IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Not reportable

Case No: **C499/2021**

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES Applicant

and

PSA obo LONDIWE MADIKIZELA First Respondent

GENERAL PUBLIC SERVICE SECTORAL BARGAINING

COUNCIL Second Respondent

JACQUES BUITENDAG N.O. Third Respondent

Heard: 24 June 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to be 12 July 2024.

Summary: Review application in terms of s 145 of the LRA. Arbitrator's award not reviewable. Psychologist dismissed without a disciplinary hearing for not being registered with the HPCSA. Was *bona fide* unaware that she had been de-registered and received no notification of de-registration. Immediately rectified the situation upon being made aware of her status. Dismissal procedurally and substantively unfair. Reinstatement the appropriate remedy.

JUDGMENT

ACKERMANN AJ

[1] This is an opposed review application of the third respondent's ('the Commissioner') decision to declare the dismissal of the first respondent ('the employee') both procedurally and substantively unfair.

[2] The Commissioner ordered reinstatement with accrued arrear remuneration in the amount of R296 655.61 which is what the employee would have earned, had she not been dismissed.

Background facts

[3] The employee was employed by the first respondent ('the employer') as a psychologist. She was employed permanently from 3 March 2009

[4] On 14 October 2020 it came to the attention of the employer that the employee was not registered with the Health Professionals Council of South Africa ('the Council'). The employee was informed of this fact on the same day.

[5] On 27 October 2020 the employer informed the employee that it was considering her suspension in terms of clause 7.2 of the Collective Agreement (referred to in the arbitration award as the 'DCS Disciplinary Code and Procedures, GPSSBC Resolution 1/2206') because she was guilty of practicing her trade without being registered as a psychologist with the Council, which amounted to a breach of her contract, clause 5.1.3.5.

[6] The employee was invited to make written representations.

[7] In her written representations of 28 October 2020, the employee said she was informed on 14 October 2020 of the suspension of her registration status, and that this was the first time she was made aware of this fact.

[8] The employee sought clarification from the Council on the days that followed 14 October 2020. She was informed by the Council that in 2017 she had paid R1 700.00 towards her annual fee which was R134.00 short. She paid R150.00 to cover the shortfall, but unbeknown to her, she was already suspended. It is common cause that she was not notified of this fact by the Council and continued to practice under the impression that she was properly registered, and continued to pay her annual fees.

[9] I mention as relevant that it appeared from the employee's evidence that the Council was not a model of administrative efficiency. She testified for example that even prior to 2017 she did not receive her registration card from the Council, and that this was nothing out of the ordinary. She testified that she kept

proof of payment as proof of registration and that a lot of other psychologists did the same thing.

[10] When she became aware on 14 October 2020 that she had been suspended she paid the penalty of R20 150.00 as directed by the Council within 5 days of being notified. She also immediately informed her employer of the situation including her direct supervisor.

[11] She learnt in her communications with the Council that her yearly fees were being accepted, but not allocated to her name because her registration had been suspended, after her short payment in 2017.

[12] Over and above the fact that she received no communications from the Council that she was suspended, the Council continued to send her general communications.

[13] On 28 October 2020, the employer informed the employee that she was suspended. Her employer told her that she must provide proof by 2 November 2020 that her membership was not suspended since April 2017 and prove that her registration status was in good standing, failing which, her contract will be terminated.

[14] She asked for an extension of time of 30 days. However, on 4 November 2020, her employer terminated her employment contract, relying on clause 5.1.3.5 which made provision for dismissal if she was not registered with the Council.

The dismissal letter read that this failure was 'tantamount to a breach of Contract which is regarded as serious misconduct' (emphasis added).

[15] The employee's appeal was unsuccessful. The date of her dismissal was deemed the date of the appeal outcome, namely 18 January 2021. The reasons given for the termination were breach of contract and 'Dishonesty by continuing to function without proper authorization' (emphasis added).

[16] Before this, and on 8 December 2020, the employee was re-registered with the Council, and on 14 December 2020 the Council informed the employee that she was entitled to practice again as a psychologist.

[17] She referred her dismissal to the bargaining council and the Commissioner's finding that her dismissal was both procedurally and substantively unfair, was handed down on 10 June 2021.

Evaluation

[18] The Commissioner, in reaching his decision accepted that practicing without registration may be regarded as serious misconduct. However, in coming to his decision that the dismissal was unfair, he had regard to the principles set out in *Sidumo v Rustenburg Platinum Mines Ltd and Others*[1] that fairness requires a balancing of the interest of the employer and employee, and that he had to

[1] (2007) 28 ILJ 2405 (CC)

consider the totality of circumstances in determining the fairness of the dismissal.[2]

[19] In arriving at his decision that the employee was unfairly dismissed, the Commissioner had regard to a number of factors.

[20] He considered the evidence relating to the wording of section 19A(2) of the Health Professions Act,[3] which states that a notice of suspension must be sent to the person in question, and that such a person is deemed suspended "*As from the date of issue of the notice referred to in subsection (2) and its receipt by the person concerned*" (emphasis added).

[21] The Commissioner, interpreted, correctly in my view, that suspension is only deemed effective not on issue of the notice, but only once the notice is received by the person in question. He accepted the employee's evidence that she never received such a notice, and no evidence to the contrary was produced by the employer. In such circumstances it cannot be fair towards the employee to impute dishonesty. She genuinely did not know that she had been de-registered as a member of the Council.

[22] The employer's case, as I understand it, was that this did not matter because she was *de facto* in breach of her contract of employment para 5.1.3.5, which says that an employee must at all times uphold his/her registration status with

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[2] Award para 44
[3] 56 of 1974

the relevant Statutory Professional Council(s). 'Failure to renew or uphold the registration status may lead to the termination of this Contract.'

[23] In this regard, the employer's case at arbitration was not entirely clear. On the one hand, the employer seemed to rely only on a breach of contract, on the other hand the employer gave repeated evidence of dishonesty on the part of the employee, justifying her dismissal. A good deal of time was spent by the Commissioner in seeking to gain clarity on the issue. The evidence of Ms Sebotsa for the employer was replete with references to the employee's dishonesty and she was asked whether the employee was dismissed for misconduct. The version finally settled on by the employer seemed to be that the dismissal was warranted because the breach of contract meant that there was misconduct.

[24] Said differently, given the allegations of dishonesty, the employer would have to show that the employee knew since April 2017 that she was in breach of her contract because she knew she was not registered with the Council. But it is common cause that the first time she found out of her suspension was on 14 October 2020. This was not seriously challenged at arbitration.

[25] It is important to examine how it came to the employee's attention that she had been de-registered by the Council.

[26] It seems that it all came about due to an inadvertent short payment by the employee as it related to her annual membership fees in 2017. She testified that she was unaware of the increase that had led to her short-payment and the

consequent de-registration by the Council in April 2017 which was not communicated to the employee until 14 October 2020.

[27] It is also of some relevance that the employee continued to pay her annual fees in the *bona fide* belief that she was a member in good standing.

[28] The Commissioner also took into account the efforts made by the employee when she was made aware of her suspension on 14 October 2020. She testified that she immediately stopped practicing and on 15 October 2020 she wrote to the Council to find out what the reasons were for her suspension.

[29] This militates against any suggestion that she was being dishonest, or aware of her breach of contract. The Commissioner's finding that there is no evidence that the employee attempted to hide her suspension at any time prior to October 2020, and that it cannot be found that she was dishonest, as alleged, or guilty of gross misconduct, when she herself was unaware of the suspension, cannot be faulted.[4]

[30] Similarly it is undisputed that within 5 days of becoming aware that she was suspended she paid the penalty fee and her suspension was revoked from 8 December 2020.

[31] The Commissioner further applied his mind to the emphasis the employer placed on the fact that the employee was practicing while suspended. In dealing

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[4] Award para 52

with this point, the Commissioner had regard to the employee's evidence that the Council took no further action against her, and instead revoked the suspension. There was no evidence that she was charged with misconduct by the Council because she had practiced while suspended since 2017.[5] It is further worth pointing at, as noted by the Commissioner, that the Council waived the required rewriting of the board exam.[6]

[32] One can reasonably deduce from this that the Council viewed the matter at worst as an innocent oversight by the employee, and at best an administrative error on the part of the Council not to notify the employee of her suspension.

[33] The Commissioner also found that her de-registration was a supervening event, making it impossible for the employee to work, and as a matter of fairness, the employer should have at least considered alternatives to dismissal in order to give her sufficient time to engage with the Council about her registration status.[7]

[34] It is clear that the Commissioner was alive to the nub of the dispute, and had regard to all the relevant evidence. It cannot be said that his decision was one that no reasonable decision-maker could reach on the facts before him. His finding therefore that the dismissal was substantively unfair, cannot be disturbed on review.

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[5] Award para 54
[6] *Ibid*
[7] Award para 55

[35] As far as the procedural unfairness of the dismissal was concerned, the Commissioner again had regard to the essential issues and took all relevant facts into account.

[36] He rejected the employer's contention that a fair process can be gleaned from the fact that the matter was investigated, that the applicant was aware of the allegations, was given an opportunity to respond and was notified of the reasons for her termination.

[37] It is worth emphasising that the employer had indicated in the termination letter and the outcome of the employee's appeal that her conduct was regarded as serious misconduct. Ms Sebotsa in her evidence for the employer referred repeatedly to the employee's dishonesty, misconduct, and that she was a 'dishonest person'. As already stated, there is no evidence to support such allegations.

[38] In cross-examination Ms Sebotsa conceded that no formal charges were ever brought by way of a charge sheet, and it is common cause that no disciplinary hearing took place. The Commissioner correctly found that the Collective Agreement on the Disciplinary Code and Procedure for the Department of Correctional Services bound the parties (to a formal disciplinary procedure for allegations of serious misconduct).[8] Ms Sebotsa conceded this.

[8] Award para 58

[39] Thus, the employee's precautionary suspension was dealt with in terms of paragraph 7.2 of the collective agreement, and paragraph 6 read together with paragraphs 7.1, 7.3 and 7.4 provide for a formal disciplinary hearing procedure to be followed for allegations of serious misconduct.

[40] On the employer's own version, the matter related to serious misconduct. If that is so, formal disciplinary procedures should have followed, instead of the overhasty measures implemented by the employer where it imposed a very tight deadline for the employee to engage with the Council.

[41] Consequently, the Commissioner cannot be faulted for finding that the employer ought to have complied with the procedures set out in the aforementioned paragraphs if it considered the matter one amounting to serious misconduct (which it did).

[42] The employee was afforded a week to prove that she was re-registered and to answer allegations of serious misconduct. Providing this proof was out of the employee's hands, because she was waiting to hear back from the Council regarding her application for re-registration. Notwithstanding that she provided proof of her re-registration by the Council on 14 December 2020, she was still dismissed on 18 January 2021 (the date of the appeal outcome). In other words, her suspension was revoked before the appeal outcome. Notwithstanding the employer went ahead and dismissed her.

[43] In sum, and as the employee testified, it made no sense that she would continue paying her annual fees if she knew she was de-registered. On no construction

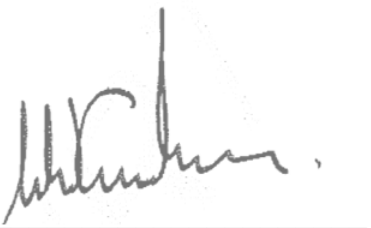
can it be said that she was dishonest. It would have been a different matter, had she not been paying her fees. In such an event she could not have plausibly contended that she was unaware of de-registration. But those facts do not obtain. What the Commissioner was faced with was uncontroverted evidence that the employee was paying her annual membership fees, but due to an error she had short-paid and unbeknown to her, she was de-registered.

[44] I am therefore of the view that the decision of the Commissioner that her dismissal was procedurally unfair is not a decision that no reasonable decision-maker could arrive at on the facts before him.

[45] Section 193 of the LRA posits reinstatement as the primary remedy for dismissals that are substantively unfair. The Commissioner concluded that there were no reasons not to order retrospective reinstatement from 18 January 2021, with full back pay. I have no reason to interfere with this finding. I consequently make the following order

Order:

1. The review application is dismissed.
2. There is no order as to costs.



Lourens Ackermann

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant's:	Adv Z Mapoma instructed by State Attorney P Melapi
For the Respondent:	C May of BDP Attorneys