IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA02/2018

In the matter between:

THE DEPARTMENT OF EDUCATION	
(PROVINCE OF THE NORTHERN CAPE)	**Appellant**
and	
JOHN KEARNS N.O.	**First Respondent**
DERRICK TSHEPO KEALOGILE	**Second Respondent**
PUBLIC SERVANTS' ASSOCIATION OF SOUTH AFRICA obo MR DERRICK TSHEPO KEALOGILE	**Third Respondent**

Heard: **13 November 2018**

Delivered: **27 February 2019**

Summary: **Review of the decision of a presiding officer – principle restated that a government department as an employer has the right to review unreasonable, irrational or procedurally unfair conduct by presiding officers exercising delegated authority. – such decision administrative action and the employer having the right to seek administrative law review; Labour Court empowers under section 158(1)(h) of the LRA to hear and determine the review – presiding officer setting aside charges against employee – Labour Court**

LABOUR APPEAL COURT

dismissing review on the basis that employer failed to set out a cause of action in its affidavit by relying specifically on PAJA

Held that the Department pleaded its factual case in its founding affidavit. Although it did not specifically set out its cause of action as a review under section 6 of PAJA, it was clear from its averments in the founding affidavit, that the Chairperson acted unreasonably, irrationally and procedurally unfairly when he dismissed all the misconduct charges against Mr Kealogile on the basis that the delay (of more than 60 days since the precautionary suspension of Mr Kealogile) in convening disciplinary hearing was unjustifiable. Further that the Chairperson of the disciplinary hearing committed a gross irregularity in omitting to provide the Department with the opportunity to present evidence on the reasons for why it did not proceed with the disciplinary hearing within 60 days of Mr Kealogile's suspension. The facts clearly demonstrate that the Chairman acted procedurally unfairly by failing to give the Department an opportunity to provide reasons or lead evidence on why the charges should not be dismissed. Furthermore, the *audi alteram principle* is the cornerstone of procedural fairness as its plays a vital role in providing the repository of power with an opportunity to obtain information which may be relevant for the proper exercise of the power. Appeal upheld – decision of Chairperson set aside. Coram Sutherland JA, Murphy and Kathree-Setiloane AJJA

LABOUR APPEAL COURT

JUDGMENT

KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Rabkin-Naicker J) dismissing the appellant's application in terms of section 158 of the Labour Relations Act 66 of 1995 (*"LRA"*) to review and set aside the decision of Mr John Kearns in which he dismissed the charges against the second respondent, Mr Derrick Tshepo Kealogile ("Mr Kealogile"), on the grounds that the Department of Education, Northern Cape Province ("Department") had not convened the disciplinary inquiry to hear evidence on the charges against Mr Kealogile within 60 days of placing him on cautionary

suspension. Mr Kealogile is a member of the Public Servants' Association of South Africa (PSA) which acts on his behalf.

[2] Section 158(1)(h) of the LRA provides that the Labour Court "may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law". Mr Kearns, who is the first respondent made the impugned decision in his capacity as chairperson of the disciplinary hearing which the Department convened against Mr Kealogile.

Background

[3] Mr Kealogile is employed by the Department as a Deputy Director: Security and Risk Management. During the course of 2015, the Department filled three vacant senior positions. Mr Kealogile and other employees of the Department had applied for the vacant positions but were not appointed. Instead, the Department appointed Messrs Walsak, Snyders and Mmetseng to the three vacant posts. It is common cause that none of them met the qualifying criteria for appointment to the vacant posts.

[4] Mr Kealogile declared a dispute and the matter was arbitrated under the auspices of the General Public Service Sector Bargaining Council ("GPSSBC"). On 6 July 2015, the arbitrator ordered the Department to appoint Mr Kealogile and a certain Mr Pelser to two of the vacant posts.

[5] The Department was aggrieved at the outcome and filed an application to review and set aside the award. The Labour Court dismissed the review application under case number JR1676/15. The Department admitted on the pleadings that it acted grossly unfairly in failing to follow its recruitment policies and appointing unqualified individuals to the three vacant posts.

[6] Mr George represented the Department in the arbitration proceedings. He put on record that he would provide Mr Kealogile with certain requested information but that he would not verify the qualifications of the three successful candidates. He did, however, give Mr Kealogile permission to verify their qualifications on his own. Mr Kealogile requested and obtained the

LABOUR APPEAL COURT

requisite information to verify the qualifications of the three successful candidates.

[7] The Department retaliated by charging Mr Kealogile for misconduct. A disciplinary hearing was convened on 30 March 2015. Mr Kearns was appointed as the Chairperson of the disciplinary hearing. The PSA, on behalf of Mr Kealogile, raised certain points *in limine* at the disciplinary hearing. One of the points raised was that the disciplinary hearing did not take place within 60 days of Mr Kealogile's suspension but only after 180 days. The PSA also requested that the disciplinary hearing be postponed pending the outcome of the review application.

[8] The Chairperson did not accede to the PSA's request but instead postponed the disciplinary hearing to 25 April 2016. The hearing, however, only resumed on 11 May 2016 by agreement between the parties. At the hearing, the Chairperson sought clarification from the PSA on whether the relief sought by Mr Kealogile, on 30 March 2016, should be postponed pending the finalisation of the review application in the Labour Court. The PSA responded in the affirmative.

[9] The Chairperson also raised with the Department's legal representative (Mr George) the question of a postponement. Instead of answering the question, Mr George seemingly accepted that the disciplinary hearing was not held within 60 days of Mr Kealogile's suspension. In response, the Chairperson, curiously, stated that he would postpone the hearing by agreement '*until the ruling is out*'.

[10] In June 2016, the Chairperson made a ruling:

(a) dismissing all the charges against Mr Kealogile;

(b) lifting his suspension with immediate effect; and

(c) ordering him to report for duty immediately.

In making this ruling, the Chairperson reasoned as follows:

LABOUR APPEAL COURT

'A total of 180 days has elapsed since the suspension with no hearing being held, and the employee is still on suspension.'

Clause 2 of the Disciplinary Code and Procedure for the Public Service requires that the principles that inform the Code and Procedure must inform any decision to discipline an employee: "2.2 *Discipline must be applied in a prompt, fair, consistent and progressive manner.*"

Clause 7.2(c) was not adhered to, namely "*if an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The Chair of the hearing must then decide on any further postponement*", this was not done.

This investigation does not appear to be complex enough in nature to justify the delay in terms of clause 7.2(c).

In Dladla v Council of Mbombela Local Municipality and Another (2008) 17 LC 6.4.1, the Court mentioned that it is trite in our law that a suspension must be fair. In conclusion, the Court found that employers must act in terms of their own disciplinary code in disciplining employees. Similarly where a contract of employment provides for a procedure in terms of which an employee may be suspended the employer should act in terms of that provision.

Also in Naidoo v Rudolph Chemicals (Pty) Limited (2008) 17 NBCCI 6.4.1:It was held by the Commissioner that although it is trite that an employer has the right to suspend an employee pending a disciplinary hearing, such suspension is not supposed to be punitive in nature in that it is supposed to enable the employer party to make the necessary investigations without any interference from the employee. Such suspension should also not be for an unreasonably long period before a disciplinary inquiry is held.

Having had the opportunity to listen and hear both sides' arguments, and having considered both explanations carefully, I am of the opinion that the suspension is unprocedural and the delay in holding a disciplinary hearing is unjustifiable in terms of clause 2.2 of the Disciplinary Code and Procedure of the Public Service, Resolution 1 of 2003."

LABOUR APPEAL COURT

In the Labour Court

[11] During August 2016, the Department brought a review application in terms of section 158(1)(h) of the LRA. It sought the following relief:

(a) That the first respondent's updated ruling as Chairperson of the disciplinary hearing dismissing all charges against the second respondent be reviewed and set aside; and

(b) That the matter be referred back to the Chairperson to consider the merits of the charges against the second respondent, alternatively, the matter to be referred back to the Chairperson to consider the points *in limine* afresh and provide the Department an opportunity to lead evidence on each of the points *in limine* raised; and

(c) Mr Kealogile is ordered to pay the costs of this application.

[12] The Department alleged in its founding papers in the review application that the Chairperson of the disciplinary inquiry misconstrued the issues upon which he was called upon to decide by stating:

> 'That the employer waived its right to proceed against the employee due to an unreasonable delay in convening a disciplinary hearing.'

The Department contended that the record of the disciplinary hearing reflects that the employee representative never raised a point *in limine* that the employer waived its right to proceed against the employee due to an unreasonable delay in convening a disciplinary hearing. The Department, furthermore, contended that the Chairperson committed a gross irregularity by not allowing it to provide reasons or lead evidence on why it did not proceed with the disciplinary hearing within 60 days of Mr Kealogile's suspension, and on why the charges should not be dismissed. For these reasons, it contended that Chairperson acted procedurally unfairly.

[13] The Labour Court dismissed the review application on the basis that:

> *'The founding papers give no indication as to the legal basis for the review. In other words there is no indication as to whether the applicant contends that*

LABOUR APPEAL COURT

the decision sought to be reviewed constitutes administrative action, or that in exercising public power the first respondent offended the principle of legality.

...

The founding papers further do not make the case that the applicant relies on the common law in relation to domestic or contractual disciplinary proceedings.

In addition to these problems with the pleadings, the applicant seeks to send back the impugned decision to the same decision-maker to consider.

...'

[14] The Labour accordingly found that the Department did not make out a case for the relief sought and dismissed the review application.

[15] The appeal lies against the judgment and order of the Labour Court with leave of this Court.

The Appeal

[16] Resolution 1 of 2003[1] is an agreement which binds all state employers and state employees (Collective Agreement) who fall within the registered scope of the Public Service Co-ordinating Bargaining Council ("PSCBC"). The Collective Agreement contains the Disciplinary Code and Procedure for the Public Service. It prescribes, amongst other things, the procedure for conducting a disciplinary hearing and the powers and duties of the Chairperson.

[17] Clause 7.3 of the Collective Agreement provides that the representative of the employer will lead evidence on the conduct giving rise to the hearing after which the employee representative may question any witness introduced by the representative of the employer. Thereafter, the employee will also be given an opportunity to lead evidence and the representative of the employer may question the witness.

[1] The Collective Agreement is concluded in terms of section 23 of the Labour Relations Act, No 66 of 1995 (LRA).

LABOUR APPEAL COURT

[18] The Department contended that at no stage during the proceedings on either 30 March 2016 or 11 May 2016 did the Chairperson commence and conduct the hearing as required by clause 7.3(i) of the Collective Agreement or allow its representative to lead evidence on the misconduct giving rise to the hearing as required by clause 7.3 (j). Nor did he request the parties to submit argument to him on whether the charges of misconduct may be dismissed on the grounds that the disciplinary hearing was not held within 60 days of placing Mr Kealogile on precautionary suspension. This notwithstanding, the Chairperson issued an undated "in limine ruling" dismissing all the misconduct charges against Mr Kealogile.

[19] The Department's principal contention is that the Labour Court erred in concluding that it had not made out a case for the relief sought. In concluding that the Department's founding papers gave no indication of the legal basis for the review, the Labour Court relied upon the decision of this Court in *Hendricks v Overstrand Municipality and Another* (*Hendricks)*.[2] There it held that:

> *'[29] In sum therefore, the Labour Court has the power under section 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds "permissible in law" ...'*

[20] The Labour Court held in this regard:

> *'The founding papers give no indication as to the legal basis for the review. In other words there is no indication as to whether the applicant contends that the decision sought to be reviewed constitutes administrative action, or that in exercising public power the first respondent offended the principle of legality. It is not pleaded as to which legislation or subordinate legislation, or instrument, the decision is ultra vires. The record filed reflects that the Chairperson, first respondent, was appointed in terms of a Collective*

[2] 2015 (36) ILJ 163 (LAC) at para 29.

LABOUR APPEAL COURT

Agreement setting out the disciplinary code and procedure in the Public Service (Resolution 2 of 1999 as amended in 2003). The founding papers do not make the case that the Chairperson acted ultra vires the terms of the collective agreement. Rather it is stated that he acted outside his powers in dismissing the charges against the second and third respondents when it is alleged such a ruling was not prayed for by the employee's representatives.

The founding papers further do not make the case that applicant relies on the common law in relation to domestic or contractual disciplinary proceedings.'

[21] This Court held in *Hendricks* that an employer has the right to review unreasonable, irrational or procedurally unfair conduct by presiding officers exercising delegated authority. Significantly, it held that:[3]

> *'The underlying guiding rationale of the ratio decidendi in Gcaba and Chirwa is that once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law it is preferable to use that particular system. In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking a review under PAJA. The ratio cannot justifiably be extended to deny an employer a remedy against an unreasonable, irrational or procedurally unfair determination by a presiding officer exercising delegated authority over discipline. The remedies available to an aggrieved employee under the unfair dismissal and labour practice jurisdiction of the LRA are not available to employers. Section 191(1)(a) of the LRA expressly restricts these remedies to the "dismissed employee or the employee alleging the unfair labour practice". The only remedy available to the employer aggrieved by the disciplinary sanction imposed by an independent presiding officer is the right to seek administrative law review; and section 158(1)(h) of the LRA empowers the Labour Court to hear and determine the review. To hold otherwise is to deny the employer any remedy at all against an abuse of authority by the presiding officer'*[4]

[22] The Labour Court, in my view, clearly misconstrued the *ratio* in the *Hendricks* judgment. The Department had clearly pleaded in the review application that

[3] *Hendricks* at para 27.
[4] *Hendricks* at para 27.

LABOUR APPEAL COURT

the Chairperson ignored the relevant facts as well as that he acted procedurally unfairly. It is clear from its founding papers that the Department had alleged facts from which it could be inferred that the Chairperson acted unreasonably, irrationally, alternatively procedurally unfairly, which are all grounds for a review under the Promotion of Administrative Justice Act[5] (PAJA). It is common cause that the decision of the Chairperson at issue constitutes administrative action that is reviewable under section 6 of PAJA. Although the Department did not pertinently rely on the provisions of PAJA in its founding affidavit, it did do so during argument.

[23] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[6] the applicant did not directly rely on the provisions of the PAJA in its notice of motion and founding affidavit. The respondents argued that the applicant did not disclose its causes of action sufficiently clearly, or precisely for the respondents to be able to respond to them. The Constitutional Court held:

> *'Where a litigant relies on a statutory provision, it is not necessary to specify it but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action."*

[24] In the current matter, the Department pleaded its factual case in its founding affidavit. Although it did not specifically set out its cause of action as a review under section 6 of PAJA, it was clear from its averments in the founding affidavit, that the Chairperson acted unreasonably, irrationally and procedurally unfairly when he dismissed all the misconduct charges against Mr Kealogile on the basis that the delay (of more than 60 days since the precautionary suspension of Mr Kealogile) in convening disciplinary hearing was unjustifiable in terms of clause 7.2 of the Collective Agreement.

---

[5] Act 3 of 2000.
[6] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 at paras 26 and 27.

LABOUR APPEAL COURT

[25] Crucially, the Chairperson of the disciplinary hearing committed a gross irregularity in omitting to provide the Department with the opportunity to present evidence on the reasons for why it did not proceed with the disciplinary hearing within 60 days of Mr Kealogile's suspension. The facts clearly demonstrate that the Chairman acted procedurally unfairly by failing to give the Department an opportunity to provide reasons or lead evidence on why the charges should not be dismissed.

[26] It is well established in our law that everyone is entitled to be heard before an adverse decision is taken against him or her – this is called the *audi alteram partem* rule. In *Psychological Society of South Africa v Qwelane and Others*[7] the Constitutional Court highlighted the considerations of legal policy that underpin this *rule* as follows:

> '*It is trite that at common law and in terms of the tenets of natural justice, hearing the other party – audi alteram partem – is an indispensable condition of fair proceedings.*
>
> ...
>
> *The principle is underpinned by two important considerations of legal policy. The first is recognising the subject's dignity and sense of worth. Second, there is a more pragmatic consideration. This is that audi alteram partem inherently conduces to better justice.*"

[27] The *audi alteram principle* is the cornerstone of procedural fairness as its plays a vital role in providing the repository of power with an opportunity to obtain information which may be relevant for the proper exercise of the power.[8] In short, it is indispensable to fair proceedings. More recently, the Constitutional Court in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*,[9] said that "procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the

[7] *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at paras 33-and 34.
[8] *Psychological Society* at paras 33-34.
[9] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51 at para 64.

LABOUR APPEAL COURT

opportunity to be properly represented and fairly heard before an adverse decision is rendered".

[28] In the current matter the dismissal of the charges against Mr Kealogile was a far-reaching and extraordinary step. The Chairperson was obliged in the circumstances to give the Department and Mr Kealogile an opportunity to address him and lead evidence on why the charges should not be dismissed. He was, moreover, enjoined to do so by the terms of the Collective Agreement itself.

[29] His failure to do was procedurally unfair both under section 6(5) of PAJA and clause 7.3 of the Collective Agreement. The appeal must according succeed.

<u>Costs</u>

[30] I consider this to be a matter where it would not be fair and just for Mr Kealogile to be mulcted with the costs of the appeal.

<u>Order</u>

[31] In the result, I make the following order:

1. The appeal is upheld with no order as to costs.

2. The order of the Labour Court is set aside and substituted with the following order:

"The decision of the first respondent discharging the charges against the second respondent is reviewed and set aside."

F Kathree-Setiloane AJA

Sutherland JA and Murphy AJA concur.

LABOUR APPEAL COURT

APPEARANCES:

FOR THE APPELLANT:	Mr F Petersen
	Instructed by Mjila and Partners
FOR THE RESPONDENTS:	Mr P M Venter
	Instructed by Andrie Hechter Attorneys

LABOUR APPEAL COURT