



Arbitration Award Rendered

Case Number: MP8660-18
Commissioner: Letsema Mokoena
Date of Award: 22-Aug-2019

In the **ARBITRATION** between

PSA obo Rieger, F

(Union/Applicant)

and

Department of Education

(Respondent)

Union/Employee's representative: Ms P Letebele (Union Official)

Union/Applicant's address: PO Box 282

Sonpark

Nelspruit

1206

Telephone: 0137417500,0137665427,0828808962

Telefax: 013 741-750-5608

E-mail: F.Rieger@education.mpu.gov.za, pamela.letebele@psa.co.za,
phumzile.zulu@psa.co.za

Employer's representative: Mr F Venter (Advocate)

Respondent's address: Private Bag 11341

Nelspruit

1206

Telephone: 0788040818,0713700189,0828210709

Telefax: 0866801904

E-mail: I.Madonsela@education.mpu.gov.za, eljana@adendorffs.com,
fuenther@law.co.za

DETAILS OF HEARING AND REPRESENTATION

- [1] The Arbitration hearing between PSA obo Rieger, Frieda-Marie and Department of Education (Mpumalanga) was held under the auspices of the Commission for Conciliation Mediation and Arbitration ("CCMA"), at Mbombela offices on 06 August 2019 in terms of section 51 read with section 52 of Employment Equity Act No 55 of 1998 as amended ("EEA").
- [2] The Applicant (Rieger, Frieda-Marie) was represented by Ms Pamela Letebele and the Respondent (Department of Education, Mpumalanga) was represented by Advocate F Venter briefed by Adendorff Theron Incorporated. The proceedings were both electronically and manually recorded and both parties provided a combined bundle of documents marked "A".

PRELIMINARY ISSUES

Application for Postponement

- [3] At the beginning of this arbitration Ms Letebele on behalf of the Applicant applied for postponement, which the Respondent opposed. Main reason submitted was mainly that due to the fact that the Applicant was booked off sick by a medical doctor and as a result thereof not able to attend the arbitration proceedings. A medical certificate to that effect was also submitted to substantiate that indeed the Applicant was incapacitated.
- [4] Advocate Venter opposed this application for postponement and argued that the matter has been postponed for the past three sittings and has been long standing. If postponement is granted it will be for the fourth time. Postponement is not a right but an indulgence and medical certificate is hearsay, the Applicant is not so bed ridden that she cannot attend this arbitration. On previous occasions the matter was postponed under similar circumstances.
- [5] He submitted further that the dispute arose in 2018 premised on an application to do extra work in terms of Public Service Act. As it stands the Applicant has to submit a new application every year. Under the circumstances the Applicant is frivolous. The parties met and concluded pre-arbitration minutes and the issues in dispute are clear, the Applicant does not seem interested to finalize this matter and the Respondent is desirous to. The Respondent continues to incur costs and is ready to proceed.

Ruling

- [6] I understand that postponement should not just willy-nilly be granted and in terms of Rule 23 of the CCMA Rules it is a discretion that should be exercised judicially after considering all relevant factors including surrounding circumstances.
- [7] The matter has been long standing and justice delayed is justice denied. This justice applies to both parties and it is also one of the primary functions of the CCMA not just to resolve dispute but to do so speedily.
- [8] Without going deeper in terms of the history of the matter I must among other things commend the parties for drafting and signing pre-arbitration minutes, which I must admit contributed immensely in my decision whether to postpone this matter.
- [9] After considering the parties' respective submissions I believe it is in the best interest of justice taking into account the nature of the dispute which relates to an allegation of discrimination including how long it has not even begin to be arbitrated, postponement is therefore not granted.

ISSUE TO BE DECIDED

- [10] The purpose of this arbitration was to determine whether or not the Applicant was unfairly discriminated against by the Respondent on an arbitrary ground i.e. in that by not approving the Applicant's application to do extra work (part-time lecture and community radio station presenter work) outside her normal duties or employment constituted discrimination on the Applicant's right to lead a private life.
- [11] The Applicant earns above the threshold as set in terms of section 6(3) of Basic Conditions of Employment Act and as per the provisions of section 52(3)(b) of EEA, the parties consented to CCMA's jurisdiction to arbitrate this matter.
- [12] It must be made clear from the onset that issues were succinctly narrowed down and it was agreed that the combined bundle of documents was common cause.
- [13] After the Commissioner together with the parties had narrowed the issues it was agreed that the parties shall submit written closing arguments in relation to the dispute or the issues in dispute.

BACKGROUND TO THE DISPUTE

- [14] The Applicant is employed by the Respondent as an Assistant Director: Grievances and Dispute Resolution and earns R42 463.97. She in terms of section 30 of Public Service Act read with relevant directives / regulations applied to the Respondent to do extra-curricular work or remunerative work (part-time lecturer and community radio station presenter work), which request was declined by the Respondent.
- [15] The Respondent disapproved the Applicant's application on the basis that she assumed remunerative work without approval by Executive Authority, work done outside her employment is likely to interfere with or impede the effective performance of her functions. Her functions are such that she is responsible for grievance; dispute resolution and prevention, which requires her to work beyond her normal working hours. Her duties requires her undivided attention and for her to take some of her work home. The Respondent further directed her that she must resign from the extracurricular employment and furnish proof thereof failing which the Respondent reserved its right to take necessary disciplinary action.
- [16] The Applicant in her formal grievance compared herself to five of her colleagues in the following manner:-
1. Ms Duduzile Mavis Gininda, Registry Clerk is allowed by her immediate supervisor to run a tuck shop where she sells popcorn and peanuts;
 2. Ms Sindile Londiwe Mkhathswa, HR Practitioner – Recruitment sells Avon Cosmetics;
 3. Ms Yvone Tawana Nkosi, HR Officer, is sells Avroy Shlain Cosmetics and is supported by her immediate supervisor;
 4. Mr Albert Baloy, Education Specialist Chief Officer, is a tutor at UNISA Nelspruit and previously was a Part-time at Unigrad College and
 5. Mr Hendry Moosa Shongwe, Legal Admin Officer, was a Tutor at Unisa Nelspruit.
- [17] Despite the Applicant lodging the abovementioned grievance, the Respondent did not deal with it.
- [18] Consequently, the Applicant referred this dispute to CCMA alleging unfair discrimination.
- [19] The alleged discrimination is as per paragraph 10 herein above.

[20] Relief sought by the Applicant is to be compensated and approval be granted if I find in her favour.

SURVEY OF SUBMISSIONS AND ARGUMENTS

[21] I considered all relevant evidence / common cause issues we agreed upon and written arguments raised by the parties, because section 138(7) of the LRA requires brief reasons, I have therefore only referred to evidence / common cause agreed upon and arguments I regard necessary to substantiate my findings and resolve the dispute.

THE APPLICANT' SUBMISSIONS:

[22] The Applicant always complied with the relevant legislation and regulations before she performed remunerative work. The Response the Applicant received from the Respondent relating to her application was prejudicial.

[23] The community radio station work is on Sundays from 12h00 to 13h00 while the Part-time Lecturer work is between 08h30 and 12h30 on Saturdays including Wednesdays from 17h30 to 19h30. The Applicant works for the Respondent from Monday to Friday from 0745 to 16h15.

[24] Remunerative work she applied for are wholly performed during her private time and it does not impede with effective and efficient performance of her functions with the Respondent. This work never interfered with the Applicant's functions and there is no evidence to suggest that including conflict with her duties. She has been doing this since 1995 and has been performing well when it came to her performance within the Respondent.

[25] Grogan, J "Dismissal" Juta 2014 ed. at 137 observes that "discrimination" in its neutral sense, arises when an employee is treated differently from his or her colleagues in circumstances, which on the face of it, indicate that the employee should not be treated differently."

[26] In terms of International Labour Organisation, ILO Convention no 111,"The Convention Concerning Discrimination in respect of Employment and Occupation of 1958 read together with the Recommendation of the same number. Article 1 defines "discrimination" to include:-

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with 'representative employers' and 'workers' organisations, where such exist, and with other appropriate bodies.

- [27] According to the South African Labour Guide; measured against the above definition, the South African concept of "discrimination" must be understood as meaning 'any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity in treatment in employment or occupation. The second stage of the South African test — that is, the inquiry into "unfairness" corresponds to ascertaining whether discrimination is on a prohibited ground equivalent to those proscribed by the Convention.
- [28] In the authoritative publication by Pretorius, JL et al, "Employment Equity Law" LexisNexis 2012 (Service 12) [3-3] — [3-4], the learned authors refer to *Lewis v Media 24 Ltd* (2010) 31 IU 2416 (LC) at par 38: "[Discrimination] would be 'direct' if the employer 'treats' the employee differently from others because of the prohibited ground" — for example sexual harassment or a policy that provided housing subsidies for male teachers but not for female ones."

THE RESPONDENT' SUBMISSIONS

- [29] The Applicant does not enjoy an automatic right to perform remunerative work outside the normal scope of her duties, such right only comes about once certain statutory conditions are met.
- [30] In terms of section 2 of the EEA, "the purpose of this Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination."
- [31] The Applicant is required to prove on the basis of the documents and argument, that a right in terms of the EEA has accrued to her and that she has the right to lead her life over weekends without any state interference. The Applicant does not (as a public servant) enjoy unfettered freedom to engage in other remunerative work outside the scope and ambit of her employment.

- [32] Section 22 of the Constitution provides that every citizen has the right to freely choose their trade, occupation or profession and further provides that the practice of a trade, occupation or profession may be regulated by law.
- [33] The application for approval is made in terms of the relevant provisions and directives of the Public Service Act and not the EEA. Once approval is granted and the employee is armed with a right to perform remunerative work in terms of the Public Service Act, then that right is not translated into the domain of the EEA. The Applicant's right to live a private life over weekends is a right embodied in the EEA is misguided. The provisions of section 36 of the Constitution were carefully considered by the legislature to legitimately and for good reason impose a constitutionally protected limitation on a broad interpretation of section 22 of the Constitution.
- [34] Decision made by the executive authority to disapprove the Applicant's applications, amount to administrative action. The correct procedure that ought to have been adopted by the Applicant in this instance was to make application to the High Court to review and set aside the two decisions, which decisions constitute administrative action. The Commissioner can therefore not review and set aside this decision.
- [35] The Applicant's case is not that she has been discriminated against on the basis of a listed ground. The Applicant contends that the discrimination is found as an arbitrary ground. Accordingly she has made out no case in terms of section 51(2)(a) as she was not prevented from exercising any right contained in section 51 of the EEA.
- [36] Contents of pages 55 to 63 more especially page 56 at paragraph 4, it is clear that applications must be made by no later than 30 April of each year. These should be done on an annual basis and the Applicant was aware of. She demonstrated that the radio presenter and lecturing applications were filed outside the provisions of this directive. No right accrues to her.
- [37] There is simply no live controversy for which the arbitrator can determine. It is clear that the radio presenter and lecturing applications and the timeframes within which the Applicant sought permission, has lapsed.
- [38] The Applicant has not been prejudiced. Her applications were not approved. The non-approval falls within the discretion of the Executive Authority. The law allows for such discretion.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [39] In this matter I am required to determine whether or not the Applicant was discriminated against by the Respondent on arbitrary grounds as per the provisions of section 51 of the EEA and if so, I am required to further determine whether or not the discrimination was unfair.
- [40] The ground that has been identified as arbitrary in this matter has been referred to as right to lead private life outside working hours. This right emanates from the Applicant seeking her application to be allowed to do extra work (part-time lecture and community radio station presenter work) outside her normal duties to be approved by the Respondent. If I find that the Respondent's conduct towards the Applicant was tantamount to discrimination as alleged, I am further required to grant the Applicant such permission and compensate her for the discrimination.
- [41] In terms of section 11 of EEA, if discrimination is alleged on arbitrary ground, the onus of proof is on the Applicant to prove that the conduct was not rational, it amounted to discrimination and it was unfair.
- [42] In *Harksen v Lane & Others (1998) 1 SA300 CC*, discrimination was explained as having the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparable serious manner.
- [43] *Article 1 of the ILO Convention no 111* as rightfully referred to by the Applicant indeed defines the term "discrimination" as: Distinction, exclusion or preference which has effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
- [44] It is important to note as alluded to by the Respondent that the Applicant's referral is in terms of section 51 read with section 52. Section 51 is all about protection of employee's rights while section 52 is the dispute resolution path.
- [45] It is noted that the Applicant's discrimination was based on alleged arbitrary ground and as such it was her responsibility to not just allege but to go beyond just a mere allegation. She has to prove that the conduct was not rational, amounted to discrimination and that the discrimination was unfair.
- [46] The Applicant in this matter did not just merely allege, she tried to support her allegations by providing five (05) comparators or similarly suited employees.

- [47] The Respondent on the other hand vigorously argued that this was an administrative action and I am swayed by this notion, which action the Respondent had to exercise judicially as per the prescripts of the Public Service Act including regulations and/or directives to that effect. I however wish not to concentrate on this issue at this juncture which will lead me to deal with Respondent's notion of whether or not CCMA lacks jurisdiction to deal or interfere with this. I shall nevertheless deal with the alleged arbitrary ground under the circumstances.
- [48] This ground which the Applicant has mentioned as an arbitrary ground, does it pass the test of an arbitrary ground?
- [49] I need to determine if this ground constitute arbitrary ground of discrimination in terms of EEA, one has to also consider if the alleged discrimination had any impact on the Applicant and there must also be a factual link between the ground and alleged discrimination taking into cognizance the objective and the purpose of EEA.
- [50] Section 2 of EEA talks to the purpose of this Act and among other things is to achieve equity by promoting equal opportunity and fair treatment in employment by eliminating unfair discrimination in the workplace.
- [51] It is clear from the arguments and I need not regurgitate it as to what led to this matter being referred to the CCMA. There are laws, policies and procedures which guide the parties in terms of how they exercise their rights, duties and responsibilities. We are also aware that where there is an action there is a reaction.
- [52] The Applicant had been enjoying the benefits of extramural work without permission having been sought and granted, hence instruction to stop and desist from doing so. It was nevertheless clear from the dispute that I am seized with, she tried to resuscitate it hence she applied for approval, which approval was dealt with and permission not granted. She resorted to a grievance procedure which the Respondent did not deal with.
- [53] It would appear that when she tried to resuscitate it, she was out of time as an application in terms of procedures and guidelines read with the Public Service Act, she ought to have submitted her application by no later than 30 April of each year in this matter it ought to have been by no later than 30 April 2018 not in August 2018.

- [54] In dealing with the facts of this matter and arguments it is very clear to me that the Applicant did the right thing by informing her employer that she was enjoying herself with extramural work while the Respondent was in the dark all along. The Respondent in response gave reasons why she could not continue and instructed her to stop and desist or face disciplinary action and she heeded the call.
- [55] The decision of the Respondent under the circumstances was not capricious it appears that there was a thought process to it hence the said justifications by the Respondent as to why it could not grant her permission.
- [56] Be that as it may, it was in my view the Respondent's decision was not pejorative as it provided reasons. It is also probable that even if the grievance the Applicant lodged was entertained the comparators she mentioned are not in the same level of authority and responsibility as her and therefore they could not be judged or considered in the same light.
- [57] There is no link between the decision the Respondent made and the Applicant's alleged discrimination, there may be a financial impact to her as she is no longer enjoying the benefits of extramural work, she is however able to lead a private life in the manner she may deem fit. It is well known that in terms of employment law an employee's rights to do extra work may be limited and that is law of general application. Permission may be granted subject to certain terms and conditions being met in *casu* there is the Public Service Act as well as regulations including policy and procedures relating to such application.
- [58] Even if for a moment one is to think what if the Applicant did not stop and desist from doing extramural work and she was disciplined, would that still be regarded as discrimination?
- [59] My answer to the above is negative, I do not think so hence she did not resist the instruction and did as instructed.
- [60] In my view having regard to the facts of this matter and arguments presented it seems like the Applicant wanted to go through the back door to reinstate her extramural work whereas it is clear that she needed to submit her application prior to 30 April and in any event she had accepted the outcome of her divulging that she had been doing extramural work without the Respondent's knowledge and/or authorisation. She never even resisted the instruction to resign from her extramural work, she just did as instructed. If she regarded the Respondent's as discriminatory she would have not resigned from her extramural work but would have right there and there say she was discriminated against.

- [61] If she truly and honestly believed that the Respondent was discriminating against her she should never have resigned from her extramural work instead lodge a grievance.
- [62] The Applicant based on her position duties and responsibilities should know better and cannot try and circumvent the law to achieve her aim of being granted permission to do extramural work in this fashion.
- [63] I am aware I left the issue of jurisdiction in limbo and I think it is only fair to comment on it albeit in passing as this was never an issue I had to determine.
- [64] The Respondent's proposition or notion that the correct procedure that ought to have been adopted by the Applicant in this instance was to make application to the High Court to review and set aside the two decisions, which decisions constitute administrative action. The Commissioner can therefore not review and set aside this decision.
- [65] In my view as far as CCMA jurisdiction is concerned regarding this matter after due consideration of all relevant material available, my view is that CCMA does have jurisdiction to consider this matter in as far as the Respondent's decision is concerned as to whether or not such a decision amounted to discrimination as per prescripts of EEA, among other thing one needs to consider whether or not such administrative action was arbitrary, capricious or pejorative to the Applicant within the context of EEA.
- [66] Based on what the Respondent regarded as reasons as to why the Applicant could not be allowed to continue to do extramural work, it should further be noted that the Respondent despite the Applicant's application falling outside the prescribed time frames still entertained it, that for me shows that the Applicant was afforded fair administrative action as the Respondent bend the rules to accommodate her even after the last date of applying had long passed i.e. 30 April every year.
- [67] It therefore goes without saying that the Applicant' right to apply to the Respondent to do extramural work accrues every year.
- [68] In closing, it is my finding that the Respondent's conduct after duly considering the facts of this matter as well as both parties arguments did not amount to unfair discrimination as alleged.

Award

- [1] The Applicant was discriminated against on arbitrary ground as alleged.
- [2] As a result of the abovementioned, the Applicant's application is dismissed.



Letsema Mokoena
CCMA COMMISSIONER: (Mpumalanga)



APPROVED