

# ARBITRATION AWARD

Panelist: RG Pieterse \_\_\_\_\_  
Case No.: GPBC44/2020 \_\_\_\_\_  
Date of Award: 20 September 2021 \_\_\_\_\_

## In the ARBITRATION between:

PSA obo MA Israel \_\_\_\_\_  
(Union obo Applicant)

and

Department of Infrastructure Development \_\_\_\_\_  
(Respondent)

**Union/Applicant's representative:** Bongane Qankase \_\_\_\_\_  
**Union/Applicant's address:** 567 Belvedere Street \_\_\_\_\_  
Arcadia \_\_\_\_\_  
0083 \_\_\_\_\_  
**Telephone:** (011) 718 5400 \_\_\_\_\_  
**Telefax:** \_\_\_\_\_  
**E-mail:** [bongane.qankase@psa.co.za](mailto:bongane.qankase@psa.co.za)

**Respondent's representative:** Christopher Makhubele \_\_\_\_\_  
**Respondent's address:** 18 Rissik Street \_\_\_\_\_  
Marshalltown \_\_\_\_\_  
Johannesburg \_\_\_\_\_  
**Telephone:** (011) 853 0300 \_\_\_\_\_  
**Telefax:** \_\_\_\_\_  
**E-mail:** [christopher.makhubele@gauteng.gov.za](mailto:christopher.makhubele@gauteng.gov.za)

### **DETAILS OF HEARING AND REPRESENTATION**

- [1] This is the award in the arbitration between PSA obo MA Israel (hereinafter referred to as the Applicant) and Department of Infrastructure Development, (hereinafter referred to as the Respondent) that was held on 30/09/2020, 24/11/2020, 15/02/2021, 25/05/2021, 15/06/2021 and 19/07/2021.
- [2] The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138(7) of the LRA.
- [3] This award is not intended to be a verbatim transcript of the evidence led at the arbitration hearing but rather a determination with brief reasons for such determination.
- [4] Evidence relevant to the determination or to support any of the elements of fairness as required may be referred to. This however does not mean that I failed to consider other evidence or ignored such evidence in coming to my decision.
- [5] Both parties were present at the arbitration. The Applicant represented by Mr Bongane Qankase, an official from the Public Servants Association (PSA) and the Respondent was represented by Mr Christopher Makhubele.
- [6] The Applicant submitted their heads of argument on 08/09/2021 and the Respondent submitted their heads of argument on 12/08/2021.

### **ISSUE TO BE DECIDED**

- [7] Whether the dismissal of the applicant was procedurally and substantively fair. If I find the dismissal to be unfair, I must then determine the appropriate relief. The Applicant seeks retrospective reinstatement.

### **BACKGROUND TO THE ISSUE**

- [8] The matter concerns an alleged unfair dismissal due to Ill Health.
- [9] The Applicant was employed by the Respondent in the position of Deputy Director Logistic Support Services from 2013, however she joined the Department in 2009 as Deputy Director at the office of the Head of the Department.

- [10] The Applicant was dismissed on 31 December 2019 due to ill health retirement.
- [11] The Applicant alleges that the dismissal was procedurally and substantively unfair and did not comply with the PILIR policy and seeks retrospective reinstatement.
- [12] The Respondent submitted that the dismissal was procedurally and substantively fair and they did comply with the provisions of the PILIR policy.

## **SURVEY OF EVIDENCE AND ARGUMENT**

### **RESPONDENT'S CASE**

- [13] The first incapacity leave application for the Applicant was around 12/09/2012. The Applicant applied for short term incapacity leave for the period of 22 working days from 13/01/2012 to 13/02/2012. This was for the 2010/2012 sick leave cycle. The application was partially approved by the PHS as a result the Department implemented the recommendations from PHS.
- [14] The second incapacity leave application of the Applicant was 13/09/2012. The Applicant applied for short term incapacity leave for the period of 22 working days from 12/05/2021 to 12/06/2012. This was for the 2010/2012 sick leave cycle. The Department implemented the recommendations from the PHS.
- [15] The third incapacity leave application of the Applicant was 02/11/2018. The Applicant applied for 7 working days short term incapacity leave from 03/05/2018 to 11/05/2018. This was for the 2016/2018 sick leave cycle. The application was declined by the PHS and the recommendations of the PHS was implemented by the Department.
- [16] The fourth short term incapacity leave application of the Applicant was 02/11/2018. The Applicant applied for 6 working days short term incapacity leave from 23/04/2018 to 02/05/2018. This was for the 2016/2018 sick leave cycle. This application was approved by the PHS and recommendations was implemented by the Department.
- [17] The fifth application was for long temporary incapacity leave around 02/11/2018 for 85 working days from 08/08/2018 to 04/12/2018. This was for the 2016 – 2018 sick leave cycle. The application was approved by the PHS and the recommendations was implemented by the Department.
- [18] The sixth application was an independent medical report that was initiated by the Department with the consent of the Applicant. The application came from the PHS with the recommendations that the

Applicant should be discharged from the Public Service on account of permanent ill health.

- [19] The Applicant submitted all her application for short and long terms incapacity to the Respondent with the relevant documents. This was a medical report that was initiated by the Respondent and this was done in line with clause 6.4 of the PILIR policy ("The applicable employer will engage with the Health Risk Manager")
- [20] Although the Respondent initiated the process, it had first source consent from the Applicant to do so.
- [21] Mr Julian Kayter testified under oath stating that he is the Deputy Director in Human Resource Management responsible for leave, sick leave, conditions of service, employment equity staff establishment information management, salary administration, housing allowance and overtime.
- [22] He testified that incapacity leave is managed through the PILIR policy. He explained the process that an employee should follow when making an application for incapacity leave and the employer shall receive such application and refer it to the PHS.
- [23] He testified about the various incapacity applications of the Applicant (which is not in dispute). He referred to the recommendation of PHS that the services of the Applicant be terminated and based on that report it is evident that the Applicant will not be able to return to work.
- [24] He testified on the letter of termination that was dated and signed on 29 October 2019 based on the recommendations of PHS. The termination date is 31 December 2019.
- [25] He confirmed that the Applicant had the right to appeal her termination and as such the appeal should have been submitted to the Labour Relations Department.

#### **APPLICANT'S CASE**

- [26] The Applicant testified under oath and testified that she applied for various incapacity leave periods.
- [27] She testified that a letter was send by the PSA to the Respondent (Director Thembi Nkonyeni and Acting Chief Director Wesley Jacobs) on 16 October 2019 wherein the PSA draw their attention to the requirements of the PILIR policy and requesting them for the letter from the PHS saying the Applicant should be put on ill health retirement. This letter was followed by a letter of termination duly signed by

Mr Bethuel Netshiswinzhe, Head of Department on 29 October 2019 and handed to the Applicant on 12 November 2019.

- [28] The Applicant testified that she never applied for ill health retirement as the letter suggests. She testified that she did not accept the termination in terms of clause 7.4.3 of PILI policy. She further testified that she appealed the termination and was assisted by her union, PSA. The appeal letter dated 15 November 2019 was sent to Ms. Tasneem Motara and Mr Podile Podile from Labour Relations. The appeal letter was then followed with a letter dated 13 December 2019 from Mr Bethuel Netshiswinzhe which letter informed her that an employee whose employment is terminated on grounds of incapacity relating to ill health (ill health retirement) in the public service does not have a right of appeal. The Department therefore lacks jurisdiction to consider the appeal lodged on your behalf.
- [29] She testified on the PILIR policy, clause 8.1 and submitted that she never applied for ill health retirement as required by the policy. She referred to clause 8.4.1, 8.4.2 and 8.4.4.1 and testified that was never issued with the Annexure E as required by clause 8.4.1 of PILIR policy. She never completed part B which is a statement by the employee. The treating medical practitioner at the time was Dr Elsa van Duran and she (Dr van Duran) did not complete part C of Annexure E as stated in the PILIR policy.
- [30] She further testified that she was back at work fulltime and performing her duties from July 2019 and she only went for her treatment on a monthly basis until she was dismissed. She submitted that her dismissal was unfair because the Respondent failed to follow the PILIR policy.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

- [31] The employee testified that she was back at work fulltime from July 2019 and that could not be confirmed by Mr Kayter, in fact Mr Kayter testified that her manager should know whether she was back at work from July 2019. This evidence was not challenged during cross-examination neither was it addressed in the heads of argument of the Respondent and it stands to be undisputed.
- [32] It is clear from the evidence that the employee did not apply for ill health retirement and also that she was unhappy with the decision of the Respondent to terminate her employment due to ill health.
- [33] The Respondent submitted in his heads of argument that "it is evident that Ms. Israel never lodged a formal grievance with the employer about her termination regardless the fact that she was informed of the outcome of PHS on or about August or September 2019. Her termination was on 31 December 2019 so from August 2019 to 31 December 2019 she had a chance to lodge a grievance, but she did

not as she knew and accepted that she was sick and unable to provide service.” This argument of the Respondent is incorrect and misplaced. It is evident from the testimony of the Applicant that she received a termination letter from Mr Bethuel Netshiswinzhe on 15 November 2019 which was duly signed by Mr Bethuel Netshiswinzhe on 29 October 2019. The Applicant was working during the month of August, September and October 2019, not knowing what is waiting for her. It is evident from her evidence and the Applicant’s bundle of documents that the PSA lodged a grievance on her behalf, the appeal letter dated 15 November 2019 was send to Ms. Tasneem Motara and Mr Podile Podile from Labour Relations. It is therefore incorrect to say that the Applicant never lodged a grievance. In fact, Mr Mr Bethuel Netshiswinzhe replied back informing her that that an employee whose employment is terminated on grounds of incapacity relating to ill health (ill health retirement) in the public service does not have a right of appeal and the department therefor lacks jurisdiction to consider the appeal lodge by PSA on her behalf. Mr Kayter however in his evidence testified that she had the right to appeal. The letter from Mr Bethuel Netshiswinzhe is dated 13 December 2019 and signed on 17 December 2019.

- [34] It would seem as if the Respondent solely relied on the report from the PHS and the recommendations to terminate the employment of the Applicant without having followed the required provisions of the PILIR policy without having regard that the Applicant was back at work from July 2019.
- [35] I refer to clause 8 (III HEALTH RETIREMENT) of the PILIR policy. “The employer must submit an application for ill health as soon as it is evident that an employee may not be able to return to work following incapacity. The Independent Medical Report is dated 22-07-2019. By the date of this report, the Applicant was already back at work and she continued to work till 31 December 2019. In other words, through the whole process of the Respondent, the Applicant was at work fulltime performing her duties as required from her. She only attended her treatment once per month. The Respondent failed to proof that it was evident that the Applicant may not be able to return to work because the Applicant was already back at work from July 2019.
- [36] The only way that could have determined the permanent ill health status of the Applicant would have been a medical report from an independent occupational Therapist. Such report was requested by the respondent, but was never forthcoming. Nonetheless, the Respondent proceeded with the termination on the recommendation of PHS.
- [37] In terms of clause 8.4 of the PILIR policy, it is clear that Annexure E must be completed and forwarded to the Health Risk Manager with all the supporting information. The information required in terms of Annexure E are Part A: Statement by Employer, Part B: Statement by the Employee and Part C:

Statement by the treating medical practitioner. It is evident from the testimony of the Applicant that at least Part B was not done as she never made a statement in this regard and Part C was not completed as there was no statement from her treating medical practitioner.

- [38] The Applicant argued that the Applicant is not unable to render an effective service, in fact, she is able to do so and she was doing that since July 2019 till her last day of employment, which was 31 December 2019.
- [39] It would also seem that the Respondent failed to ascertain the feasibility of alternative employment or adapting the duties or work circumstances to accommodate the employee.
- [40] In terms of a Confidential Assessment Report for Long Temporary Leave of Ms. Israel conducted by PHS on 02/11/2018, the PHS recommended that: *"She needs to consult an Occupational Therapist for the purposes of undergoing a Functional Capacity Evaluation (FCE). This will provide the objective evidence regarding her ability to continue working albeit with alteration and or in alternate position. This will provide crucial information on her ability to work and assist the employer in terms of compliance with regards to schedule 8, the Code of Good Practice"*
- [41] There is also a further failure on the side of the Respondent in that they failed to follow the recommendations of the PHS in the Confidential Assessment Report for Long Temporary Leave conducted by PHS on 02/11/2018 as set out in point 40 above.
- [42] Mr S Lekalakala who is the Deputy Director clearly accepted the recommendations of PHS of 02/11/2018 and wrote a memorandum dated 07/05/2019 wherein he specifically highlighted in the recommendations that: 1. An independent Assessment of Ms. Israel is requested based on the above information and 2. That Ms. Israel also undergo a Functional Capacity Evaluation. The Respondent never conducted the FCE as recommended by the PHS in the report of 02/11/2018 and the memorandum of Mr Lekalakala dated 07/05/2019. Without this FCE, the Respondent could not objectively determine the functional ability of the Applicant.
- [43] The Respondent failed to provide evidence that the Applicant is permanently unable to work.
- [44] I am of the view that the Respondent failed to provide objective evidence that the Applicant is unable to render an effective service.

[45] I am also of the view that the Respondent did not follow the PILIR policy when terminating the employment of the Applicant due to ill health.

[46] For my reasons as set out above, I find the dismissal of the Applicant was procedurally and substantively unfair.

### **REMEDY**

[47] The Applicant sought retrospective reinstatement as a relief.

[48] In terms of section 193 (1)(a) of the LRA, I am empowered to order the reinstatement as a primary relief.

[49] I cannot find any reason why the Applicant should not be retrospectively reinstated.

### **AWARD**

In the premises I make and deliver the following award:

[50] The dismissal of the applicant was both procedurally and substantively unfair.

[51] The Respondent, the Department of Infrastructure Development is ordered to reinstate the Applicant, Mrs MA Israel retrospectively to the date of dismissal to wit 31 December 2019 with full back pay in the same or similar position she occupied prior to her dismissal and on terms and conditions of employment no less favourable than those applicable at the time of her dismissal and without any loss of benefits.

[52] The reinstatement of the Applicant in the preceding paragraph is effective 01 October 2021.

[53] The Applicant is directed to report at the office of the Respondent and tender her service on Friday, 01 October 2021.

[54] The back pay referred to in paragraph 51, is calculated as follows: R60180.03 x 21 months = R1 263 780.63 (One million two hundred sixty-three thousand seven hundred eighty rand and sixty-three cents) subject to statutory deductions.

[55] The Respondent is ordered to pay the amount referred to in paragraph 54 above not later than 30 October 2021.

[56] There is no order as to costs.

A handwritten signature in cursive script, appearing to read 'RG Pieterse', is positioned above a horizontal line.

Panelist: RG Pieterse