



GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL



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## ARBITRATION

### AWARD

Panelist/s: Adv. Itumeleng Kgatla

Case No.: GPBC17352021

Date of Award: 18 May 2022

In the ARBITRATION between:

PSA obo REFILOE LESAONA

APPLICANT

And

DEPARTMENT OF EMPLOYMENT AND LABOR

RESPONDENT

Union/Applicant's representative:

Mr. ARCHIE SIGUDLA

Union/Applicant's address:

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Respondent's representative:

Ms. NANCY PHETLHA

Respondent's address:

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

- [1] This unfair dismissal dispute was enrolled for arbitration in terms of Section 191 (1) of the Labour Relations Act 66 of 1995 as amended (LRA). The matter was arbitrated over a number of days at no 167 Thabo Sekhume Street in Pretoria, being the workplace of the Applicant. The arbitration was concluded on the 08<sup>th</sup> of April 2022 and written closing arguments by the parties were received on the 20<sup>th</sup> of April 2022.
- [2] Applicant was represented by **Mr Archie Sigudla**, a union official from the Public Servants Association (the PSA). **Ms Nancy Phetlha** represented the Respondent in her capacity as the Labour Relations Manager employed by the Respondent.
- [3] The proceedings were conducted in English without any need for interpretation. Digital and manual recordings were made during the process. Both parties were afforded the opportunity to present *viva voce* evidence under oath, in chief and in re-examination and to cross examine opposing testimonies. Written closing arguments were presented and considered.
- [4] In terms of Section of 138(7) of the LRA, the Commissioner is required to issue a signed arbitration award with brief reasons. It is for this reasons that only salient points will be referred to in this award even though all evidence and submissions were considered.

### ISSUES TO BE DECIDED:

- [5] I am required to decide whether or not the decision of the Respondent to dismiss the Applicant for an alleged misconduct in relation to excessive absenteeism and non-compliance with the Respondent's leave policy is fair in the circumstances, on both substance and procedure.
- [6] Should I find that the dismissal was unfair, I must determine an appropriate remedy in terms of Section 193 (1) of the LRA.

### COMMON CAUSE ISSUES

- [7] The Applicant employed by the Respondent as a Call Centre Agent on fixed term contract basis from 2007 and was appointed on indefinite basis on the 1<sup>st</sup> of November 2012.
- [8] At the time of her dismissal, the Applicant was at salary level 6 and earned a monthly salary of **R19 971-11**.
- [9] Following the conclusion of a disciplinary process, the Applicant was dismissed on the 2<sup>nd</sup> of August 2021, lodged an appeal, and the appeal was dismissed on the 22<sup>nd</sup> of September 2021.

## ISSUES IN DISPUTE

- [10] The Applicant is of the view that her dismissal was unfair both on procedure and substance. The Respondent contents that the Applicant's dismissal was procedurally and substantively fair.
- [11] In terms of the relief sought, the Applicant is praying for reinstatement with retrospective effect. The Respondent has recorded its prayer that the Applicant's application should be dismissed.

## SURVEY OF EVIDENCE

### RESPONDENT'S CASE

- [12] **Mr Shangolirimini Demana** was sworn in and testified as the first witness in support of the Respondent's case and submitted documentary evidence which was accepted and marked bundle "R".
- [13] The witness testified that he is employed by the Respondent as the Inbound Supervisor for the Customer Care Section.
- [14] The witness testified that his main responsibility is to supervise call centre agents. The witness stated further that the Applicant is one of the 13 team member(s) under his supervision and that the Applicant reports directly to him.
- [15] The witness testified that he drafted and submitted a report as per page 5-7 of bundle "R" to Human Resource on the basis that the Applicant was absenting herself from work without authorisation. The witness stated further that the Applicant would sometimes come to work late for different reasons or sometimes for no reason at all.
- [16] The witness testified that the Applicant would sometimes take sick leave but fail to submit a sick note as required by the policy.
- [17] The witness testified that he first initiated an informal process to deal with the behaviour of the Applicant but the same did not yield any positive results.
- [18] The witness testified that the Applicant would take leave but fail or neglect to capture the leave on the system and that he would force the Applicant to do the same as that would reflect badly on him as the supervisor if left unattended.
- [19] The witness testified that a meeting, as per the minutes on page 11 of bundle "R" was called on the 1<sup>st</sup> of March 2021 to deal formally with the issue of the Applicant's non-compliance with the leave policy despite having been reminded through SMS, whatsapp and email communication(s).
- [20] The witness testified that team members would be required to attend to at least 50 emails per day when working from home and that laptops for been provided to enable employees to work from home.

- [21] The witness testified that in cases where the Applicant's annual or sick leaves are exhausted, her sick leave would be converted to unpaid leave.
- [22] The witness testified that the Applicant's absenteeism negatively affected production and service delivery on the part of the Respondent.
- [23] The witness testified that it is his responsibility to caution his sub-ordinates about non-compliance with the leave policy, and further that, he would have been disciplined had he not dealt with the issue of non-compliance by the Applicant in the manner that he did.
- [24] The witness testified that he arranged coaching programs and other initiatives to assist the Applicant after she had informed him that she has a spiritual calling.
- [25] The witness testified that he was advised by the Employee Health and Wellness Program (EHWP) in 2020 that, in the circumstances, the Applicant must fill a form and submit a report from the *Gobela* and that the same was relayed to the Applicant but the Applicant never came back with or submitted such a report.
- [26] The witness testified under cross-examination that the Applicant's absenteeism behaviour started on or about 23 September 2020 and that by that time, the Applicant's sick leave was already exhausted.
- [27] The witness testified that he is not sure about the policy position in situations where the employee has a calling or is incapacitated by rituals or initiation issues but he advised the Applicant to liase with the EHWP Section for proper advice and assistance.
- [28] The witness testified that the Applicant had told him that she is not comfortable to discuss certain of her issues with the immediate supervisor and the he only heard of her challenges in relation to inability to wake up in the morning and not being able to locate the workplace in the meeting with **Mr Tshikome** (acting Deputy Director) on the 15<sup>th</sup> of March 2021.
- [29] The witness testified that he recommended in a report dated the 1<sup>st</sup> of April 2021 that the Applicant should be disciplined as per page 6 of bundle "**R**".
- [30] **Ms Aniline Nel** was sworn in and testified as the second witness in support of the Respondent's case and relied on bundle "**R**".
- [31] The witness testified that she is employed by the Respondent as a Senior Practitioner Conditions of Service in the Human Resource Section.
- [32] The witness testified that she is responsible for leave administration, service benefits, acting and housing allowances *inter alia*.

- [33] The witness testified that she knows the Applicant as an employee of the Respondent and that she has in the past assisted the Applicant with an application for Temporary Incapacity Leave (TIL) and the requirements thereof. The witness stated further that the application for TIL is employee initiated.
- [34] The witness has testified that the Applicant has applied for TIL on several occasions, and further that some applications were granted and some were declined, and explanations were proffered in cases where such applications were not successful. The witness stated further that reasons relating to the refusal of TIL are given in person for confidentiality and medical reasons.
- [35] The witness stated that the file information of the employee or the Applicant can only be made available with the consent of the Applicant because the information is treated with the highest form of confidentiality.
- [36] The witness testified that the Respondent does not have a policy dealing with training on issues related to training or initiation connected with ancestral calling.
- [37] The witness stated that the option available to the Applicant is to take annual leave and unpaid leave which is to the maximum of 184 days as per the existing policy on leave determination. The witness stated that the Applicant has never discussed leave for issues related with ancestral calling with her.
- [38] The witness stated that the Applicant/any employee can be instructed to apply for unpaid instead of sick leave in the circumstances of lack of sickness evidence despite having sick leave credits.
- [39] The witness testified that the ancestral calling is not regarded as sickness or injury in terms of the Policy and Procedure on Incapacity and ill Health (PPIIH) and as a result, TIL cannot be applied for by the Applicant or any employee of the Respondent in the circumstances.
- [40] The witness testified that the document on page 25 of bundle "R" does not satisfy the requirements of a medical certificate.
- [41] The witness testified under cross examination that she has been working for the Respondent since 1992 and has 25 years' experience in the Human Resource environment.
- [42] The witness testified that TIL application is submitted through different forms and further that, it is the responsibility of the Health Risk Manager to make a determination whether or not such a leave should be granted.
- [43] **Mr Nzama Shirindza** was sworn in and testified as the third witness in support of the Respondent's case.
- [44] The witness testified that he is a professional Social Worker and further that he has been registered with the Council for 13 years. The witness stated further that he is employed by the Respondent and is tasked with

assisting employees of the Respondent with psycho-social problems. The witness stated further that he has been attached to the EHWP section of the Respondent for the past Nine (9) years.

[45] The witness stated that he knows the Applicant from 2015 when she had at the time referred herself to the EHWP section and further that the Applicant was referred to the external service provider for assistance.

[46] The witness testified that the Applicant did not complete some of the scheduled sessions, and further that, the reason could have been that the Applicant had an underlying problem apart from what she was divulging.

[47] The witness testified that in 2016, he arranged a joint sitting with the two (2) supervisors of the Applicant, **Ms Singo** and **Mr Baloyi**. The witness stated further that the Applicant was present in the meeting and was accompanied by a union representative.

[48] The witness testified that it was discussed in the meeting that the Applicant does not adhere to the Respondent's leave policy and that there is a communication breakdown between the Applicant and her line manager.

[49] The witness stated that the report from the external service provider was shared with him on the basis of his professional status and for the purpose of implementation of the recommendations.

[50] The witness testified under cross-examination that the Applicant was referred to the external service provider in 2015, 2018 and 2019 and did not complete the sessions in 2015. The witness stated further that all the reports of the external service provider were sent to the Applicant even though the costs were borne by the Respondent.

[51] The witness testified that the Applicant's file was closed when the matter was referred to Employment Relations for intervention.

[52] **Ms Ntosasa Velamina Singo** was sworn in and testified as the Respondent's fourth witness. The witness stated that she is the Assistant Director responsible for customer care, inbound and outbound sections.

[53] The witness testified that she is the Applicant's moderator by virtue of the fact that, **Mr Shangolirimi Demani**, who is the line manager of the Applicant reports to her.

[54] The witness testified that a report was submitted to the Health Risk Manager (HRM) following the misconduct of the Applicant. The witness testified that the following steps were taken to assist the Applicant before referring the matter to HRM:

- The Applicant was referred to the coaching sessions but showed no improvement.
- The Applicant was issued with a verbal warning.
- The witness has personally tried to intervene and to find out what the Applicant's issues were

- [55] The witness testified that she has been moderating the Applicant since 2015 under different supervisors and that the Applicant's conduct has been the same.
- [56] The witness testified that the Applicant would sometimes not arrive at work without even calling but would not do such for two consecutive weeks. The witness testified that, it is possible that the Applicant was aware that her salary would be frozen if she failed to report for duty for two (2) weeks in succession.
- [57] The witness testified that the Applicant is good at what she does and knows her work, but the only problem is the late coming and absenteeism.
- [58] The witness testified that she was called in a meeting on the 15<sup>th</sup> of March 2021 on the basis that the Applicant had indicated that she is not comfortable talking with the Supervisor and wanted to talk to the Deputy Director as per page 8 of bundle "R".
- [59] The witness testified that the Applicant indicated in the meeting that she has a calling for which she has done the first part of the training which was aimed at making her stable in relation to the complications caused by the spiritual calling.
- [60] The witness stated further that it was indicated by the Applicant the *sangoma* who stabilized her is not yet registered, and for that reason, the Applicant was not able to produce a medical certificate as requested by the meeting.
- [61] The witness testified that the Applicant's work performance did not improve despite the stabilization and the undertaking to do so.
- [62] The witness testified that the Applicant was advised by the meeting to approach HRM for leave options available to her and further that it was incumbent on the Applicant to approach HRM.
- [63] The witness testified that the Applicant revealed in the meeting that she has been in denial about her calling and has as a result misdiagnosed herself and attended psycho-social sessions unnecessarily.
- [64] The witness testified that, the document as it appears on page 25 of bundle is a document that she has not seen before, but upon reading it, the document sounds like an application from the traditional healer.
- [65] The witness testified that the document is dated the 17<sup>th</sup> of August -2021, and the Applicant was dismissed in September 2021, and for that reason, the witness believes that the letter was submitted when the disciplinary process of the Applicant were at an advanced stage.



- [66] The witness testified that the email by the Applicant dated the 27<sup>th</sup> of June 2021 as per page 11 of bundle “A” requesting fully paid leave to attend the initiation is unreasonable as the same would prejudice the Respondent financially and in terms of its ability to deliver on its mandate.
- [67] The witness testified that, the most reasonable and practical option available to the Applicant as provided by the policy, would be to take unpaid leave for the duration of the training.
- [68] **Mr Timothy Sekome** was sworn in and testified as the fifth witness in support of the Respondent’s case. The witness testified that he is attached to the Customer Care Services Unit of the Respondent, and knows the Applicant as a fellow employee.
- [69] The witness testified that he organised the meeting of the 1<sup>st</sup> of March 2021 as the Deputy Director, as he then was. The witness testified further that his substantive position is that of Assistant Director, Customer Care Services.
- [70] The witness testified that he arranged a meeting for the 23<sup>rd</sup> of November 2020 with the aim of dealing with the Applicant’s absenteeism allegations but the meeting was moved to the 24<sup>th</sup> of November 2020 at the instance of the Applicant. The witness stated that the Applicant stated in the meeting that she has issues connected with ancestral calling and that such issues were taken in serious light by the meeting, and the Applicant was advised to gather more information about the calling.
- [71] The witness testified that a follow up meeting was convened on the 1<sup>st</sup> of March 2021 wherein the Applicant indicated during the meeting that she has consulted, underwent a certain process and was now stabilised, and will be able to carry on with her normal duties. The witness stated that the Applicant further indicated to the meeting that there is another part of the training which she must still complete.
- [72] The witness testified that the purpose of the meetings was part of the intervention processes as to assist the Applicant as he did not want her to lose her job, and that the Applicant made a commitment to improve her behaviour.
- [73] The witness testified that the Applicant was issued with a final written warning on the 28<sup>th</sup> of September 2018 as per page 15 of bundle “A” but her conduct did not change, which to his believe meant that the Applicant does not take the progressive discipline processes in a serious light.
- [74] The witness testified that he does not understand the contents of the letter from the *Sangoma* as it appears on page 25 of bundle “A”.

- [75] The witness testified that he was booked off sick with effect from June until December 2021 and therefore he is not aware of any further documents which were or might have been submitted by the Applicant to the Respondent or its service providers.
- [76] The witness testified that he received an email from the Applicant dated the 27<sup>th</sup> of June 2021 requesting three (3) months paid leave and further requesting that the Supervisor should not be informed about such a request as it appears on 11 of bundle “A”.
- [77] The witness testified that the Applicant received her charges on the 31<sup>st</sup> of May 2021 as per page 4 of bundle “R”.
- [78] The witness testified that he was not aware of the Applicant’s final written warning during the follow up meeting held on the 1<sup>st</sup> of March 2021.
- [79] The witness testified under cross-examination that he had a one-on-one meeting with the Applicant wherein the following points came to light or were discussed:
- The reasons why the Applicant could not tell her supervisor about her calling and the fact that she did not want people to know about her calling.
  - The Applicant was advised about the most appropriate assistance that could be offered by the Respondent in her circumstances, and that, she was advised to engage with Human Resource regarding her situation.

#### APPLICANT CASE

- [80] The Applicant was sworn in and testified as the first witness in support of her case and stated that, she was employed by the Respondent as a Call Center Agent with effect from July 2007 on a fixed term contract basis until she was employed on indefinite basis on the 1<sup>st</sup> of November 2012.
- [81] The witness testified that she started being absent from work without authorization from 2015 because of illnesses which were very unusual. The witness stated that she would sometimes feel like she is carrying something very heavy and would sometimes fail to wake up in the morning when is supposed to go to work.
- [82] The witness testified that her work performance started dropping as a result of such unusual health conditions which Medical Practitioners were not able to diagnose. The witness stated further that she then decided to adopt a new approach of finding out what could be going wrong with her health.
- [83] The witness testified that she was informed at the Zion Christian Church (ZCC) in 2015 that she has a spiritual calling and that she had to be initiated. The witness testified that she was shocked and chose to ignore the advice

and that, from that point on, her life became complicated. The witness stated further that she would be involved in accidents on her way to work and would sometimes fail to locate the workplace

- [84] The witness testified that she later, in 2017, sought help from the Apostolic Church as the church that she and the family grew up attending.
- [85] The witness testified that she spoke to her Director **Mr. Mashilo Mangena** (the Director) about her matter in December 2020 before she could do the process called *invuma* as arranged by her family and the *Gobela*. The witness testified that *invuma* is the process undertaken to plead with the ancestors for more time to prepare for the initiation and the actual process of *ukuthwasa*.
- [86] The witness testified that she sent an email to the Director on the 18<sup>th</sup> of May 2021 as per page 13-14 of bundle “A”, seeking leave to work from home for a period of four (4) weeks in Mount Fletcher in the Eastern Cape and to simultaneously undergo initiation which was the prerequisite for her before she can undergo the actual training.
- [87] The witness testified that the *Gobela* who had assisted her with the *invuma* was not ancestrally qualified to assist her with the next step in line, the initiation and as a result, she had to travel and be based in the Eastern Cape for four (4) weeks.
- [88] The witness testified that charges of misconduct were formulated and preferred against her while she was under the impression that her special leave request was still being considered and processed by the Director and the EHWP section.
- [89] The witness testified that she never had health related problems and that her work performance was on par until 2015 when she started having complications.
- [90] The witness testified that she believes that her dismissal was not fair on the basis that, by the time she was charged, she was busy with the actual process relating to the initiation and had already opened up to the superiors about her particular and peculiar situation.
- [91] The witness testified that she is no able to proceed with the initiation because of financial reasons by virtue of the fact that the process costs an arm and leg, which costs, the witness stated, may be in excess of **R60 000-00**. The witness testified that she is still negatively affected by the calling because of the outstanding initiation and training processes.
- [92] **Ms. Kgomotso Jessica Dibakwane** was sworn in and testified as the Second witness in support of the Applicant's case.

[93] The witness testified that she knows the Applicant from her traditional principal (*Gogo*) who has initiated her and further that, at the time, the Applicant was also attending some processes with *Gogo* who also wrote the letter in page 25 of bundle “A”.

[94] The witness testified that the aim of the letter was to request for the Applicant to be given time off or opportunity to undergo the initiation process.

[95] The witness testified that the traditional healing stages include the following *inter alia*:

- Anxiety and depression
- Diagnosis and misdiagnosis by *Gogo*
- Ceremony to the ancestors to appease and seek guidance
- *Invuma* which takes up to 4 weeks period on a full-time basis and the aim to stabilize the initiate
- *Ukuthompa*-this is linked to the lineage and family heritage and takes between 4-6 weeks duration.
- The back to normal period whereby the initiate is now waiting for a green light or guidance to proceed with the final process called *ukuthwasa*.
- *Ukuthwasa*-the process takes between 3-6 months duration and the first three (3) are strictly on a full-time basis.

[96] The witness testified that she is registered with both the Traditional Health Practitioners Council and Dingaka Africa Association and further that, she is certified to issue sick notes of three (3) days to six (6) months.

[97] The witness testified that the costs of the whole processes must be borne by the initiate or her family and ranges between **R90 000-R100 000-00**. The witness stated further that the amount covers the following:

- Eight (8) goats
- Two (2) sheep
- *Ukuthwasa* fee at R25 000-00
- *Invuma* fee at R7 000-00
- Bones at R12 000-00
- Alcohol for the traditional band at R30 000-00
- Traditional/Nguni regalia at R25 000-00 to R30 000-00
- Quantum travelling costs to Zimbabwe or Mozambique to fetch the appropriate spirit of the initiate

[98] The witness testified under cross-examination that the principals are *Baba Gebuza* and *Gogo Mkhulu*.

- [99] The witness testified that she was referred by the principals to work with and assist the Applicant as her practice is in Hammanskraal and closer to the workplace of the Applicant.
- [100] The witness testified that the principal was not aware at the time of writing the letter in page 25 of bundle “A” that the Applicant was already dismissed. The witness stated further that *Gogo Mkhulu* is based in the Eastern Cape and has a branch in Vosloorust.
- [101] The witness testified that, though not well vest with corporative aspects such as logos and other marketing related aspects, *Gogo Mkhulu* is fully registered with the appropriate regulatory bodies.

#### **ANALYSIS OF EVIDENCE, ARGUMENT AND FINDINGS:**

- [102] The statutory and other framework for the determination of this dispute is provided by the provisions of Section 185 (a) of the LRA, which reads as follows:
- “Every employee has the right not to be unfairly dismissed”*
- [103] The other framework is provided by the provisions of item 2 (1) of Schedule 8 of the Code of Good Practice of the LRA in relation to dismissal, which reads as follows:
- “A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure”*
- [104] Briefly, I a required to determine whether or not the decision of the Respondent to terminate the services of the Applicant following a disciplinary hearing for the alleged misconduct related to absenteeism and non-compliance with the Respondent’s leave policy, taking into account the spiritual calling of the Applicant having been brought to the attention of the Respondent was procedurally and substantively fair.
- [105] The fairness or otherwise of a dismissal thereof, depends on the facts of the case and the appropriateness of the dismissal as a penalty.<sup>1</sup>The Applicant was dismissed for absenteeism and non-compliance with the Respondent’s leave policy. The Applicant has in the circumstances submitted that strange things were happening in her life and that it was later found that she has a spiritual calling.
- [106] The matter is relation to the spiritual calling of the Applicant was brought to the attention of the Respondent in December 2020 through the Director and a follow up meeting was held on the 1<sup>st</sup> of March 2021.The Applicant was served with charges on the 25<sup>th</sup> of May 2021, approximately two months after a follow up meeting was held to discuss possible interventions in light of her spiritual calling.

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<sup>1</sup> Item 2(1) Schedule 8 of the Code of Good Practice: Dismissal

- [107] It is common cause that the Applicant has on several occasions applied for Temporary Incapacity Leave (TIL) successfully and sometimes unsuccessful. The Applicant has argued that the Respondent ought to have advised her of the TIL processes in the circumstances.
- [108] I see no reason why blame should be attributed to the Respondent about a process that the Applicant has by her own admission, successfully embarked on in the past.
- [109] It is common cause that the Applicant has excessively absented herself from work without authorization of the superiors or would sometimes fail or delay to fill the leave on the system. It follows that I must now look into the reasons and or circumstances accompanying the conduct of the Applicant.
- [110] The Applicant has submitted that peculiar events started unfolding in her life from 2015 and that is the main reason why her work performance started to drop, and that she later found out that she had a spiritual calling, which she had decided to ignore at first.
- [111] It is common cause that, prior to 2015, the discovery of the spiritual calling and its accompanying peculiar complications, the Applicant had a clean disciplinary record and good work performance.
- [112] It is common cause that the Applicant was issued with a final written warning in 2018, albeit not clear ,whether or not the final written warning was still active at the time of the Applicant's disciplinary process and her subsequent dismissal by the Respondent.
- [113] The Courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behavior through a system of graduated measures such as counseling and warnings.<sup>2</sup>
- [114] It is common cause that steps were taken by the Respondent to intervene in and assist the Applicant in the circumstances before and after it was revealed that the Applicant has a spiritual calling. It is not in dispute that the Applicant is well vest with the policies of the Respondent and knows what is expected of her as an employee.
- [115] 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 continued employment relationship intolerable. Examples of serious misconduct, subject to the rules that each case should be judged on its merits, are gross dishonesty or willful damage to the

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<sup>2</sup> Item 3(2) of Schedule 8 of the Code of Good Practice: Dismissal

property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.<sup>3</sup>

[116] The Respondent's Rules are clear that absenteeism and non-compliance with the leave policy should be taken in a serious light with appropriate consequences management.

[117] It is common cause that the Respondent's existing leave policy and instruments on leave do not make provision for TIL in the circumstances of a spiritual calling. The Respondent has submitted that a spiritual calling is not regarded as an injury or sickness for the purposes of TIL.

[118] The Applicant has submitted that the Respondent ought to have granted her three (3) months special leave on full pay to enable her to attend to all the outstanding processes including *ukuthwasa*.

[119] 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.<sup>4</sup>

[120] In the case of ***Kievets Kroon Country Estate (Pty) Ltd v CCMA & Others ZALC 146; [2011] 3 BLLR 241 (LC)***, the Court in this case, as per Francis J ,concurring with and upholding the findings of the Commissioner had the following to say:

*"[18] .....the Commissioner said that there is a great deal of mystery about the phenomenon of a "calling", however, it was the third respondent's case that her health would have been in danger if she had not heeded the call from the ancestors. The Commissioner said that an extract from the Holy scriptures could shed light on what a calling entails and its effect on the lives of those who were called. He said that in the old testament there is a story about a prophet Jonah who was called by God and sent to Nineveh. Jonah decided to disregard the calling of God and sailed the boat to Tarshish. A severe storm hit the ocean and the boat sank.....All Christians and people subscribing to the Christian faith and religion believe that God calls his servants to the ministry and that those who fail to heed His call suffer the same fate as Jonah did. The Commissioner said that what was good for the gander must be good for the goose also. The third Respondent believed that she was called by the ancestors to become a sangoma.....It appears to him that the third respondent had decided to follow the sangoma course*

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<sup>3</sup> Item 3(4) of Schedule 8 of the Code of Good Practice: Dismissal

<sup>4</sup> Item 3(5) of Schedule 8 of the Code of Good Practice: Dismissal

*to save her life. She must have genuinely believed that if she did not do so, she would die or suffer serious misfortune”*

[121] I am inclined to believe that the conduct of the Applicant in the circumstances leading excessive absenteeism and non-compliance with the Respondent's leave policy was influenced by factors beyond her control and directly linked to her spiritual calling. It cannot be said that an employee in the circumstances of the Applicant would just risk losing her job merely for the purpose it.

[122] In the case of **Smith v Kit Kat Group (Pty) Ltd (JS787/14) [2016] ZALCJHB 362**, the Court ruling in favour of the employee, as per Snyman J, opined as follows:

*“[1] The matter was born of a tragic event, which instead of being resolved on the basis of compassion and good sense, escalated in to unfortunate litigation on the basis of discrimination. I am surprised how often employers can be short sighted when it comes to personal circumstances of their employees. The employment relationship in the modern Constitutional era is akin to a marriage, and as an employer, one has to ask yourself how you would treat your spouse in the case of personal tragedy, and then act accordingly”*

[123] It is common cause that the Applicant applied or requested for a four (4) weeks permission to work from home in order to be able to attend to one the outstanding processes related to the spiritual calling called the initiation and the Respondent never indicated whether such a request is granted or denied, but instead, what followed was then the disciplinary processes against the Applicant within the space of a month from the date of such a request.

[124] I find that the Respondent in this matter did not act in a compassionate manner and good sense that is expected in a relationship akin to a marriage, but instead adopted a technical and strictly legalistic approach aimed at finding fault and apportionment of a blame towards the Applicant than showing empathy.

[125] It is common cause that the Applicant has been an excellent employee prior to 2015 and has served the Respondent with diligence and devotion.

[126] In the circumstances of the Respondent's leave policy being silent on TIL in situations related to spiritual calling, I find that the Applicant's request for three (3) months' leave of absence on full pay was far-fetched and unreasonable, the Respondent as the employer, would be in a position of prejudice should it be required to grant or heed to such a request. It is my considered view that such a request should not made available merely for the asking.

[127] In the circumstances I find that the dismissal of the Applicant the Respondent was substantively unfair.



## REMEDY

[128] In the case of **ARB Electrical Wholesalers (Pty) Ltd v Hibbert (DA3/13) [2015] ZALAC 34**, the LAC's Wagly JP with Ndlovu JA and Coppin JA concurring, opined that, in terms of Section 193(1) of the LRA, the remedy that an employee whose dismissal is found to be unfair may be entitled to is reinstatement or re-employment or to be paid compensation. Section 193(2) then goes on to provide that the Labour Court or an arbitrator "must" order the employer to re-instate or re-employ an employee whose dismissal was found to be unfair unless certain exceptions set out in that sub-section apply or the reason for the unfair dismissal was only a failure by the employer to follow a fair procedure. The primary remedy of reinstatement or re-employment does not include compensation. Reinstatement implies being placed back in the employment from the date of dismissal and the employee is therefore entitled to his full salary from the date of his dismissal to the date he recommences employment. With regard to re-employment, this can be ordered from any date after dismissal and a different date ordered at which the employee must commence rendering his/her services. Payment from the date of reinstatement and between re-employment date and the date of commencing employment again is not compensation but payment of salary for unfair dismissal. This is akin to granting specific performance or similar relief in a contractual dispute.

[129] In the case of **Equity Aviation Services (Pty) Ltd v CCMA and Others (2009) (1) SA 390 (CC)**, the Court as per Nkabinde J, opined:

*"The ordinary meaning of the 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing the employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated, they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of Section 193(1) (a) indicates, the extent of retrospectively is dependent upon the exercise of discretion by the Court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The Court or arbitrator may thus decide the date from which reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The fact that the dismissed employee has been without income during the period since his or her dismissal must, amongst other things, be taken into account in the exercise of the discretion, given that the*

*employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly"*

[130] In light of the personal circumstances, the status of the disciplinary record of the Applicant, the gravity and circumstances under which the offence was committed, the nature of the relationship and the prayer of the Applicant. I find that retrospective reinstatement is the appropriate remedy.

#### **AWARD**

[131] The Respondent is therefore ordered to reinstate the Applicant retrospectively.

[132] The Second Respondent is ordered to pay the Applicant an amount of **R 159 768-88** (One Hundred and Fifty-Nine Thousand, Seven Hundred and Sixty-Eight Rands, and Eighty-Eight Cents (**R19 971-11 x 8 Months**), being the monthly salaries due to the Applicant since the date of dismissal.

[133] The amount in paragraph 132 above is subject to normal statutory tax deductions.

[134] The order(s) in paragraph 131 and 132 above must be implemented on or before the 30<sup>th</sup> of June 2022.

[135] No order as costs.



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**Name: Adv. Itumeleng Kgatla**  
**(GPSSBC) Arbitrator**