Employment law update

Talita Laubscher *BIur LLB (UFS) LLM* (*Emory University USA*) is an attorney at Bowman Gilfillan in Johannesburg.

Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at Bowman Gilfillan in Johannesburg.

Unfair discrimination on the basis of age

In *Jansen van Vuuren v South African Airways (Pty) Ltd and Another* [2013] 10 BLLR 1004 (LC) the Labour Court was required to consider whether South African Airways (SAA) had unfairly discriminated against the applicant employee on the basis of age when it introduced certain new terms and conditions of employment in accordance with a collective agreement. In addition, Shaik AJ was required to consider whether SAA committed an unfair labour practice by unilaterally deducting annual leave from the employee's annual leave entitlement without the employee's knowledge.

The employee was an airline pilot who had reached the then official SAA retirement age of 60. At the time that he reached this age, SAA had in principle agreed with the Air Line Pilots Association of South Africa that the retirement age would be increased but this still needed to be formalised in writing. The employee made inquiries as to whether, given the negotiations around an increased retirement age, he would remain in service after he reached the age of 60.

He was advised telephonically that he would remain in service until he reached the age of 63 but that he was to remain at home for the period during which the terms and conditions of the collective agreement were being negotiated. The employee continued to receive his normal salary during this period, but it later transpired that SAA treated this period as annual leave and unilaterally deducted his absence from his annual leave entitlement without him having any knowledge of this.

In terms of the collective agreement SAA extended its retirement age to 63, subject to certain terms and conditions. The employee was recalled to flying duty but was subject to the new terms and conditions of the collective agreement, including a reduction in his salary for doing the same work as before. He alleged that SAA had unfairly discriminated against him by introducing new terms and conditions that prejudiced him because of his age. The effect of the terms of the collective agreement was that pilots over the age of 60 earned a lower salary and were denied certain privileges compared to their younger counterparts. Pilots over the age of 60 were in effect treated as subordinates to those whom they had previously supervised and this differentiation was based solely on age.

Shaik AJ considered this in light of the Constitution and the Employment Equity Act 55 of 1998 (the EEA), which prohibits unfair discrimination. SAA argued that the employee did not have a claim as the employee's employment had automatically terminated when he reached the age of 60 and thus the new collective agreement that came into effect after his

retirement novated his previous terms and conditions.

However, Shaik AJ held that the employment contract had not been terminated – the applicant had simply been told to stay at home while SAA was re-negotiating the retirement age. Furthermore, the employee never received a new contract of employment with new terms and conditions and he was not entitled to be paid accrued annual leave pay until he retired at the age of 63.

There was undisputed evidence that SAA differentiated between employees on the basis of age. SAA, however, argued that the employee had failed to show that there was an employment policy or practice that unfairly discriminated on the grounds of age and there was no comparator. It was also alleged by SAA that it was unlawful for the employee to 'cherry pick' certain terms of the collective agreement, that is, the extension of the retirement age, and to request the court to ignore other terms, such as the reduced remuneration.

Furthermore, SAA alleged that the remuneration and conditions were as a result of collective bargaining and the court should therefore not nullify the outcome of collective bargaining. Shaik AJ considered the fact that, in terms of s 11 of the EEA where an employee shows that discrimination exists, there is a rebuttable presumption that such discrimination is unfair unless the employer can justify it.

Shaik AJ held that a collective agreement is subject to the Constitution and the EEA and cannot be used to justify unfair discrimination. Furthermore, public policy had to be determined with reference to the Constitution and terms that violated the Constitution were therefore contrary to public policy and accordingly unenforceable.

SAA later unilaterally terminated the collective agreement in 2007. Shaik AJ found that reliance on the collective agreement to justify discrimination was misplaced as SAA did not appear to regard itself as bound by it and unilaterally terminated it. It was concluded that the collective agreement was discriminatory and unfair and served no legitimate purpose. It was also held that there was no need for a comparator as it was not a claim for equal pay for equal work.

Shaik AJ considered mitigating factors that the collective agreement was subsequently cancelled and thus discrimination was brought to an end. However, this did not detract from the fact that the emplo-yee had suffered discrimination and SAA derived a benefit at the employee's expense. Thus, SAA was ordered to pay compensation equal to one year's remuneration and damages equal to the difference between the salary the employee received and the salary and benefits he should have received had his terms and conditions not been unilaterally changed by the collective agreement.

As regards the alleged unfair labour practice, at the time that the employee reached the age of 60 he had accrued annual leave to the value of R 330 000. Had his employment terminated, he would have been paid out this amount as accrued annual leave pay. In fact, he did receive payment of R 330 000 in respect of his accrued annual leave but was then

told that this amount was paid in error as he was entitled to be paid such amount only on retirement and he was thus required to repay this amount.

The employee was under the impression that he had received his normal salary during this time. However, it subsequently transpired that SAA treated this period as annual leave and deducted this absence from his annual leave entitlement. The amount that the employee received each month was actually his accrued annual leave pay and not a normal salary. The employee was not consulted with on this and this arrangement was unilaterally implemented.

SAA conceded that this was unfair but alleged that it was not an unfair labour practice as leave is not a benefit. Shaik AJ held that while there may be case law to the effect that leave pay is not a benefit, this does not mean that leave itself is not a benefit. It was held that forcing the employee to go on leave constitutes an unfair labour practice and SAA was ordered to pay the employee a sum equivalent to the number of days' annual leave that had been deducted from his annual leave entitlement.

Moksha Naidoo *BA (Wits) LLB (UKZN)* is an advocate at the Johannesburg Bar.

Credibility findings – post *Heroldt v Nedbank*

Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others (LC) (unreported case no JR960/12, 10-10-2013) (Fourie AJ)

The question posed by the court in this application was to what extent an arbitrator's error in accessing the credibility of witnesses when faced with two mutually destructive versions, renders such award reviewable.

The applicant was dismissed for allegedly uttering a racial slur while in the presence of three colleagues. One colleague reported the incident to the employer, KPMG. At an internal inquiry, the colleague testified to what she had heard and, despite the applicant denying this allegation, he was found guilty and dismissed.

In arbitration proceedings, under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), KPMG led the evidence of the employee who laid the complaint. Not only did the applicant continue to deny such wrongdoing, he further led, as witnesses, the evidence of the remaining two colleagues who were present when the incident allegedly occurred. Both colleagues denied having heard the applicant make these remarks.

Faced with these mutually destructive versions the arbitrator accepted KPMG's version over that of the applicant's. The arbitrator based his findings on the sole ground that no reason could be advanced as to why KPMG's witness would fabricate her version, especially in light of the fact that there was no 'bad blood' between the applicant and KPMG's witness.

At the core of this application was the fact that the arbitrator failed to assess the credibility

of any of the witnesses when arriving at his decision.

On review, the court referred to the judgment of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* (2003) 1 SA (11) SCA wherein the Supreme Court of Appeal laid out the accepted test applicable to both a trail court and an arbitrator when faced with a factual dispute. According to the judgment (at para 5) the court had to come to a conclusion on the disputed issues by making findings on –
• the credibility of the various factual witnesses;
•their reliability; and
• the probabilities.

The court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on a variety of subsidiary factors, such as –
• the witness' candour and demeanour in the witness-box;
• his or her bias, latent and blatant;
• internal contradictions in his or her evidence;
• external contradictions with what was pleaded or put on his or her behalf, or with established fact or with his or her own extra-curial statements or actions;
• the probability or improbability of particular aspects of his or her version; and
• the calibre and cogency of his or her performance compared to that of other witnesses testifying about the same incident or events.

A witness' reliability will depend, apart from some of the factors above, on –
• the opportunities he or she had to experience or observe the event in question; and
• the quality, integrity and independence of his or her recall thereof.

Finally, an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues are necessary components in coming to a conclusion. In the light of its assessment of all of the above factors the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

While acknowledging the above approach to be sound in law, the court pointed out that this approach needs to be exercised with some caution in order to maintain the distinction between reviews and appeals. To apply this onerous test, applicable when appealing credibility findings of a trial court, to review proceedings under the Labour Relations Act 66 of 1995 (LRA), could blur the distinction between appeals and reviews, especially in light of the recent decision in *Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae)* 2013 (6) SA 224 (SCA), wherein the SCA, in setting out the proper approach to reviews under the LRA held:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(*a*) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(*a*)(ii), the arbitrator must have misconceived

the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable' (at para 25).

Against this backdrop, the court held that it is not axiomatic that an award wherein the arbitrator failed to properly apply the aforementioned test was reviewable for this reason alone.

On this point, Fourie AJ, at para 17 held: 'While arbitrators should always aspire to meet the exacting standard set by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery* for the proper assessment of conflicting versions by a finder of fact, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, their decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.'

In adopting this approach to the merits before it the court found that, by failing to assess the credibility of any of the witnesses, the arbitrator *in casu* fell short of the standard aspired to in the *Stellenbosch* case. However, this alone did not render the award reviewable without first considering whether his decision fell within the band of reasonableness. Further to this it was not necessary for the arbitrator to have found the applicant and his or her witnesses unreliable for him or her to find their version improbable (see *Transnet Ltd v Gouws and Others* (LC) (unreported case no JR206/09, 25-4-2012), at paras 11 to 20).

Factors, as recorded in the proceedings that supported a finding that it was improbable for KPMG's witness to have fabricated her version were:
• The complainant did not initially mention the applicant's name in her complaint and intended for KPMG to send a general instruction for employees to divest from such behaviour.
• KPMG disciplined the applicant after an investigation and not at the behest of the complainant.
• The complainant was reluctant to participate in both the inquiry and at arbitration and did not intend for the applicant to be dismissed.

In light of the above, the court held that in finding KPMG's version more probable, the arbitrator's decision was not one that a reasonable person could not come to given the evidence before him or her.

The application was dismissed with no order as to costs.