Pitfall in using arbitration in labour disputes

By Jose Jorge and Steven Adams

15 Jun 2017

The recent case of Sampson v South African Post Office serves as a cautionary tale for employers and highlights one of the pitfalls of using the process of inquiry by an arbitrator, in terms of s188A of the Labour Relations Act.

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The aim of arbitration is to expedite the disciplinary process, leaving the parties with a final and binding award. The only option for a party dissatisfied with the award is to have it reviewed and set aside by the Labour Court.

In April 2011, the employer appointed the employee as a manager in its legal services department. The relationship proved difficult and some seven months later in November 2011, the employer suspended the employee, pending an investigation into allegations relating to a breach of his fiduciary duties and insubordination.

The parties agreed to an inquiry before an arbitrator appointed by Tokiso Dispute Settlement, an accredited agency. On 4 June 2012, the arbitrator found the employee guilty of the allegations and summarily dismissed him. Dissatisfied with the arbitrator's award, the employee approached the Labour Court in July 2012 to have the award reviewed and set aside. In September 2012, some three months after his dismissal, the employee commenced employment with a new employer, LegalWise.

Arbitration set aside

Three years later, on 3 September 2015 the review application was finally heard in the Labour Court. The employer did not make an appearance and a default order was granted, reviewing and setting aside the arbitrator's award and remitting the matter back to Tokiso for a rehearing before a different arbitrator.

On 8 September 2015, the employee's attorneys wrote to the employer stating that in light of the Labour Court's finding, the employment relationship had been re-established. Therefore, the employee should be compensated for the period of three years and three months since June 2012 and should be paid his monthly salary as an employee of the employer from September 2015 (the date the review application was determined).

The employer denied the employee's claims. It maintained that the dismissal stood until the outcome of the new arbitration hearing. It further submitted that it personally had no obligation to organise another arbitration because the court had ordered Tokiso to do so, on service of the order.

On 26 October 2015, the employee launched an application asking the Labour Court to revive his contract of employment with the employer retrospectively, as if he had never been dismissed. The employer argued that the status of an arbitrator in terms of s188A of the LRA is unique in that the arbitrator stands in the role of a chairperson in a disciplinary enquiry and as an arbitrator. It maintained that when an enquiry by an arbitrator is reviewed and set aside, as with the outcome of an internal disciplinary hearing, the dismissal must stand unless ordered otherwise by the court.

Employment relationship re-established

The main question before the Labour Court was, when the arbitrator's award was reviewed and remitted back for another 'pre-dismissal arbitration', did that mean that the employee was once again employed, as if he had never been dismissed and, as a result entitled to be compensated, or did it mean that he remained dismissed until the matter was reheard?

In a judgment delivered on 10 May 2017 (almost four years after the initial termination of the relationship) the Labour Court found that the order reviewing and setting aside the award restored the status quo ante. The effect of the order was that the dismissal could not remain in force. In effect, the order revived the contract of employment as if the employee was never dismissed.

The court then went on to consider the employee's claim for payment. The relief claimed by the employee was not that he be accepted back into employment but simply a remittal of the award for rehearing. The employee, despite not tendering his service to the employer for the last three years, sought payment up until the date of judgment even though he remained in the employ of LegalWise.

The court awarded what it described as 'essentially back pay' for the period between the employee's 'dismissal' and the date of the review court's decision (three years and three months). The amount payable was to be calculated as the difference between what the employee would have earned as an employee of the employer and what he earned at LegalWise in the same period.

Failure to tender services dismissed

The court did not attach any significance to the employee's failure to tender his services to the employer after the review court's decision. It found that it would be artificial to expect the employee to resign from the employ of LegalWise, where he had been able to mitigate his losses after his 'unfair dismissal' by the employer to pursue his claims in this regard.

While the court accepted that the failure of an employee to tender services after being reinstated might have serious legal consequences, in the case before it, the court felt it was clear that the employer had made it clear that it would not have accepted the tender of his services. The court accordingly awarded the employee remuneration calculated as the

difference between what he would have earned at the employer and what he earned at LegalWise from 3 September 2015 to 26 October 2015.

The employee was also awarded accrued leave from 4 June 2012 to 26 October 2015. The court did not consider that the employee would have accrued and taken annual leave while working at LegalWise.

Arbitration carries risk

The court accepted that its judgment was contrary to the purposes of s188A of the LRA, which was to avoid long delays in the resolution of disputes and the attendant risk of back pay.

It referred to the unreported case of SATAWU & others v MSC Depots, where the court highlighted this risk. “That an employer must run when it decides to place the function of workplace discipline in the hands of an unknown third party ... But the integrity of the system depends on the expertise of the arbitrator, and that is where the first employer’s initial confidence in the system was betrayed.”

The court held that its hands were tied and suggested that s188A might benefit from legislative scrutiny in future. This is cold comfort for any employer.

This judgment, whether correct or not, is certainly contrary to the purpose of s188A. It serves as a disincentive for any employer considering whether to use s188A especially in circumstances where the employee may have been guilty of the allegations against him.

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