

SOUTH AFRICA / JUDGMENT

BIFAWU obo Ndhlovu v Commission for Conciliation Mediation and Arbitration and Others (JR 1432/21) [2022] ZALCJHB 287 (20 October 2022) [2022] ZALCJHB 287

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 1432/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 1432/21

In

the matter between:

BIFAWU
obo ANNAH NDHLOVU
Applicant
And
COMMISSION
FOR CONCILIATION,
First Respondent
MEDIATION
& ARBITRATION
COMMISSIONER
MICHAEL HOWITZ N.O.
Second Respondent
UNITY
INCOPORATED
Third Respondent

Heard:

19 October 2022

Delivered: 20 October 2022
(This judgement was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 20 October 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to review and set aside a ruling issued by the second respondent (the commissioner) in which he held that the applicant had not been dismissed on the date that the referral of an unfair dismissal dispute had been referred to the CCMA, and that her referral thus stood to be dismissed.
- [2] The applicant was employed by the third respondent on 1 October 2007 as a payroll administrator. During the lock down that commenced on 26 March 2020, the applicant was unable to present herself at work. The third respondent instructed its employees to work from home. On 18 June 2020, after the introduction of a level 3 lockdown, the third respondent's CEO instructed the applicant to return to work. The applicant questioned this instruction, which was repeated on 19 June 2020, when the applicant was advised that her continued absence would be treated as absence without leave. The applicant responded by stating that she had a genuine fear of reporting for work, on account of her pre-existing medical conditions. The applicant consulted her medical practitioner on 24 June 2020 and was booked off until 29 June 2020. Her condition worsened, and she was admitted to hospital on 30 June 2020, where she tested positive for Covid-19, and remained until 24 July 2020. After her discharge, the applicant was treated at a rehabilitation hospital until 28 August 2020.
- [3] The applicant was paid until the end of July 2020. In August 2020, she received a reduced amount, and requested the union to take up the matter of her short payment. After further correspondence, the third respondent ultimately responded by stating that the applicant had exhausted her sick leave and annual leave, and paid her contributions to medical and retirement funding from her 13th cheque. In a WhatsApp message that assumed some significance in these proceedings, the third respondent's HR manager Mr. Singo sent a message that reads "You need to make arrangements for your medical aid contributions as from 01 October 2020. We need to terminate you until such time you're able to resume work. Your position will remain open until such time reasonable you are able to resume normal work". The applicant contends that this message constituted a dismissal.

- [4] On 22 September 2020, the third respondent wrote to the applicant requesting her to return to work on 28 September 2020. On 27 September 2020, the applicant wrote to the third respondent stating that she was not absent from work but that she was sick, still on oxygen at home. On 6 October 2020, a trade union official representing the applicant wrote a letter to the third respondent demanding clarification on the decision not to pay salary, medical aid and pension contributions, as well as the termination of the applicant's employment.
- [5] On 20 October 2020, the union referred a form 7.11 to the CCMA, claiming that the applicant had been unfairly dismissed.
- [6] On 15 March 2021, the third respondent wrote a letter to the applicant recording an adjustment to her salary for the period March 2021 to February 2022.
- [7] The matter was initially scheduled for a con/arb process and rescheduled for an arbitration hearing on 9 June
2021. At the arbitration hearing,
- [8] During April 2021, the applicant was charged with various counts of misconduct.
- [9] At the outset of the hearing, the commissioner was required to make a ruling on whether the applicant had been dismissed with effect from 1 October 2020. The applicant testified, as did the applicant's union representative.
- [10] The commissioner's award records the third respondent's contention that the applicant had not been dismissed on 1 October 2020, and that the referral to the CCMA was premature. He also records the applicant's evidence that she considered that she had been dismissed with effect from 1 October 2020, and the third respondent's contention that just because it had stopped paying the applicant while she was on extended sick leave, that was no indication that she had been dismissed. The arbitrator had regard particularly to the salary adjustment advice addressed to the applicant, and the letter of dismissal dated 21 April 2021.
- [11] The applicant contends that the commissioner committed gross misconduct in that he made a finding not based on the material that served before him, and that he exhibited bias. The applicant's founding affidavit does not clearly articulate the basis for review and indeed, devotes much to the disaster management acts and regulations, and the application of the LRA to persons incapacitated on account of Covid properly is a defence against a claim of unfair dismissal. All of these averments are irrelevant for present purposes. The only issue in dispute for present purposes is the existence of a dismissal, a matter where the applicant bore the onus of proof and where the test for review does not extend, as the applicant fails to appreciate, to the reasonableness rather the correctness of the commissioner's award. Put another way, the test is a factual one and the issue for the review court is whether or not the arbitrator's ruling is correct. The correctness threshold applies to findings on matters of jurisdiction, and where an arbitrator is alleged to have committed an act of gross irregularity, whether latent or patent. Jurisdictional

issues

include territorial jurisdiction, rulings on whether the applicant is an 'employee' as defined, and the existence of a dismissal. In this category, the arbitration process by definition admits only a single (correct) answer.

- [12] The first, the record discloses that the commissioner fully appreciated that the existence of any dismissal on 1 October 2020 was a jurisdictional question, and that the applicant had the onus to prove the existence of a dismissal on that date. In her evidence, the applicant relied solely on the WhatsApp message referred to above, which she said was received on 18 September 2020, when she noticed that she had not been paid. The applicant states and evidence that '... It shows me that I was terminated...'

Under cross-examination, when pressed to explain why she thought that she had been dismissed on 1 October 2020, the applicant said that '... According to my knowledge if you say I must make an arrangement to pay my medical aid contribution it means that I am no longer your employee I must pay for myself.' The applicant was also pressed to explain why she chose only to read and rely on a WhatsApp message in the face of correspondence addressed to her during the course of September 2020 and in particular, why she thought that she had been dismissed in the absence of a formal letter of termination of employment. In regard to the correspondence addressed to her after 1 October 2020, and in particular, the notice of the adjustment in her salary, the applicant's response was that this was simply a cover-up by the third respondent. When pressed by the commissioner to explain she thought that she had been dismissed from 1 October 2020, the applicant again responded that she had not been paid, and that in her view, notice that her medical aid and retirement contributions would be recovered from her 13th cheque meant that she had been dismissed. In response to a question to the effect that the third respondent had continued to pay the applicant medical aid contributions, despite the WhatsApp message sent in September, the applicant could not dispute that she had been advised only in May 2021 by the medical aid that her subscriptions were outstanding. The applicant could also not explain why if as she contended that she had been dismissed in October 2020, the third respondent continued to pay her medical aid contributions until May

2021. Under cross-examination, the applicant was shown a letter of dismissal which recorded that she had been found guilty on five counts of misconduct and that following a full inquiry, the contract of employment had been terminated. The letter dated 21 April 2021. The only response by the applicant was that this was a cover-up on account of her having referred a dispute to the CCMA in October 2020.

- [13] The commissioner then summarized the evidence adduced by the applicant and recorded to the third respondent's position as reflected in her cross-examination. In essence, the third respondent had put to the applicant that it had paid her medical aid subscriptions through to the end of April 2021, a period of seven months after the applicant stated that she had been dismissed, a matter not disputed by the applicant who acknowledged that she had medical aid cover until May 2021; the letter sent to the applicant on 15 March 2021 regarding her

salary adjustment in the form of a 6% salary increase; the applicant's dismissal on 21 April 2021 for misconduct; and the letter produced by the third respondent addressed by the applicant's doctor on 26 January 2021, stating that she would be fit for duty on 1 March 2021.

- [14] The definition of 'dismissal' in section 186 (1) of the LRA includes the termination of employment by the employer, with or without notice. This has been interpreted to mean that it is necessary for there to be a termination by the employer by engaging 'in an act which brings the contract of employment to an end in a manner recognized as valid by the law'. In cases of ambiguity, what must be determined is the existence or otherwise of 'a clear and unambiguous intention not to go on with the contract of employment' (see *Council for Scientific and Industrial Research v Fijen* [1996] 6 BLLR 685 (A)). In *Ouwehand v Hout Bay Fishing Industries* (2004) 25 ILJ 731 (LC), the court noted that it was incumbent on an employee claiming to have been dismissed to establish, on a balance of probabilities, 'some overt act by the employer that is the proximate cause of the termination of employment'.
- [15] The commissioner was correct to find that on a balance of probabilities, the applicant's evidence was insufficient to disclose any overt act by the third respondent that had the consequence of a termination of her employment. The only evidence adduced by the applicant in this regard is the WhatsApp message which does not disclose an unequivocal, overt act that constitutes the termination of the applicant's employment. The applicant's subjective view that notice to her of the third respondent's intention to discontinue paying her medical aid contribution constituted a dismissal is of no consequence. The test is objective and what must necessarily be brought into account of the four factors mentioned by the commissioner – the fact that the third respondent continued to pay the applicant medical contributions for a further seven months and her acknowledgment of this fact; the medical certificates submitted by the applicant to the third respondent during March 2021, the letter addressed to the applicant by the third respondent during March 2021 advising her of a favourable adjustment in her salary; and the letter of termination of employment dated 21 April 2021. To the extent that the applicant wishes four of these away on the basis of a conspiracy theory or development of a cover-up, there is nothing in the record to sustain this view. It is no more than a misguided assumption made by the applicant and the union representatives acting on her behalf.
- [16] In short, the applicant has failed to make out a case for review and the application stands to be dismissed.

Order

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Union official

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