

SOUTH AFRICA / JUDGMENT

Eicker v PSCBC and Others (JR2255/11) [2018] ZALCJHB 115 (13 March 2018)

[2018] ZALCJHB 115

COURT

Labour Court Johannesburg

BEFORE

A J Steenkamp

CASE / FILE NUMBER

JR2255/11

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REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2255/11

In the matter between:

A EICKER Applicant and PSCBC First Respondent N G J MBILENI Second Respondent MINISTER OF SAFETY & SECURITY Third Respondent SOUTH AFRICAN POLICE SERVICE Fourth Respondent

Heard: 15 February 2018

Delivered: 13 March 2018

Summary: Review – LRA s 145 – application of collective agreement – temporary incapacity leave.

STEENKAMP J

Introduction

- [1] This is an application to have an arbitration award by a Bargaining Council panellist, Ms N G J Mbileni, reviewed and set aside. It concerns the application of a collective agreement known as Resolution 7 of 2000.

Background

facts

- [2] The applicant, Mr Anton Eicker, was employed by the South African Police Services (SAPS, the fourth respondent). He was diagnosed with post-traumatic stress disorder (PTSD). He applied for temporary incapacity leave (TIL) and for ill health retirement. The latter claim has largely become moot as he has subsequently been dismissed and that dispute is pending before another forum. But his application for temporary incapacity leave in terms of the relevant collective agreement was rejected. His own doctors formed the opinion that he was unfit to work; but the Health Risk Manager said that he could fulfil light duties in an alternative post. The National Commissioner of SAPS accepted the recommendation of the HRM. Eicker filed a grievance. That was dismissed. He then referred a dispute to the Public Service Coordinating Bargaining Council (PSCBC, the first respondent).
- [3] The arbitrator found that SAPS's interpretation and application of Resolution 7 of 2000 and the National Instruction 2 of 2004 was correct. She found that the HRM was empowered to make recommendations on whether or not an application for TIL should be granted; and that that presupposes that SAPS has a discretion to either accept or reject the recommendation.

Review grounds

- [4] The applicant's review grounds, as set out in his founding affidavit, are wide ranging and vague. But in oral argument Mr Kirstein focused on two grounds of review:

4.1 The arbitrator considered only Eicker's application for temporary incapacity leave and not for ill health retirement; and

4.2 The arbitrator did not properly consider the relevant clauses in the collective agreement (Resolution 7 of 2000) and in the relevant National Instruction issued by SAPS.

Evaluation / Analysis

- [5] The first review ground has largely become moot, given that Eicker has since been dismissed. He has challenged that dismissal and its fairness is yet to be considered by the Bargaining Council. But if that forum is to find his dismissal unfair, the arbitrator's

decision on ill health retirement in this dispute may remain relevant. And the nub of the review application is whether the arbitrator's interpretation of the collective agreement is reasonable.

- [6] The arbitrator characterised the dispute before her thus:

"Whether [SAPS's] application and interpretation of the collective agreement namely Resolution 7 of 2000 is correct".

- [7] In her consideration of the evidence and argument before her, though, the arbitrator considered the Resolution as well as National

Instruction 2 of 2004. Those two instruments, argued Mr Eicker, compelled SAPS to grant him TIL; but SAPS argued that it retained a discretion.

- [8] The arbitrator considered the provisions of both instruments. Clause 4(a) of the National Instruction, as quoted by the arbitrator,

provides:

“If an employee has exhausted his or her sick leave entitlement for the sick leave cycle and, according to a medical practitioner requires to be absent from work due to incapacity which is not permanent, may at the discretion of the National Commissioner[1] be granted temporary incapacity leave with full pay for each such period...”

- [9] Given that clear wording, the arbitrator reasonably concluded that the National Commissioner of SAPS retains a discretion to grant or deny TIL. And clause 6(b) states that:

“An employee who is absent from work due to an alleged occupational injury or an occupational disease, must complete and submit the documents required for temporary incapacity leave and the documents must be referred to the health risk manager for verification and validation of the period of absence.”

- [10] That is what Eicker did. The HRM considered the documents and recommended to the National Commissioner that TIL not be granted.

Exercising her discretion, the Commissioner accepted the HRM’s recommendation. That is in line with the definition contained in the National Instruction:

“health risk manager” means a medical assessor appointed to examine and make recommendations to the National Commissioner on all applications for incapacity leave, ill health retirement and injuries on duty of employees.”

- [11] The arbitrator reasonably concluded that the HRM has to recommend a cause of action to the National Commissioner; that the HRM in this case did so, having had regard to the views of various medical practitioners; and the National Commissioner had the discretion to accept the HRM’s recommendation. That is a reasonable conclusion, given the wording of the National Instruction.

- [12] Clause 4(6)(a) of the National Instruction also envisages that an employee is only entitled to paid leave until he or she can resume duties:

“An employee who sustains an occupational injury or who contracts an occupational disease is entitled to occupational injury and disease leave with full pay from the time he or she becomes unable to work,

- (i) until he/she can resume their duties; or

(ii) until he/she is discharged from the Service after an inquiry as contemplated in section 34 of the Act.”

[13] The arbitrator may be criticised for not setting out her interpretation of Resolution 7 of 2000 more fully and clearly. But

this Court has to consider whether her conclusion is reasonable, given all the evidence before her. That included the Resolution,

which provides in clause 7.6:

“Employees who as a result of their work suffer occupational injuries or contract occupational diseases shall be granted occupational injury and disease leave for the duration of the period they cannot work.”

[14] In this case, the HRM concluded that Eicker could return to work, albeit in a different capacity in a protected environment. The arbitrator concluded that, given this assessment, the National Commissioner was entitled to accept the HRM’s recommendation.

That is a reasonable conclusion, based on the wording of the collective agreement.

[15] The arbitrator’s award, albeit brief, included a reasonable interpretation of the collective agreement. It is in line with the principles of interpretation summarised by Wallis JA in Natal Joint Municipal Pension Fund:[2]

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[16] In short, it would not be sensible to read into the relevant instruments a construction that SAPS would be bound by the opinion of an employee's doctors. A third party – the HRM – had to consider the opinions of various medical practitioners. Based on those opinions and records, the HRM formed a view and made a recommendation. The National Commissioner, exercising her discretion, accepted that recommendation. That is in line with the wording of the two instruments. And the arbitrator's finding in that regard is not unreasonable.

Conclusion

[17] The award is not open to review.

[18] With regard to costs, the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[3] very recently reiterated:

“The rule of practice that costs follow the result does not apply in Labour Court matters. In Dorkin, Zondo JP explained the reason for the departure as follows:

‘The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers’ organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court.’

In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct.”

[19] In this case, I take into account that this matter has a long history; that Mr Eicker has suffered ill health; and that the ensuing litigation may have clarified, to an extent, some issues concerning the collective agreement. Taking into account the considerations of both law and fairness, I do not consider a costs award to be appropriate.

Order

[20] I therefore make the following order:

20.1 The application for review is dismissed.

20.2 There is no order as to costs.

Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES APPLICANT: P Kirstein Instructed by Johan Gouws. THIRD AND FOURTH
RESPONDENTS: P C Pio Instructed by the State attorney.

[1] My underlining.

[2] Natal Joint Municipal Pension Fund v Endumeni Municipality

[2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) par [18].

[3]

[2018] ZACC 1 par 24-26.

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