Awards, cases and comments

INDEPENDENT MEDIATION SERVICE OF SOUTH AFRICA
Mediation Notes

Incapacity

*by **Ellem Francis**, IMSSA arbitrator, attorney at the Legal Resources Centre, Gauteng Consumer Court.*

In this case, the arbitrator was called upon to decide whether or not the dismissal of an employee due to incapacity was fair.

The facts and circumstances of this case make for interesting reading. The incapacity arose as a result of an injury the employee suffered outside working hours on a day he was absent from work. The dismissal was done in terms of the employer's Medical Disability Procedures.

In May 1994, the doctor found that it was unlikely that the employee would recover fully from the injury, and recommended that the employee be placed in alternative employment, where he would not be required to take 'strenuous physical exertions' as a result of standing.

The employee was temporarily placed at the 'cost office', where he performed clerical duties. The limitations placed on him by his condition were taken into account when he was placed in this position. A memorandum was sent by the company social worker requesting that the suitability of the employee be evaluated. There was no evidence indicating whether the evaluation was done and, if so, what the result was.

Responses to a memorandum sent to various divisional managers in June 1994 by the Department of Human Resources indicated that they did not have any vacancy to accommodate the employee.

This process was repeated in May 1996. The response from the managers was still the same. The result was that the company issued the employee with a letter terminating his employment. An interesting aspect of the evidence is that the company employed several employees between the period of the employee suffering the injury and his termination.

The company, in support of its argument that it acted fairly, used the various memoranda which had been sent to the divisional managers. In essence, one of the company's arguments was that it had exhausted all the requirements for a fair procedure in terminating the employment. In other words, by asking, through memoranda, whether managers had a vacancy for the employee, the requirement of seeking an alternative to dismissal had been complied with.

The union, on the other hand, argued strongly that the circulation of memoranda, which were responded to within a day, was not sufficient effort on the part of management in seeking an alternative position for the employee. The

employer had not consulted with the employee on the matter. The union further argued strongly that not advising him of his rights amounted to denial of a fair hearing.

The fact that the employee had not performed duties and that the company had continued to pay him his salary was found to have been fair. However, in taking into account that a number of vacancies arose between the time of the injury and the dismissal, the arbitrator found that the company had failed to exhaust all possibilities in search of a suitable and alternative position for the employee.

In arriving at his decision to reinstate the employee, the arbitrator took into consideration the fact that the employee had, at one stage, performed clerical duties, as was also recommended by the doctor. The arbitrator was further not convinced that a company which employs 4 800 people was unable to find an alternative position for the employee in a period of three years.

The arbitrator took into consideration the employer's failure to consult as required by the company's own policy, the 11 years of service the employee had with the company and the failure to conduct a hearing prior to the dismissal of the employee.

Code of Good Practice *vs* statutory obligations

Snow on the Highveld is an unusual occurrence. In Witbank, it is particularly unusual. People in the area are not acclimatised to it. The cold spell was inconvenient not only to the people in the region, but also led to a dispute between the company and the union.

The arbitrator in this matter had to decide whether or not the dismissal of an employee was fair. The dismissal complied with Schedule 8 of the Code of Good Practice in terms of the LRA, but not with the provisions of the Occupational Health and Safety Act (OHSA).

The 17 July 1996 was confirmed as the coldest day of winter thusfar in the region. The employee, who could not cope with the cold weather, approached his supervisor and told him so. He informed the supervisor that his eyes were negatively affected by the cold. The supervisor sent him back to his job, saying it was essential that the task he was busy with be completed on that day. He, however, advised him that he could rest for awhile in order that his condition could improve.

Despite this, the employee and a colleague were required by the company to work outside without any protective clothing, like gloves and goggles. This led to a complication in the employee's health condition. As a result, he was declared medically unfit to perform the job. The company dismissed him for his incapacity due to ill health.

In analysing the evidence of the company, the arbitrator found that it had complied with the provisions of Schedule 8 of the LRA. In assessing the status of Schedule 8, in particular items 10 and 11, the arbitrator found these were guidelines, not rigid principles that had to be adhered to at all times and all circumstances. In other words, departure from the guidelines may be warranted, depending on the circumstances of each case.

The arbitrator answered the question of whether compliance with Schedule 8 would be a defence in a case where the employer acted negligently and in contravention of the OHSA in the negative. The arbitrator found the company to have acted negligently by failing to provide safety clothing to the employee. The possibility that the employee's condition was caused by his work circumstances was not ruled out.

Negotiating forum: provincial *vs* national jurisdiction

In the case, the matter to be determined was whether the Provincial Negotiating Forum (PNF), Mpumalanga, had jurisdiction to refer the dispute to arbitration, or whether it was a dispute which had to be dealt with at national or provincial level. The dispute concerned the union's contention that the employer started to deduct HOSMED (the province's medical scheme) contributions from the salaries of certain union members from 1 July 1996 without prior consultation. It was common cause that changes in conditions of employment, including those relating to medical aid benefits, are negotiated in the National Bargaining Forum, or its offshoot, the Medical Aid Committee. During the evidence and arguments, it emerged that the critical issue in dispute was whether the dispute referred to in the terms of reference involved a change in conditions of employment. If it did, it had to be dealt with at national level. If it did not, it could be dealt with at provincial level.

The employer led evidence by a member of the negotiating team at national level and the convenor of the POLMED committee (later renamed the Medical Aid Committee). He explained that all medical aid issues are dealt with at national level. This would include disputes about HOSMED deductions, because the outcome of the dispute affected not only Mpumalanga. There were members of HOSMED in the Northern Province, the Eastern Cape, Gauteng and other provinces. It was therefore necessary to deal with this dispute and all medical aid issues in an integrated manner at national level.

There was insufficient evidence to support the union's argument that referral to national level was a mere formality, as the matter, in reality, would be dealt with at the provincial level.

The arbitrator found that the Mpumalanga Provincial Negotiating Forum did not have the jurisdiction to refer the dispute relating to the HOSMED deductions to arbitration. This dispute was one which had to be dealt with at national level.

IMSSA does it again

In 1997, IMSSA was very successful in providing training to trade union officials and shopstewards.

This was made possible by funding from the Department of Labour. This year, IMSSA has again entered into partnership with the Department. It will now be able to provide subsidised training for public sector unions on all its courses.

IMSSA will make available its considerable experience in alternative dispute resolution to union shopstewards and organisers, thereby helping to ensure the success of the LRA and the CCMA

Courses and workshops

Courses will be provided in line with the new LRA, legislative developments and the economic imperatives of the day. They will be continuously adapted to meet the specific needs of the public sector unions. Courses offered by IMSSA include:

- negotiation and conflict resolution
- arbitration skills
- the LRA
- the BCEA
- relationship building
- employee participation.

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