis)

(c) an employer refused to allow an employee to resume work after she-

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) was absent from work up to four weeks before the expected date and up to eight weeks before the actual date, of the birth of her child;

(d) an employer who dismissed a number of employees

for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

- (e) an employee terminated a contract of employment with or without because the employer made continued employment intolerable for the employee”

[39] The third respondent’s case being that there was a policy in existence that compelled the applicant to retain his services beyond the retirement age of 63, suggests that he could have also referred his dispute in terms of section 186(b) of the Act, in which case a retirement such as the one in question could be a dismissal as envisaged in this section.

[40] Further, section 187 (1)(f) of the Act provides that a dismissal is automatically unfair if the reason for the *dismissal* is :

- “(f) that the employer unfairly discriminated against the *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex,

ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, marital status family responsibility.”

[41] In terms of section 191 (5) (b) an employee may refer an automatically unfair dispute only to the Labour Court for adjudication, and not to the CCMA for arbitration.

[42] Counsel for the applicant referred me a Judgement of Landman J in the matter of *SCHMAHMANN V CONCEPT COMMUNICATIONS NATAL (PTY) LTD [1997] 8 BLLR 1092 (LC)*. In this matter Landman J held that an employee is not dismissed if that person is retired by his or her employer on attaining the agreed or normal age of retirement(at 1097).

[43] In this matter Landman J also held at 1096 that,

“when an employer and employee agree specifically or by implication (retirement on normal retirement age)in advance that the fluctuation of time is to operate as a guillotine which severs their employment relationship then it cannot be said that when this ate arrives that there has been a dismissal by the employer although the relationship and the

contractual obligations are terminated. Barker and Holtzhausen *South African Labour Glossary* Juta 1996 defined dismissal as 'the termination of the employment of an employee by an employer'. The LRA does not depart from this common conception of a dismissal."

[44] In my view, the aforesaid observations made by Landman J in the *SCHMAHMANN* case, do not assist with the difficult question, in a retirement dispute such as this, as to how the dispute should have been framed or defined by the third respondent. The applicant in the *SCHMAHMANN* case did not challenge her retirement when she was notified of her retirement. She only felt aggrieved about her retirement after she had accepted it. In the matter before me the third respondent challenged the fairness of the retirement, prior to it coming into operation.

[45] The second respondent found that the third respondent was dismissed for a reason "not known" to the third respondent, which jurisdictional fact would then confer the necessary jurisdiction onto

the CCMA to arbitrate the matter.

[46] The second respondent also filed an affidavit wherein he specifically states that he found that the employee as dismissed for an unknown reason.

[47] Quite clearly, on what was conciliated and on the facts presented before the second respondent, this could have not been a basis for assuming jurisdiction. This was not the reason advanced by the third respondent in any of his referral forms (for conciliation or arbitration, respectively), to be the reason for his dismissal. It was either an automatically unfair dismissal based on discrimination on grounds of age, or an unfair labour practice as envisaged by schedule 7, item 2(1)(d).

[48] Whichever way one views the matter, the second respondent should have set out clearly on which facts he assumed jurisdiction.

[49] In the **CAREPHONE** judgement the following specific test regarding review was formulated in paragraph

37 of that judgement :

“ Is there a rational objective basis justifying the connection made by the administrative decision maker between material properly available to him or her and the conclusion he or she eventually arrived at ?”

[50] The second respondent had no material available to him which could justify the conclusion that the third respondent was dismissed for a reason unknown to him. All the facts suggest that the dispute related to a retirement issue and the second respondent should have, in that context advanced a proper basis for assuming jurisdiction and fixed his terms of reference in relation thereto. This he did not do. In my view he exceeded his powers by assuming jurisdiction without a justifiable and rational reason. This renders his award reviewable.

[51] There is, in addition to the aforesaid, another important aspect of the arbitration proceedings which needs to be considered in this application for review, and that is the question of the third

respondent's representative.

[52] Section 138(4) of the Act provides that, in any arbitration proceedings, a party to the dispute may appear in person, or be represented "**only** (my emphasis) by a legal practitioner, a co-employee or by a member, office bearer or official of that party's **trade union** (my emphasis) or *employer's organisation* and, if the party is a juristic person, by a director of that *employee*."

[53] According to Mr Wagiet's affidavit which he filed at court he is a "male consultant" employed by the Islamic Unity Convention, which is not a trade union. He is not a co-employee, nor a member, or office bearer or official of a trade union. He is also not a legal practitioner. Consequently he is not entitled to represent any employee at any of the proceedings conducted under the auspices of the CCMA.

[54] The second respondent, in my view, committed a fatal irregularity by permitting Mr Wagiet to act

on behalf of the third respondent. In permitting a consultant to represent an employee, when such a consultant was clearly precluded from the Act from representing an employee, the second respondent also exceeded his powers.

[55] It is ordered :

That the arbitration award in this matter is set aside and remitted to the Commission for Conciliation, Mediation and Arbitration.

E REVELAS

For the applicant:

ADVOCATE C.S KAHANOVITZ instructed by

BERNARDT VUDIC POTASH & GETZ

For the third respondent:

No appearance

Date of Judgement: 22 February 1999

This Judgement is also available on the Internet
at the following Website:

<http://www.law.wits.ac.za/labourcrt>