REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-LAB-APP-AAA-2018/00066

In the matter between:

NAMIBIA FOOD AND ALLIED WORKERS UNION **APPELLANT**

and

NAMPHARM (PTY) LTD **FIRST RESPONDENT**

MEMORY SINFWA **SECOND RESPONDENT**

Neutral citation: *Namibia Food and Allied Workers Union v Nampharm (Pty) Ltd* (HC-MD-LAB-APP-AAA-2018/00066) [2019] NALCMD 27 (1 November 2019)

Coram: Claasen, AJ
Heard: 13 June 2019
Delivered: 25 October 2019
Reasons: 1 November 2019

Flynote: Labour Law – Unfair labour practice — List of conduct constituting unfair labour practice prescribed in Labour Act, s 50(1)*(a)-(g)*, - numerus clausus – termination of recognition agreement – jurisdiction of arbitrator with reference to unfair labour practice – termination of agreement not an unfair labour practice within meaning of section 50(1) – appeal dismissed.

Summary: The appellant, dissatisfied with the termination of a recognition agreement, referred a dispute of unfair labour practice to the Office of the Labour Commissioner. At the commencement of the proceedings the respondent raised a point *in limine*, contending that the referral is bad in law as not falling within the ambit of section 50(1). The arbitrator heard evidence on the entire matter and at the end of proceedings dismissed the case.

Held an unfair labour practice is narrowly circumscribed by the categories contained in section 50(1)(a) – (g).

Held conduct falling outside section 50(1)(a) – (g) does not constitute an unfair labour practice.

Held further a challenge to an employer's contractual right to terminate a recognition agreement does not constitute conduct capable of falling within any one of the list of categories enumerated at section 50(1)(a) – (g).

ORDER

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1. The appeal is dismissed.
2. There is no order as to cost.

JUDGMENT

CLAASEN, AJ:

Introduction

[1] This is an appeal against an arbitral award made by the second respondent on 19 November 2018 in the Office of the Labour Commissioner. The appeal is opposed.

Factual background

[2] On 03 December 2014 the appellant and respondent entered into a written recognition collective agreement, regulating the relationship between the parties. Following disputes between the parties pertaining to alleged respective breaches of such agreement the respondent terminated and cancelled the written agreement. Aggrieved by the cancellation the appellant referred a dispute of unfair labour practice to the office of the Labour Commissioner on 11 April 2018.

[3] In its summary of dispute the appellant indicated that the respondent, in taking certain unilateral decisions to cancel the written agreement regulating the relationship between the parties committed an unfair labour practice as contemplated in section 50(1)(a) (b) and (g) of the Labour Act 11 of 2007. The relief appellant sought therein related to a retraction of the respondent's decision to cancel the recognition agreement, and in consequence to recognize the appellant as exclusive bargaining agent of respondent's employees. Furthermore, the appellant sought an order that the respondent withdraw its decision to cease deduction of union dues from employee salaries.

Proceedings before the Arbitrator

[4] The arbitration hearing took place before the second respondent on 20 September and 01 October 2018. The appellant called three witnesses to testify during the arbitration proceedings whilst the respondent called one witness. It was agreed between the parties at the commencement of the arbitration hearing that the arbitrator would rule on an *in limine* objection raised by the respondent. The objection pertained to the jurisdiction of the arbitrator flowing from her capacity to determine disputes of rights within the strict ambit of section 50(1) of the Labour Act 11 of 2007.

[5] The respondent essentially contended that the written arbitration agreement is self-contained with its own remedies flowing from breach, and that the referral under section 50(1) was incompetent as a complaint about cancellation of the agreement does not fall within the ambit of section 50(1). The respondent contended, the referral is not one envisaged in the Act as an unfair dismissal.

[6] The second respondent, upholding the thrust of respondent's argument, found that it was necessary to consider the merits of the case so as to determine whether an unfair labour practice was committed. This was despite the fact that the written referral unmistakably premised the complaint on the cancellation of the recognition agreement. The arbitrator, with reference to specific clauses in the recognition agreement, found that it was the appellant which did not comply with the terms of the recognition agreement. She further found that the respondent, invoking the terms of the written agreement, provided the appellant an opportunity to rectify certain alleged breaches. The arbitrator further found that the appellant's failure to remedy the breaches gave rise to the respondent terminating the agreement. She concluded that it was the appellant who bargained in bad faith and that there was no evidence suggesting that the respondent refused to bargain collectively or that the respondent exerted intimidation.

[7] At the end of the proceedings, the arbitrator stated that the recognition agreement was terminated fairly and that the respondent's conduct did not amount to an unfair labour practice. In the result she dismissed the matter and made no order as to costs.

Proceedings before this court

[8] Ms. Shilongo appeared for the appellant and Mr. Horn appeared for the respondent. The appellant relied on the following questions of law:

1. The arbitrator erred in law in her conclusion that the respondent did not bargain in bad faith and refused to bargain collectively.
2. The arbitrator erred in the interpretation of the facts, in accepting that the appellant bargained in bad faith, no reasonable arbitrator would have come to the same conclusion.
3. The arbitrator erred in law in the manner in which she interpreted the application of clause 15.1.2 of the recognition agreement.

[9] The respondent, in its grounds enumerating the basis of its opposition, stated that the first and second questions raised by the appellant are not questions of law but that of fact. In respect of the last question of law the respondent maintained that the arbitrator correctly interpreted clause 15.1.2 of the recognition agreement, and correctly found that the respondent was entitled to terminate the agreement.

[10] In her written heads of argument Ms. Shilongo contended that the arbitrator erred in law in her interpretation of what constitutes an unfair labour practice for the purpose of section 50(1) of the Labour Act 11 of 2007, and ordering that the appellant had not proven an unfair labour practice. I pause to mention that the arbitrator's finding on the point *in limine* raised by the respondent at the commencement of arbitration is not the subject matter of this appeal. Ms. Shilongo further contended that the finding by the arbitrator that it was the appellant who bargained in bad faith was a finding that no reasonable arbitrator could have reached. Ms. Shilongo further argued, with reference to section 50(1) that the evidence during arbitration established that it was the respondent who refused to collectively bargain in good faith.

[11] The purported failure by the respondent to give the appellant notice of its intention to terminate the recognition agreement, so Ms. Shilongo contended, constitutes an unfair labour practice within the meaning of section 50(1)(b) and (g). The respondent's termination of the recognition agreement was not supported by a valid reason so argued Ms. Shilongo, the arbitrator could never on the evidence have found that the appellant acted in bad faith.

[12] Mr. Horn for the respondents formulated these issues in dispute. In essence the appellant has lodged an appeal against the decision of the second respondent as it alleges that the first respondent did not have a right to cancel the recognition agreement. The appellant therefore argues that it did not breach the recognition agreement and that the cancellation of the recognition agreement was therefore wrong in law. It is the respondent's further contentions that the dispute referred to is not of the kind contemplated in section 50(1) of Act 11 of 2007 as it simply pertains to whether or not a recognition agreement was validly cancelled. He further submitted that the powers of the second respondent does not allow for the type of relief sought by the appellant.

[13] Regarding the question as to whether the appellant raised proper questions of law as contemplated by section 89(1)(a) Mr. Horn submitted that questions 1 and 2 are not questions of law, and that the third question raises no legal principle as to the interpretation of clause 15.1.2. of the recognition agreement. Mr. Horn concluded, with reference to the record of proceedings, that the respondent was entitled to cancel the recognition agreement in the manner it did.

[14] The arbitrator's ruling on the point *in limine* that the respondent's conduct did not constitute an unfair labour practice is not challenged on appeal. What this effectively amounts to is that the arbitrator, upholding the respondent's contentions that the referral falls outside the ambit of section 50(1) of Act 11 of 2007, determined the question with reference to evidence led during the arbitration hearing. The failure by the appellant to challenge the arbitrator's finding that the cancellation of the recognition agreement falls outside the scope of section 50(1) is fatal and renders a consideration of the balance of the grounds of appeal otiose. Absent a challenge on appeal the arbitrator's finding in that regard stands.

[15] The attack on the arbitrator's interpretation of paragraph 15.1.2. of the recognition agreement does not take the matter any further as it was, in view of the formulation of the referred dispute, unnecessary to interpret same. An alternative interpretation of such paragraph does not make the referral one which falls within the "closed list of categories"[1] enumerated at section 50(1) of Act 11 of 2007.

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

1. The appeal is dismissed.
2. The matter is removed from the roll and considered finalized.

C Claasen
Acting Judge

[1] *City of Windhoek v Katuuo* (LCA 47/2015) [2016] NALCMD 11 (17 March 2016)

APPEARANCES:

APPELLANT:	N Shilongo Of Sisa Namandje Co Incorporated
RESPONDENT:	S Horn Of De Klerk Horn and Coetzee Incorporated