



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Case No: PR159/17

In the matter between:

SINDISWA SYLVIA JORDAAN

Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

JONATHAN GRUSS

Second Respondent

DEPARTMENT OF EDUCATION, EASTERN CAPE

Third Respondent

Heard: 20 March 2018

Delivered: 20 March 2018

Edited: 22 June 2018

EX TEMPORE - JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside a ruling made by the Second Respondent under case number PSES145-17/18EC.
- [2] In his ruling, the Second Respondent, to whom I shall refer as the Arbitrator, correctly recorded that the issue that he was required to decide whether the Applicant should be granted condonation for the late referral of an unfair dismissal dispute to the bargaining council.
- [3] The background to the issue is recorded in the ruling under review and I do not intend to repeat all of the relevant facts, save to say that the employment of the Applicant was terminated in accordance with the provisions of Section 14 (2) of the Employment of Educators Act, 76 of 1998. That section provides that if an educator who is deemed to be dismissed in terms of subsection (1) at any time reports for duty, the employer may on good cause shown approve the reinstatement of that educator into the former post or any other post, on such conditions that the employer may determine.
- [4] In the present instance, on 14 March 2017, the Superintendent-General for Education: Eastern Cape advised the Applicant that her dismissal had been confirmed in terms of Section 14 (1) on the basis that he was not convinced that the Applicant had shown cause for her unauthorised absence.
- [5] The subsequent referral of an unfair dismissal claim was late. The Applicant had until the 27th of April 2017 to refer her dispute. The dispute was referred only on the 25th of May. The referral was therefore 28 days late; a degree of lateness that the Arbitrator considered serious.

- [6] The Arbitrator noted that the Applicant had not explained the delay between her receipt of the letter on 28 March 2017 refusing the request for reinstatement, and the referral of her dispute on the 25th of May 2017. Be that as it may, the primary basis on which the Arbitrator decided to refuse condonation is in relation to the Applicant's prospects of success, or more accurately the lack of them.
- [7] What the Arbitrator held was that a termination of employment in the circumstances envisaged by Section 14 (2) could never amount to a dismissal for the purposes of the Labour Relations Act and therefore that a claim for unfair dismissal was simply not competent.
- [8] The Arbitrator referred to the matter of *De Villiers v Head of Department: Education Western Cape* (2010) 31ILJ 1377 (LC) and also (2009)30 ILJ 1722 (C). In that instance, the court confirmed that where a discharge is deemed by statute to have occurred (such as provided for in Section 14 (1) of the Employment of Educators Act), this did not constitute a "dismissal" as defined in Section 186 (1) of the LRA.
- [9] In other words, where the employment of an educator is terminated, as I have indicated, in the circumstances contemplated by Section 14, this is a termination of employment by operation of law and not a dismissal for the purposes of the LRA. The employee therefore has no claim for unfair dismissal. The employee's proper right of recourse is a review in terms of Section 158 (1) (h) of the Labour Relations Act.
- [10] On the basis that, ultimately, the bargaining council had no jurisdiction to entertain any unfair dismissal claim, the Arbitrator concluded that the Applicant had no prospects of success and accordingly refused to condone the late referral of the dispute.

[11] To the extent that the Applicant in this present instance submits that the Arbitrator committed a gross irregularity in failing to consider that the Third Respondent did not conduct a disciplinary hearing before dismissing the Applicant, that he failed to apply his mind to the facts before him, that his ruling bore no rational connection to the facts on which the ruling is based, there is no merit in any of these submissions. All of them overlook the principle that the termination of employment in the present case was not a termination at the initiative of the employer rather than a termination by operation of law.

[12] In those circumstances I cannot fault the Arbitrator's conclusion that the application for condonation should be refused on the basis primarily of the lack of any prospects of success. The application to review and set aside the Arbitrator's refusal to grant condonation thus stands to be dismissed.

[13] The order I make is thus the following:

Order

1. The application is dismissed.
2. There is no order as to costs.

VAN NIEKERK J
Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Mr Madokwe

Instructed by:

(not available)

For the respondent:

(not available)

Instructed by:

(not

LABOUR COURT