



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 2790-21

In the matter between

NATIONAL HEALTH LABORATORY SERVICES

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

NAMISILE KHESWA N.O

Second Respondent

HAPPY KGOTLENG MOLOTSI

Third Respondent

Heard: 12 December 2024

Delivered: 07 May 2025

Summary: Penalty review of Arbitration Award – The commissioner’s decision to reinstate the employee without backpay and to impose a 12-month final written warning is reasonable, given that the employee’s failure to physically return to work during the COVID-19 pandemic arose from his status as a highly vulnerable individual.

JUDGMENT

SWARTZ, AJIntroduction

[1] This is an application to review and set aside the arbitration award dated 8 December 2021, issued under the first respondent's (CCMA) case number GAJB23284-20 (the award), by the second respondent (the commissioner), in terms of section 145 of the Labour Relations Act¹ (LRA).

[2] The commissioner found the dismissal of the third respondent (Happy Kgotleng Molotsi – Mr Molotsi) substantively unfair and ordered reinstatement without backpay and subject to a final written warning for 12 months.

[3] This is a penalty review wherein the applicant, National Health Laboratory Service (the NHLS), seeks an order in terms of which the award is reviewed, corrected, and set aside, alternatively, that the dispute is remitted back to the first respondent for adjudication by another commissioner.

[4] The charges brought against Mr Molotsi, which culminated in his dismissal, arose at the height of the COVID-19 pandemic. This is a material consideration, as it serves to contextualise the factual matrix of this matter.

Factual background

[5] The factual milieu is mostly common cause.

[6] Mr Molotsi was employed by the NHLS on 1 November 2016. At the time of his dismissal, he held the position of IT Project Manager. Mr Molotsi was dismissed on 28 October 2020.

¹ Act 66 of 1995, as amended.

[7] On 9 September 2020, Mr Molotsi faced a disciplinary hearing on four charges of misconduct for (i) Absence without authorised leave; (ii) Failure to follow lawful instructions; (iii) Failure to follow the NHLS's Risk Assessment Outcome; and (iv) Failure to follow the NHLS Code of Conduct and Employment Contract.

[8] The national lockdown in South Africa, declared due to the COVID-19 pandemic, began on 27 March 2020, following a state of disaster declaration on 15 March 2020.

[9] Following the lockdown, the NHLS allowed its employees to work from home for several weeks, until 1 June 2020, when all employees were instructed to return to the office in person. At the end of June 2020, Mr Molotsi was diagnosed with advanced chronic kidney disease and hypertension, as confirmed by Dr Mashabane's medical certificate dated 6 July 2020. Consequently, he underwent a urological procedure on 3 July 2020 and was placed on sick leave until 13 July 2020.

[10] On 9 July 2020, Mr Molotsi submitted a certificate of illness from Dr Mashabane, referred to above, to Ms Keitumetse Boikanyo (Ms Boikanyo) working in the Human Resources (HR) department of the NHLS. This certificate stated *inter alia* that:

'Mr. HK Molotsi has been under my care for a period of 1 month. He suffers from hypertension and advanced chronic kidney disease. He is currently being considered [for] chronic renal replacement therapy.

Based on his underlying co-morbid conditions, it is my professional opinion that Mr. HK Molotsi is a vulnerable employee in terms of the guidance on vulnerable employees and workplace accommodation in relation to COVID-19 pandemic-19.

I therefore strongly recommend that he be allowed to work from home pending company policy and criteria.'

[11] On the same day, Ms Boikanyo responded to Mr Molotsi stating *inter alia* that: 'Please be advised that as per the Dr's note, their recommendation would be dependent on the Company Policy and criteria.'

There's a risk assessment that needs to be done by you and your Manager to determine the risk / danger that you might be exposed to by physically being at the office. The application will all depend on the scoring of that assessment. Dear Sister Magasa and Sister Potgieter, may you kindly assist with the risk assessment form and advise further.'

[12] The risk assessment form was duly sent to Mr Molotsi and his line manager, Ms Marcia Kwapa (Ms Kwapa). The NHLS required them to determine Mr Molotsi's appropriate exposure risk group. Based on this assessment, a risk score would be calculated, which would then inform the decision to be made. On Friday, 10 July 2020, Ms Kwapa informed Mr Molotsi that they would complete the risk assessment exercise together on Monday, 13 July 2020, the day he was due to return to work following the conclusion of his sick leave.

[13] On 13 July 2020, Mr Molotsi did not return to work, asserting, *inter alia*, that he was unable to do so due to his comorbidities. He further contended that other employees without comorbidities were working from home, and in any event, he was able to perform all his duties remotely.

[14] A series of emails exchanged between Mr Molotsi and either Ms Boikanyo or Ms Kwapa between 13 and 23 July 2020 reflects that:

14.1 Mr Molotsi was unhappy to have Ms Kwapa evaluate his risk assessment;

14.2 Ms Kwapa was dissatisfied with his failure to return to work and insisted that he do so, pending the outcome of his risk assessment and the NHLS's remote working policy; and

14.3 Mr Molotsi contended that the NHLS's protocol regarding working from home was not aligned with Annexure A of the COVID-19 Occupational Health and Safety Directive, that he was being harassed into returning to work and that other employees were being allowed to work from home without undergoing a risk assessment.

[15] Thereafter, the union and the Occupational Health and Safety (OHS) committee got involved, and Mr Molotsi was instructed to comply with undergoing his risk assessment.

[16] On 29 July 2020, Ms Kwapa sent an email to Mr Molotsi at 8:18 am demanding that he physically return to work by 10:00 am that day, failing which she would *'take the necessary action in line with NHLS Conditions of Employment'*.

[17] On 4 August 2020, at 3:40 pm, a Zoom meeting request was sent by the NHLS to Mr Molotsi for a Zoom meeting at 9:00 am on 5 August 2020, the subject being *"Risk Assessment – Mr Happy Molotsi"*. At 5:59 pm on the same day, Mr Molotsi responded to all the recipients on the Zoom meeting request, informing them *inter alia* that:

17.1 He was unavailable for the meeting as he had already been scheduled to attend a standing meeting;

17.2 He stated that he could not be a party to conducting the risk assessment himself, as it could only be carried out by the nurse after reviewing the input data he had already provided to the HR and OHS committee. Accordingly, there was no need for a meeting to complete the risk assessment;

17.3 He stated that he had submitted his medical documentation to HR, and that HR had not indicated whether any further information was required by the risk assessor; and

17.4 He criticised the role of the HR department in his risk assessment process, suggesting that it had not been handled appropriately or transparently.

[18] As noted in his email dated 5 August 2020, Mr Molotsi did not attend the scheduled risk assessment meeting held via Zoom. As a result, the assessment proceeded in his and Ms Kwapa's absence, without the benefit of all relevant information. Nevertheless, the assessment was completed on the same day, and Mr Molotsi was classified as a medium-risk employee, scoring a 6. He was subsequently informed that, based on this outcome, he was required to return to the office and resume his duties on site.

[19] Following receipt of the risk assessment outcome on 5 August 2020, Mr Molotsi sent an email to Nurse Magasa, who had led the assessment, and to the NHLS CEO, Mr Karmani Chetty (Mr Chetty). In this email, he stated his intention to invoke clause 49 of the Direction issued by the Minister of Employment and Labour in terms of Regulations 4(10) (the Regulations). He also expressed concern that contracting COVID-19 could be fatal due to his medical condition, stating that he was in the '*...last stage of kidney disease and also [had] uncontrolled diabetes and hypertension with heart arrhythmia*'. Mr Molotsi was subsequently booked off on sick leave from 6 to 7 August 2020. Despite the outcome of the assessment, he continued to work from home remotely.

[20] On 27 August 2020, Mr Molotsi received a letter from the NHLS Employee Relations Specialist, which, *inter alia*, issued an ultimatum requiring him to report for duty by no later than the close of business on 31 August 2020. The letter stated that failure to comply would be regarded as wilful intent and a repudiation of his contract of employment, resulting in the termination of his services without further correspondence. Mr Molotsi contends that he was not paid for the month of August 2020.

[21] On 31 August 2020, Mr Molotsi was served with a notification to attend a formal disciplinary hearing scheduled for 9 September 2020. The chairperson of the hearing found him guilty on all four charges but recommended that the NHLS offer appropriate support through the Employee Assistance Programme (EAP) within seven days of the outcome. It was further recommended that, should Mr Molotsi refuse the assistance of the EAP, his employment be terminated.

[22] Mr Molotsi informed the EAP consultant that he did not agree with any aspects of the referral, except those relating to his health. He expressed the view that the process was punitive.

[23] On 22 October 2020, the EAP consultant communicated the above to the NHLS and requested that further engagements be held. However, no such engagements took place, and Mr Molotsi was dismissed on 28 October 2020.

[24] Mr Molotsi thereafter referred an unfair dismissal dispute to the CCMA.

NHLS's submissions

[25] The founding affidavit identifies the ground of review as the commissioner's conclusion that, despite finding Mr Molotsi guilty of misconduct, dismissal was too severe a sanction and therefore inappropriate. The NHLS contends that this conclusion is unreasonable. It further argues that the commissioner failed to give due consideration to its disciplinary policy, which expressly states that refusal to comply with reasonable instructions may warrant summary dismissal.

[26] The NHLS bases this ground in its founding affidavit, *inter alia*, on the assertion that Mr Molotsi:

26.1 Wilfully refused to attend the risk assessment on 5 August 2020 despite being advised of the need for such an assessment;

26.2 Deliberately ignored the NHLS's lawful and reasonable instructions to return physically to the workplace and undergo the assessment;

26.3 Even after the disciplinary outcome persisted in refusing to comply with the outcome's recommendations of attending the EAP;

26.4 As he attended the disciplinary hearing in person and returned to work on 31 August 2020, following the NHLS's repudiation letter, this implied that he was physically capable of attending the workplace;

26.5 He was in breach of clauses 1.2 and 6.2.3 of his contract of employment; and

26.6 He showed no regret and had a negative attitude towards his line manager.

Mr Molotsi's submissions

[27] In the answering affidavit, Mr Molotsi alleges that the award is reasonable in that the commissioner duly considered the totality of the circumstances and the inappropriateness of the sanction of dismissal. The commissioner's award is

rationally connected to the evidence and is reasonable, taking into account the components of rationality and proportionality.

[28] In the answering affidavit, Mr Molotsi's version is *inter alia* that:

28.1 He did not refuse the EAP offered by the NHLS and recommended by the chairperson, however, this recommendation was not appropriate as this was not a performance issue, and Ms Mata from the NHLS conceded that the NHLS did not follow up with the EAP's consultant's recommendation to find a way forward;

28.2 The NHLS disregarded clauses 17 and 18 of the Regulations gazetted on 4 June 2020;

28.3 He had clearly communicated to the NHLS that he did not feel safe returning to work in person, as any exposure to the virus could have been fatal for him. Nevertheless, the NHLS disregarded his concerns and persisted inappropriately in requiring him to attend a risk assessment;

28.4 It is denied that he refused to undergo a risk assessment and the sister who attended the risk assessment was not qualified to do so;

28.5 The nature of his role did not require his physical presence in the workplace, and he was able to perform all his duties from home. His conduct was not detrimental to the NHLS. Furthermore, the NHLS demonstrated a lack of empathy for his medical condition during the COVID-19 pandemic and could have reasonably accommodated him, which may have led to a different outcome;

28.6 He did not refuse to attend the risk assessment on 5 August 2020. Rather, on 4 August 2020, he informed the NHLS that he was unavailable at the scheduled time due to a prior work commitment and outstanding queries. Despite this, the NHLS proceeded with the assessment in his absence without addressing his concerns or rescheduling the meeting; and

28.7 The NHLS ignored clauses 48, 49, 53 and 54 of the Regulations, and he should not have been disciplined, let alone dismissed, for refusing to physically attend at the workplace.

[29] Accordingly, the award was reasonable, and the review application ought to be dismissed.

This Court's analysis of the evidence

[30] This matter, and the events that unfolded between June 2020 and Mr Molotsi's dismissal on 28 October 2020, must be understood in the context of the height of the COVID-19 pandemic, a period during which the global population was deeply traumatised and gripped by fear of infection. This context is critical to my analysis.

[31] The analysis set out below is based on the transcript and the arbitration bundle, and is distinct from my evaluation of whether the award is susceptible to review.

[32] Having carefully considered and analysed the transcript and the arbitration bundle, it is, in my view, evident from the record that Mr Molotsi harboured a genuine fear of returning to the workplace during the height of the COVID-19 pandemic, due to his multiple comorbidities. I am further of the opinion that the NHLS acted irrationally and unreasonably in refusing to permit him to work from home, and that his dismissal was unfair. This opinion is based on the evidence contained in the transcript and arbitration bundle.

Mr Molotsi's medical condition

[33] Mr Molotsi testified that he suffered from stage 5 renal failure (the most severe stage). This is where his kidneys are nearing or at complete failure, and dialysis or a transplant may be necessary. He further testified that such a condition destabilises the heart and the lungs. Over and above this condition, he was also diagnosed with an irregular heartbeat, diabetes, stones in the bladder and hypertension.

[34] Mr Molotsi's medical conditions were never disputed by the NHLS. The arbitration bundle contained medical certificates from Dr Jankelow (cardiologist), Dr Bielu (general practitioner), Dr Glocer (Urologist) and Dr Mashabane (specialist

physician/nephrologist²). It was common cause that he had a urological procedure on 3 July 2020.

[35] During the disciplinary hearing on 9 September 2020, the chairperson even remarked that '*...he looked like he was in pain and he looked very unhealthy the way I looked at him, I thought maybe he needed to be helped*' and '*...he didn't look healthy, he sort of looked a bit, at a person that doesn't look as if he's actually healthy...*'. Further, Ms Kwapa, Mr Molotsi's line manager, conceded during cross-examination that he was a highly vulnerable employee.

[36] Throughout his evidence, Mr Molotsi repeatedly emphasised that he was afraid returning to work in person would expose him to the risk of contracting COVID-19. Given his various comorbidities, he believed this would likely result in his death. It was clear that he held a sincere and deeply held belief that returning to the workplace would be fatal, a view he expressed unequivocally throughout the arbitration.

Mr Molotsi's job at the NHLS

[37] Mr Molotsi was the NHLS's IT Project Manager. Since the hard lockdown, which commenced on 27 March 2020, he worked from home, and after he had an operation on 3 July 2020, he continued to work from home. As he stated, '*... we still had emails, we could have telcon meetings, she could contact the clients, everything was working as per, as I was in the office... So there was nothing that changed, everything was working fine and there were no issues*'.

[38] Unlike the laboratory employees, there was no operational need for Mr Molotsi to be physically present at the workplace. During cross-examination, Ms Kwapa, despite being the one demanding Mr Molotsi physically come back to work and that disciplinary action be taken against him, conceded that the IT department is

² A medical doctor who specialises in the diagnosis, treatment, and management of diseases and conditions affecting the kidneys.

a functional department and that in functional departments, core people can work from home.

[39] Apart from the period during which he was booked off sick, he consistently performed all his duties remotely, and it is common cause that there were no concerns regarding the quality or completion of his work. Despite this, the NHLS unilaterally deducted his salary in August and October 2020. Furthermore, his substantial accrued leave was not taken into account.

[40] Mr Molotsi contended that other NHLS employees, such as *inter alia* 'Debra' and 'Stacey', were working from home and that they had not been required to undergo any risk assessments. He contended that he was being treated unfairly and differently by having his line manager, Ms Kwapa, demanding that he physically return to work. These allegations were not contested by the NHLS. The only feedback given to Mr Molotsi in this regard was from Ms Boikanyo from HR on 13 July 2020, when she stated in an email, '*I am not sure about the arrangement with the below employees. I am/was not involved in their working arrangements, I was not consulted*'.

The risk assessment

[41] The transcript clearly reflects that Mr Molotsi did not agree with the necessity of a risk assessment. His understanding was based on information provided by Nurse Aida prior to the NHLS requiring him to undergo such an assessment. According to her, a doctor's recommendation was sufficient for the NHLS to allow him to work from home. Nurse Aida explained that a risk assessment was only necessary where an issue needed to be identified. However, if an employee had already obtained a medical report recommending remote work, no further assessment was required, as the doctor's report served as adequate proof. She further advised that, should there be any doubt about the report, the NHLS had the option of referring the employee to a doctor of its own choosing for further evaluation.

[42] The transcript makes it clear that the NHLS maintained the position that Mr Molotsi could only work from home if a risk assessment was conducted and the outcome supported such an arrangement. This assessment required the participation of both the employee and the line manager. Although Ms Kwapa initially insisted that Mr Molotsi present himself in person for the assessment with her, she later conceded during cross-examination that the assessment did not, in fact, need to be conducted face-to-face.

[43] On 5 August 2020, the risk assessment was conducted via Zoom without the participation of either Ms Kwapa or Mr Molotsi, in direct contravention of the risk assessment policy, which required the involvement of both parties. It is evident from the email correspondence that Mr Molotsi did not refuse to attend the assessment scheduled for that date. Rather, on 4 August 2020, he informed the participants that he was unable to attend due to a prior commitment and enquired whether any further information was required from him. This suggests that he was under the impression the assessment would be postponed. The participants proceeded with the meeting without informing Mr Molotsi that it would go ahead regardless, and no request for additional information was made. Notably, during cross-examination, Nurse Magasa admitted that she had not read Mr Molotsi's emails sent on 4 August 2020.

[44] Dr Chin, a medical practitioner employed by the NHLS, explained that the risk exposure to COVID-19 and being classified as a vulnerable employee are two separate and distinct considerations. He testified that exposure to COVID-19 poses a significantly heightened risk to vulnerable employees, potentially resulting in hospitalisation or even death. Dr Chin further clarified that an employee who is able to perform their duties, regardless of vulnerability, is not regarded as temporarily incapacitated.

[45] The risk assessment, conducted in the absence of both Mr Molotsi and Ms Kwapa, concluded that although Mr Molotsi was classified as a highly vulnerable employee, his exposure risk was assessed as medium, with a score of 6—categorised as 'Acceptable risk (low to medium) – can come to work'. The assessment also explicitly stated: 'Any other arrangement outside the risk assessment must be discussed between an employee and a line manager'. On 5

August 2020, upon receiving the final outcome of the risk assessment, Mr Molotsi emailed Nurse Magasa, copying Mr Chetty, the CEO of the NHLS, expressing his disappointment, articulating his fear of dying if required to return to work, and notifying them of his intention to invoke clause 49 of the Regulations. Despite this email, and notwithstanding the assessment's express stipulation regarding alternative arrangements, neither Mr Chetty nor any other senior NHLS official took steps to engage with or address Mr Molotsi's concerns. As a result of his unresolved fear of dying, Mr Molotsi did not return to the workplace.

[46] Extensive correspondence followed between Mr Molotsi and various NHLS role-players regarding this issue. This ultimately led to the NHLS issuing a repudiation letter dated 27 August 2020, in which it stated, *inter alia*, that his refusal to return to work constituted a repudiation of his contract of employment. Mr Molotsi subsequently returned to work on 31 August 2020, after which he was served with a notice to attend a disciplinary hearing.

[47] Ultimately, the correspondence makes it clear that Mr Molotsi was not opposed to undergoing a risk assessment but was simply unable to attend at the scheduled time and date. Given that neither party had previously navigated the complexities of COVID-19, it is understandable that there may have been differing interpretations of the risk assessment policy and procedure. However, what is particularly striking is the NHLS's rigid adherence to its interpretation of the policy, to the apparent exclusion of Mr Molotsi's repeated and sincere expressions of fear for his life should he be required to return to work in person. This lack of consideration for his perspective reflects a failure to engage meaningfully with his concerns.

Contract of employment and the repudiation letter

[48] The NHLS's repudiation letter, which alleges that Mr Molotsi repudiated his contract of employment by failing to return to the workplace, as well as the assertions in the founding affidavit that he was in breach of clause 1.2 - stipulating that his place of work is the NHLS Sandringham offices, and clause 6.2.3 - allowing for termination in the event of breach are misplaced.

[49] In determining the fairness of Mr Molotsi's dismissal, it is essential to look beyond the mere question of contractual breach. Fairness requires a contextual and balanced assessment of the surrounding circumstances, including the unprecedented nature of the COVID-19 pandemic, Mr Molotsi's medical vulnerability, his consistent communication of genuine fear for his life, and the NHLS's rigid interpretation of internal policies. The failure to accommodate his concerns and the procedural shortcomings in how the risk assessment was handled raise serious questions about whether the dismissal met the standard of substantive fairness required from the LRA.

The Direction by the Minister of Employment and Labour in terms of Regulations 4(10),³ (the Regulations), Return to Work Framework NHLS Guideline (Framework) and Guidance on vulnerable employees and workplace accommodation in relation to Covid-19⁴ (the Guidance)

[50] In this Court's view, the NHLS was indeed in breach of the above Regulations, Framework and Guideline in force at the time of the events leading to Mr Molotsi's dismissal.

The Regulations

[51] Clause 17.1 provides that all employers must undertake a risk assessment in terms of clauses 20.1 to 20.3 of the Regulations.

[52] Clause 20.3 provides that the risk assessment '*...must take special measures to mitigate the risk of COVID-19 for vulnerable employees in accordance with the Department of Health's Guidelines to facilitate their safe return to work or they working from home*'.

³ Direction by the Minister of Employment and Labour in terms of Regulation 4(10) of the Regulations R480 of 29 April 2020 issued by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2) of the Disaster Management Act. 2002 Gazetted 4 June 2020.

⁴ Guidance issued by the Department of Health on 25 May 2020.

[53] Clause 48 provides *'An employee may refuse to perform any work if circumstances arise which with the reasonable justification appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to COVID-19'*. While Mr Molotsi did not refuse to perform his duties, he declined to do so at the office. Moreover, the relevant clause clearly provides that either the employee or the health and safety representative must be reasonably justified in believing that such performance would result in exposure. Mr Molotsi, based on his comorbidities and the medical recommendation from Dr Mashabane dated 6 July 2020, which states, *'I therefore strongly recommend that he be allowed to work from home pending company policy and criteria'*, was justified in exercising his right not to work from the office.

[54] Clause 49 provides *'An employee who has refused to perform work in terms of clause 48 must as soon as reasonably practicably notify the employer either personally or through a health and safety representative of the refusal and the reason for the refusal. Every employer must, after consultation with the compliance officer and any health and safety committee, endeavour to resolve any issue that may arise from the exercise of the right in terms of clause 48'*. The correspondence clearly demonstrates that Mr Molotsi consistently communicated his fear of returning to the office to HR, Ms Kwapa, and other relevant parties. The correspondence further indicates that the NHLS made no meaningful attempt to address Mr Molotsi's concerns. Instead, it adhered rigidly to its own narrow interpretation of the risk assessment. Had HR and/or Ms Kwapa engaged with Nurse Aida, or taken the time to meaningfully consult with Mr Molotsi, the NHLS might have come to appreciate the depth of his genuine fear of dying if required to return to the office, despite his assessed level of exposure to COVID-19 being considered low/medium. Furthermore, Ms Kwapa conceded during cross-examination that the nature of the IT department's work was, in fact, conducive to remote working.

[55] Clause 50 provides, *'Clause 48 applies whether or not the person refusing to work has used or exhausted any other applicable external or internal procedure'*.

[56] Clause 54 provides, *'No employee may be dismissed, disciplined, prejudiced or harassed for refusing to perform any work as contemplated in clause 48'*. Mr

Molotsi was dismissed, disciplined and prejudiced for refusing to return to the office – that is to perform his work at the office. The NHLS is clearly in breach of clause 54 of the Regulations.

[57] Clause 55 provides *'If there is a dispute as to whether clause 49 has been contravened, the employee may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or an accredited bargaining council for conciliation and arbitration in accordance with the procedures contained in section 191 of the Labour Relations Act, 1995 (Act No.66 of 1995)'*. Following receipt of the risk assessment, Mr Molotsi, on 5 August 2020, informed Mr Chetty and Nurse Magasa, *inter alia*, of his intention to invoke clause 49 of the Regulations. Nevertheless, and in apparent disregard of the provisions of clause 54 of the Regulations, the NHLS persisted in disciplining and taking issue with Mr Molotsi's failure to physically return to the workplace.

The Framework

[58] Clause 1(iv) of the Framework provides, *'Participation in exploring, presenting and suggestion of alternative is key for speedy buy-in by those affected'*, and clause 1(v) provides, *'During this crisis period consistency should be workplace specific not national, since a "one size fits all" approach will not be ideal'*.

[59] Clause 4(iv) of the Framework provides that *'All efforts must be made to ensure staff work from home where practical. Those working from home, should produce weekly performance reports which are consistent with expected performance'*. Clause 4(viii) provides *'Employer to explore various meaningful and "temporary" accommodation of categories of highly vulnerable staff who are working in the high risk environments'*.

[60] Although Mr Molotsi was not working in a high-risk environment, such as a laboratory, the fact that he was a highly vulnerable employee who feared for his life if required to return to the workplace ought to have been given serious consideration by the NHLS. Both Ms Kwapa and Dr Chin conceded, under cross-examination, and the risk assessment itself confirmed that Mr Molotsi was indeed a highly vulnerable

employee. Yet, rather than making any effort to reasonably accommodate him, the NHLS chose instead to impose punitive measures in pursuit of an inflexible and unreasonable position.

[61] The clauses of the Framework quoted above clearly afforded the NHLS the discretion to reasonably accommodate Mr Molotsi, an opportunity it chose not to exercise.

The Guidance

[62] Under the slide '*RIGHTS, ROLES AND RESPONSIBILITIES*', and under the heading '*EMPLOYEE*', it states, '*Right to remove themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger to their life or health, without undue consequences*'. This guidance mirrors clause 48 of the Regulations.

[63] Mr Molotsi conducted himself in accordance with this Guideline.

The suspensive condition in the disciplinary outcome: Mr Molotsi must attend the NHLS's Employee Assistance Programme (EAP)

[64] The chairperson's disciplinary hearing finding *inter alia* stated that '*Furthermore, should you refuse to take assistance offered by the NHLS then the dismissal sanction is awarded*'.

[65] The commissioner's finding in paragraph 108 of the award, that Mr Molotsi failed to honour his part of the agreement to attend the EAP, is not supported by the evidence. A review of the correspondence, along with the testimony of Mr Rampta (the chairperson of the disciplinary hearing), confirms that Mr Molotsi did not refuse to attend the EAP. Mr Rampta himself testified that HR had provided him with a letter stating as much. Furthermore, it is evident from a letter dated 5 October 2020 from Mr Molotsi's attorney, as well as an email from Ms Mata (the EAP consultant), that Mr Molotsi did attend an EAP session, although he expressed disagreement with

certain aspects of the process. In response, Ms Mata requested that the NHLS suggest a way forward.

[66] Mr Molotsi's objection to being referred to the EAP was based on the fact that his concern related not to performance, but to a health matter, an area outside the EAP's scope. Nevertheless, the NHLS once again declined to engage with Mr Molotsi further and proceeded to issue his dismissal letter on 28 October 2020.

This Court's conclusion after considering the record

[67] As previously noted, this matter must be contextualised within the fearful and unprecedented period of the COVID-19 pandemic. It is regrettable that Mr Molotsi's various health conditions deteriorated during this time. From this Court's analysis of the record, it is abundantly clear that the NHLS's instructions and demands for Mr Molotsi to physically return to work were unreasonable.

[68] The NHLS disregarded the provisions of the Regulations, its own Framework, and the Guidance. In the Court's view, it demonstrated a complete lack of empathy or regard for Mr Molotsi's health conditions, and its conduct was regrettable.

[69] Notwithstanding the above, and even prior to the implementation of various COVID-related legislative measures and directives, the International Labour Organisation (ILO) has, for decades, recognised an employee's right to safeguard their life when there is reasonable justification to believe that the workplace environment poses a threat to their health or life.

[70] The right of an employee to refuse to do work that is unsafe and poses a serious danger is recognised internationally. During 1981, the parties to the ILO adopted the Convention on Occupational Safety and Health (No. 155); article 13 states:

'A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.'

[71] It is regrettable that Mr Molotsi did not file a cross-review to challenge the commissioner's findings that he was guilty as charged and that no backpay should be awarded. I am mindful, however, that regardless of my own views, this Court's role is confined to determining whether the review should succeed. I am not at liberty to grant relief beyond that which has been sought.

[72] What follows is my analysis of the ground of review. The Court's earlier observations do not form part of this review analysis but were included to convey its strong disapproval of the manner in which Mr Molotsi, a highly vulnerable employee during the COVID-19 pandemic, was treated by the NHLS.

Analysis of the review application

[73] As a Court of review, its role is not to re-decide the matter, but to determine whether the commissioner's decision was reasonable, taking into account the totality of circumstances, including the nature of the misconduct, potential harm, and the impact on the employee.

[74] The commissioner found that Mr Molotsi's dismissal was substantively unfair and ordered reinstatement without backpay, subject to a final written warning for 12 months.

[75] In terms of section 193(1) and (2) of the LRA, reinstatement is the primary remedy where a dismissal is found to be unfair unless the circumstances set out in section 193(2) are present.⁵ They are not present here.

[76] In essence, the NHLS challenges the award on the ground that, although the commissioner found Mr Molotsi guilty of the charges, she nevertheless reinstated him, albeit without backpay. The NHLS contends that this constitutes an unreasonable outcome and is therefore subject to review. As stated above, this is a penalty review.

⁵ See: *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC) at paras 53 - 62.

[77] The starting point is the relevant portions of item 3 of The Code of Good Practice: Dismissal provides:⁶

77.1 Item 3(4) provides that *'generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable...'*;

77.2 Item 3(5) provides, in turn, that *'when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself; and*

77.3 Item 3(6) provides that *"the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration'.*

[78] The Constitutional Court judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁷ is the *locus classicus* judgment on penalty reviews. The Court (per Navsa AJ) held:

'[116] However, the commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the Mine's valuable property which he did not do. However this is not the end of the inquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.

[117] The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training, are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that the principle of progressive discipline will not

⁶ Code of Good Practice: Dismissal, Schedule 8 of the LRA.

⁷ 2008 (2) SA 24 (CC) at paras 116 – 117 and 119.

assist to adjust Mr Sidumo's attitude and efficiency. In my view, the commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of the appropriateness of the sanction.

...

[119] To my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner.'

[79] In *National Union of Metal Workers of South Africa obo Cloete v Trentyre (Pty) Ltd and others*⁸, the employee, a general worker, was dismissed for being under the influence of alcohol at work on an isolated occasion. The commissioner found the sanction of dismissal unfair and ordered the employee to be reinstated on a final written warning with the forfeiture of backpay. The company succeeded on review, with the decision of the commissioner being replaced with an order that the employee's dismissal was substantively fair. On appeal to the Labour Appeal Court (LAC), the Court reversed the Labour Court's judgment and restored the award. Having found that the employee was under the influence of alcohol, but not to the extent that he could not perform his duties, Zondo JP concluded:⁹

'In the light of the above can it be said that the commissioner's decision that the sanction of dismissal was too harsh and his order that the appellant be reinstated are unreasonable in the sense that they are decisions that a reasonable decision-maker could not reach? In my view that can certainly not be said on these facts and circumstances. If I had sat at a commissioner I would definitely have also found that dismissal as a sanction was too harsh in the circumstances of this case.'¹⁰

⁸ [2016] JOL 35706 (LAC) (*Trentyre*).

⁹ A Myburgh, C Bosch, *Reviews in the Labour Courts*, at p 287 – 288.

¹⁰ *Trentyre supra* at para 15.

[80] In light of the foregoing, and while this Court is of the view that the commissioner ought not to have found Mr Molotsi guilty of the charges, it is nonetheless evident that she exercised her discretion judiciously, having regard to the particular circumstances of the matter. In doing so, she effectively concluded that dismissal would constitute an unduly harsh sanction. Although not explicitly referencing item 3 of the Code of Good Practice: Dismissal, the commissioner's reasoning reflects a clear appreciation of its principles and the applicable case law concerning appropriate sanctions. She gave due consideration to the fact that Mr Molotsi had no prior record of similar misconduct, was a particularly vulnerable employee, and that corrective discipline, rather than dismissal, was the more appropriate and proportionate response.

[81] In the circumstances, I am satisfied that the decision arrived at by the commissioner is one that a commissioner confronted with the evidence presented at the arbitration could reasonably have arrived at. The decision is reasonable based on the evidence before the commissioner, and as such, the award should not be set aside.

Costs

[82] Section 162 of the LRA grants this Court a discretion to make cost orders according to the requirements of the law and fairness. This means this Court is not bound to follow the general rule of costs follow the result. Instead, this Court may make a costs order according to the requirements of the law and fairness.

[83] The conduct of the parties is particularly relevant where considerations of fairness arise. As previously outlined under the heading '*This Court's Analysis of the Evidence*', I criticised the manner in which the NHLS treated Mr Molotsi during the unprecedented and deeply unsettling period of the COVID-19 pandemic. In my view, the NHLS was treated with leniency, having been ordered merely to reinstate Mr Molotsi without any award of backpay.

[84] Notwithstanding the arbitration award, the NHLS nevertheless delayed Mr Molotsi's reinstatement by pursuing a review application which, lacked substantive

merit. It is also worth noting that the NHLS, as a leading institution during the COVID-19 pandemic, ought to have set an example in the fair and compassionate treatment of vulnerable employees. While I am mindful that the failure of the review means the reinstatement order remains in force, thereby preserving the ongoing employment relationship between the parties, considerations of law and fairness in these circumstances support the conclusion that the NHLS should bear the costs of this application.

[85] In the result, the following order is made:

Order

1. The review application is dismissed.
2. The applicant is to pay the third respondent's costs.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr X Mofokeng
Instructed by: HM Chaane Attorneys Inc.
For the Third Respondent: Mr R Maddern
Instructed by: Wright Rose-Innes Inc.