
SOUTH AFRICA / JUDGMENT

Kellerman v Commission for Conciliation, Mediation and Arbitration and Others (C312/2017) [2018] ZALCCT 16 (16 May 2018) [2018] ZALCCT 16

COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C312/2017

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IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C312/2017

In the matter between

ROBERT ADRIAAN KELLERMAN

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

HOWARD ADAMS

Second Respondent

ATTIX UK LTD TRADING AS REDSTOR

Third Respondent

Heard: 14 March 2018

Delivered: 16 May 2018

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review a condonation ruling by the second respondent (the Commissioner). In the Ruling, condonation was denied for the late filing of a referral to the CCMA. The referral alleged an unfair labour practice relating to demotion. The referral was filed on the 3 March 2017.
- [2] The referral was 51 days late according to the Commissioner. He based this finding on the applicant's averments in the condonation application before him i.e. that the third respondent (the company) promoted one 'Casten' and demoted the applicant on the 1 October 2016. The applicant submits that the Commissioner should have found the date that the dispute arose to be that of his final retrenchment around the 24 and 30 January 2017.
- [3] In as far as the Applicant challenges the Commissioner's finding on the extent of the delay in the papers before me, I do not find the Commissioner's finding reviewable. The delay was lengthy and the applicant's explanation for it unconvincing, as the Commissioner records, his explanation was that: "...he initially was confused by the 'Respondent's irrational and chaotic restructuring process' and that he only became aware of the alleged unfair labour practice in the form of an unfair demotion and provision of benefits when the Applicant was informed of his alleged unfair retrenchment on 24 and 30 January 2017. These dates should be regarded as the act when the alleged unfair labour practice commenced and therefore condonation should not be required."
- [4] In his affidavit before this Court, the applicant again tacitly acknowledges that the alleged unfair labour practice occurred at least on 1 October 2016. He avers in paragraph 49 of the affidavit that:

"It is submitted that my unfair dismissal by the respondent, just a few days after my one-on-one with Paul Evans, when I objected to and raised questions about Craig Casten and the "restructuring process", serves as prima facie evidence that I acted wisely since 27 September 2016, by not objecting heavily against the Respondent's unfair labour practices. I truly believe that had I done so, I would have been unfairly dismissed in 2016 already."

- [5] The Commissioner's finding on the length of the delay and the poor explanation for it is thus entirely reasonable in the Court's view. In his Ruling, the Commissioner did not simply deal with the delay and reasons therefore, he also considered the prospects of success in the unfair labour practice dispute. He summarises the contents of the affidavits before him as well as the submissions of the parties at the condonation hearing inter alia as follows:

"PROSPECTS OF SUCCESS

Applicant

19. According to the Applicant he had good prospects of success as the Respondent refused to supply him with vital information including

proof that the Applicant had consented to his employment contract being amended and the employment agreement of Craig Casten.

20. It was furthermore submitted on behalf of the Applicant that the Respondent's averment that the Applicant had accepted his new position was the opinion of a third party which had no first hand knowledge of the Applicant's working environment and should be rejected as hearsay evidence.

Respondent

21. The Respondent submitted that the Applicant had never been demoted as he was still earning the same salary. His new position included many of his old responsibilities and he had responded positively to his new position and excelled in it. The Applicant's new position was in actual fact an increase in status. He had in actual fact introduced himself as the Head of Retention Marketing.
22. The Applicant was not being prejudiced by not being provided with the requested information and there were other avenues that he could have explored to request this information."

- [6] The Commissioner's found as follows in reference to the prospects of success that:

"27. This brings us to the prospects of success for the alleged unfair demotion. The Applicant's salary was left untouched and although his job description had now been altered none of his new roles gave the impression that his altered job description had now led to a reduction in his status. The Applicant seemed more concerned with the appointment of Craig Casten as the Head of Marketing as he was of the view that he was not suitably qualified to hold such a position.

28. Craig Casten was not appointed in a new position but in the Position of Head of Marketing, a position previously held by Tony Ruane.
29. It is therefore my finding that the Applicant's prospects of success are in doubt as far as the alleged demotion is concerned.

This combined with a lengthy delay and inadequate explanation for it, leads me to find that the Applicant had failed to establish good cause why condonation for his late referral of the alleged unfair demotion should be granted."

- [7] in the courts view, the finding above, taking into account the evidence before the Commissioner, is well within the bounds of

reasonableness and not susceptible to review.

- [8] The applicant's further grounds for review are difficult to discern but appear to be based on the concept that the Commissioner,

by basing his ruling on evidence received ‘in breach of the parole evidence rule’, committed a reviewable irregularity. It would seem that the applicant is objecting to the Ruling being based on the evidence contained in the affidavits filed in respect of the application for condonation. Such a procedure is prescribed in terms of the rules of the CCMA, in particular Rule 31. The parties also made oral submissions in a hearing in reference to their sworn affidavits. There is no merit in this ground of review.

[9] In all the circumstances, the application to review the ruling cannot succeed. I am not inclined to make a costs order in this matter given that the applicant is an individual. I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances

For the Applicant: Guthrie and Theron Attorneys

For Third Respondent: Coen de Kock instructed by Bagraims Attorneys

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