



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C659/2015

In the matter between:

SOUTH AFRICAN POLICE SERVICE

Applicant

and

DENJIVILLE ADENDORF

First Respondent

S. SAMUEL N.O.

Second Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Third Respondent

Heard: 10 May 2017

Delivered: 11 October 2017

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed review of an arbitration award under case number PSSS121-14/15. The applicant dismissed the first respondent (Adendorf) on the 15 August 2013 for misconduct in respect of charges relating to absenteeism and pursuant to a disciplinary enquiry. The second respondent (the arbitrator) made an award of retrospective reinstatement.
- [2] Adendorf was absent from work from 29 November 2012 to 5 February 2013. He was absent from his quarters during visits on 15 and 23 January 2013. He was charged for:
- a. Absenteeism from work without reason and permission;
 - b. Failure to produce medical certificates for his periods of absences, 29 November 2012 until 14 January 2013 and from 18 January 2013 until 5 February 2013; and
 - c. Absence from barracks on 23 January 2013, 28 January 2013 and 31 January 2013.
- [3] The arbitrator stated in paragraph 6 of the Award that the essence of Adendorf's case: "was that the current charges against him were related to his medical diagnosis of ADHD which the respondent was aware of and failed to act on and which failure rendered the applicant unable to perform in the post that the respondent posted him to. Furthermore that the respondent was required to investigate the reason for his absenteeism and consider the medical report that recommended his transfer but elected instead to deal with his absenteeism as misconduct."
- [4] The Arbitrator found that the employer did not do enough to assist Adendorf after his ADHD diagnosis. In paragraph 73 of the Award, she states the following:
- "I noted the respondent's evidence that it had expended great effort in assisting the applicant but that he had rejected or not cooperated with its efforts. I noted however that the records relied on by the respondent related to 2010-11 during the applicant's substance abuse episode and did not relate to the current charges arising from his absenteeism in 2012 and 2013 which was preceded by a report of

his medical diagnosis. The respondent's evidence relating to the Regulation 64 process did not explain with any conviction why it was not constituted during the period spanning the applicant's substance abuse from 2010 until his medical diagnosis of ADHD between September and October 2012 despite the persistent absenteeism during the entire period or why there were no records of it responding to the medical diagnosis."

- [5] The Arbitrator found that it was more probable than not that the respondent processed Adendorff's absenteeism as a form of misconduct. She found in paragraph 81 of her Award that: "the applicant's dismissal was not substantively fair since the respondent did not demonstrate that it followed a fair process when confronted with the undisputed evidence of the applicant's alleged incapacity arising from his medical diagnosis in 2012."
- [6] In its supplementary founding affidavit, the applicant stated that the only documentary evidence before the Arbitrator that pertained to the diagnosis of ADHD, was the medical report issued by Dr Chanakya Jonnalagadda MBChB, FC Psych (SA) dated 11 November 2012 which reads as follows:

"Denjville Adendorf has been admitted to Claro Clinic from 25th September 2012 till 8th October 2012. He was admitted due to work related stress, with deteriorating performance at work related to the stress.

He stated that he had been transferred to a new section within the Parliamentary Police Service in early 2012. This posting required that he stand at a particular post for the whole day, and that he really struggled to stand at this post for prolonged periods of time due to boredom. He stated that he would initially attempt to stay at his post, but that over time, he found it too boring and would wander from his post. After a certain time, he had started to become absent, and he would stay away from work, as he could not cope with the boredom. He stated that he had tried to explain his problem to his superiors but that he did not feel that they understood his problem.

He had been admitted to Claro Clinic in 2011 for a substance abuse problem. He denied current drug use.

He has been assessed during his admission, and was newly diagnosed with Attention Deficit Hyperactivity Disorder. He has been started on medication for ADHD, and he is tolerating the medication well, and he states that it helps him to concentrate much better. A lot of work has also been done on his communication skills, as the assessment has shown that he had not been communicating his needs clearly to his Superior Officers.

Though he is much more attentive, and much less easily bored on medication, my professional opinion is that he is not well suited for a Post which he needs to remain at a checkpoint for the whole day. I have met with his superior Officers and have discussed my opinion with them. I recommend that he be transferred to a different post, which will be more challenging and varied in the work that he needs to do.”

- [8] At the arbitration Lieutenant Colonel Molotsi (Molotsi) who was Adendorfs superior while he was stationed at Parliament testified that since 2010 Adendorf had 20 disciplinary sanctions on his record. Over and above his absences from work without permission, he had been declared unfit to carry a firearm, found guilty by a court of law and in a departmental enquiry for forgery of a medical certificate and for damaging police vehicles without reporting it. Adendorf was also arrested for assaulting his girlfriend and for being in possession of tik. Adendorf was given a sanction of dismissal suspended for six months four times.
- [9] Molotsi had referred him to rehab once Adendorf’s parents had told Molotsi that he was using drugs, something Adendorf himself had continuously denied. He testified that he had spent years trying to assist Adendorf to “get him back on board” as he put it.
- [10] The minutes of the pre-arbitration meeting recorded that the arbitrator had to decide the following issue: “If the Applicant was treated unfairly and if dismissal was the correct sanction for the misconduct at the time of the incident.” The minute refers to dismissal for absenteeism. There is no indication in that minute that incapacity was relevant to the dispute. It was common cause that Addendorf had

not produced a medical certificate for the absence from work except for one relating to two days when his doctor described his ailment as gastritis.

- [11] The grounds of review include that the decision of the Arbitrator was one that a reasonable decision maker could not make. One example proffered for this ground merits mention and that is the Arbitrator's conclusion that "an employee charged with absenteeism related offences cannot be at fault if there are valid reasons for his absence." The evidence before her did not establish that there were valid reasons for his absence from work during the period for which he was charged. Adendorf was according to his own evidence helped by the medicine he was prescribed for his ADHD. He had been temporarily placed back at E-Relief at Parliament because the section he was transferred to after the ADHD diagnosis was headed by someone who was chairing another disciplinary hearing in which he was facing more charges. Adendorff testified:

"I was complaining to the – the superiors or to my supervisors at E-Relief and nothing was done and I just started booking off sick again, not coming to work. If they phoned to ask where, what, why don't I come to work, I tell them I can't cope at this post where I am posted."

- [12] When asked if he would be able to work at Parliament if he was reinstated, he said he would be at work at all times because: *"my mind-set, my self-discipline and the way I feel. That never-mind attitude, now it is no longer there."*
- [13] It appears obvious to the Court that a reasonable decision maker could not have found that it was unfair for the SAPS to dismiss Adendorf in the wake of his disciplinary history and its many efforts over years to assist him, and in face of his continued misconduct. There is no need in my view to refer to a multitude of cases and developing jurisprudence to establish that the Award is reviewable. Condonation was sought for the late filing of the founding papers and issue taken by the applicant for the late filing of the answering papers. Condonation is granted in respect of the non-compliance with the Rules of Court. I therefore make the following order:

Order

1. The Award under case number PSSS121-14/15 is reviewed and set aside and substituted as follows:

1.1 'The dismissal of the first respondent was substantively fair.'

2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Adv R. Nyman instructed by the State Attorney

First Respondent: Adv C. Bosch instructed by Marais Muller Hendricks INC