IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH CASE NO: P217/07 &P219/07

In the matter between:

DEPARTMENT OF HEALTH EASTERN PROVINCE

Applicant

and

THE PUBLIC HEALTH AND WELFARE
SECTORAL BARGAINING COUNCIL

First Respondent

MARION FOUCHE N.O. Second Respondent

M H NQUPE Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) in terms of which she found that the third respondent's dismissal was substantively unfair and ordered that he be re-employed from the date of the arbitration award.

2. The application was opposed by the third respondent.

3. The third respondent has also brought an application to make the arbitration award an order of Court which was opposed by the applicant. The Court had on 23 November

2007 ordered that both applications be heard simultaneously.

The background facts

4. The third respondent was employed by the applicant, the Department of Health Eastern Province since February 1980. He was dismissed for misconduct relating to dishonesty and fraud on 18 March 2003. This was after he had pleaded guilty to the charge. He lodged an internal appeal against his dismissal on 30 April 2003. He continued working normally until 23 April 2004 when he was informed by the applicant that his appeal was unsuccessful and that his dismissal was upheld.

5. The third respondent referred an unfair dismissal dispute to the first respondent, the Public Health and Welfare and Sectoral Bargaining Council. The commissioner issued an arbitration award in terms of which the applicant was ordered to re-employ the third respondent who was ordered to report for duty within three days of receipt of the award. The applicant felt aggrieved with the award and brought a review application.

The evidence led

6. The third respondent has a BA degree majoring in Public Administration. He was appointed by the applicant as an administration clerk in February 1980. He was subsequently promoted to a senior clerk and in February 1992 to chief administrative clerk. This post was abolished in 1999. According to third respondent, he should have been appointed to the position of senior administrative officer upon the retirement of Mrs van der Berg at the end of November 1994. They day after van der Berg retired, he took up her position in an acting capacity and fulfilled all the duties

attached thereto. It was the responsibility of the regional office of the applicant to effect his appointment to this post, by translating his rank from a chief administrative clerk to a senior administrative officer. Van der Berg had also been a chief administrative clerk like himself and, in terms of the automatic progression provided for in the PAS, she was promoted first to an administrative officer and later to a senior administrative officer. Many other colleagues had also progressed in rank automatically in accordance with the PAS. He had expected that he would likewise be promoted, automatically, in accordance with the PAS, but was not. Instead the applicant decided to advertise the post, although this was not required in terms of the agreement between the applicant and the trade unions. The post of senior administrative officer was indeed advertised in 1997 and he also applied. After a delay of some five months he was informed that the post had to be re-advertised. The post was, however, never re-advertised.

7. The third respondent referred an unfair labour practice dispute concerning promotion to the CCMA in 1998. The CCMA arbitration award ordered the applicant to advertise the post and to consider him for the post. The award was subsequently made an order of court by the Labour Court. The applicant ignored both the award and order of court. He brought a contempt application which was dismissed on 29 December 1999 on the basis that he had cited the wrong party. He had also approached the Public Protector for assistance and upon his enquiry, the applicant explained that the third respondent could not be appointed in the post as the post was not funded. The third respondent disputed this, as the post had been approved and appeared on the official organogram of the applicant. He had also approached the applicant's human resources department in Bisho and the applicant's Mr Nkangeni

investigated the matter. It came to light that the applicant had not given effect to the CCMA arbitration award because "things had changed at the hospital" where the third respondent was working and that the post of senior administrative officer had been upgraded to the post of middle manager: health.

8. In March 2001 the third respondent was informed that the senior administrative post had been upgraded to that of middle manager and that the latter post had to be advertised. He had been acting in this position since December 1994, first as a senior officer and later as a middle manager, contrary to the respondent's policy, which limited an acting period to 12 months. He had received no acting allowance during this entire period. Incidentally he had been incorrectly placed on the lowest notch of the salary scale. During all this time he witnessed his colleagues progressing in accordance with the PAS, whereas he was not promoted. The post of middle manager: health was duly advertised in June 2002 and he applied for it. He was informed that he would not be considered for the post because he did not meet the requirements. He disputed this as, according to him, he met all the requirements and had acted in the position for a number of years. In the very least, he expected to be called for an interview. A colleague, Mrs Gillimore, who had been acting in a higher position for just one year and who had applied for another middle manager post, was called to an interview and was appointed.

9. The third respondent testified that not being called to an interview was the last straw for him. He had been acting for some eight years, working under stressful circumstances, never receiving recognition or compensation therefor and all his attempts to get promoted proved futile. He "snapped" and orchestrated his own

promotion. He completed the necessary forms to indicate that he had been interviewed and recommended for the post, inserted the Superintendent's name and signed on his behalf and asked members of the interview panel to sign the form. The form was submitted to Bisho. When the promotion was about to be implemented, the truth was discovered and he was charged with fraud. He was called to a disciplinary hearing and pleaded guilty. He expressed remorse for what he did. It was the applicant's failure to attend to his many attempts to get promoted that forced him into doing this.

10. At the disciplinary hearing of 18 March 2003 the third respondent objected to the chairperson presiding as he was from the regional office and, as a result, was familiar with the third respondent's case. A neutral person with no knowledge of the matter was required. Furthermore, the chairperson was two ranks lower than him, whereas the collective agreement required a chairperson to be of higher rank than the accused employee. The chairperson considered the rank of the third respondent as an aggravating factor as he was in a senior position. The applicant found this remark of the chairperson peculiar because when it suited the applicant it recognised him at level 11, a senior position, but when it concerned his performance it did not. Referring to his many years of service, his working circumstances, the promotion of colleagues while he was overlooked and his ill health in mitigation, the third respondent pleaded for leniency. The chairperson did not consider the mitigation factors and recommended the third respondent's dismissal.

11. The third respondent appealed against his dismissal on 26 March 2003 to the MEC in terms of the applicable collective agreement. More than a year later, on 23 April

2004, he received the outcome of the appeal from the Director-General (the DG) in the Premier's office. His dismissal was upheld. The third respondent was surprised that the DG had communicated the appeal outcome to him, because in his dismissal letter he was directed to submit his appeal to the MEC. This is in accordance with the collective agreement, Resolution 2 of 1999. According to the third respondent, the DG had no knowledge of his case. During the year that he was awaiting the outcome of his appeal, he continued his normal duties, without any restrictions, and remained the acting administrator. During this time the hospital participated in the Premier's Good Governance Award and he as the hospital manager, headed the team. He received a letter from the MEC, congratulating him on the achievement of winning the award. He also headed the setting up of a step-down clinic for HIV and TB interviews for new staff. As a result of his departure after his appeal outcome was made known, the interviews did not continue and the hospital did not continue in the awards anymore.

12. The applicant called Mr Nkangeni, the assistant director: employment relations as its witness. He testified that the third respondent had been acting as hospital secretary. At the time no provision existed for the payment of an acting allowance. An acting allowance was introduced only in April 2001 or 2002. He agreed that the third respondent's complaint had been referred to him. He investigated the matter, approached the then regional director and enquired why the applicant was treated as he was treated. The regional director explained that the arbitration award had not been implemented because no funds were available to fund the post of senior administrative officer. He informed the regional director that the third respondent had

been acting in the post without an appointment letter. The regional director did not know who was supposed to issue such a letter. Subsequently one Dr Rank addressed a letter to the district office, instructing it to fund the post and advertise it. After his investigations were completed, Nkangeni submitted a report and advised the third respondent that he would find out from human resources whether one of the vacant doctor's positions could be abolished to fund the administrative officer's post. He spoke to colleagues in human resources, but not the most senior human resources staff members. Some were of the opinion that it could be done, others not. It was more or less at the same time that the third respondent made himself guilty of misconduct. He disputed the third respondent's allegations that the DG who had considered the applicant's appeal had no authority to do so. He explained that, in terms of Resolution 2 of 1999, the MEC is the appeal authority, but could delegate this responsibility to an official who is higher in rank than the person who chaired the disciplinary hearing. The DG could accordingly consider an appeal because he/she is a public servant, is higher in rank than the chairperson of the hearing and has no knowledge of the matter. *In casu* the authority to consider the appeal had been delegated to the DG. He said that an appeal could be submitted directly to the MEC or via his officer to the MEC within 5 days of being informed of the sanction. Pending the outcome of the appeal the employee in question was supposed to render services and must be remunerated, although the sanction was dismissal. The sanction was only implemented once the outcome of the appeal was known. Therefore the date of the appeal outcome was the date of the dismissal. All appeals at the time in question were handled by an Independent Monitoring Task team, which was appointed at national level to assist with the backlog in the Eastern Cape. In this process the authority to deal with appeals was delegated to the DG. Like all the other

appeals, the third respondent's appeal was handled by the DG. The dismissal was the sanction for dishonesty in terms of the disciplinary code, Resolution 2 of 1999. This was in accordance with the Public Service Act and the Labour Relations Act. The applicant had a zero tolerance policy in cases of dishonesty because corruption had to be rooted out. In all instances of dishonesty employees were dismissed. The third respondent's misconduct breached the trust relationship and dismissal was, therefore, the only sanction that could be considered. He did not accept the third respondent's version that the applicant had forced him into doing what he did because he was asked to be patient. The third respondent was in charge of the hospital and, therefore, should be trustworthy. What he did was grossly dishonest and any sanction other than dismissal would not be appropriate.

13. The second witness called by the applicant was Mr Peters, a senior assistant director of Port Elizabeth Hospital Complex and employed in human resources. He testified that he and one Oosthuizen were appointed to investigate the third respondent's suspected misconduct. Before the investigation he had already discovered that a promotion for the third respondent had been captured on the system for a post that had not been advertised, i.e. the post of middle manager: health. He investigated the matter and made enquiries at the applicant's offices in Bisho and took statements from Dr Guha and everybody who was indicated as an interview panel member on the form that recommended the third respondent for promotion. The third respondent was also interviewed on 30 August 2002. He explained that he had not attended an interview, but approached the Premier's office and was instructed to promote himself. The third respondent signed the recommendation on Dr Guha's behalf because he was on sick leave. When the third respondent's fraud was discovered, a disciplinary enquiry was

arranged. The third respondent did not appear at the hearing on a number of occasions, but finally attended the hearing in March 2003. Mr Notley presided over the hearing. He did not participate in the investigation, neither was the investigator's report given to him prior to the hearing. The third respondent pleaded guilty and his dismissal was recommended. He was, however dismissed a year later after his appeal had been considered. He worked whilst his appeal was pending. On 4 or 5 November 2003 he was suspended because he had placed advertisements for new staff at a step down facility, contrary to the policy that everything should be channelled through the district manager. The district office was not aware of the step-down facility that the third respondent was supposed to have set up. As a result, the district manager addressed a letter to Bisho, confirming that posts which were not on the establishment had been advertised and enquired into the outcome of the third respondent's appeal. Peters was not certain whether the suspension had in fact been implemented. According to Peters, van der Berg, a senior administrative officer, retired in 1994. She had been responsible for human resources duties. After her retirement the third respondent automatically performed her duties, but her post remained vacant.

14. Peters testified that he was aware that the third respondent had referred an unfair labour practice dispute to the CCMA and that the arbitration award ordered the respondent to advertise a senior administrative post. Such a post was advertised at the time, but was not filled because of financial constraints. Peters explained that posts which were vacant before 1997 were considered not funded and a moratorium had been placed on the filling of those posts. The third respondent had to be translated to the position of an administrative officer. After three years experience in that position, he could be rank promoted to the post of senior administrative officer. He referred to

several middle manager positions that had been advertised. He was not certain for which one the third respondent had applied, but explained that the advertisement for the post of middle manager: health required a nursing diploma or degree, registration with the Health Professions Council of SA and experience. Another middle manager post, that of middle manager: hospital, appears to be the post the applicant had applied for, according to his application form and the recommendation form he had signed on behalf of Dr Guha. This position, was however, not available at Empilweni Hospital, the hospital where the third respondent was stationed. Another post of middle manager: health was advertised and required a B degree in health sciences and experience in management. The post of middle manager: administration required a diploma or degree in administration management, knowledge of the public service regulations and computer literacy. He also referred to an advertisement of middle manager: community health centres for East London and in Motherwell in Port Elizabeth for which a degree or diploma in Public Administration was required. As far as Peters was aware, the third respondent did not have a qualification in health and was not registered with the council. In consequence he did not qualify for the post of middle manager: health, the one he had applied for according to the application form. He referred to the MEC's letter, addressed to the "Hospital Manager" in December 2003, congratulating the hospital on its achievement in the Good Governance Awards. According to Peters, the medical superintendent would be the hospital manager, alternatively the nursing services manager, both positions being higher in rank that the one occupied by the third respondent. He also referred to a letter addressed to the third respondent in February 2004, congratulating him and his team on the award and inviting them to participate in future again. He explained that the award had been given to the hospital. The post of administrative officer existed on the establishment.

The commissioner's award

15. The commissioner has dealt extensively with the evidence led and the parties submissions in her award. Repeating that and limited challenge on review is not necessary. I will therefore summarise the commissioner's finding on the appropriateness of the sanction of dismissal. The commissioner recorded that Mr Kroon who had appeared for the third respondent at the arbitration hearing had argued that the sanction of dismissal, given the circumstances, was too harsh. The applicant was quite happy to benefit from the third respondent's labour and services in higher positions when it suited them, but denied him acknowledgement, recognition or compensation for his loyalty and dedication over an extended period of time. He was *de facto* filling higher positions as his previous position had been abolished. It was, therefore, not open to him to have returned to his previous position or to refuse to act in the higher positions. As a matter of fairness the third respondent should have been promoted or in the very least have received some compensation for acting in the higher positions. Kroon had conceded that the third respondent had taken the law into his own hands by committing an act of dishonesty. According to Kroon, not all acts of dishonesty justify dismissal. The third respondent's conduct was understandable, given the applicant's unfair conduct towards him over a number of years. This, so it was argued, constituted compelling mitigating circumstances and should operate against dismissal. He did not agree with the disciplinary chairperson's finding that there were no mitigating circumstances.

16. The commissioner recorded that the applicant's representative Mr Gqamana had argued that the dismissal was appropriate in the circumstances, having regard to the

disciplinary code and the Code of Good Practice: Dismissal, contained in Schedule 8 of the Act. It was argued that the commissioner should not interfere with the decision taken by an employer as to sanction. He referred the commissioner to several decisions which are not necessary to repeat.

17. The commissioner stated that the third respondent had admitted to having committed fraud. She said that it was trite that fraud is a form of dishonesty and generally justifies dismissal. She said that this matter presented an exceptionally difficult state of affairs: on the one hand there is the third respondent who committed, admittedly, a serious act of dishonesty. On the other hand, the applicant undoubtedly treated the third respondent unfairly for a considerable time. The applicant appointed the third respondent on the wrong salary notch from the beginning and failed to implement some of the rank promotions that were due in terms of the PAS. The applicant required the third respondent to act in a more senior position for almost ten years, contrary to the rule that prohibited acting for more than 12 months and ignoring a directive from the Auditor-General in this regard. Moreover, the applicant ignored an arbitration award and an order of the Labour Court. And finally, the applicant did not even short list or interview the third respondent for an appointment to middle manager, although on the undisputed evidence, the post he had been acting in had been restructured into the middle manager position. She said that she took note of the fact that the third respondent did not have a qualification or registration in health sciences, as required for the advertised middle manager position, but surprisingly the applicant required and permitted him to act in that position without said requirements. The applicant deserved more than just a slap on the wrist.

18. The commissioner said that the third respondent did what he could: he had approached the CCMA, then the Labour Court and initiated contempt proceedings when the applicant failed to comply with the Labour Court order. The contempt proceedings went in the applicant's favour only because the applicant in the contempt proceedings had been incorrectly cited. In addition, the third respondent had approached his HR Department and the Public Protector. He clearly pursued all avenues. Because he was defeated in his every attempt, he was "forced", in his words, to take the law into his own hands; he "snapped". The commissioner said that she accepted that Nkangeni told him to wait and be patient. He had been patient for between eight to ten years, he had pursued the available avenues and the applicant had done nothing to address his situation. How long was he expected to be patient? In the commissioner's view it was understandable that some people would come to the end of their tether, having tried and hitting another stumbling block every step of the way. Having regard to all the circumstances, she found, contrary to the observations of the disciplinary chairperson, that mitigating factors existed and should have been considered. Having said this, the commissioner said that she must make it clear that she did not condone the actions of the third respondent, but nevertheless found mitigation circumstances contributed to the substantive unfairness of the third respondent's dismissal. The commissioner said that it could not be fair for the applicant to hold the third respondent accountable, but in the same breath shirked its own responsibilities and ignore its own actions.

19. The commissioner said that having concluded that the third respondent's dismissal was substantively unfair and having regard to the fact that the third respondent had waived his right to promotion, she needed only to consider the appropriate relief for

his unfair dismissal. He had prayed for reinstatement retrospective for 12 months. The commissioner then referred to the provisions of section 193 of the Act and found that none of the reasons in section 193(2) existed *in casu.* The third respondent wished to be reinstated. She said that she had already concluded, on the evidence, that the trust relationship had not broken down; the dismissal was substantively unfair and there was no evidence before her that the applicant would find it practicably unreasonable or impossible to reinstate or re-employ the third respondent. In the light hereof she said that in terms of section 193(1) of the Act, she was enjoined to consider reinstatement or re-employment.

20. The commissioner said that before she had to pronounce on the relief to the third respondent, she needed to reiterate that she did not condone the third respondent's misconduct. It was of a serious nature and relief is warranted only because of the exceptional and extraordinary circumstances. In granting the relief she had regard to the fact that the third respondent was before this tribunal with the proverbial "unclean hands". In consequence she had decided on

re-employment rather than retrospective reinstatement. The applicant was ordered to re-employ the third respondent from the date of the award (23 March 2007). She found that his dismissal was unfair and ordered the applicant to re-employ him as from the date of the award in a post suitable to his qualifications and experience and in the Nelson Mandela Metropolitan area. She ordered that he be re-employed at a post level not lower than the post of a chief administrative clerk (or its equivalent) and at the concomitant salary scale and other benefits. The salary scale and benefits must be at the current scale, that is, as at the date of the award and not at the scale as at the date of dismissal. He was ordered to report for duty within three days of receiving the award.

21. The applicant was unhappy with the award and brought a review application.

The ground of review

22. The applicant has in its heads of argument confined itself to the following grounds of review:

    22.1 The commissioner's findings are not reasonable;

    22.2 The commissioner failed to apply her mind to the issues before her;

    22.3 The commissioner exceeded her powers in interfering with the dismissal sanction imposed by the applicant for the dishonest misconduct. Alternatively the finding by the commissioner that the trust relationship between the applicant and the third respondent was not irretrievably broken down is not reasonable.

Analysis of the evidence and arguments raised

23. The crisp issue that arises in this application is whether the commissioner's setting aside of the sanction of dismissal imposed by the applicant and substituting it with re-employment is one that a reasonable decision maker could not have taken.

24. The commissioner's award was issued before *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC). It is now trite that in deciding whether an award is reviewable the only question that needs to be asked is: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? This Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the

reasoning employed by the commissioner. This Court is not concerned whether the commissioner was correct or whether it agrees with the commissioner. There is a range of decisions that will fall within the bounds of reasonableness by the Constitution. This Court must simply ensure that the commissioner's decision falls within those bounds. To succeed, the applicant must establish that the decision falls outside the bounds of what are reasonable.

25. The reasonable employer test as a means of determining whether to interfere with a sanction imposed by the employer has been rejected by *Sidumo*. Clear guidelines have been given about what factors need to be considered in considering the sanction. The following quotation that appears at page 1131 at paragraphs 78 and 79 of *Sidumo* suffices:

"In approaching the dismissal dispute impartially, a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant

circumstances."

26. It is trite that contrary to what the applicant has stated in the founding affidavit, the task of determining the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner and not that of the employer. It was held in *Phalaborwa Mining Co Ltd v Cheetham & others* [2008] 6 BLLR 553 (LAC) at 563:

"Sidumo enjoins a court to remind itself that the task to determine fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was the legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create. I have to remind myself that the test, ultimately is whether the decision by the third respondent is one that a reasonable decision-maker could reach in all the circumstance. On this test, I cannot gainsay the decision of the third respondent...".

27. It is common cause that the third respondent commenced employment with the applicant in February 1980 and that he was found guilty of fraud on 19 March 2003 after he had attempted to appoint himself in a senior post. He was not suspended after he was charged and continued in the position up to 23 April 2004 when his appeal was dismissed. He had at all the enquiries that he had appeared in pleaded guilty and showed remorse.

28. It is not in dispute that the applicant had sometime in 1998 referred an unfair labour practice dispute to the CCMA after the applicant had failed to appoint him to the post

of senior administrative officer. He had at the time been acting in the post since 1 December 2004. The commissioner in that dispute ordered the applicant to advertise the position of senior administrative officer at Empilweni Hospital before 28 February 1999 and that the third respondent's application for promotion should then be considered. There was non compliance with the award. The award was made an order of Court in terms of section 158(1)(c) of the Act by this Court on 6 April 1999. The applicant was given up to end of June 1999 to advertise the post of senior administrative officer and once it was advertised and the third respondent had applied he had to be considered for the said post. Again there was non compliance which prompted the applicant to bring contempt of court proceedings against the respondent. The contempt of court application was argued before me on 18 November 1999. The application was dismissed on 29 December 1999 on the basis that I was not satisfied that the third respondent had discharged the onus to prove that the order was granted against the respondent that the third respondent had cited in the contempt of court proceedings.

29. It was not disputed by the applicant's counsel that there was non compliance with the court order of 6 April 1999. It was further not disputed that the third respondent had been subjected to all the treatment that he had outlined when he testified before the commissioner. The applicant contended that it has a zero tolerance towards fraud. It should be commended for that. No cogent reasons were provided why there was non compliance with the 1999 award and court order. I am mindful of the fact that these are no contempt of court proceedings but raises this simply on the basis that on the one hand we have to do with a State organ against an individual who has been subjected to a grave injustice for about than 10 years. He had approached the CCMA

for assistance. He was granted an award in his favour and then had the award made an order of Court. He had cited the wrong party in the contempt of court proceedings and was unsuccessful. He approached the Public Protector for assistance. He could not be assisted on the basis that there was no funds for the post. He remained acting in the post for about 10 years. He saw junior members of staff been appointed into senior positions. He applied and was not appointed. Out of shear desperation he created a post, applied for it and sent recommendations to Bisho that he be appointed. He was confronted about what he did. He pleaded guilty and showed remorse.

30. I have set out above why the commissioner found that the sanction of dismissal was inappropriate in the circumstances of this case. I do not deem it necessary to repeat those since they speak for themselves. I have pointed out that the test on review is not whether this Court agrees with the finding made by the commissioner or whether the commissioner's finding was wrong. This is not an appeal but a review and the distinction between the two should not be blurred. The commissioner has given a well-reasoned award stating why she believed that the sanction of dismissal in this particular case was not warranted. She took into account the special circumstances of this case when she decided that the sanction was not warranted. I had raised with the applicant's counsel whether there were similar cases involving the applicant and its employees where court orders were ignored which might prompt the employees to do what the third respondent did and was informed that there are no such cases. It would therefore appear that this case is an isolated one and would not set a precedent.

31. A commissioner when deciding the issue of sanction must consider the circumstances of that case. This is exactly what the commissioner did in this case. The facts of this

case are clearly distinguishable from those in *MEC for Finance, Kwazulu-Natal & Another v Dorkin NO & Another* [2008] 6 BLLR 540 (LAC), where the employee had been charged with 12 acts of serious misconduct. The State had suffered losses of more than R1.2 million and the employee was found guilty of nepotism and abuse of power. The court said the following at paragraph 6 and 17 of the judgement:

"In my view, there can be no doubt that an employee who is found guilty of the number of allegations of which the second respondent was found guilty, when such allegations are of the serious nature of which the allegations against the second respondent were, should be dismissed. I can see no basis which would, generally speaking, save the employee from dismissal. Of course, very case would have to be decided on its own merits. There is nothing that the second respondent said in the disciplinary enquiry or in the answering affidavit which, in my view, a lesser sanction that dismissal.

In my view, if one has regard to the multiplicity of the charges of misconduct of which the second respondent was found guilty, their seriousness and the amount of financial loss that the second respondent caused the Department of education, this was a case in which it was justifiable for the employer to take the steps aimed at changing the sanction imposed by the first respondent."

On the one hand we have a person who has committed fraud and has shown contrite for it. On the other hand we have a state institution that has failed the employee miserably. It has shown scant regard to orders of this court. Had it applied with the court order, the third respondent would needless to say have found itself in this position.

32. It is common cause that the applicant did not suffer any financial losses arising out of

the third respondent's fraud. The commissioner also took into account that the third respondent was not suspended after he was charged and continued to be employed in the same position about a year later until his appeal was dismissed. Had the trust relationship broken down, the third respondent would not have been allowed to remain in the position that he was in. No cogent reasons were provided why he was allowed to remain in the same position.

33. In all the circumstances, I am unable to find that the commissioner ignored any material factor in evaluating the fairness or otherwise of the sanction imposed by the employer. Nor can I, in all the circumstances of this case, conclude that the award made by the commissioner was manifestly unfair to the applicant. None of the grounds of review have been established. To my mind, having regard to the reasoning of the commissioner, based on the material before her, it cannot be said that her conclusion was one that a reasonable decision-maker could not reach.

34. The application stands to be dismissed.

35. Since there is no basis not to make the arbitration award an order of court, that application stands to be granted.

36. There is no reason why costs should not follow the result in both applications.

37. In the circumstances I make the following order:

37.1 The review application is dismissed with costs.

37.2 The arbitration award dated 23 March 2007 under case number PSHS79-04/05 of the Public Health and Welfare Sectoral Bargaining Council is made an order of Court in terms of section 158(1)(c) of the Act, with costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	N GQAMANA INSTRUCTED BY STATE ATTORNEY
FOR THIRD RESPONDENT	:	P N KROON INSTRUCTED BY PUMEZA BONO ATTORNEYS
DATE OF HEARING	:	11 SEPTEMBER 2008
DATE OF JUDGMENT	:	12 SEPTEMBER 2008