IN THE LABOUR COURT OF SOUTH AFRICA HELD IN DURBAN

CASE NO.D806/08

In the matter between : -

EXPRESS PERSONNEL SERVICES APPLICANT

And

CCMA FIRST RESPONDENT

COMM G. GERTENBACH SECOND RESPONDENT

G. BALIRAM THIRD RESPONDENT

JUDGMENT

Cele J

INTRODUCTION

[1] This is an application in terms of section 145 of the Labour Relations Act No 66 of 1995, (the Act), to have an arbitration award dated 27 August 2008, issued by the second respondent as a commissioner of the first respondent, reviewed and set aside. The award being assailed is a three months' salary compensatory order which was issued in favour of the third

respondent in his capacity as an erstwhile employee of the applicant. The third respondent did not oppose this application.

Background facts; -

[2] The third respondent applied for an employment position with Hillside Aluminum, a labour broker, which would supply labour to the applicant. On 6 December 2007 the third respondent presented herself for a prescribed medical examination which was conducted by Dr Dhaniram, in anticipation for that employment position. The Medical Doctor then advised the third respondent that she could not be allowed to work in a hot environment because of her body mass which was below the required minimum and because she had not passed the exercise test she was subjected to. Her pulse rate was found to be 144 per minute after 5 minutes whereas the accepted pulse rate was 120 per minute. It was further established that due to her chronic sinusitis she would also have to wear a respirator permanently in the production area. However, the written test results did not disqualify her totally for the employment position she was interested in because it was said that she was "fit with limitations".

[3] The third respondent and the applicant then signed a contract of employment on 18 January 2008, in terms of which the third respondent was to commence employment on Tuesday, the 22nd January 2008, as an In Service Student, in the Chemical Engineering section of the applicant.

[4] On Monday, the 21st January 2008, the applicant's Consultant Ms L. P. van der Merwe advised the third respondent telephonically that she was medically unfit to work in the designated area and that she needed to

cancel the employment contract of the third respondent. The third respondent was aggrieved by the contract cancellation and she referred an unfair dismissal dispute for conciliation and arbitration by the first respondent. The second respondent was appointed to arbitrate the dispute and he found the dismissal to have been substantively fair but procedurally unfair. He ordered the applicant to compensate the third respondent. The applicant initiated the present application.

Chief findings of the commissioner :-

[5] The second respondent considered the evidence and found that:-

- The contract in question in no uncertain terms records the extreme limited rights which the employee (the applicant) had.
- Contracts of this nature further subject the employee (the applicant) to the whimsical mercy of employers and particularly their clients and leave them without proper recourse. Consequently the latter two parties find themselves in such powerful positions that it inevitably leads to the abuse and to the detriment of employees.
- he would be deceive his conscience if he did not record his dismay that so called employers and their clients can under the umbrella of operational needs or temporary employment contracts or the nature of the business treat employees as nothing more than commodities who keep the operational wheels chumming, without any sense of fairness as is envisaged in modern labour legislation.
- This is a shocking state of affairs and flies directly in the face of one of the cornerstones the Labour Relation Act, namely that dismissals must also be procedurally fair.

- The respondent's actions also stand in stark contrast to section 33 of the constitution which dictates that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- The requirements of fairness would fundamentally be served in most instances by the employer engaging the employee in discussions in respect of the reasons for the anticipated termination of the contract and exploring alternatives to the termination, particularly where there is a no fault termination or as in this instance the contract, a termination for incapacity.
- There appears to be no reason whatsoever why the respondent could not have implemented a fair procedure before dismissing the employee.
- Moreover, the manner in which she was dismissed smacks of a total disregard of her dignity and respect.
- It was a temporary contract which was to terminate on 31 December 2008. She could never have expected that her contract would not even come into being and that it would be summarily terminated by a single telephone call without the implementation of any procedure at all.
- The termination of the applicant's contract was procedurally unfair.

Grounds for review

[6] The applicant has raised a number of the grounds for review both in the founding affidavit and in the supplementary affidavit, in terms of rule 7A (8). What is unfortunate though is that, the applicant failed to plead the facts or law on which it was sought to prove that the commissioner committed a defect as defined. Citing the grounds of review as they appear in section 145 of the Act can never be enough. The manner of how

the defect is alleged to have been committed must be identified and pleaded.

[7] When the matter was presented by Mr. Rheeder, counsel for the applicant, I directed his attention to this disparity and, if I understood him correctly, after some attempt to explain this short coming, he conceded to the short fall as he proceeded to address me on the fairness of the compensation, without pursuing the issue. Whatever else can be said about the findings of the commissioner, the application should therefore fail on this point alone, when it is sought to have the arbitration award reviewed and set aside on the findings of procedural fairness.

[7] Further, and in any event in my view, the decision reached by the second respondent, on procedural fairness can not be described as a decision that a reasonable decision maker could not reach, see *Sidumo & another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC)*. This contract of employment was terminated by a telephone call. No attempts were made by the applicant to comply with any of the fair procedures for a dismissal.

[8] It was further submitted that the commissioner committed a defect by not imposing a minimal compensation as envisaged in *Smith v CCMA & others [2004] 6 BLLR 585.* Mr. Rheeder suggested that an amount equivalent to six weeks' compensation would be appropriate in that the applicant's transgression was minimal. I do not agree. On the contrary I share a similar outrage with the commissioner, at the manner in which the applicant dismissed the third respondent. A telephone call is all it took to dismiss her. That cannot amount to any attempt to comply with a fair procedure.

[9] An attempt was made to suggest that the third respondent misrepresented the results of her medical condition to the applicant, resulting in the signing of the contract on Friday, 18 January 2008. The Medical Doctor called to testify for the applicant, at arbitration, said that the third respondent was “fit with limitations” to work for the applicant. The Doctor knew the environment wherein the third respondent was to be trained. The Consultant of the applicant had part of the medical report of the third respondent when the contract was signed. The third respondent may have been more than willing to work with a respirator as suggested by the Doctor. This was clearly not a case where the third respondent was found to be medically “unfit” to work in the production area.

[9] In the Smith case (above) two months’ compensation was awarded, where an employee was at fault. In this case three months’ compensation was awarded by the commissioner. There is a close match to the two compensatory amounts awarded. There is a greater disparity in the compensatory amounts between what is suggested by the applicant, namely six weeks’ compensation as compared to the amount in the Smith-case. In my view, it cannot be said that the decision arrived at by the commissioner is one that a reasonable decision maker could not have reached.

[10] Accordingly therefore, the following order will issue:

1. The application to review and set aside the arbitration award dated 27 August 2008, issued by the second respondent in this matter, is dismissed.

2. No costs order is made.

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Cele J.

DATE OF HEARING	:	12 March 2010
DATE OF JUDGEMENT	:	15 March 2010

APPEARANCES

FOR APPLICANT	:	Adv. D.F Reeder
INSTRUCTED BY	:	Riaan Kruger Attorneys