REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 62/15

In the matter between:

PSA obo N T MATSHOBA Applicant

and

HOD: DEPARTMENT OF HEALTH, NORTHERN CAPE First respondent

MEC: DEPARTMENT OF HEALTH, NORTHERN CAPE Second respondent

Heard: 1 November 2017

Delivered: 15 November 2017

SUMMARY: Public Service Act s 17(3) – deemed dismissal. LRA s 158(1)(h) – review of MEC's refusal to reinstate employee. Irrational decision reviewed and set aside. Employee reinstated.

JUDGMENT

STEENKAMP J

Introduction

[1] Ms Nomonde Thelma Matshoba was deemed to be dismissed from her employment at the Northern Cape Department of Health in terms of s 17 of the Public Service Act[1]. She made representations to be reinstated. The Member of the Executive Council responsible for that Department[2] refused. Her trade union, the Public Servants' Association[3], seeks to have that decision reviewed and set aside in terms of s 158(1)(h) of the Labour Relations Act[4] for lack of legality.

Background facts

[2] The employee was absent from work due to ill health for an extended period of time. She applied for temporary incapacity leave in terms of the applicable collective agreement.[5]

[3] It appears from the documentation submitted by the employee that she applied for sick leave for the period April to November 2014. But it appears that this only came to the Department's attention after the fact, on 13 November 2014, when she also applied for temporary incapacity leave. However, the employer was well aware of her whereabouts and the reason for her absence: On 14 October 2014 the Acting Chief Director: Health Programmes sent a memorandum to Ms L Bezuidt, the Director: Labour Relations, reflecting that the employee's records "show incomplete submission of temporary incapacity leave application". Yet Ms Bezuidt did not mention this in her submission to the Head of Department that the employee be deemed discharged in terms of s 17(3) of the Public Service Act.

[4] On 18 December 2014 the employee received a letter in these terms from the Head of Department[6], Ms G Matlaoapane:

---

[1] Act 103 of 1994.

[2] The second respondent (the MEC).

[3] The PSA (the applicant).

[4] Act 66 of 1995 (the LRA).

[5] Resolution 7 of 2000.

[6] The first respondent.

> "Dear Mrs Matshoba
>
> RE: DISCHARGE IN TERMS OF SECTION 17(3)(a)(i) OF THE PUBLIC SERVICE ACT, 103 OF 1994 AS AMENDED
>
> You absented yourself from duty without leave and/or permission for a period exceeding one calendar month (viz, 01 July 2014 to date).
>
> Therefore, you are deemed to be discharged from Public Service in terms of section 17(3)(a)(i) of the Public Service Act 103 as amended, with effect from 12 August 2014.
>
> Kindly note that since the abovementioned section is a deeming clause and you cannot appeal, thus your services are terminated by operation of law.
>
> Furthermore, you are entitled to make a formal representation to the Executing Authority in terms of **section 17(3)(a)(i) of the Public Service Act, 103 of 1994** as amended.
>
> Trust you find the above in order."

[5] The employee made representations to the executing authority, being the MEC, on 19 December 2014. She explained that she had been ill and attached copies of medical certificates and her requests for incapacity leave. It appears that she had been booked off sick by medical practitioners from 1 July to 30 September and 2 October to 7 November 2014. She also explained that, when she had asked a labour relations officer, Mr Pape, why the Department had not contacted her, it transpired that the employer had sent a letter to an address that she had left six years earlier. She also pointed out that she had reported to work on 10 November 2014 but that her name had been removed from the attendance register. On the same day, she had a lengthy conversation about her illness with the Deputy Director in the Health Promotion Unit, Rev Makoko. She asked to see the HOD but she was told that the HOD was attending an ANC *lekgotla*. The MEC, Mr M N Jack, only responded on 11 February 2015. His curt response is worth quoting in full[7]:

[7] Spelling and grammar as in the original.

"**Dear Ms Matshoba**

OUTCOME OF YOUR REPRESENTATION: YOURSELF [*sic*]

Your representation refers.

After considering the merits of the case and subsequent representation lodged. I therefore decided that your representation be dismissed and therefore your dismissal remains effective.

The reasons for my decision are informed by the gravity of the seriousness of the misconduct.

Provision is made in terms of s 187 of the LRA and the code of Conduct for the Public Service. It is my considered opinion that u [*sic*] repudiated your contract with your continued absence from your workplace and therefore by operation of law u deemed [*sic*] to have discharged yourself.

I have also taken the following legislature prescripts into account:

- **Chapter 10 of the Public Finance Management Act (PFMA) of 1999 as updated December 2011**
- **Treasury Regulations 2001**
- **The Public Service Code of Conduct**
- **The Disciplinary Code and Procedure, Resolution 1 of 2003.**"

Grounds of review

[6] The applicant has submitted that the MEC's decision must be set aside on the grounds of legality; in other words, his decision was not rationally related to the purpose for which the power was given.

Evaluation

[7] I shall briefly reiterate the relevant legal principles before evaluating the MEC's decision against those principles.

The legal context

[8] In *MEC for the Department of Health, Western Cape v Weder*,[8] the LAC considered the application of that section by another provincial MEC for Health. Davis JA usefully summarised the relevant section of the Act:

> "Section 17(3)(a)(i) of the Act provides: 'An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself 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 dismissed 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.' Insofar as it is relevant subsection(3)(b) provides that if an employee who is deemed to have been dismissed as contemplated in s 17 (3) (a) (i), reports for duty at any time after the expiry of the period referred to in subsection 3(a) (i), a relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that employee in the public service in his or her former or any other post or position."

[9] Davis JA considered the various decisions dealing with questions of legality and administrative action in considering these provisions and concluded:[9]

> "Irrespective of the classification of the decisions of appellant as administrative action, appellant's actions are open to review in terms of s 158 (1) (h) of the LRA on the ground of legality, a principle that has been developed significantly by the courts over the past decade. So much so, that a parallel system of review for action which falls outside of the strict definition of administrative action in terms of the poorly drafted PAJA, has developed. See the observations of Cora Hoexter (2004) 3 Macquarie Law Journal 165; and more recently Lauren Kohn 2013 (130) SALJ 8-10."

[10] It is in that legislative context that the MEC's decision in this case should be considered.

---

[8] *MEC for the Department of Health, Western Cape v Weder, In Re: MEC for the Department of Health, Western Cape v Democratic Nursing Organization of South Africa obo Mangena* [2014] 7 BLLR 687 (LAC); (2014) 35 ILJ 2131 (LAC).

[9] At par 33.

The MEC's decision

[11] Apart from the unprofessional tone of the decision (using terms such as "u" for "you"), it is difficult to discern any reasoning behind the decision not to reinstate the employee.

[12] The word "therefore" in the third sentence of the MEC's decision is entirely superfluous. It does not follow on any earlier reasoning and does not point to a conclusion. It is simply irrational.

[13] The MEC then purports to give reasons for his decision. But the only reason he cites is that his decision "is informed by the gravity of the seriousness of the misconduct".

[14] However, the employee was not dismissed for misconduct. As the HOD was careful to point out in her letter of December 2014, her services were "terminated by operation of law".

[15] The reference to s 187 of the LRA is completely nonsensical. That section deals with automatically unfair dismissals. It has no bearing whatsoever on the employee's representations to the MEC.

[16] As far the "legislature prescripts" are concerned, the MEC simply cites – seemingly at random – an Act, the treasury regulations, a code of conduct and a collective agreement, without any indication why those are relevant to the case at hand, and if so, how it informed or influenced his decision.

[17] There is no indication that the MEC considered the employee's representations, setting out the reasons for her absence, her illness, the failure of the Department to contact her, or her attempts to report for work and to speak to the relevant officials at all. His "reasons" for refusing reinstatement bears no relation to the employee's representations.

[18] On the facts of the cases in *Weder* and *Mangena*, the LAC found:

> "[41] It is common cause that both employees were ill. They may have been incorrect not to inform appellant of the reasons for their absence but, that on its own, did not appear to constitute wilful, nor deliberate conduct on their part. No reason has been provided, even in the answering affidavit with the benefit of hindsight, as to why their continued employment would have been rendered intolerable. There is, in summary,

a stark absence of a plausible reason/s for the decisions taken by appellant.

[42] In my view, applying the test of legality, insufficient evidence was provided by the appellant to why the decision to reject the representations made was sufficiently rationally related to the purpose for which that power was given to appellant. In particular, and critical to these disputes, insufficient evidence was provided as to why a continued employment relationship had been rendered intolerable by the conduct of these employees."

[19] The same considerations apply in this case. The employee only belatedly informed the Department of the reason of her absence, being her illness; but the Department knew where to find her, and more importantly, the MEC's decision not to reinstate her does not take that factor into account at all. Nor does he explain why a continued employment relationship would be intolerable. And the LAC in *Weder* accepted the *dictum* of Van Niekerk J in *De Villiers*[10] that the requirement of 'good cause' means that unless the employer, having regard to the full conspectus of the facts and circumstances, is satisfied that the employee's conduct has made a continued employment relationship intolerable, it should as a general rule approve the employee's reinstatement.

Conclusion

[20] The MEC's decision was irrational. It cannot be said that it was rationally connected to the purpose of the Public Service Act.

[21] Both parties asked for costs to follow the result. I see no reason in law or fairness to differ.

[10] *De Villiers v Head of Department: Education, Western Cape* (2010) 31 *ILJ* 1377 (LC).

Order

[22] I therefore make the following order:

22.1 The decision of the second respondent, the MEC for the Department of Health, Northern Cape, of 11 February 2015 refusing to reinstate the employee, Ms Nomonde Thelma Matshoba, is reviewed and set aside.

22.2 The Department of Health, Northern Cape is ordered to reinstate Ms Matshoba retrospectively to 18 December 2014.

22.3 The second respondent is ordered to pay the applicant's costs.

_____

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: P Venter

Instructed by Adrie Hechter.

RESPONDENTS: M Majozi

Instructed by Nonyane attorneys.