

**CCMA**

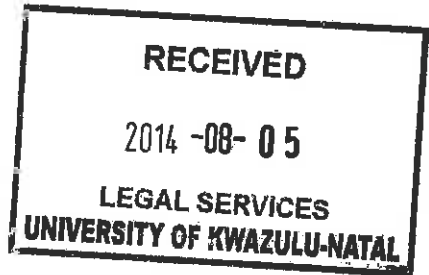
# Arbitration Award Rendered

Case Number: KNDB3503-14

Commissioner: Bess Pillemer

Date of Award: 3-Aug-2014

In the **ARBITRATION** between



**University of Kwazulu – Natal  
Staff Union (UKSU)**

(Union/Applicant)

and

**University of Kwazulu Natal**

(Respondent)

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## **Details of hearing and representation**

[1.1] The arbitration was held at the CCMA Durban on 28 July 2014.

[1.2] Both parties were legally represented. B Purdon represented the Applicant. M Maeso represented the Respondent.

## **Issues to be decided**

[2] Initially two issues had to be decided:

[2.1] Whether Gill Manion was entitled to represent the Union at the Joint Bargaining Forum (JBF) and the Joint Consultative Forum (JCF).

[2.2] Whether Gill Manion has the automatic right as the union representative to represent employees who are members of the Union in grievance and disciplinary proceedings.

## **Background to the issue**

[3.1] The issue set out in [2.1] above fell away at the arbitration because the Respondent accepted that Manion has the right to represent the Union at the various bargaining and consulting forums. It had informed the Applicant of its stance just prior to the arbitration.

[3.2] The issue set out in [2.2] is essentially a matter of interpretation. Mr. Purdon led the evidence of one witness, Malusi Dlamini. Mr. Maeso elected not to call witnesses.

[3.3] The facts set out below were agreed or not disputed.

[3.3.1] The Applicant is one of four trade unions that operates within the University and which are parties to the recognition agreement with the University. It is the majority union. The three other trade unions are NTEU, NEHAWU and COMSA.

[3.3.2] The Applicant, following correct procedures and in terms of its Constitution, appointed Manion into three administrative positions, i.e. UKSU officer, organizer and union representative. She performs these functions as directed by the Union's executive committee. These positions embraced *inter alia* a broad range of administrative functions as well as dealing with the complaints and needs of its members.

[3.3.3] In respect of the position of union representative the UKSU's Constitution states in section 11.4.2.1 that the union representative shall in terms of section 14 (4) of the Labour Relations Act, 1995, and at the request of an employee in the workplace, assist and represent the employee in grievance and disciplinary hearings.

[3.3.4] The Applicant's case was that Manion was entitled to represent employees at internal disciplinary hearings in terms of its Constitution and the Labour Relations Act.

[3.3.5] The Respondent's case was that because Manion is not an employee of the University she has no automatic right to represent employees in disciplinary processes, which right is limited to being represented by a fellow employee unless the chairperson of the particular hearing rules that outside representation may be allowed for that particular proceeding.

[3.4] I set out the relevant sections referred to below on which Mr. Purdon and Mr. Maeso based their arguments:

[a] Section 14 of the LRA 66/1965

"Trade union representatives. - (1) In this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

(2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves

(a) if there are 10 members of the trade union employed in the workplace, one trade union representative.....

(3) The constitution of the representative trade union governs the nomination, election, terms of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions –

employee in grievance and disciplinary proceedings;

(b) to monitor the employer's compliance with workplace –related provisions of this Act...

(c) to report an alleged contravention of the workplace-related provisions of this Act.....

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours-

(a) to perform the functions of a trade union representative; and

(b) to be trained in any subject relevant to the performance of the functions of a trade union representative.

[b] Section 213 of the LRA defines trade union representative as follows:

"trade union representative" means a member of a trade union who is elected to represent employees in the workplace"

[c] The recognition agreement defines a representative as "a person appointed by any party to represent such party on the JBF or the JCF". Paragraph 8 sets out the circumstances where the University agrees to give access to the unions and although no mention is made of attendance at disciplinary enquiries, paragraph 8.2 which deals with time off for union activities states inter alia:

"8.2.3 Union representatives shall be given reasonable time-off during working hours to represent their members at disciplinary and grievance hearings."

[d] The Disciplinary Code, which is annexed to the Conditions of Service, states

ACT FOR PROCEDURE TO BE FOLLOWED."

**Applicant's argument**

[4.1] Mr. Purdon referred to the line of case law that affirms the view that an employee does not necessarily have the right to be represented by a union official at a disciplinary enquiry. He contended that this line of cases was not of relevance in this context but only applied when the procedural fairness of dismissal was challenged, that is when an employee was denied the right to be represented by a union official. He contended that none of those cases had considered the question from the viewpoint of the organizational rights of the union.

[4.2] Mr. Purdon submitted that section 14(2) of the LRA was for the benefit of the members of the trade union and not for the employer. This section empowers the members to elect representatives themselves, and provided that the Union has acted *intra vires* in terms of its constitution he contended that it was not open to the University to only recognise the shop stewards elected by the body of its employees. He contended that the LRA did not restrict trade union representatives to employees. Section 12.1 provides that any representative can have access to serve members interest. He also argued that the recognition agreement does not limit office bearers to being employees. The meaning of representative is not ambiguous, it means any person appointed by any party. He also submitted that merely because the recognition agreement refers to 'time off' it does not mean that a person who is not employed by the university cannot be a representative. Such a person would not need time off but that does not lead to the conclusion that only representatives who take time off are entitled to represent employees.

[4.3] Mr. Purdon pointed out that section 8.2.3 of the recognition agreement envisages representation at the disciplinary hearing, and he argued that that read together with section 14(4) of LRA shows that there is an agreement in force between the parties, and that Manion is entitled to represent members of the union in disciplinary and grievance procedures. The recognition agreement does not prohibit a Union official from representing an employee at a disciplinary enquiry.

[4.4] Mr. Purdon asked for costs. He contended that the Respondent had been frivolous and vexatious in refusing to allow Manion to represent the Union at the Joint Bargaining and Consultative Forums, admitting she was entitled to do so only immediately prior to the arbitration.

to perform the functions of an official of the Union in terms of section 12 and 14 of the LRA. This is also addressed in the Code of Good Conduct.

[4.6] Mr. Purdon led the evidence of one witness, Malusi Dlamini, who proved some of the documentation and confirmed some of the facts referred to by Mr. Purdon.

### **Respondent's argument**

[5.1] Mr. Maeso said the main focus of the dispute had been on the right of Manion to represent the union at the Joint Bargaining and Joint Consultative forums. The University now conceded that she had the right to do so. He said that it was only at the conciliation that the issue of whether Manion had an automatic right to represent employees at disciplinary hearings arose. The University was concerned that if she were allowed to do so it would open the floodgates to others to represent employees at disciplinary enquiries. The question that has to be decided he said is whether the documents allow someone who is not employed by the University to automatically represent employees in internal disciplinary hearings even though this is not allowed by the university as a matter of practice or policy.

[5.2] Mr. Maeso made the point that paragraph 2.5.11 of the recognition agreement defined representative as meaning "a person appointed by any party to represent such party on the Joint Bargaining Forum or the Joint Consultative Forum". He identified the distinction between representatives that deal with collective bargaining and those who represent employees in disciplinary enquiries. Mr. Maeso said it was common for persons other than employees to represent parties in such fora, but not so at disciplinary hearings, where the usual rule is that representation is limited to a co-employee unless some special dispensation has been agreed.

[5.3] Mr. Maeso agreed with Mr. Purdon that the recognition agreement was silent on the issue outside the clauses referring to the election of ten representatives and allowing employees so elected for time off to attend to disciplinary enquiries.

[5.4] Mr. Maeso referred to clause 9 of the recognition agreement and contended that when it states "the parties agree that a maximum of ten representatives per Union is allowed" this means shop stewards, and this is supported by the two paragraphs before, which make provision for obtaining permission for "time off" for such responsibilities. Mr. Maeso argued that it was plain that this envisaged that the union representatives would be employees. Mr. Maeso referred to sections 11 to 18 of the LRA and claimed that these paragraphs supported his contention, in circumstances where the recognition agreement did not clearly set out the limitations. Although the LRA widely defines trade union representative in this definition it is limited in section

representatives, and that it is only these that are entitled to represent at disciplinary enquiries. Mr. Maeso explained that it is because the LRA limits trade union representation to a fellow employee in grievance and disciplinary procedures which is why it was necessary to limit the wide definition of representative by the Joint Bargaining and Joint Consultative Forum. He argued that sections 14.2 and 14.4 should apply.

[5.5] Mr. Maeso pointed out that this did not mean that the Union was rudderless in this respect. All the other top ranking officials in the Union were employees and could represent colleagues in hearings, and the chairperson of the hearing had the discretion to allow external representation.

[5.6] Mr. Maeso added that the only referral to Union representation of employees in its Constitution was that at the CCMA. Mr. Maeso emphasised that the Union Constitution directs and controls the relationship between the Union and its members and cannot be used with a third party.

[5.7] Mr. Maeso submitted that the Applicant's attorney was informed prior to the arbitration that the primary issue was resolved, and that costs should not be awarded in these circumstances.

#### **Motivation and analysis of evidence and argument**

[6.1] In my view the LRA is merely permissive in allowing a union to represent a member at a disciplinary hearing and does not compel an employer to permit outside representation at internal disciplinary hearings. It is clear that the Respondent does not of right allow outside representation and that it is a matter of discretion afforded the chairperson of any disciplinary hearing as to whether outside representation in the form of a trade union representative or legal representative will be allowed for that particular hearing, having regard to the issues involved in the particular case.

[6.2] I agree that the collective agreement in referring to allowing time off to ten elected officials *inter alia* to represent its members provides a clear indication that what is contemplated is representation by co-employees. Union officials like Manion do not require time off. It obviously does not refer to someone in her position.

[6.3] In any event section 14(2) of the LRA refers to employees in a workplace electing representatives from among themselves and refers therefore to co-employees. The section does not assist Mr. Purdon's argument that representatives referred to in section 14(4) are not necessarily co-employees, since if they have been elected from among the employees in the workplace they must necessarily be co-employees.

of a particular hearing on application allows her to do so, because she is not an employee of the Respondent she has no automatic right to represent union members.

[6.5] The parties both enjoyed a measure of success. The concession made by the Respondent that eliminated the issue in [2.1] resolved a major part of the dispute between the parties. The remaining issue in [2.2] has been decided against the Applicant. In the circumstances I consider it fair that each party should bear its own legal costs and I make no order as to costs.

**Award**

[7.1] Gill Manion is entitled to represent the Union at the Joint Bargaining Forum and the Joint Consultative Forum.

[7.2] Gill Manion does not have an automatic right as the union representative to represent employees who are members of the Union in internal grievance and disciplinary proceedings and may only do so if permitted by the chairperson of the grievance or disciplinary hearing.

[7.3] There is no order as to costs.

Signature: \_\_\_\_\_



Commissioner: Bess Pillemer

Sector: Educators (private)