ARBITRATION AWARD

Panelist/s: Kevin Perumal
Case No.: GPBC 1107/2020
Date of Award: 4 June 2021

In the ARBITRATION between:

PSA obo R INDHUR

(Union / Applicant)

and

DEPARTMENT OF EDUCATION

(Respondent)

Applicant's representative	MR. E Mkhize **Labour Relations Officer** PSA Durban Provincial Officer
Applicant's Address:	11th Floor Delta Towers 300 Anton Lembede Street Durban 4000
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Respondent 's representative	Mr. I Pillay **Department of Education**
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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration at all materially times were held at the Department of Education, Durban Teachers Center, Chatsworth and Phoenix Teachers Center, Durban.

2. The arbitration commenced on the 28 October 2020 and was completed on the 28 April 2021.

3. The Applicant was represented by Mr. Ernest Mkhize of the PSA and the Respondent was represented by Mr. I Pillay, KZN Regional Office, Department of Education.

4. The parties agreed that closing arguments will be submitted in writing to the GPSSBC on or before the 12 May 2021, and that the award be issued by the arbitrator on or before the 31 May 2021.

5. The Respondent indicated that should they not submit their closing arguments by the agreed date, the arbitrator must then decide the outcome on the basis of the evidence presented at the arbitration.

ISSUE TO BE DECIDED

6. I am called upon to determine whether the sanction of dismissal imposed by the Respondent was procedurally and substantively fair.

BACKGROUND TO THE ISSUE

7. The applicant was employed by the Respondent and occupied the post of Administration Clerk at Evergreen Primary School at salary level 7 since 1993.

8. On the 23 January 2020, the Applicant was discharged by the Respondent after completing 30 years of service.

9. On the 21 January 2020, the Applicant was notified that her services with the Respondent was terminated and that she was discharged in terms of section 17 (2) (C) of the Public Service Act – incapacity due to poor work performance, after an incapacity hearing which took place on the 17 November 2019. The dismissal came into effect on the 23 January 2020.

10. On the 5 February 2020, the Applicant referred a dispute to the GPSSBC for conciliation. The dispute could not be resolved at Conciliation and was thereafter referred by the Applicant to the GPSSBC requesting that the dispute be arbitrated upon.

11. Despite the pre-arbitration minuted having been drawn up, the parties had not signed off on the same, given the Respondents view that they were placing everything in dispute.[1]

12. The Applicant did not furnish their own bundle of documents and relied upon the Respondents bundles to lead evidence during the arbitration.

13. An attempt was made by the arbitrator to determine a possible settlement of the dispute in terms of section 138 (3) of the LRA, however the dispute could not be settled between the parties.

POINT IN LIMINE

14. There were two point ***in limine*** raised by the applicant. The first being that they had applied for the recusal of the Respondents representative on the basis that the representative had chaired the incapacity hearing. He also determined the sanction of dismissal to be applied to the Applicant. He was now representing the Respondent in this arbitration in a bias manner given that he had prior knowledge of the case at hand.

15. The Respondent argued that the Applicant cannot choose who to represent the Respondent, he was not a legal Practioner, and that he was well versed with the evidence of the respondent with regard to the incapacity of the Applicant to perform her duties.

[1] Bundle A1 1-2

16. As arbitrator I had dismissed the application on the sole basis that the Respondent will have to bear the consequences of their representative leading their case as well as adducing evidence at the arbitration which may lead to certain procedural irregularities in the arbitration.

17. The second point in limine related to the issue of a postponement of the arbitration. As Arbitrator I was called upon to determine whether the request for a postponement of the arbitration by the Respondent held on the 23 March 2021 should be granted. The Applicant had requested That the Commissioner issue his ruling in writing to the parties. That the arbitrator considers the issue of wasted costs for the scheduled arbitration of the 23 March 2021.

18. Upon investigation of the matter regarding the notice of set down, it was confirmed by the GPSSBC that no formal communication was received by the Case Management Offices of the GPSSBC in this regard and that no application for the postponement was received since the 12 March 2021. The issue then is should the Respondent bear the wasted costs of this arbitration. In this regard the parties were referred to Rule 40 of the GPSSBC Rules for the Conduct of Proceedings before the GPSSBC which state that "an arbitrator may make an order of costs". It thereafter ruled that from the evidence before me that the Respondent representatives had acted in a frivolous and vexatious manner by not attending the agreed set down date of the 23 March 2021 in its conduct during the arbitration proceedings and therefore costs should follow. Rule 40 (2) provided for wasted costs incurred by a party who is represented in the arbitration.

19. The following Ruling was then issued:

The Respondent party will pay to the GPSSBC, the day fee of the arbitrator being R 3000.00 plus the travel cost of the arbitrator being R 602.00 inclusive of toll fees. The arbitration stands adjourned to the 12 and 13 April 202 1in Chatsworth Durban.

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENTS CASE

A Summary of the Evidence of the Respondent's case.

Witness 1: Mr. I Pillay

20. The witness testified that he was employed by the Respondent as the Deputy Director Human Resources Management.

21. Due to a number of cases regarding serious absenteeism, the respondent conducted an investigation and developed a three step process to deal with the matter, this included: meeting with the relevant employee and bringing it to the employee's attention, writing a letter instructing the employee and calling on the employee to return to work and lastly conducting an incapacity hearing to offer the employee an opportunity to state their case.

22. The Respondent managed this process in line with Public Resolution 10 /1999 and adhered to the Pillar Policy to manage illness of employees. On the 28 June 2018, he was appointed Presiding Officer for the incapacity hearing against the Applicant. His appointment was made in terms of clause 7.3 (b) of Schedule1 of the Resolution 1 of 2003 (Disciplinary Code and Procedure for the Public Service).

23. His functions as Presiding Officer included amongst others the power to pronounce a sanction, to inform the Applicant of the final outcome and right of appeal as per clause 7.4 of Schedule 1 of the Resolution read in conjunction with clause 9. The Applicant was charged with incapacity and not misconduct, in that the Applicant was unable to perform her duties arising from her alleged ill health.

24. The witness testified that once an employee has exhausted their sick leave provisions, they would need to complete Annexure "A" if the absence is under 30 days, and Annexure "B" if longer than 30 days. These applications would be accompanied by relevant supporting documents of the treating doctors provided for by the employee and the application would be sent to the Health Care Management for an assessment to determine whether sick leave should be granted as paid leave to the relevant employee.

25. With regard to the Applicant the witness stated that the Respondent had given the Applicant several opportunities to rectify her alleged sick leave record. The Applicant was called in on a number of occasions and despite being represented

by her trade union officials made several commitments to make herself available for work, but then retracted on her commitment to be at work on time and regularly.

26. In 2017, th Applicant was cautioned at a disciplinary hearing regarding her absenteeism as well as non-submission of leave forms. On the 7 June 2018, the Applicant was requested to attend a meeting with the Respondents appointed officials to discuss her excessive leave-taking.[2] The purpose of the meeting was to give the Applicant and opportunity to rectify her absenteeism and agreement was reached that she been given support by the Employee Wellness Programme. The Applicant had failed to adhere to this agreement. The Applicant was advised through various letters that her absenteeism from the workplace as a result of her alleged illness was in breach of various policies of the Respondent.[3]

27. In 2018, after an incapacity hearing the Applicant agreed to leave without pay for periods in excess of the 36 days granted to the Applicant.[4]

28. On the 19 October 2018 the Applicant was further summoned to a meeting to discuss her continued absence from duty.[5] At this meeting the issue of an alternative placement came up but the Applicant was not prepared to move to an alternative worksite.

29. During the excessive periods of absenteeism, the Applicant had not convinced the Health Care Management that she had suffered major chronic ailments that warranted paid sick leave in excess of the provisions nor did she submit medical reports that may have necessitated possible medical boarding.

30. The Respondent had followed the route of Incapacity Hearing due to ill health as a result of the Applicant alleging that her absenteeism was a result of her alleged illness.

31. The witness stated that the Applicant did not attend the Incapacity Hearing scheduled for the 2 October 2019, and he decided that the hearing be adjourned to the 4 November 2019. The Applicant did not attend the hearing on the 4 November 2019 and he decided that it was in the best interest to continue noting that the Applicant was advised of the hearing on previous occasions and had absent herself

[2] Bundle B 11-11 B
[3] Bundle B 18
[4] Bundle C 20
[5] Bundle B 12

.He continued with the hearing and after receiving all the evidence assessed it and made a decision that the Applicant is dismissed from the services in terms of section 17 (2)(c) due to incapacity due to poor work performance.[6]

Cross -examination of the witness.

32. The witness clarified that the Applicant was introduced into the system during the nighties as a Librarian Assistant but the job title and functions had changed to that of Admin Clerk. He was not sure how it came about that the documents in 2018 and 2019 still referred to the Applicant's job title as Library assistant, however, she was performing the duties of the Admin Clerk.

33. The dismissal letter had an error with regard to the date and it should have been 23 January 2020 and not 21 January 2019.

34. He confirmed that the Applicant was discharged in terms of Section 17 (2) (c) of the Public Service Act.

35. He informed the arbitration that as Chairperson of the Incapacity hearing he was granted the delegated powers to pronounce on the sanction, and issue the discharge verdict and appeal thereof in the letter of termination. There was no need to obtain approval from the HOD of the Department.

36. The witness stated that the Applicant had completed Annexures "A "and "B "and not Annexure "F "that concerned medical boarding. The Respondent had not conducted their own assessment of the Applicants illness as they were varied and differed from period to period of absence. There was no specific chronic ailment that was identified by her health care specialists to necessitate any further investigation by the Respondent.

37. He confirmed that he had requested the trade union representative to recuse himself from the incapacity hearing as he saw no need for him to be present as the applicant was not present.

[6] Bundle C 10-13

38. When confronted with the allegations that the Applicants absenteeism from the workplace was as a direct result of the school principals abuse and victimization of the applicant, the witness stated that the Applicants chronic absenteeism had commenced prior to the Principal arriving at the school and continued thereafter.

Re-examination of the witness

39. The witness confirmed that the letter contained on page 18 of Bundle "B" was addressed to the Applicant

Witness 2 Ms. H. Naidoo

41 The witness testified that she was employed by the Respondent and was appointed to the position of Principalat Evergreen Primary School since January 2015. She was acquainted with the Applicant, as the Applicant was employed by the school as an Admin Clerk paid for by the Respondent. The Applicant was responsible for among other duties, the front office, data capturing, typing, annual financial statements, insurance and learner education.

42. She had on numerous occasions raised the issue of the Applicants failure to attend work regularly with the Applicant but had approached from the perspective of a follow female employee showing concern for what is deemed womanly issues. She had tried to mentor the Applicant as well as council her with regard to her health issues. The witness pointed out that the Applicant was absent from the workplace for a number of periods that exceeded the norm for sick leave prior to her being appointed at the school as Principal and her absenteeism had continued after her appointment. [7]

43. The Applicants absenteeism from school caused tremendous hardships, as a new person had to be appointed for the interim period to oversee her responsibilities and this was frequent resulting in inconsistency and falling behind with Departmental responses to issues raised, concerns raised by the school governing body as well as parents and teachers had increased, thereby stress levels increased and deadlines became harder to achieve. She had consistently advised the Applicant of these

[7] Bundle A 12-15

challenges, and the Applicant would agree with her but will not change her behavior. She even advised the Applicant to take an entire term off to sort out her health issues and find out what is medically wrong with her, but the Applicant did not take her advice seriously.

44. There are approximately 200 school days in a year and the number of days of absenteeism by the Applicant had varied in each year. [8] In 2016 the Applicant was absent from school for 180 days, in 2017, 59 days and in 2018, 78 working days. This pattern was similar in previous years. She had given a factual account of the Applicants absenteeism to the Department. The witness testified that she did not approach the PSA to discuss the same challenges of the Applicant's absenteeism. She was aware that the Department had held a Disciplinary Hearing with the Applicant in 2017 and the Applicant was found guilty of the charges brought against her (absenteeism) and was given 2 month's suspension without pay, suspended for 2 years and a final written warning. [9]

45. Documents related to the annual financial statements could not be found and the Applicant was advised thereof.[10] Other financial issues were not timeously performed and the Applicant had to be reminded thereof. [11] Various periods of unpaid leave was applied for by the Evergreen Primary School to the Department on behalf of the Applicant.[12]

46. On the 6 February 2019, she had written another letter to the department complaining about the Applicants absenteeism from school and the implications thereof. [13] This was followed up by the Chairperson of the School Governing Body who had complained to the Department regarding the Applicants absenteeism from school. [14] For the period 28 January 2019 – 31 July 2019, the Applicant was absent from school for 76 days. [15] She was adamant that she was not contacted by the union regarding the Applicant's absenteeism nor was she aware of a possible transfer of the Applicant to another school.

Cross examination of the Witness

[8] Bundle A 12
[9] Bundle A 134-137 para 4
[10] Bundle A 116
[11] Bundle A 117.
[12] Bundle A 119-133
[13] Bundle B 4-5

47. Under cross examination, the witness stated that she was not present at the school in 2014 and was not aware of any protest/ demonstration nor was she aware if there was a councilor involved in the protest/ demonstration. She was a Level 1 Educator prior to coming to the school. She had supervised the Applicant since 2015 and managed the Applicants performance when the Applicant was present at school. Her performance rating remained unchanged during the various assessments that she had undertaken, despite the Applicants performance ratings being unusually high prior to her arriving at the school.

48. Whenever the Applicant would return from sick leave she would find it very difficult to re-integrate herself with her work commitments given the lengthy periods of absenteeism. She had mentored the Applicant on work issues as well as on private matters. She was aware that the Applicant was discharged from the services of the Respondent. [16] The witness could not comment on the validity of the discharge letter as contained in Bundle C page 9.

49. She was aware that the Applicant had suffered many ailments, from the reading of the medical certificates but was unable to pin point any serious medical condition that may have warranted a medical boarding process. She had not made fun of the Applicant when the Applicant complained off an ear ache.

50. The witness testified that she had seen the affidavit of the Applicant on page 15 of Bundle "B" and had requested the Department to intervene. She was unaware as to what had transpired concerning the allegations made against her by the Applicant, and had not taken the matter any further. She may have become aware of a possible transfer of the Applicant to another school, but this was corridor talk as there was no formal communication from the Department about the same issue.

51. When confronted with the allegations that the Applicant became depressed by her treatment as Principal, she stated that it was unreasonable because the Applicants' absenteeism started long before she was appointed Principal. She further disagreed with the Applicants version that she was abusive and had shouted at her on numerous occasions. She also denied talking to the SGB about the Applicants issues.

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[14] Bundle B 6
[15] Bundle B 7
[16] Bundle C 9

52. She had empathized with the Applicant when her mother became ill and had not denied her leave to take care of her mum. She further denied that she had not shown any compassion when the Applicants blood pressure had reached 218/155. The witness also denied threatening the Applicant in any way or form. The witness justified her report as contained in Bundle "A "pages 12-15 by stating that she had given the Applicant the benefit of the doubt when it came to her illness but had done her research from 2007 to show that the Applicant spent a large amount of time outside her workstation and was unable to perform the functions to which she was employed to do. She had not dismissed the Applicant, as the power to dismiss did not reside with her.

53. The witness further testified that there were a number of other allegations made by the Applicant which she could not remember but this did not mean that she was guilty of such allegations but also that it should not detract from the fact that the Applicant had absented herself from work for a number of reasons related to illness and not these allegations alleged by the Applicant.

Re-examination of the Witness

54. Under re-examination, the witness stated that the work that should have been performed by the Applicant was not done as the Applicant was frequently absent from the workplace. The Applicant was never put off from work by her psychologists for a period exceeding 3 months. The witness confirmed that the Applicant had also changed her psychologists as well. The Applicant had not presented any requests to herself for a transfer to another school. She was not responsible for the Applicants illness and or depression as alleged by the Applicant. The best interests of the students were of paramount importance to her in the running of the school. During the Applicant's mother's illness, she granted the Applicant 5 day's family responsibility leave despite the Applicant not completing the leave application form.

55. The witness confirmed that it was not possible for the Applicant to have achieved exceptional performance given that she was absent from the workplace for over half the year also noting that whilst the Applicant was on sick leave or absent from work, someone else had to be appointed to perform her tasks and carry out her responsibilities.

Summary of the Evidence of the Applicant's case.

Witness 1: Ms. R Indhur

56. The Applicant stated that she was 51 years old, was employed by the Department of Education and placed at Evergreen Primary School and was unfairly dismissed. She previously held the position of Librarian Assistant and for the past seven years was appointed as Senior Admin Clerk. She reported directly to the Principal Ms. H Naidoo and that her performance assessments tools provided for 80% finance related activities and responsibilities and the other 20% was admin related. She performed exceptionally well despite being a single parent and would take tasks home to complete. She had worked under 5 different principles during her working career and her performance rating was above average.

57. The challenges started when the new Principal was appointed under dubious circumstances. The Principal had brought her down and made her feel useless. She was set in her ways with regards to the management of the school's finances but the Principal wanted things done her way which caused much confusion and many challenges between them occurred.

58. She believed that she was unfairly dismissed because she was not present when the decision was taken to dismiss her. She was booked off sick and had sent the sick note with her union representative to the incapacity hearing. The official who took the decision to dismiss her, did not possess the authority to do so given that the very same official knew everything about her case and it was unfair for him to dismiss her.

59. The unfairness extended to her representative as well in that the Chairperson of the Incapacity Hearing had requested her representative to recuse himself as she was not present at the incapacity hearing. She was advised by her daughter of the outcome. He daughter had received the email confirming her discharge. [17] She received the outcome of the incapacity Hearing from Mr. Mooloo who advised her that the Mr. Pillay was working on getting the Principal out of the school. [18] She had not filed a grievance against the Principal as she was advised to place this matter on hold by her union representatives. Mr Pillay had requested the union to request her to consider a transfer but she had refused as she believed that she was not the problem

[17] Bundle C 9

but that the Principal should be moved out of the school, despite this assertion she was never formally advised by the Respondent of a possible transfer to another school. She became sick because of the pressure applied by the Principal on her. As a result of her illness, she further became depressed.

60. With regard to her non-attendance at Incapacity Hearing held on the 17 November 2019, she had handed a sick note to Vinod from PSA to hand over to the Chairperson of the Incapacity Hearing. [19] She did not receive any calls from the union on the day of the hearing as she was unwell and may have fallen off to sleep. She was adamant that she was unwell and that the Incapacity Hearing should not have taken place without her being present. Furthermore, her medical certificate was not accepted by the Chairperson of the Incapacity Hearing.

61. She had received the letter dated 7 June 2018 regarding her excessive leave – taking. [20] She further received the letter dated 11 October 2018 requesting a meeting with herself in regard to her continuous absence from duty. [21] On the 19 October 2018 she was present at this meeting[22]. It was at this meeting that Mr. Khan had proposed a possible transfer to another school informally to her.

62. The witness then stated that as a result of no action being taken against the Principal, she made the affidavit alleging harassment by the Principal. [23]

63. In 2016, she absconded from work and was charged and faced a Disciplinary Hearing, was found guilty and had to pay back the department for the leave that she had taken. In January 2017 she returned to work and started earning a salary with benefits. During 2017, she was also hospitalized and was absent from the workplace for approximately 59 days. In 2018, she was absent for approximately 78 days. Between 2007 and 2015 she underwent a divorce and suffered a burn out and was granted unpaid leave which she accepted. She did not receive any counselling from the Principal when she had returned to work in 2017. She did not deliberately abuse her sick leave; she was ill on the days that she was absent.

64. She has been rehabilitated since her dismissal and would pray and wish that she could go back to school and be of benefit to the school that she had worked in for over 27 years.

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[18] Bundle C 10-13
[19] Bundle C 15-16
[20] Bundle B 11-11B
[21] Bundle B 12 -12B
[22] Bundle B 14

Cross examination of the witness

65. Under cross examination the, witness confirmed that she was employed by the Respondent and was stationed at Evergreen Primary School. Amongst her responsibilities she processed leave applications for staff and teachers employed at the school and was aware of the procedures that managed the leave processes. She was aware that her sick leave cycle over a three-year period provided for 36 days leave to be taken and over and above applications had to be made to the Respondent which had to be assessed by the Health Care Management.

66. At the time of the Incapacity Hearing she was not able to attend as she was booked off sick by her doctor and had sent her medical certificate to her union representative on the morning of the hearing between 4-5 am. Her mental state did not allow her to attend despite her intentions of being there. She was being treated for depression.

67. She reiterated that the Principal was the main cause of her illnesses. Despite her conduct she was praying for a new situation.

68. On the 15 August 2018, she did not attend the Incapacity Hearing, but had attended on the 19 October 2018. At this hearing she confirmed that the outcome was that she would return to work on Monday 22 October 2018. The witness further confirmed having received the letter dated 7 June 2018 regarding excessive leave taking. She denied having any knowledge of a possible transfer to another school as she believed that she had done nothing wrong. She was adamant that the Principal had made her life miserable.

69. She was unable to recall the date on which she had met with Mr Khan but recalled that it was after the meeting of the 19 October 2018, wherein Mr Khan had told her that she should have been out of the system a long time ago due to her continued absenteeism from school.

70. She further affirmed that she was entitled to 36 day's sick leave in a 3 - year cycle anything above this was at the discretion of the Respondent. Between the period

[23] Bundle B 15

2007 – 2015 and the period prior to her dismissal, she had not applied for medical boarding, despite being depressed at the workplace.

71. She had consistently relied on her representatives to protect and advance her interests, however, they had failed her in many instances, even at these proceedings she was not aware of the right to present all of her medical reports to attest to the fact that she was ill during her absences from work.

72. The witness agreed that during her absences from work, the school had to ensure that the work was performed, however her absence was as a direct result of her illness brought upon by the situation in the school.

73. She was now ready to take on her work commitments and many of the illnesses that she previously had was now being properly managed. She denied manipulating her leave to her benefit and that she concerned herself with many other issues that did not concern her. She was not given an opportunity to represent herself and produce the proof (documents)to support her claims that she was ill. The Health Risk Manager did not call her nor did they suggest that alternative and or further tests be conducted to determine the status of her illness.

74. She denied using her personal situation of her divorce and bringing up of her young children to garner sympathy from those around her.

Re-examination of the witness.

75. The witness claimed that her leave applications were received by the school Principal and processed to the Principal's benefit given that she had a personal vendetta against her. She was knowledgeable about the leave processes. She had not manipulated her leave to her benefit nor did she use her personal circumstances to garner sympathy for her situation. She was represented in all instances by her union officials but was not present at the last sitting when she was dismissed. She submitted a sick note for the period 1 November 2019 – 30 November 2019 and could not attend the Incapacity Hearing. The sick note was from her treating Psychiatrist Dr. S K Kader. Had she been present she would not have been unfairly dismissed, she would have explained her situation. The Doctor's sick note was not considered by the Chairperson of the Incapacity Hearing. Her representative was asked to leave the hearing therefore she was not represented.

76. Since her dismissal her medical status has changed with the support of her children and former husband, she is recovering well. She has a new mindset to make things better for herself and her children. She has even reduced her medication and have started alternative treatment.

77. The reasons why she believed that her former shop stewards/ representatives did not adequately represent her was that they were more understanding towards the Department's needs.

78. The witness claimed that she had not handled this matter well in that she had focused on the wrong issues. She should have focused on her health and getting well so that she could attend school regularly. She wants to go back to the school and continue with meeting her deadlines and to perform her duties well.

ANALYSIS OF EVIDENCE AND ARGUMENT

79. It was noted that the parties had failed to sign the pre-arbitration minute confirming agreed common cause facts and those facts that are in dispute. After the parties had led their respective witnesses I have established from the leading of evidence the following:

79.1. The Applicant is 51 years old, was employed by the Department of Education and placed at Evergreen Primary School. She previously held the position of Librarian Assistant and for the past seven years was appointed as Admin Clerk. She reported directly to the Principal Ms. H Naidoo and performed administrative and financial functions at the school.

79.2. On the 23 January 2020, the Applicant was discharged from duty after failing to attend an Incapacity Hearing to determine the status of her illness. She had completed 30 years of service with the Respondent.

79.3 She was not present at the Incapacity Hearing, was booked off sick at the time of the hearing and had submitted a sick note with her Union Representative for the period 1 November 2029 – 30 November 2019.

79.4 Her representative was not allowed to participate in the hearing and was told to leave.

80. ***The first issue to be determined, is whether the Chairperson of the Incapacity Hearing had the power and the authority to dismiss the Applicant.***

81. The Public Service Act 1994 (Act 103 of 1994) as amended stipulates under Section 16B Discipline (1) Subject to subsection (2) *"when a chairperson of a disciplinary hearing pronounces a sanction in respect of an employee found guilty of misconduct, the following persons shall give effect to the sanction: (a) In the case of a head of department, the relevant executive authority; and (b) in the case of any other employee, the relevant head of department"*.

82. On the 28 June 2018, Mr I Pillay was appointed Presiding Officer for the Incapacity Hearing against the Applicant. His appointment was made in terms of clause 7.3 (b) of Schedule1 of the Resolution 1 of 2003 (Disciplinary Code and Procedure for the Public Service).[24]

83. His functions as Presiding Officer included amongst others the power to pronounce a sanction, to inform the Applicant of the final outcome and right of appeal as per clause 7.4 of Schedule 1 of the Resolution 1 of 2003. [25]

84. On the 23 January 2019, the Chairperson of the Incapacity Hearing delivered the Findings and Outcome of the Incapacity Hearing together with a letter of discharge (Notice of Dismissal) to the Applicant. The Applicant contended that the Chairperson did not have the power to dismiss her.

85. The power and authority to give effect to the discharge lies with the executive authority as per 16 B of the Public Service Act, however on closer reading of the appointment letter of the Chairperson of the Incapacity Hearing the Head of Department had delegated his power and authority to the Chairperson when he stated at para (i) *of the letter the following "Pronouncing a sanction, on behalf of the employer, with due consideration to the stipulated considerations and giving written notification to the employee and the employee representative of the final outcome of the hearing, including, if applicable, the sanction imposed and the right of the employee to appeal [Clause 7.4 of Schedule 1 of Resolution 1 of 2003*]"[26].

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[24] Bundle C 1-2
[25] Bundle C 1-2
[26] Bundle C 2 (i) @ page 2

Therefore, the effect of the appointment with such rights concluded by the Respondent that there was no need to obtain such approval from the HOD is founded in such delegation. Furthermore, the Respondent had corroborated my findings in this regard when they had stated there was no need to obtain the approval of the HOD when discharging an employee as such power as delegated by the HOD to the relevant Chairperson.

86. ***The second issue to determine is whether the appropriate Codes of Good Practice and or Collective Agreements were utilized in the course of the discharge of the Applicant.***

87. The Applicant was charged with incapacity under the Public Service Co-ordinating Bargaining Council Resolution 10 of 1999 and not misconduct in terms of Resolution 1 of 2003 (Disciplinary Code and Procedure for the Public Service).

88. The Respondent argued that there was a grey area when it came to this issue. On the one hand the Applicant had frequently absented herself from the workplace as a result of ill health and on the other hand she had become incapacitated due to ill health resulting in poor work performance. The key component in both issues was the fact that the Applicant was not present at work for long periods of time and the reasons for her absence was stress and ill health related issues. Absenteeism from the workplace either approved or unapproved as in the case of the Applicant, is directly related to misconducting herself.

89. The Disciplinary Code and Procedure for the Public Service @ Annexure A state that an employee will be guilty of misconduct, if he/ she, among other things "performs poorly or inadequately for reasons other than incapacity and absents or repeatedly absents him/herself from work without reason or permission.

89. On the 30 August 2019, the Respondent advised the Applicant that in terms of her conditions of employment continuous and or regular absenteeism is defined as misconduct and as such you could expose yourself to possible disciplinary action.[27]

90. The Respondent nevertheless chose the incapacity route resulting in poor performance to discharge the Applicant.

91. ***In General Motors South Africa (Pty) Ltd v National Union of Metal Workers of South Africa and Others LC. PR 206/2016,*** the court dealt with this challenge and reasoned as follows:

> *"In my view, by declining to recognise a category of incapacity arising from persistent intermittent absence from work, the arbitrator committed a material misdirection that amounts to an error in law. The passage from AECI Explosives (Zommerveld) v Mambulu referred to above makes clear that the LAC has accepted that persistent absence from work because of genuine ill-health is a legitimate ground on which to terminate employment, and on that related to the capacity and not the conduct of an employee".*

92. In the case of ***AECI Explosives Ltd Zommeveld v Mambulu [1995] 9 BLLR 1 (LAC)*** the court said the following

> *"It seems to us that the company, having accepted the authenticity of the medical certificates was entitled to rely on incapacity. It was entitled to dismiss the applicant…..For his incapacity to perform his job with such incapacity (was) due to persistence absence from the work because of genuine ill health"*

The court went further to quote the case of Hendricks v Mercantile Sa Ltd (1992) 16 ILJ 34 (LAC) at 312 I-J. The test for substantive fairness was stated by Tebbut J at 313D to be the following:

> "The substantive fairness of the dismissal depends on the question whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include inter alia the nature of the incapacity; the cause of the incapacity, the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on other employees; the employees work record and length of services.

[27] Bundle B page 18 @ last para.

93. In my view, the present matter before me is distinguishable because there was never established as a matter of fact that the Applicant was genuinely ill which resulted in her persistent absenteeism. In fact, the Respondent had alleged throughout the entire proceedings that the Applicant had manipulated her sick leave to her own advantage and she cried for sympathy with regard to her personal circumstances. As pointed out by the court in Hendricks the following factors must be taken into account:

93.1 **Nature of the incapacity**: The applicant had persistently stayed away from work for various reasons. For the period 22 January 2019 – 31 July 2019 the Applicant was absent for a period of 76 days [28] . For the period 1 January 2018 – 8 November 2018, the Applicant was absent for 130 days[29] and for the period 16 January 2017 – 29 November 2017 the Applicant was absent for a period of 59 days.[30] For the period 18 January 2016 – 7 December 2016, the Applicant was absent for a period of 178 days.[31]For the period 2007 – 2019 according to the Thandile Health Risk Management Report the Applicant has applied for 139 days sick leave, 240 days temp incapacity leave resulting in 379 days absent from work. The Health Risk Management Report in most instances approved partial sick leave and stated that "*the available information does not validate the full period of temporary incapacity leave applied for and only partial period of temporary incapacity leave can be adjusted" Furthermore the Report stated that there is no indication of an adverse effect on the employee's future work potential.* [32] *At page 63 B of the Reports, the Health Risk Management stated that the leave submitted indicated sick leave mismanagement.* [33]

My analysis of the evidence as presented by the Health Risk Management Reports clearly indicate that there was a mismanagement of sick leave by the Applicant and there was no single indicator that the applicant had suffered any major illness that may have warranted and justified the amount of sick leave taken over the period of time and even yearly. There was further no evidence submitted that the Applicant could have applied for

[28] Bundle B 7
[29] Bundle B 8
[30] Bundle B 9
[31] Bundle B 10
[32] Bundle B 37 B and 38 B

medical boarding as a result of her illness and incapacity to perform her functions. In fact, the evidence suggested that when the applicant was at work she had performed, this is corroborated by the Health Risk Management Report which stated that there was no indication of an adverse effect on the employee's future work potential.

93.2 **The cause of the incapacity**: The Applicant had suggested that the cause of her incapacity was as a result of the newly appointed Principal who changed systems and procedures, mistreated the Applicant and belittled her to the extent that she signed an affidavit and submitted it to the school for further investigation. She had not lodged a grievance because her Union Representatives had advised her not to. The Respondent on the other hand stated that the allegations made by the Applicant was unfounded and that she was manipulating her sick leave to garner sympathy and support for her absence from the workplace. The respondent also stated that the sick leave was being abused prior to the Principal arriving at the school and the trend continued after the Principal had arrived in 2015. The Respondent further stated that there was no evidence provided of this harassment raised on record either by the Applicant or her Union Representative.[34] This does not mean that these allegations were not warranted. In my view the allegations made were serious enough to warrant a thorough investigation by the Respondent to ascertain the facts and to take the appropriate action. This did not happen.

93.3 **The likelihood of recovery, improvement or recurrence:** The Thandile Health Risk Management Reports for the sick leave periods in question from early as 2007, suggested that there was no adverse indication that the Applicants work would suffer, a proper diagnosis and prognosis of the Applicants illness supported by empirical medical evidence would enable the Applicant to fully recover and perform her duties as an employee of the Respondent. The Applicants illnesses varied from period to period except for one period where she was diagnosed with depression. The sick leave records and ailments that the Applicant had suffered clearly showed that if managed

[33] Bundle B 63 B
[34] Bundle C 11

properly she would have improved her health. What recurred was the abuse of sick leave by the Applicant.

93.4 **The period of absence and its effect on the employer's operations;** The period of absence as presented in para 93.1 speaks for itself. The Applicant was absent at an average of 111 days per annum over the 4- year period. According to the Principal the school years was approximately 200 days per annum. This meant that for more than 55% of the year the Applicant was absent from the workplace. There is no doubt that this would have had a detrimental effect on the running of the school from an administrative and financial perspective.

93.5. **The effect of the employee's disability on other employees**; The Applicant had reported to the School Principal and was responsible for the Educators leave records. The Principal had verified during evidence that the school had suffered tremendously, financial statements were not prepared, administrative tasks not completed, filling systems were inaccessible and this caused the Governing body to employ temporary staff at a huge cost to the school. This placed tremendous pressure on the Principal to manage the process as the Applicant was employed by the department and not the school.

93.6 **The employees work record and length of services**: The Principal had confirmed that she could not understand how the Applicant has satisfied her performance targets prior to her arrival when the Applicants absenteeism records speaks volumes. I am also of the view that if an employee is absent from the work place for more than 50 % of the time in a given year it is very unlikely or improbable that the said employee would be able to perform her tasks above average in the given performance cycle. Therefore, in my view the previous performance assessments prior to the Principal arriving at the school were not a true reflection of the employee's performance. It is clear that whilst the Principal was there the Applicants performance was below average. The applicant had completed 30 years of service with the Respondent.

94. In casu, the issues raised by the Court in Hendricks when assessed against the Applicant, I am of the firm believe and opinion that the Respondent should have charged the Applicant for misconduct and not incapacity. This was clearly an issue of abuse of sick leave as supported by the Thandile reports and the evidence before me. At page 12 of Bundle C, the Chairperson of the Incapacity Hearing stated the following "*There is nothing on record, over the years to suggest that the employee is so severely debilitated that she cannot render service to her employer and surely no employer can be expected to keep an employee in their capacity that has such a long history of absenteeism*". This statement further supports my view that the Applicant should have been charged for misconduct.

95. ***The Court in Head of Department of Education v Mofokeng and Others [2015] 1 BLLR 50 (LAC [30] to [34]*** where the commissioner misconstrued the arbitration proceedings or undertook an inquiry in a misconstrued manner, it follows that the Commissioner cannot be said to have arrived at a reasonable result, as there would not have been a fair trial of the issues. This decision was further explained in the Labour Appeal Court in Goldfields Mining South Africa (Pty) Limited v CCMA & Others [2015] 1 BLLR 20 at para 14. In my view the Respondent misconstrued the allegations as incapacity issues as opposed to issues related to the conduct of the Applicant (Absenteeism)

96. The fact that the Applicant was unable on the grounds of incapacity to attend work regularly as concluded by the Respondent, did not have the effect of migrating the issue from capacity to misconduct, the Respondent was fully entitled to treat the matter as it did, as a case of incapacity that resulted in a failure to meet acknowledged contractual obligations relating to attendance at work. However, the Respondent was required to fully comply with Resolution 10 of 1999 in so far as it related to the Incapacity read together with the Code of Good Practice contained in Schedule 8 of the Labour Relations Act. ***In Casu*** the Applicant was dismissed for incapacity related to ill-health, it can be accepted that the starting point for the Respondent was to have regard to, and consider the provisions of items 10-11 of the Code of Good Practice: Dismissal which state as follows:

10 Incapacity: Ill health or injury

(1) *Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.*

(2) *In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.*

(3) *The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counseling and rehabilitation may be appropriate steps for an employer to consider.*

(4) *Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to* accommodate the incapacity of the employee is more onerous in these circumstances.

11 **Guidelines in cases of dismissal arising from ill health or injury**

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and
(b) if the employee is not capable-
(i) the extent to which the employee is able to perform the work;
(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
(iii) the availability of any suitable alternative work.

97. Having regard to the above provision the court in ***IMATU obo Strydom v Witzenburg Municipality & Others [2012] 7 BLLR 660 (LAC) at paras 6-9, stated that:***

"An incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties be it in a position she occupied before the inquiry or in any suitable alternative position…….. permanent incapacity arising from ill- health or injury is recognised as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would, under such circumstances be fair, provided that it was predicted on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

98. On closer examination of the Incapacity Hearing conducted by the Respondent the following facts emerge:

98.1 The Respondent had failed to conduct a comprehensive investigation into the alleged incapacity of the Applicant;
98.2 The Thandile Health Risk Management Reports over an extensive period of time did not provide for the Applicant to be assessed by independent doctor and or specialist to establish the veracity of the claims made by the Applicant and her treating doctors;
98.3 The Chairperson of the Incapacity Hearing had failed to allow the Applicant's representative to be present, despite the fact that the Applicant

had presented a sick note that had booked her off from work for the entire month of November 2019

98.4 A plea of not guilty was entered into the record, clearly in the absence of the Applicant or her representative how was a plea of not guilty entered?

99. The Respondent presented that the Applicant was informed on numerous occasions to be present at the Incapacity Hearing and had failed to attend except the one on the 19 October 2018 at which hearing it was agreed that the Applicant should return to work on Monday 22 October 2018. It was never disputed that the applicant had returned to work on the 22 October 2018 as per the outcome of the 2018 Incapacity Hearing.

100. The Applicant was then absent again for 76 days during the period 22 January 2019 – 31 July 2019. The Applicant was then requested to attend a further Incapacity Hearing on the 2 October 2019, which was postponed as a result of the Applicants Representative not being present, to the 4November 2019. On the 4th November 2019, the applicant was not present but her representative was present. The Incapacity hearing continued in the absence of the Applicant.

101. The Notice of Incapacity Hearing dated 22 August 2019, signed off on the 30 August 2019, made provisions for the Applicant to supply a medical affidavit from the specialist dealing with her condition. It further provided that the Applicant must send a representative to the hearing.[35] I see no reason why the representative was therefore requested to recuse himself when in fact the Applicant had complied with the Respondents request in this regard.

102. having regard to the above as well as the courts assertions in Strydom, the Respondent had hopelessly failed to establish a proper investigation into the Applicant's incapacity, in fact there was no incapacity except that the Applicant abused her sick leave provisions to absent herself from work. Even if this is the case, the Respondent also failed to adequately address the issue of alternative placement based on an objective assessment of her ability to perform her current duties and any alternative position. At the meeting of the 19 October 2018, a possible transfer was mooted by the Respondent, however in the subsequent months leading to the final Incapacity Hearing where the Applicant was dismissed, the Respondent again

failed hopelessly to investigate and communicate with the Applicant of a possible transfer.[36]

Conclusion

103. On the basis that it is permissible in law to dismiss the Applicant on account of excessive absences from the workplace I have no doubt that had the migration of the inquiry had taken place from incapacity to misconduct, a reasonable chairperson would also have found that the dismissal of the applicant would have been the most appropriate sanction, however this did not happen, therefore it renders the dismissal unfair.

104. There was no evidence presented at the arbitration that the trust relationship had irretrievably broken down. There was further no evidence placed before the Chairperson of the Incapacity Hearing to this effect as the record does not address this matter. Therefore, there is no conclusive evidence before me that the trust relationship had irretrievably broken down. ***See Edcon Ltd v Pillemer NO & Others [2010] BLLR 1 (SCA).***

105. Section 192(2) of the LRA which provides that:

"**If the existence of the dismissal is established, the employer must prove that the dismissal is fair."**

The court in ***De Beers Consolidated Mines V Commission for Conciliation Mediation and Arbitration and Others (JA68/99) [2000] ZALAC 10 (3 March 2000)*** the court said that:

> *"It is important to remember that once the facts are established, it is, ultimately, a matter of opinion whether a dismissal is fair or not. [50] The onus is thus on the employer to prove the facts upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of the arbitration proceedings, then* ***cadit quaestio****, the employer has*

[35] Bundle B 1
[36] Bundle B 14A

failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair.

106. Accordingly, there is basis for a finding to be made that the dismissal was substantively unfair. In terms of section 193 of the Labour Relations Act 66 of 1995, there are basically three remedies for unfair dismissal and unfair labour practice, namely reinstatement, re-employment and compensation. Section193 of the Act provides that in ordering the reinstatement and re-employment of a dismissed employee, arbitrators must exercise a discretion to order reinstatement re-employment, not earlier than the date of dismissal. In my view the Applicant must bear the responsibility of abusing her sick leave provisions despite having been found guilty in an inappropriate forum, reinstatement would be wholly unjustified.

107. On the appropriateness of the sanction that should have been imposed much is made about the failure of the Respondent to adequately address the incapacity issues of the Applicant related to ill-health. In closing arguments advanced that dismissal was the appropriate sanction. I do not agree with this statement. Just because one in authority over an errant employee requests that dismissal be upheld does not mean that the arbitrator is bound to grant such a request. ***In Casu***, before me the evidence justifies that the working relationship can be restored but it does not mean that dismissal is nonetheless not the appropriate sanction.

108. I am not satisfied that this is a matter where dismissal is an appropriate sanction. However, reinstatement with full back-pay on the other hand disregards the serious wrong committed by the employee. I believe that it is more appropriate that there is a serious penalty for the applicant's failure to attend work regularly and therefore order the reemployment of the Applicant with effect from 01 January 2021.

AWARD

I make the following award:

109. The dismissal of the Applicant is substantively unfair and the respondent is ordered to re-employ the applicant as from 01 January 2021.

110. The Respondent is further ordered to pay the Applicant her salary and benefits with effect from 1 January 2021, by no later than the 31 July 2021.

111. The Respondent is ordered to issue the Applicant with a Final Written Warning effect from date of dismissal.

112. There is no order as to costs.

KEVIN PERUMAL

ARBITRATOR

4 June 2021