IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D 1425/19

Not Reportable

In the matter between:

EDITH THEMBISILE NTOMBIANI MKHWANAZI **Applicant**

and

THE MEC FOR THE DEPARTMENT OF EDUCATION KWAZULU-NATAL **Respondent**

Heard: (On the papers)

Delivered: Electronically on 8 April 2022.

JUDGMENT

WHITCHER J

Nature of application

[1] This case is brought in terms of section 158(1)(h) of the Labour Relations Act, 1995 (the LRA). The applicant seeks to have set aside the decision of the respondent made on 12 November 2019 not to reinstate her after she was purported to have been deemed dismissed on 4 August 2017 by operation of law in terms of section 14(1) of the Employment of Educators Act, 1998 (EEA).

The law

[2] The effect of section 14(1) is that, provided the statutory jurisdictional requirements are met the employment contract of the affected educator is terminated by operation of law.

[3] The jurisdictional requirements are: the educator must have been permanently employed, the educator must have been absent longer than 14 consecutive days and the absence must have been without permission of the employer.

[4] The applicant contends there is an additional jurisdictional requirement, as evidenced by Item 7.2 of the Department of Education's Circular relating to '…Automatic Discharge on Account of Misconduct' (the Circular).

[5] The Circular provides that:

> In instances where the employee continues to be absent, the supervisor/head of the institution must notify him/her in writing on the 8th day after the first day of absence that he/she has failed to submit the applicable leave forms, duly completed…and must advise the employee that in terms of the measures relating to abscondment, he/she will be deemed to be discharged from service should he/she fail to return to work or should a valid application for leave, duly completed not be received within 14 days…The notification in this regard must be either handed to the employee concerned personally or forwarded by registered mail to the last known address.

[6] Since the termination of employment under section 14(1) happens by operation of law, it is not challengeable under section 191 of the LRA or open to judicial review.

[7] However, a dispute about whether the jurisdictional facts presented themselves in order for the legal fiction to take effect is justiciable and in a review application such as the one before me.[1]

[8] Section 14(2) provides that if an educator who is deemed to have been discharged at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement or reemployment of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine (s 14(2)).

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[1] See: *South African Medical Association obo Mutunzi v MEC: Health in the North West* (JR 2580/12, 22 May 2020); *Gangaram v Member of the Executive Council for the Department of Health, KwaZulu-Natal and Another* [2017] 11 BLLR 1082 (LAC); *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC). The principle is comprehensively articulated in *Mutunzi.*

[9] The decision under section 14(2) is an exercise of statutory power, reviewable under section 158(1)(h) of the Labour Relations Act, 1995. It is a legality review, which tests whether decisions are rationally related to the purpose for which the power to make that decision was given. Also to be considered would be whether the decision not to reinstate the dismissed employee was rationally connected to the information before the respondent and to the reasons the respondent gave for it.

[10] As evidenced by the wording of section 14(2), the dismissed employee must *show* good cause for their application for reinstatement to be approved. The legal sense of the word, 'show', means that the employee must demonstrate or explain why good cause exists to reinstate him. The employee thus has a duty not only to place facts before the decision-maker but to show how these facts meet the legal standard of 'good cause'.

The Facts[2]

[11] The applicant was an educator at Zakhele Primary School (Zakhele) in Kranskloof.

[12] On or about 27 July 2017, other educators at Zakhele stopped teaching and demonstrated against the presence of the applicant at the school. This arose in circumstances where she had delivered a written complaint to the Department about their and the conduct of the principle in conducting the affairs of the school.

[13] On 2 August 2017, the applicant was instructed by the Circuit Manager to leave the school and await a disciplinary hearing.[3]

[14] She was also told to present herself the next day (3 August 2017) at the Circuit Office with the name of a school to place her in. She did not. Instead, she consulted her trade union who sent an email to the respondent on 4 August 2017. It reads as follows:

> *As per telephonic conversation [today] Mrs ETN Mkhwanazi has been displaced from Zakhele Primary in Claremont. NAPTOSA and the educator has informed*

[2] The same facts served before the reinstatement committee.

[3] That the applicant was indeed told to await a disciplinary enquiry is confirmed by a document drafted by the Circuit Manager dated 12 October 2017 and which formed part of the record before the reinstatement committee.

Nkosi of the situation. The educator is 57 years old and not in a position to move schools, this is not an option, neither is taking leave going to assist with the problem. You did indicate that you will revert to me after 2pm today.

[15] The respondent did not respond. Instead it sent text messages to the applicant, repeating its instruction that she find an alternative school and complete leave forms. The applicant responded that she was waiting for the hearing she was told to expect.

[16] On 16 October 2017, the applicant received a letter from the Department. It reads as follows:

Leave without pay will be granted to you for the period [3 August 2017 to 13 October 2017] as you failed to report for duty with no valid reason.

…it is also recorded that arrangements have been made for you to report for duty to the Circuit Office: Kranskloof.

…It is in your own interest to comply with the arrangements as failure to immediately report to the Circuit Office will result in the freeze of all future salaries.

[17] The applicant's salary was frozen in December 2017. Crucially, in a letter sent to the Department on 12 December 2017, her lawyer informed the respondent that:

"We are instructed to record as we hereby do that our client tenders her services to the Department in terms of her contract of employment.

[18] The Department responded to this letter six (6) months later (on 3 July 2018) as follows:

…Due to the instability incident at Zakhele Primary School on 27 July 2017, your client left the school and reported at the circuit office for the remaining days in that week.

On 2 August 2017 the Circuit Management informed her that she should submit a school name of her choice for gainful employment at other school as a precautionary measure while the issues at Zakhele School were being investigated.

Your client agreed with Circuit Management that she would submit a school name of her choice by 3 August 2017.

Thereafter from 3 August 2017 your client never reported for duty.

The Circuit Manager tried contacting your client on several occasions for the following weeks requesting her to report for duty or provider her leave forms but she failed to do so.

Our Department therefore maintains that the leave without pay accordingly effected against your client was correctly and rightfully effected.

[19] Significantly, nothing was said about the applicant's "tender of services".

[20] A further lawyer's letter was sent to the Department on 29 August 2018. It was submitted that it was not the applicant's duty to look for a replacement school and that the Circuit Office Management had told her that the department no longer allowed reporting to the Circuit Office. The Department responded three months later (on 13 November 2018), stating that it stood by its previous letters.

[21] On 2 July 2019, the applicant went to Truro House to query her matter. She was handed a letter which informed her that she had been discharged in terms of section 14(1) of the EEA with effect from 4 August 2017. The letter is dated 16 August 2018 and addressed to her c/o Zakhele Primary School.

[22] The letter also recorded that notwithstanding a letter dated 17 April 2018, the applicant had continued to be absent. The respondent has failed to produce this letter, despite the applicant's claim that that she did not receive it.

[23] The applicant submitted to the committee that she had not been absent without permission. She had been instructed to leave her school and the Department had decreed that the period 3 August 2017 to 13 October 2017 would be regarded as unpaid leave. She had also tendered her services on 12 December 2017, before the respondent relied on s 14(1). Lastly, the applicant pointed out, she was an experienced educator with over 30 years of service.

<u>The decision of the reinstatement committee</u>

[24] In arriving at its decision, the committee reasoned as follows:[4]

In the letter from the department advising [the applicant] her of her granting the granting of leave without pay she was requested to immediately report for duty at the circuit office in order to avoid having her services terminated on persal for abscondment. [She] unashamedly refused to report for duty as advised, indicating in her text to the Circuit Manage that she was awaiting details of the hearing. [The

[4] See the minutes of their meeting.

applicant] only started to make contact with the Department through her lawyer after her salary had been frozen but still did not return to work, and when she eventually reported to Truro House, her services had already been terminated on persal.

The issues to be determined

[25] The applicant contends there was no deemed dismissal because not all the jurisdictional requirements set out in section 14(1) and the Circular were met. She further contends that the decision not to reinstate her was irrational.

[26] The respondent submits that it was sensible to remove the applicant from Zakhele School to bring stability at Zakhele and to advise her to choose the school of her choice. She refused to co-operate in the Department's attempt to place her at another school. It was only in December 2017 when her salary was frozen that she suddenly realised that she needed to offer her services, and she stopped making excuses about waiting for a hearing. But by then she had absented herself from duty without valid reason from 4 August 2017 for more than 14 successive days.

Did all the jurisdictional facts presented themselves in order for the legal fiction to take effect?

[27] I concur with the applicant's submission that they did not.

[28] It cannot be said that the applicant was absent without permission from 4 August 2017:

28.1 The applicant did not leave her employment at Zakhele School of her own accord. She was instructed by the respondent to leave.

28.2 She was then given an unreasonable instruction to solve this problem on her own and within a few days. Crucially, on 5 August 2017 the applicant's trade union reasonably tried to engage the respondent on the matter, but the respondent failed to respond.

28.3 According to the section 14(1) notice dated 16 August 2018, the applicant was deemed to have been dismissed from 4 August 2017, yet the respondent decreed that the period 3 August 2017 to 13 October 2017 would be regarded as unpaid leave.

[29] The effect of the Circular (see paragraphs 4 and 5 above) is that it constitutes an additional jurisdictional requirement which enjoins the respondent to formally place the applicant on terms and explicitly warn her about section 14(1). There is no record of such a notice. The text message to the applicant does not comply with these requirements.

[30] The purpose of section 14(2) is for the efficient removal of employees who have absconded, and is intended to be used sparingly only in cases where the employer is unaware of the whereabouts of an absent employee or if the employee has evinced a clear intention not to return to work.[5] The applicant was contactable and it cannot be said that the applicant had absconded given the communications between her, her trade union and the respondent in that period.

Was the decision of 12 November 2019 irrational and arbitrary?

[31] Even if my finding above is wrong, the decision of the committee was irrational. They failed to take into account the above and following factors which demonstrated good cause:

31.2 The applicant tendered her services in December 2017. The respondent with no explanation failed to accept the tender. There is no averment from the respondent and evidence that at the time it was not practical to reinstate her and/or that the relationship had irretrievably broken down.

31.2 There is similarly no averment and evidence that when the applicant made her reinstatement application, it was not practical to reinstate her and/or that the relationship had irretrievably broken down.

31.3 The respondent also failed to follow less restrictive procedures such as resorting to its disciplinary code and procedure, or its incapacity procedure, to determine whether the applicant committed any act of misconduct warranting dismissal.

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[5] *Member of the Executive Council for the Department of Education Western Cape Government v Jethro N.O and another* (CA10/2018) [2019] ZALAC 38; [2019] 10 BLLR 1110 (LAC); (2019) 40 ILJ 2318 (LAC) (13 June 2019).

[32] There is one further aspect which brings into question whether the respondent was entitled to rely on the applicant's purported deemed dismissal. The applicant was paid until November 2017. Such implies that even if the provisions of the deeming provisions had taken effect from 4 August 2017, being paid implies that she was reinstated and then effectively suspended without pay.[6]

Order

1. The applicant is not deemed dismissed.
2. In the event that the above order is wrong, the decision of the respondent taken on 12 November 2019 is reviewed and set aside and substituted with the following decision: the applicant is reinstated retrospective to 4 August 2017, such order to take into account any salaries paid to the applicant from 4 August 2017.
3. The respondent must pay the applicant's costs of suit.

Benita Whitcher

Judge of the Labour Court of South Africa

Appearances: None
Written Submissions:
For the Applicant: Prior & Prior Attorneys
For the Respondent: T Khuzwayo, instructed by State Attorney, KwaZulu-Natal

[6] See: *South African Medical Association obo Mutunzi v MEC: Health in the North West* (JR 2580/12, 22 May 2020) at para 20.