IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C659/2018

In the matter between:

BROADREACH (PTY) LTD	Applicant
and	
BENNET C.M. N.O.	First Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
SUTASHA DOOKI	Third Respondent

Date heard: September 9 2020 by virtual hearing

Delivered: 18 January 2021 by means of scanned email

JUDGMENT

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[1] This is an opposed application to review an arbitration award under case number WECT381-18. The first respondent (the Commissioner) found that the dismissal of the third respondent was substantively unfair. The applicant (the company) was ordered to pay 'back pay and compensation' in the amount of R109,856.93.

[2] The third respondent was employed as a software engineer from 1 August 2016 and received a monthly salary of R70,700. During her term of employment, out of a possible 361 working days, she was away from the workplace for a variety of reasons for 189.5 days i.e. 52% absence.

[3] On 7 December 2017 she was given notice to attend a disciplinary hearing on the following charges:

"Abuse of sick leave and/ or leave in that from the start of your employment to date you have taken in excess of 30 days sick leave as well as an additional amount of 26 days leave for alleged injuries on duty. You have throughout this period attended to at least thirteen different medical practitioners for a variety of conditions, non-related to each other. Furthermore there is a pattern whereby periods of sick and IOD (injury on duty) are willfully aligned to ensure you are out of work. This coupled with your refusal to attend to a medical practitioner appointed by the company makes the company believe you are abusing your sick leave; and

Unauthorised absence in that from the 20th to 27th November 2017 you were absent from work without permission. Although annual leave was originally approved it was withdrawn with sufficient notice for you to still report for duty. Your failure to do so make it unauthorized."

[4] I deal with the Commissioner's evaluation of the Charge of unauthorized absence at the outset.

"21.This therefore brings us to the matter of the unauthorized leave. Applicant was absent from 20 November 2017 to 27 November 2017, the period of which she had originally applied for leave. Whether the holiday commenced during the previous period of sickness I do not know. Applicant stated that the leave had been approved in September 2017 and that from that approval air tickets and hotels had been booked. Respondent argued that it gave Applicant ample notice of the revoking of her leave. There was no evidence that Respondent had notified her directly. That Respondent had told Applicant's legal representative on 14 November 2017 that the leave was revoked does not prove that he in turn told Applicant. Furthermore, in regard to an international holiday, can a mere seven days' notice that the leave is cancelled be called ample? I think it cannot. I understand why Respondent wanted Applicant to come to work and not go on leave. I can also understand why she did not. Revoking the leave may have been lawful. It was not however fair under the prevailing circumstances. It must be

borne in mind that at that stage Applicant was suffering from a severe major depressive disorder with anxiety distress. A holiday may well have had recuperative benefits. Applicant was not physically constrained from working."

[5] With regard to the unauthorized leave, the third respondent testified that when she left for Thailand she did not know that the approved leave was revoked. Her attorney did mention to her that there was a meeting on the 14th of November 2017:

"APPLICANT REPRESENTATIVE: When did he get back to you?

APPLICANT: On the 14th so that was from what he said to the to the client uhm what we called then the client but ja he said that I don't want to revoke my leave uhm but ja so he never mentioned that the leave was revoked or anything like that ….."

[6] In an affidavit filed of record before the Commissioner, the third respondent's legal representative set out the facts as follows:

"17. Due to the fact that the Applicant had been ill and had been booked off from work, on 13 November 2017 (3 days before the Applicant's commencement of her annual leave), the Respondent forwarded me a correspondence withdrawing the Applicant's annual leave which had been granted and demanding that the Applicant reports for duty on 20 November 2017.

18. Due to the fact that the Applicant had already made all the necessary arrangements in respect of her family vacation to Thailand I advised the Respondent that it would not be possible for the Applicant to report for duty on 20 November 2020."

[7] It is highly improbable that third respondent's legal representative would have given such advice without instructions from the third respondent. The Commissioner did not apply his mind to the enquiry he should have in these circumstances i.e. whether given that third respondent knew that her leave had been revoked, she was guilty of this charge.

[8] On the 30 November 2017, three days after her return from Thailand, third respondent did become physically constrained from working after she had a fall on a flight of stairs at the workplace and was signed off for that day by an Emergency Room Doctor and then certified unable to work up to and including 6 December 2017.

[9] In his Award, the Commissioner further records in relation to the 23 days sickness absence in October and November 2015, plus five days arising from the fall on the stairs, the following:

"19. While the level of absence is high, on what basis can it be said that she was not sick or that she was manipulating the medical practitioners in order to get signed off? She was treated variously by GPs, a psychiatrist and an emergency room doctor who were, it must be assumed, conducting their examinations on a basis something better than a quick wipe over with an oily rag. As said before, if Respondent had sent Applicant for specific tests and a medical examination with their nominated doctor and asked him to confer with the other practitioners in order to obtain reports of Applicants' conditions and treatments, it might have had some hard evidence upon which to base its assumption of fakery. It does not however do or have either. Respondent cannot defend its position by saying that it said to Applicant to go to its chosen GP but she would not. This situation required an instruction to Applicant and an in depth examination to set the baseline, medically speaking.

20. I have a suspicion that the real nail in this particular coffin was the trip to Thailand."

[10] It appears to the Court that the relationship between employer and employee became toxic when the third respondent, and then the applicant, brought in their legal consultants to communicate through. The stance taken by the employer at arbitration, and by its legal representative in cross-examination of third respondent at arbitration, and in this application, was to focus on the 'malingering' hypothesis. This in the face of mental health problems being experienced by the third respondent, as was evident from the report in affidavit form by a psychiatrist who treated her. This crass approach to the mental health of an employee, and

the lack of an investigation into whether there was an incapacity issue at play, may well have influenced the Commissioner to make the Award that he did. Had the charge against third respondent been only 'Abuse of sick leave', the Award may have not been susceptible to review.

[11] But it is the Commissioner's finding on the issue of the "final nail in the coffin" charge that deserves scrutiny. The third respondent knowingly took unauthorized leave. It is further evident from the record before the Commissioner, that third respondent engaged with the applicant by email while in Thailand. Having received an email from her employer stating that the leave for the period of 20-27 November would be treated as unpaid, and that her legal representative had been informed that her leave was revoked on the 13th November, third respondent replied as follows:

"Hi Zonika,

I have applied for annual leave and been approved already for the period 17/11 – 27/11.

Legally this leave cannot be revoked and nor was it ever withdrawn by me.

It is therefore noted that this will not be taken as unpaid leave and cannot be forced onto me by Broadreach.

I trust that all in in order!

Regards Sutacha Dookhi"

[12] The third respondent was defiant in refusing to take the unauthorised leave as unpaid. She was dismissed on the 20 December 2017. By the 8 January, according to the Award, she had secured new employment earning R72,000 per month. A reasonable decision-maker would have found her guilty of this Charge, and taken relevant evidence into account regarding her knowledge of the withdrawal of authorization, and her insubordination reflected in her email correspondence from Thailand. However, the Commissioner awarded her an amount equivalent to two and a half weeks salary for her period of unemployment

and an additional one month's compensation on account of the 'substantive unfairness' of her dismissal.

[13] In my view, the finding that the sanction of dismissal in respect of taking unauthorized leave was substantively unfair, was a decision that a reasonable decision maker could not make. The Award thus stands to be reviewed and substituted. I make the following order:

Order

1. The Award under Case Number WECT-381-18 is reviewed and set aside and substituted as follows:

1.1 The dismissal of Sutasha Dookhi was substantively fair.

2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

For the Applicant: Snyman Attorneys

For the Third Respondent: Herold Gie Attorneys