

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1144/20

In the matter between:

MAFIKA EDWIN KHUMALO

Applicant

and

MEC: MPUMALANGA DEPARTMENT OF EDUCATION

Respondent

Heard: 6 July 2023

Delivered: 21 February 2024

JUDGMENT

MAKOPO, AJ

Introduction

[1] Mr Mafika Edwin Khumalo (the Applicant) was employed by the Department of Education Mpumalanga (the Respondent) as an Educator. He was deemed to be dismissed in terms of Section 14(1)(a) of the Employment of Educators Act¹ (EEA).

[2] The Applicant brings a review application, to set aside his dismissal on the grounds that his dismissal is unlawful.

[3] The Applicant was represented by Mr Bayi and the Respondent was represented by Advocate M Ngobeni–Moyana.

¹ Act 76 of 1998.

[4] On the 4th of July 2023, the Respondent requested a postponement on the basis that the Respondent's Attorneys had withdrawn and Advocate Ngobeni was now instructed by the State Attorney to represent the Respondent. I declined to hear the postponement as it was clear that the reasons advanced were not sound, instead, I stood the matter down to the 6th of July 2023, at 14h00, in order for the counsel of the Respondent to read the papers and prepare for arguments.

4.1 On the 6th of July 2023, counsel for the Respondent indicated she was indeed ready to proceed.

Background facts

[5] The review turns on two aspects:

5.1 Whether the decision to dismiss the Applicant is reviewable or in the alternative; and

5.2 Whether any decision was made at all.

[6] Both parties required condonation of the Applicant for the late filing of the review and the Respondent for the late filing of the answering affidavit.

[7] I ruled that the matter could proceed on the merits without the need to deal with the condonation applications as the matter was in fact ready in this respect.

[8] On the merits of the matter, the Applicant seeks a review in terms of Section 158(1)(h) of the Labour Relations Act² (LRA).

[9] It is common cause that the Applicant had absented himself from his employment from the 4th of December 2018 until the 27th of February 2019, without notifying his employer of the reasons for being absent from his employer.

² Act 66 of 1995, as amended.

- 9.1 On the 27th of February 2019, at about 16h00, the Applicant received a call informing of the hearing at the Reginal Office, the following day at 08h30.
- 9.2 The Applicant, attended the meeting and made a presentation to the Chairperson as contemplated in Section 14(1)(a) of the EEA.
- 9.3 At that meeting the Applicant presented a medical certificate, indicating that he was booked off work from the 11th of December 2019 to the 2 April 2019 (this medical certificate was not included in the bundles before this Honourable Court).
- 9.4 The recommendation from the Chairperson, according to the Applicant was only communicated to him on the 21st of May 2019.
- 9.5 This assertion goes against annexures 'LH1' and 'LH2' found on pages 51 and 52 of the paginated papers.

[10] I enquired from Mr Bayi if he had sight of the medical certificate as filed or presented to the Chairperson of the meeting, he indicated that he also had not had sight of that document, there were no details given where the Applicant obtained treatment i.e, names of the hospital or treating doctors of any document supporting his reasons from being absent from work.

10.1 In *Member of the Executive Council of the Department of Education Western Cape Government v Jethro N.O and Another*³, a decision of the Labour Appeal Court dealt with the provisions of Section 14(1) and (2) of the EEA:

'[41] A letter informing an employee of his or her deemed discharge by operation of law under section 14(1) of the EEA involves no decision or exercise of a public power, and thus cannot constitute administrative action; but a decision taken under section 14(2) of the EEA constitutes an exercise of a statutory power and the performance of a public function by the Department. It is a decision of an administrative nature (as opposed to an executive, legislative or judicial nature), which is

³ [2019] ZALAC 38; (2019) 40 ILJ 2318 (LAC).

informed by policy considerations regarding efficiency, and may adversely affect the rights of persons outside the Department, such as the respondent. The decision cannot be challenged under Chapter VIII of the LRA because it does not constitute a dismissal as defined in section 186(1) of the LRA - the dismissal having been deemed and the decision in terms of section 14(2) of the EEA being concerned solely with a request for reinstatement on good cause. The decision likewise cannot constitute an unfair labour practice under section 186(2) of the LRA because it does not relate to the rights and interests protected by that remedy. In the premises, a decision by the Head of Department, charged with the exercise of a statutory discretion to reinstate on good cause shown by an employee deemed to have been discharged, constitutes administrative action reviewable in terms of PAJA. The Labour Court accordingly did not err in its finding in that regard.'

[11] The Applicant did not put me in a position where I could come to his aid to be able to determine that indeed he had shown good cause for being absent from his employment from the period of the 4th of December to the 27th of February 2019.

[12] The Applicant argued that there was no decision taken by the Applicant, and relied on the Public Service Act⁴ (PSA), the Applicant's submissions and reliance on the PSA are misguided based on the papers filed and submissions made at the hearing of the matter.

[13] It is clear that the relevant legislation in this matter is the EEA as the Applicant had absented himself from his employment for a period of almost 2 months.

[14] The Applicant was invited by the Respondent to make representation, the offer was declined at the hearing of the matter and counsel for the Respondent argued that in the event that the Applicant persists that there was no decision that was made, the Applicant cannot succeed in the review.

⁴ Act 103 of 1994.

[15] The simple point and on the common cause, the facts are that the Applicant had absented himself from his employment from the 8th of December 2018 until the 27th of February 2019, a meeting was held after he received the notice in terms of Section 14(1)(a) of the EEA, the Chairperson found that he had not shown good cause, the Applicant argues that the decision to dismiss him can only be taken by the Respondent.

[16] Section 14 of the EEA is headed: "*Certain educators deemed to be discharged*". It provides as follows:

- '(1) An educator appointed in a permanent capacity who-
 - (a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
 - (b) while the educator is absent from work without permission of the employer, assumes employment in another position;
 - (c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or
 - (d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position, shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-
 - (i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or
 - (ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.
- (2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) 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 re-instatement 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.'

[17] In *Hayes v National Minister of Police N.O and Others*⁵, Moshwana J discusses Section 158 (1)(h) of the LRA. In paragraph 20, it was held that:

‘[20] An applicant for review is obligated to provide a Court of review with the material that served before the decision maker, particularly where the rationality of the decision is impugned. Otherwise, how can a Court of review assess rationality or otherwise in the absence of the material that served before the decision maker?’

[18] In *NEHAWU obo Ngomane v Department of Employment and Labour and Others*⁶, Van Niekerk J deals with the provisions of Section 158(1)(h), in terms of which the court is empowered to review any decision taken by the state in its capacity as employers, on any grounds that have permissible in law.

[19] He argued that there was no decision therefore, his dismissal is unfair (the Respondent’s counsel agreed with the submission from the Applicant).

[20] I am unable to assist the Applicant and I indicated I was not provided with the documents relevant to the decision.

[21] In the result, I find the Applicant has failed to make out a case for review in the papers before me.

[22] As a result, I make the following order.

Order

1. Accordingly, the application for review is dismissed.
2. There is no order as to costs.

N Makopo

⁵ [2023] ZALCCT 23; [2023] JOL 59307 (LC).

⁶ [2022] ZALCJHB 45; [2022] JOL 52963 (LC).

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Bayi

Instructed by: Bayi Attorneys

For the Respondent: Adv M Ngobeni – Moyana

Instructed by: State Attorney

LABOUR COURT