



**GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL**



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IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL HELD VIA VIRTUAL PLATFORM (ZOOM)

Commissioner : Adv.Itumeleng Kgatla

Case No : GPBC410/2022

Date of Award : 29 August 2022

In the dispute between:

PSA OBO TK DITSHEGO

(Union/Applicant)

And

DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE

(Respondent)

Applicant's representative: Mr Joel Ntwampe (PSA)

Respondent's representative: Mr.Lebo Hlongwane (Labour Relations)

ARBITRATION AWARD

PARTICULARS OF THE PROCEEDINGS AND REPRESENTATION:

- [1] This unfair dismissal dispute was enrolled for arbitration in terms of Section 191 (1) [191(5) (a)] of the Labour Relations Act 66 of 1995 (LRA). The dispute was arbitrated over several days on the virtual platform (Zoom).
- [2] The proceedings into the arbitration of this dispute were concluded on the 28th of July 2022. Both the Respondent and the Applicant submitted their written closing arguments on the 11th and the 12th of August 2022 respectively.
- [3] The Applicant was represented by **Mr Joel Ntwampe**, a union official from the Public Servants Association (PSA). The Respondent was represented by **Mr Lebo Hlongwane**, an employee of the Respondent attached to the Labour Relations Directorate.
- [4] The proceedings were conducted in English without the need of a language interpreter. 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.
- [5] In terms of Section 138(7) of the LRA, the Commissioner is required to issue a signed arbitration award with brief reasons. It is for these reasons that only salient points will be referred to in this award even though all evidence and submissions were considered.

ISSUES TO BE DECIDED:

- [6] I am required to make a determination on whether or not the decision of the Respondent to dismiss the Applicant for allegations of misconduct in relation to excessive absenteeism without leave or authorization is fair in the circumstances, on both substance and procedure.
- [7] 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

- [8] The Applicant was appointed by the Respondent on the 1st of November 2007 and was dismissed on the 18th of March 2022. The monthly gross salary of the Applicant was **-R47 936-88** at the time of his dismissal.
- [9] The Applicant was dismissed following a disciplinary and appeal processes respectively. The Applicant's disciplinary hearing was held over several days and was concluded on the 13th of October 2021. The Appeal was lodged on 17th of February 2022 and the outcomes thereto were communicated on the 18th of March 2022.

ISSUES IN DISPUTE

- [10] The Applicant contends that his dismissal was unfair on both substance and procedure, the Respondent contends that the converse is true.
- [11] In terms of the relief sought, the Applicant is praying for retrospective reinstatement. The Respondent has recorded its prayer that the Applicant's application be dismissed.

SUMMARY OF EVIDENCE AND ARGUMENT

RESPONDENT'S EVIDENCE

- [12] **Ms Mosibudi Johanna Masubelele** was sworn in and testified as the 1st witness in support of the Respondent's case.
- [13] The witness testified that she is employed by the Respondent as Deputy Director Human Resources and Management with effect from December 2014.
- [14] She is responsible for recruitment, Labour Relations, and Training and Development.
- [15] The witness testified that she knows that Applicant as a former employee of the Respondent who was employed as Construction Project Manager.
- [16] The witness testified that an employee has an obligation to inform his or her supervisor about any form of leave, and further that, some of the leave require a medical certificate as per the Determination on Leave of Absence in the Public Service on page 56 of bundle "**R**".
- [17] The witness testified that the letter from the Traditional Healer on page 42 of bundle "**R**" is not clear in terms of the dates. The witness testified further that the letter was only submitted during the disciplinary hearing.

- [18] The Applicant was absent from work without leave since November 2019 until July 2021. The Applicant was not covered for leave on the basis of having failed to submit medical evidence.
- [19] The Applicant was advised that he can take unpaid leave of up to 184 days by colleagues in August 2019. The witness testified further that she does not know what prompted the colleagues to give the Applicant that kind of advice.
- [20] The Applicant is well vested with the Respondent's leave policies and procedures.
- [21] The witness testified under cross examination that letters from registered traditional healers suffice as medical certificates and are accepted by the Respondent for leave reasons.
- [22] **Mr Duncan Excella Sewada** was sworn in and testified as the second witness in support of the Respondent's case.
- [23] The witness testified that he is employed by the Respondent as Director Construction Project Management since August 2013 and is based in Pretoria Regional Office. The witness stated further that he knows the Applicant as a Construction Manager employed by the Respondent, also based at the same office building as him (the witness).
- [24] The witness testified that the Applicant reported directly to him ever since his Manager went on pension/retirement.
- [25] The witness testified that the document on page 65 of bundle "R" is a memo written on the 09th of December 2020 requesting the Labour Relations Directorate to take disciplinary action against the Applicant for absent without leave.
- [26] The witness testified that the Respondent was adversely affected by the Applicant's absence and further that service delivery was also negatively affected as a result.
- [27] Save for the absenteeism, the Applicant is good as his work, they had a good working relationship which is now broken but reparable.
- [28] The witness testified that he does not know the reason why the Applicant was abruptly absent from work without leave or authorisation.
- [29] The witness testified under cross-examination that; he was informally aware that the Applicant has to go for the second phase of the *sangoma* training.

- [30] The witness testified that, when the Applicant went for the first phase of the training, he was not reporting to him and therefore does not know the type of leave he (the Applicant) had taken.
- [31] The witness testified that the Respondent takes the non-compliance with leave policy in a very serious light, in the context of consequences management.
- [32] **Mr Duan Manusi Kennedy** was sworn in and testified as the third witness in support of the Respondent's case.
- [33] The witness testified that he was the Chairperson of the Applicant's disciplinary hearing at the instance of the Director General of the Respondent, which hearing was held on the 12th –13th of October 2021.
- [34] The witness testified that the report was signed on the 12th of December 2021 and an email about the verdict was sent to the union representative, **Mr Joel Ntwampe**.
- [35] The witness testified that the report was issued after five (5), thus contravening the policy. The delay in communicating the outcomes was due to the complexity of the matter, which taps into religion and discrimination issues. The Applicant has not suffered any prejudice as a result of the delay as he was still in the service of the Respondent.
- [36] The witness testified that the Applicant was not dismissed for attending the traditional healing training but for contravention of the leave policy, which is well established and consistently applied. The witness testified further that the dismissal was an appropriate sanction as it was misconduct in relation to absenteeism and contravention of an established rule.
- [37] The Applicant has not taken steps to inform the employer (Respondent) about his whereabouts.
- [38] The Applicant had, since November 2019 failed to communicate with the employer until June 2020 when he (the Applicant) was informed about the possibility of having his salary frozen, which was effected later in June 2021.
- [39] The letter from Traditional Health Practitioners in the Elias Motsoaledi jurisdictional area was not considered by the disciplinary committee on the basis that it does not suffice as a medical certificate as it does not comply with the prescripts of the determination.
- [40] The letter in question did not have a practice number, was signed on the 7th of July 2021 but stamped on the 2nd of the same month.

- [41] The witness testified under cross-examination that the parties were not informed about the delay in submitting the final determination or report of the disciplinary committee.
- [42] The witness testified under cross-examination that the letter did not give the details of the Applicant's illness and the attached implications, and further that, he does not know where initiates stay for the duration of their training.
- [43] The Applicant did not lead evidence during the disciplinary hearing as to what transpired on the fateful day on which he fainted

APPLICANT'S EVIDENCE

- [44] The Applicant was sworn in and testified as the first witness in support of his case.
- [45] The witness testified that he was reporting to **Mr. Less Francis** prior to his dismissal from the employment of the Respondent.
- [46] His duties involved planning, organizing, coordinating and closing of allocated projects.
- [47] It was not possible for him to comply with the leave policy on the basis that he was not well and in a situation beyond his control.
- [48] The witness testified that he collapsed at the parking lot of the Respondent and was assisted by one **Mr. Jabu Mahlangu**, who allegedly took him to his place of residence on or about mid November 2019 on a Thursday.
- [49] He was told by the guys who assisted him that he was speaking about things which did not make sense.
- [50] He was taken to Denilton in Mpumalanga but he was not well and was taken to the *sangoma* on Monday where it became apparent that he needed to undergo the second phase of the training in relation to his traditional calling.
- [51] The witness testified that he was admitted at the facility of **Dr M.J Kotelo** with effect from the 1st of December 2019 and was admitted for a total period of 18 months, which period was prolonged due to Covid-19 lockdown restrictions.
- [52] The Doctor was still waiting for his practice number from the Regulatory Authority.
- [53] He has completed the training as of June 2021 but stated that other processes are still outstanding and could not be completed now due to financial constraints.

- [54] The Respondent was as of the end of January 2020, informed about his whereabouts by his proxy, one **Ms. Lucia Phasha**, and the employer had advised through, **Ms. Marie Venter**, who has since passed on that, he (the Applicant) should fill a Temporary Incapacity Leave (TIL) form in the circumstances. The witness stated further that the process was then disturbed the Covid-19.
- [55] The witness testified that **Mr. Les Francis** was also aware of his condition such that at some point he called and even joked about it alluding that he (the Applicant) will be a strong *sangoma*.
- [56] The witness testified that on or about 16th of February 2021, he passed by the workplace on his way from Faraday, Johannesburg, to sign an acknowledgement letter of intention to prefer charges against him by the Respondent at the instance of the Human Resources Directorate.
- [57] The witness testified that his salary was stopped in April 2021, he reported for duty in July 2021 and that the hearing was conducted on the 12th and 13th of October 2021.
- [58] He continued to render services to the employer from July 2021 until his dismissal on the 18th of March 2022, after having been charged on the 21st of May 2021.
- [59] He was employed by the Respondent since 2007 and that this was his 1st offense for the duration of his stay in the public service. The witness stated further that he is aware that he has contravened the leave policy but he acted in the circumstances beyond his control.
- [60] Under cross-examination he explained that he went for the 1st part of the training in 2015, and that he was advised by Human Resource to liaise with the Manager on the leave options available for this kind of training.
- [61] Further that his condition made him to be forgetful of many important things such that he was not able to make proper arrangements and was diagnosed with headache and psych loss as per the medical certificate on page 42 on bundle "R".
- [62] **Mr Jabu Alex Mahlangu** was sworn in as the second witness and testified in support of the Applicant's witness.
- [63] The witness testified that he used to work for an air conditioning company from 2017 to 2022 which company used to render services at the AVN building where the Respondent was housed when the Applicant was still employed there.

- [64] On or about November 2019, he was at the AVN gate when the Applicant collapsed while trying to move out of his car at the parking.
- [65] The Applicant was saying many things which did not make sense as and when he was trying to wake him up.
- [66] The witness testified that he was with the Security guard, one **Mr. Phasha** when the Applicant collapsed. He took out the Applicant's cell phone and the last dial was to his wife whom when they called her, she directed them to come to an address in Sunnyside, Pretoria where the Applicant was residing.
- [67] The wife of the Applicant was at the house where he left the Applicant, went back to AVN building to continue with his daily activities. He was later phoned by the Applicant's wife to come and assist in driving the Applicant to Denilton in Mpumalanga where he arrived and left the Applicant in the care of his family, amongst others, the Applicant's mother.
- [68] The Applicant was not in a good condition and did not talk much on the road. The witness stated further that it appeared that the Applicant's wife was aware of the Applicant's condition for the reason that she did not direct them to take him to the medical doctor or hospital. The Applicant's wife was not surprised to hear that the Applicant has collapsed.
- [69] The witness testified under cross-examination that he started working for the air conditioning company since August 2017 and was servicing the AVN building on a monthly basis and had known the Applicant since then as he would always meet him.
- [70] The witness testified that **Mr. Phasha** (the security guard) had indicated that he will report the incident to the Head of Security, whom he (the witness) does not know.
- [71] The witness testified that he also knows the Applicant outside of the work-related issues as once went to the Applicant's place in Denilton to install air conditioning systems, and would sometimes visit each other on weekends.
- [72] **Ms. Lucia Mahladi Phasha** was sworn in as the third witness and testified in support of the Applicant's case.
- [73] The witness testified that she is the ex-stay in partner of the Applicant. The witness testified that on or about November/December 2019, she was sent to the Department of Public Works in Pretoria by both the Applicant and his family to report the whereabouts and circumstances of the Applicant to his employer.

- [74] The witness stated that she reported the matter to one **Ms Martie** on or about late January 2020, after having been directed by the security guard to go to the fourth floor of the building. The witness stated further that **Ms. Martie** indicated to her that she will send her the TIL forms for the Applicant to complete.
- [75] However, the forms were never sent, she made follow ups via telephone calls but **Ms. Martie's** phone was not being answered.
- [76] The witness testified under cross-examination that she went to the Department of Public Works mainly to deliver a message that the Applicant was not well and is admitted at the facility of the Traditional Healer.
- [77] She was supposed to report the matter verbally to **Mr. Les Francis** but was advised by the cleaner to report the matter to **Ms Martie** as **Mr Les Francis** was not available. The witness testified that she was informed that **Ms Martie** is the Personal Assistant to **Mr Les Francis**.
- [78] **Dr Modikwe Jacob Kotelo** was sworn in as the fourth witness and testified in support of the Applicant's case.
- [79] The witness testified that the document as per page 20 of bundle "**A**" is a medical certificate detailing dates, sickness and fitness of the Applicant. The Applicant is no longer in his custody since he (the Applicant) has completed his training.
- [80] The witness testified that the Applicant was admitted in his traditional medical facility on the basis of him (the Applicant) having a calling of a *sangoma* which was determined through a traditional x-ray i.e. the throwing of the bones.
- [81] The witness testified that the Applicant was admitted since the 1st of December 2019 until July 2021. The witness stated further that the Applicant was brought to the facility by his family as he could not come on his own because of his condition which included the following amongst others:
- Headache and loss of sight
 - Inability to walk on his own
 - Ineloquent speech
 - Mental instability
- [82] The Applicant was treated for a prolonged period because he had multiple ancestral callings of both Pedi (*malopo*) and Zulu (*sangoma*).

- [83] He is a registered traditional healer under the auspices of the Elias Motsoaledi Traditional Practitioners but does not have his own CK as yet.
- [84] The date stamp rotates amongst all the traditional healers of the Elias Motsoaledi jurisdictional area which may lead to dates stamps differing with signature dates.
- [85] The duration of the 18 months period, the Applicant has spent a total amount of **R60 000-00** covering the following:
- *Ukuthwasisa*
 - Differentiation of medicine
 - *Nguni* training
 - *Mthawaso*/graduation training
- [86] He is a qualified traditional healer having undergone training under the guidance and authority of **Gogo Jiane**.
- [87] The witness testified under cross-examination that the condition of the Applicant was unpredictable and fluctuating from time to time.
- [88] The Applicant was sent to Faraday in Johannesburg together with other students/initiates on about February 2021 for the purpose of getting some medication.

ANALYSIS OF EVIDENCE, ARGUMENT AND FINDINGS

- [89] 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"*
- [90] 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"*
- [91] Briefly, I am required to determine whether or not the decision of the Respondent to dismiss the Applicant following a disciplinary hearing for the alleged misconduct in relation to excessive absenteeism and non-compliance with the Respondent's leave policy, taking into account the circumstances under which the Applicant was admitted to the traditional medical facility, and the steps taken by the Applicant's next of kin

to inform the Respondent of the Applicant's whereabouts and circumstances, was procedurally and substantively unfair.

- [92] The fairness of the dismissal of an employee or lack thereof, depends on the facts of the case and the appropriateness of the dismissal as a penalty.¹The Applicant was dismissed for excessive absenteeism and non-compliance with the Respondent's leave policy. The Applicant has in the circumstances submitted that he had collapsed at the parking lot of the Respondent and was taken to a traditional medical facility in Denilton, Mpumalanga.
- [93] It is common cause that the Respondent was aware of the spiritual calling of the Applicant, and, the Applicant has in the past, during the subsistence of the employment relationship,taken leave to undergo the first phase of the training.
- [94] It is common cause that the third witness has, at the instance of the Applicant and his family,went to the Respondent's premises to report the whereabouts of the Applicant and his circumstances. The Respondent has argued it was not aware of the Applicant's whereabouts as the matter was report to a person who was not the Supervisor or the line manager of the Applicant but merely a Personal Assistant of the Applicant's Manager. I find that the Respondent is unnecessarily adopting a technical approach, thus lacking empathy and compassion to the peculiar situation of the Applicant.
- [95] It is common cause that the Applicant has excessively absented himself from work without authorization of the superiors and or having completed the TIL forms given the lengthy period which he (the Applicant) was absent from work, a total period of 18 months to be precise. It follows that I must now look into the reasons and or circumstances accompanying the conduct of the Applicant.
- [96] The Applicant's fourth witness, who was also the Applicant's treating traditional doctor has testified that the Applicant's condition was fluctuating and rendered him unstable psychologically, thus rendering him incapable to taking care of vital aspects of his life.
- [97] The Respondent has argued that the Applicant's treating Doctor is not registered on the basis that he does not have a registration number. The traditional medical certificate submitted by the Applicant is stamped by the Elias Motsoaledi Traditional Health Practitioners to which the fourth witness is affiliated.

¹ Item 2(1) Schedule 8 of the Code of Good Practice: Dismissal

- [98] In the circumstances, there exists no tangible basis on which the evidence of the Applicant's fourth witness should be simply ignored.
- [99] It is common cause that the Applicant has a clean disciplinary record, had done his work excellently in the past. The working relationship between him and the Respondent has broken down but reparable.
- [100] It cannot be disputed that the excessive absenteeism of the Applicant has adversely affected the daily operations of the Respondent and service delivery in general, thus breaking down the working relationship, albeit not irreparable.
- [101] 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.²
- [102] It is common cause that the Applicant was absent from work since November 2019, continued to receive salary from the Respondent until April 2021, which salary was frozen following the Applicant having been served with the notice of intention to institute disciplinary proceedings by the Respondent.
- [103] It is apparent that the Respondent has not taken serious steps to establish the whereabouts of the Applicant and his circumstances thereto. The Respondent adopted a technical and a legalistic approach when dealing with the case of the Applicant.
- [104] The Applicant has argued that the Respondent has contravened the provisions of Resolution 1 of 2003 having failed to adhere to the time frames within which the outcomes of the disciplinary hearing must be communicated, thus, rendering the disciplinary process and the dismissal procedurally unfair.
- [105] I find that the delay in communicating the outcomes of the disciplinary hearing has not materially adversely affected the Applicant, thus justified given the peculiarity of this matter and the issues involved.
- [106] The Applicant has argued that his treating traditional Doctor has been affiliated with the Elias Motsoaledi Traditional Health Practitioners even though his own registration number is not yet issued. In the circumstances, I am inclined to believe that, contextually interpreted, the fourth witness is deemed to be registered in terms of Section 21 of the Traditional Health Practitioners Act 35 of 2004.

² Item 3(2) of Schedule 8 of the Code of Good Practice: Dismissal

- [107] Save for the Respondent's argument or challenge of the fourth witness's registration status, his evidence in relation to the admission and diagnosis of the Applicant was not challenged. It is clear from the medical certificate that the medical organization to which the Applicant's treating doctor is affiliated is legitimate. There is no reason why his medical evidence should be treated with suspicion in the absence of any other medical evidence to the contrary.
- [108] The Applicant has argued that dismissal as a sanction was a harsh sentence in the circumstances based on the fact that he acted in a manner purely beyond his control.
- [109] The Respondent has argued that the Applicant has contravened the Determination of Leave of Absence in the public service and further that, he failed to submit a medical report or certificate, alternatively, that the Applicant submitted a medical certificate which does not comply due to insufficient details and or lack of the registration number.
- [110] The medical certificate bears a date stamp of the Elias Motsoaledi Traditional Health Practitioners, and therefore, the situation of the Applicant cannot be treated like that of a person who simply submitted nothing. The emphasis on the request for technical details such as registration numbers by the Respondent in the circumstances of an existing date stamp of the association is technical and purely blame based than solution orientated.
- [111] 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 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.³
- [112] 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. It is common cause in this case that the Applicant's period of absences without authorization is excessive. However, it is my firm view that excessive absence without authorization does not automatically mean that the absence is without any justification.

³ Item 3(4) of Schedule 8 of the Code of Good Practice: Dismissal

[113] 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.⁴

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

[115] 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 his control and directly linked to his spiritual calling.

[116] 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 into unfortunate litigation on the basis of discrimination. I am surprised how often employers can be short sighted when it comes to personal circumstances"

⁴ Item 3(5) of Schedule 8 of the Code of Good Practice: Dismissal

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”

[117] It is common cause that the Applicant’s family, took steps to bring to the attention to the Respondent, the whereabouts and circumstances of the Applicant. The Respondent’s argument that they were not aware of the Applicant’s whereabouts merely on the basis that the matter was reported to the Personal Assistant of the Applicant’s supervisor instead of the supervisor himself is a mere technicality and stands not to be accepted in the circumstances.

[118] Albeit the Applicant not having signed the necessary papers, it cannot be said that the Respondent was not aware of his whereabouts and the accompanying circumstances.

[119] 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.

[120] It is common cause that the Applicant has been an excellent employee with a clean disciplinary record since he join the public service as an employee, and has served the Respondent with diligence and devotion.

[121] I am inclined to believe that the Applicant’s condition as per the evidence of the Applicant’s fourth witness who was also the treating traditional doctor partially rendered the Applicant *culpaе incapax*, to the extent that the Applicant could not account for what was unfolding in his life.

[122] It cannot be said that an employee in the circumstances of the Applicant would just risk losing his job merely for the purpose it. However, the prejudice suffered by the Respondent owing the arguably involuntary excessive absenteeism of the Applicant cannot be simply ignored.

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

REMEDY

[124] 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.

[125] 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 ‘reinstatement’ 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”

[126] In light of the personal circumstances, the status of the disciplinary record of the Applicant, the gravity ,circumstances under which the offence was committed, the nature of the relationship and the prayer of the Applicant.

[127] In assessing the appropriate remedy in the circumstances, the prejudice suffered by the Respondent in remunerating the Applicant without receiving services in return, and while he (the Applicant) was not on an approved leave, cannot just be simply ignored, the relief for retrospective reinstatement which the Applicant is seeking is not available merely for the asking.

[128] In the circumstances, I find that reinstatement without retrospective effect is the appropriate remedy.

AWARD

[129] The Respondent is therefore ordered to reinstate the Applicant,

[130] The Applicant is ordered to report at work on Monday the 12 September 2022.

Signature: 