



# ARBITRATION AWARD

Commissioner: **James Ngoako Matshekga**

Case No: **PSHS739-19/20**

Date of award: **20 July 2020**

In the matter between:

**SAMUEL RAMOTHIBE MOHOBOKO**

Applicant

and

**DEPARTMENT OF SOCIAL DEVELOPMENT- FREE STATE**

Respondent

---

## DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration before me 8 June and 6 July 2020.
2. The proceedings took place at the offices of Department of Social Development- Free State (“the respondent”) situated at Civilia Building, 5 Elizabeth Street, Bloemfontein.
3. The applicant in this matter is Mr. Samuel Ramothibe Mohoboko.
4. The applicant appeared in person and was represented by Ms. Elsie Louw, a legal practitioner from the law firm Lovius Block Incorporated.
5. The respondent was represented by its employee Mr. Thabo Mahlaba.
6. Written closing arguments were submitted on 13 July 2020 by agreement between the parties.

7. The proceedings were digitally recorded.

## **ISSUE(S) TO BE DECIDED**

8. The issue for determination in this matter is whether the applicant was dismissed by the respondent or whether he was discharged in terms of section 17 of the Public Service Act 103 of 1994 (“the PSA”).

## **BACKGROUND**

9. The applicant is an adult male who was employed by the respondent in the position of Senior Manager: Security Services. The applicant earned a monthly gross salary of R72 317.52.

10. The respondent is the provincial department of Social Development in Free State whose main aim is to deliver an integrated developmental welfare service to the vulnerable, to provide sustainable development programmes which facilitate empowerment of communities, and to render residential care and integrated developmental services to children in need of care, older and frail persons.

11. On 17 September 2019, the applicant referred a dispute to the Council. The dispute concerned the applicant’s alleged unfair dismissal that occurred on 20 August 2019. The alleged unfair dismissal dispute remained unresolved at a conciliation that took place on 17 October 2019. The applicant requested arbitration on 25 October 2019.

12. The Council set down the alleged unfair dismissal dispute for arbitration that took place on 3 December 2019 before Commissioner Theresa Malgas-Senye. On 19 December 2019, Commissioner Theresa Malgas-Senye made a jurisdictional ruling in which she made the findings set out therein.

13. The relief sought by the applicant is retrospective reinstatement in terms of section 193 of the Labour Relations Act 66 of 1995 (“the LRA”). The respondent argues the applicant’s services were terminated by operation of law in terms of section 17 of the PSA and therefore the Council lacks jurisdiction and must dismiss the applicant’s claim.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **The applicant's case**

#### **Documentary evidence**

14. The applicant submitted two bundles of documents that were marked bundle A and B. The respondent placed none of the documents contained in the applicant's bundles in dispute. The individual documents are not listed in this award for the sake of brevity and due to the number of items involved. I will however refer to relevant documents where appropriate and if necessary.

#### **Oral evidence**

15. The applicant relied on his own testimony and the testimony of two (2) other witnesses, namely, Mr. Mohomi John Legegeru ("Mohomi") and Ms. Ntombizodwa Jane Ntsimanyane ("Ntombizodwa").

16. The testimony led by all the witnesses has been fully captured on the record of proceedings. What appears in this award is a concise summary of the evidence led relevant and material to the issue in dispute.

17. The essence of the applicant's testimony was that he reported for duty from 18 October 2018 until his employment was terminated on 20 August 2019 when the respondent denied him access to the workplace and served him with a letter of termination dated 26 July 2019 via email.

18. The respondent subjected him to hostile working circumstances. As a consequence, he addressed several letters to the respondent's HOD to address the various issues (the relevant letters were written on 2 February, 6 May, 28 May and 6 June 2019). He also lodged a formal grievance on 19 August 2019.

19. A meeting took place between him and the respondent's HOD on 17 October 2018. The respondent remunerated him for the entire period that it alleges he was absent from duty.

His last payment was on 15 August 2019 and he signed for all his payslips while on duty. The respondent's HOD also appointed him as a responsible manager on 1 April 2019.

20. On 17 May 2019, the respondent launched court action to have his appointment as a senior manager declared irregular and illegal. The court action by the respondent would not have been necessary if he had not reported for duty for a period exceeding a month.
21. The respondent did not conduct any investigation to establish his whereabouts. No letters were sent to him to report for duty. He was always in possession of the respondent's cellphone and laptop.
22. The essence of Mohomi's testimony was that he is employed by the respondent in the position of Paymaster. Employees of the respondent who are permanently employed received their payslips on the fifteenth of each month. The applicant initially sent his Personal Assistant (PA) (Ntombizodwa) to sign for his payslips. However, he was subsequently informed that the applicant must sign for his payslips personally. The personally signed for his payslips during the period in dispute until the applicant's salary was stopped. A payslip can remain uncollected for a maximum of two (2) months. He saw the applicant at the office during the period in dispute.
23. The essence of Ntombizodwa's testimony was that she was the applicant's PA. She shared an open-plan office with the applicant. The applicant was reporting for duty during the period in dispute. The applicant allocated tasks to her, which tasks she performed. She was never asked about the applicant's whereabouts. They don't keep an attendance register in the office.

### **The applicant's closing argument**

24. The written closing arguments submitted by Ms. Louw on behalf of the applicant are a matter of record. It is therefore unnecessary for me to repeat them in this arbitration award. I have taken them into consideration and will refer to them where appropriate and if necessary.

## **The respondent's case**

### **Documentary evidence**

25. The respondent submitted five bundles of documents that were marked bundle C, D, E, F, G and H. The applicant placed none of the documents contained in the respondent's bundles in dispute. The individual documents are also not listed in this award for the sake of brevity and due to the number of items involved. I will however refer to relevant documents where appropriate and if necessary.

### **Oral evidence**

26. The respondent relied on the testimony of four (4) witnesses, namely, Mr. Motlolo Willem Molahloe ("Motlolo"), Ms. Liza Rossouw ("Liza"), Mr. Kgosietsile Mojatau ("Kgosietsile") and Mr. Tumelo Jacob Phahlo ("Tumelo").

27. The essence of Motlolo's testimony was that he is employed by the respondent in the position of Deputy Director: Information Security. He is aware that the applicant was not reporting for duty. The last time he came into contact with the applicant was in February 2018. The deputy directors that used to report to the applicant decided to constitute themselves and reported directly to Tumelo. He is aware of the termination letter dated 26 July 2019.

28. The essence of Liza's testimony was that she is employed by the respondent in the position of Deputy Director: Performance Management. All directors are supposed to submit annual performance agreements. The applicant did not submit his performance agreement for 2018/2019. The applicant also did not submit his assessments that were supposed to be dealt with in the meeting that took place on 6 December 2018. The applicant was also absent from the meeting that took place on 20 June 2019. She does not know why the applicant was absent at the meeting. She does not know if the applicant was on duty on that day.

29. The essence of Kgosietsile's testimony was that he is employed by the respondent as a Chief Audit Executive. He produced the audit report that appears on pages of bundle. He could not get hold of the applicant during the compilation of the audit report. Tumelo could not explain the applicant's whereabouts. Tumelo informed him the applicant last

reported for duty in April 2018. The applicant did not attend meetings that took place on 8 November 2018 and in March, April and May 2019.

30. The essence of Tumelo's testimony was that he is employed by the respondent in the position of Chief Director responsible for Corporate Services. He was the applicant's immediate supervisor. He last saw the applicant at work on 17 October 2018 when the applicant attended a meeting with the HOD. The applicant did not report for duty thereafter. The applicant did not attend weekly meetings, did not submit his performance assessments and performance plan. He telephoned the applicant (on a date he could not recall) to establish his whereabouts and the latter indicated he was in hospital and did not appreciate the call. He then stopped telephoning the applicant and escalated the matter to the HOD. The HOD undertook to speak to the applicant and intervene. The HOD wrote to the applicant and implored him to report for duty. He also saw the correspondences from the applicant but did not see the applicant at work. He did everything administratively and humanly possible for the applicant to report for duty but the latter did not. The applicant received his salary from October 2018 until August 2019. The Auditor- General found payment of the applicant's salary was wasteful expenditure and the latter paid it back. The applicant did not have permission from him to be absent from work. The applicant's absence from work was glaring and could not have escaped his scrutiny. There is no correspondence from the applicant in furtherance of the employer's work during the period in question. There are also no tasks performed by the applicant during the period in question. He did not assign any work to the applicant from 18 October 2018 to the date of the termination of the applicant's employment because the applicant was not there. The applicant stripped himself of his duties by being absent from work. On 1 April 2019, the HOD appointed the applicant as a responsible manager but the applicant did not carry out the tasks associated with his appointment.

### **The respondent's closing argument**

31. The written closing arguments submitted by Mr. Mahlaba on behalf of the respondent are a matter of record. It is therefore unnecessary for me to repeat them in this arbitration award. I have taken them into consideration and will refer to them where appropriate and if necessary.

## ANALYSIS OF EVIDENCE AND ARGUMENTS

32. Section 138(7)(a) of the LRA enjoins me to provide brief reasons for my findings. I proceed to do so.
33. Section 192 of the LRA provides that in any proceedings concerning any dismissal, the applicant must establish the existence of the dismissal. If the existence of the dismissal is established, the respondent must prove that the dismissal is fair.
34. The issue in dispute in this matter is about the applicability of section 17 of the PSA. If the jurisdictional facts of section 17 are satisfied, then there is no dismissal and the Council lacks jurisdiction. If not, then the applicant was dismissed and the dismissal will be procedurally and substantively unfair (the parties agreed on record that will be the case).
35. On 1 April 2008 the PSA was amended and the subsections of section 17 changed.
36. Section 17(3) of the PSA provides:
- ‘(a) (i) An officer, other than a member of the services or an educator or a member of the National Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.*
- (ii) If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not.*
- (b) If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the Commission may, notwithstanding anything to the contrary contained in any law, recommend that, subject to the approval of the relevant executing authority, he or she be reinstated in the public service in his or her former or any other post or position on such conditions as the Commission may recommend, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the Commission may recommend.’*

37. The state, as employer, is immunised against unfair dismissal claims in the realm of deemed dismissal. The Labour Appeal Court held in *Gangaram v MEC for the Department of Health, Kwazulu-Natal and Another* [2017] 11 BLLR 1082 (LAC) (at para 28) that “*in order for an employee to be deemed dismissed in terms of s 17(3)(a) of the PSA he/she must have absented himself/herself from official duties without permission of the employer or the HOD for a period exceeding one calendar month. Since the deemed dismissal takes effect by operation of law and not by any act on the part of the employer, the jurisdictional requirements prescribed by the legislature in s 17(3)(a) of the PSA must be met before an employee can be said to be deemed dismissed.*”
38. In this matter, there is no dispute that the applicant did not attend various meetings as testified to by the respondent’s witnesses. However, failure to attend meetings that are scheduled weeks and, in some cases, months apart is not a basis for the respondent to invoke section 17 of the PSA. For section 17 of the PSA to be invoked, the applicant must have been absent from his official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month. I do not have any evidence that was the case in this matter.
39. The respondent’s witnesses’ testimony was unhelpful to its cause of proving that the applicant was absent from his official duties without the permission of his head of department, office or institution for a period exceeding one calendar month. There were material contradictions in the respondent’s witnesses’ testimony in respect of when the applicant last attended his official duties. Motlolo’s last interaction with the applicant was in February 2018. Kgosietsile’s testimony was that Tumelo informed him in October 2018 that the applicant last reported for duty in April 2018. Tumelo himself testified he last saw the applicant on duty on 17 October 2018 when the latter attended a meeting with the HOD. More importantly, Tumelo testified he escalated and left the issue of the applicant’s work attendance to the respondent’s HOD.
40. Beyond the testimony summarized above, there is nothing reliable from the respondent that shows the applicant was absent from his official duties without the permission of his head of department, office or institution for a period exceeding one calendar month, particularly from 18 October 2018. There are no attendance registers (except the attendance registers for meetings) or clocking records. There are no leave records. There are no letters sent to the applicant or to his place of residence informing and/or instructing him to report for duty. There is no version from the HOD herself. Nothing.

41. It is common cause that the respondent continued to and fully remunerated the applicant for the entire period that he is alleged to have been absent from duty. The applicant's last payment was on 15 August 2019.
42. In *Ramonetha v Department of Roads and Transport Limpopo and Another* [2018] 1 BLLR 16 (LAC), the Labour Appeal Court held (at paras 23 and 24) that “*by its nature, an employment contract is an agreement in which an employee works for an employer in exchange for remuneration. In accepting the appellant's tender of performance and remunerating him for his services, the only conclusion to be drawn on the facts is that, on his return to work, the Department implicitly reinstated the appellant into his employment with it. This is so given that his deemed dismissal took effect by operation of law in terms of s17(3)(a)(i) on “the date immediately succeeding the employee's last day of attendance at his or her place of duty” and not on any later date determined by the employer. The appellant could no longer be deemed to have been dismissed after he had been reinstated.*”
43. Therefore, by remunerating the applicant, the only conclusion to be drawn is that the applicant was not absent from duty without permission of his or her head of department, office or institution for a period exceeding one calendar month and if he was, then the respondent implicitly reinstated him.
44. The applicant testified that the respondent dismissed him on 20 August 2019 when he was denied access to the workplace and served with the letter of termination dated 26 July 2019. I have no evidence to the contrary.
45. During the arbitration and in its closing argument, the respondent argued the applicant's employment was terminated by operation of law on 26 July 2019. The Labour Appeal Court held in the *Ramonetha* matter that “...deemed dismissal took effect by operation of law in terms of s17(3)(a)(i) on “the date immediately succeeding the employee's last day of attendance at his or her place of duty” and not on any later date determined by the employer”. Thus, it is the law that determines the date of termination and not the respondent.
46. In this matter, the respondent invoked the provisions of section 17 of the PSA to short-circuit the applicant's right not to be unfairly dismissed. It would appear that the deeming

provision was applied as an afterthought after the respondent failed to appropriately deal with the applicant's failure to, amongst others, attend meetings.

47. The respondent's HOD's decision of 1 April 2019 to appoint the applicant as a responsible manager implicitly means the applicant was reinstated and any period of absence before 1 April 2019 could not be relied on for purposes of invoking section 17 of the PSA.
48. The court action launched by the respondent on 17 May 2019 to have the applicant's appointment declared irregular and illegal is further proof that the applicant was so reinstated and regarded as an employee of the respondent as of that date.
49. The jurisdictional requirements of section 17 have not been satisfied in this matter.
50. Section 186(1)(a) of the LRA defines dismissal to mean "the employer terminated employment with or without notice".
51. The parties agreed in the pre-arbitration minutes that "the applicant's services were terminated with the respondent." I am therefore satisfied that the applicant established the existence of dismissal as section 192(1) of the LRA requires.
52. In terms of section 192(2) of the LRA, the respondent must prove that the dismissal is fair. As already stated, the parties agreed on record that if dismissal is established, then the dismissal will be procedurally and substantively unfair. This is because section 188(1) of the LRA provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or based on the employer's operational requirements; and that the dismissal was effected in accordance with a fair procedure. No such proof exists in this matter because the respondent relied on section 17 of the PSA to terminate the applicant's services. Therefore, the applicant's dismissal was both substantively and procedurally unfair.

## REMEDY

53. I have found that the applicant was dismissed by the respondent and that the dismissal was both substantively and procedurally unfair.

54. The applicant has requested relief of retrospective reinstatement. Section 193(2) of the LRA directs that if a dismissal is unfair, I must require the respondent to reinstate or re-employ the applicant unless (a) the applicant does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the respondent did not follow a fair procedure.

55. In *OCGAWU & another v County Fair Foods (Pty) Ltd* [2001] 12 BLLR 1358 (LC) the Labour Court held that an employer that contends that reinstatement is not reasonably practicable or that continuation of the employment relationship would be intolerable is obliged to lead evidence to support such a claim.

56. The respondent did not place any evidence before me to prove that continued employment relationship will be intolerable. My finding is also that the circumstances of the applicant's dismissal by the respondent are such that objectively continuation of a normal employment relationship cannot be regarded as intolerable. I also have no evidence to prove that it will be reasonably impractical for the respondent to reinstate the applicant.

57. In the absence of the evidence and anything to the contrary, I find that reinstatement of the applicant is the appropriate relief in the circumstances of this matter.

58. In *Equity Aviation Services (Pty) Ltd v CCMA and Others* 2009 (1) SA 390 (CC) the Constitutional Court explained the legal effect of a reinstatement order as follows:

*The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment*

*contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word “reinstatement” means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA orders the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee’s having been without income for that period was a direct result of the employer’s conduct in dismissing him or her unfairly.*

59. In *Coca Cola Sabco (Pty) Limited v Van Wyk* [2015] 8 BLLR 774 (LAC) the Labour Appeal Court held that the effect of a reinstatement order is to revive the contract of employment which was terminated by a dismissal. The Court further held (at para 17) that *“the money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive. The back-pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief.”*

60. The applicant has been unemployed and without income from 20 August 2019. He deserves to be placed in a position he would have been had it not been for the unfair dismissal. Therefore, a reinstatement order with back-pay from 20 August 2019 is appropriate in the circumstances of this matter.

## AWARD

61. I make the following award:

62. The applicant was dismissed by the respondent and the dismissal was both substantively and procedurally unfair.

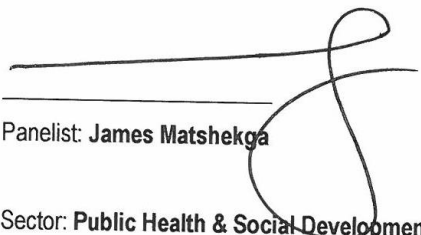
63. I order the respondent to reinstate the applicant into the same or similar position and on the same or similar terms and conditions of employment which prevailed immediately prior to the date of dismissal (i.e. 20 August 2019).

64. The respondent is ordered and expected to pay the applicant back-pay, less applicable statutory deductions, from 20 August 2019 to the date of this arbitration award (i.e. 20 July 2020). The total amount due and payable is Seven Hundred and Ninety-Five Thousand Four Hundred and Ninety-Two Rands and Seventy-Two Cents (R795 492.72), which is calculated as follows:  $R72\,317.52 \text{ p/month} \times 11 \text{ months} = R795\,492.72$ .

65. The respondent must pay to the applicant the back-pay amount stated above on or before 15 August 2020.

66. The respondent must implement the reinstatement order on 27 July 2020 and the applicant must report for duty as normal on that date (i.e. 27 July 2020).

67. No order of costs was sought and none is made.



Panelist: **James Matshekgu**

Sector: **Public Health & Social Development**