



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1552/2014

In the matter between:

NEHAWU obo D M

Applicant

And

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

**DEPARTMENT JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

Heard: 17 July 2018

Delivered: 24 August 2018

Summary: The applicant seeks to compel the respondent to consider representations made in terms of section 17(3)(b) of the Public Service Act after the applicant was deemed dismissed by the operation of law.

JUDGMENT

SEDILE, AJ**Brief background**

- [1] The applicant was employed as an administrative clerk since 1975 and later a prosecutor for the maintenance section in 2003 in the Johannesburg Magisterial district. The applicant was demoted from a Maintenance Officer without any explanation thereto to the lower position of an Administrative Clerk.
- [2] During the early months of 2006, the applicant suffered from depression as a result of the stress related to his demotion by the respondent and never reported for duties during the period he was hospitalised.
- [3] The applicant was admitted at Vereeniging Medi-Clinic for three weeks and was further admitted to Vista Clinic on 17 September 2008 and for the period of 25 September 2008 until 3 October 2008 and again on 26 November 2008. During the period that the applicant was hospitalised, he has been in contact with his immediate superior Mrs Sepuru.
- [4] On 9 December 2008, the respondent issued a letter of dismissal in terms of section 17(5)(a)(1) of the Public Service Act¹ (PSA), due to the fact that the applicant absented himself from duty without prior permission for more than one calendar month. The applicant's discharge date was with effective from 2 December 2008.
- [5] During December 2008, a notice of appeal / representation was lodged with the respondent and the respondent replied to the request on 29 July 2013 and promised to revert back to the applicant's representation letter and on 18 August 2013, the respondent indicated that the application for the applicant was in progress and that the applicant will be informed once the outcome has been received from the Chief Operating Officer of the respondent.

¹ 103 of 1994, as amended.

- [6] To date the respondent failed to respond to the applicant's representation made in terms of the deemed dismissal notice.

Submission by the applicant

- [7] The applicant hereby seeks to compel the respondent to consider the representations made in terms of section 17(3)(b)² of the Public Service Act.

Analysis of the matter

- [8] In order for an employee to be deemed dismissed in terms of s 17(3)(a) of the PSA, he / she must have absented himself / herself from official duties without permission of the employer or the HOD for a period exceeding one calendar month.
- [9] Since the deemed dismissal takes effect by operation of law and not by any act on the part of the employer, the jurisdictional requirements prescribed by the legislature in s 17(3)(a) of the PSA must be met before an employee can be said to be deemed dismissed.
- [10] The applicant is therefore entitled to make representations to the Minister as prescribed in terms of s 17(3)(b) of which the Minister is already in possession of such representations made by the applicant.

- [11] In light of the above the following order is made:

Order

² 17. **Termination of employment**

- (3) (b) If an employee who is deemed to have been so dismissed, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executive authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that of the employee in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.

1. The respondent is ordered in terms of s 158(1)(a)(iii) of the LRA, to consider the representations made by the applicant and to respond thereto to the applicant within 30 days from the date of this judgment;
2. There is no order as to costs.

P. Sedile

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: F. Erasmus of Frans F. Erasmus Attorneys

For the Respondents: K. Pheto

Instructed by: State Attorney Johannesburg

LABOUR COURT