Beck / Parmalat SA (Pty) Ltd
[2021] 2 BALR 131 (CCMA)

Division:	Commission for Conciliation, Mediation and Arbitration
Date:	02/11/2020
Case No:	**ECPE2373-20**
Before:	N Bisiwe, Commissioner

Referral in terms of section 191(5)(a)(i) of the LRA

Dismissal - Substantive fairness - Absence without leave - Employee dismissed for declining to attend work during Covid-19 lockdown for fear of infecting family - Dismissal unfair because instruction to attend work unreasonable.

Editor's Summary

The applicant, a laboratory analyst, was dismissed for being absent from work without permission for 21 days during the level 5 lockdown implemented to combat the Covid-19 pandemic. The applicant admitted that she had not reported for duty during this period, but claimed that she had decided to remain at home after her application for leave (even unpaid) had been turned down and that she had been forced to take the decision for herself because she was afraid of infecting her family. The respondent claimed that it was required to continue full production during the lockdown because it provided what had been deemed an essential service, that all prescribed safety precautions had been taken and that only pregnant employees and those with underlying chronic conditions had been allowed to stay at home during the period in question.

The Commissioner noted that at the time the President had called on companies to take care of their workers in the exceptional situation created by the pandemic. During the period in question, the number of people infected had increased from 61 to 420 and by the time the arbitration was conducted it had risen to 725 000. The respondent had heeded the President's call to continue production and had taken measures expected of it. However, the applicant was not merely seeking the comfort of her family because she was scared of an unknown virus. She had informed her manager that her child suffered from asthma and that she was living with her vulnerable elderly mother. Although the respondent had 16 other employees in the laboratory, it had not even considered the applicant's proposal that she take unpaid leave. The applicant had a reasonable explanation for not reporting for duty as contractually required and the respondent was more concerned about creating a possible precedent than with dealing with the applicant's personal circumstances. Her dismissal was, accordingly, unjustified and unfair.

Turning to relief, the Commissioner noted that although there was no reason not to reinstate the applicant, it would be unfair to the respondent to make reinstatement fully retrospective.

The applicant was reinstated, with back pay limited to a month's salary.

Award

Details of hearing and representation

[1] This matter was referred to the CCMA for arbitration in terms of section 191(5) of the Labour Relations Act 66 of 1995, as amended (the "LRA"). The arbitration was heard before me at the CCMA offices in Port Elizabeth. The proceedings were electronically recorded.

[2] Ms [****] Beck, the applicant, attended the arbitration hearing and represented herself. Lactalis SA (Pty) Ltd, the respondent, was represented by its Regional HR Manager, Mr Xolani Buqa. At the conclusion of the arbitration hearing the parties were given time until 23 October 2020 to submit their written closing arguments. Those were duly received and have been taken into consideration in the preparation of this award.

Issues to be determined

[3] I am required to determine whether or not the dismissal of the applicant was substantively and procedurally fair, and if not to consider an appropriate relief in accordance with the provisions of LRA.

Background information

[4] The applicant worked for the respondent as a Lab Analyst from 1 July 2010 until her dismissal on 29 April 2020. Her salary at the time was R21 057 per month.

[5] Her dismissal followed a disciplinary enquiry in which she was found guilty of misconduct allegations as follows:

> "AWOL for 21 days in that from 27 March 2020 you were absent from work without permission."

The applicant considers the sanction of dismissal to be too harsh. She seeks to be reinstated to her former employment.

Survey of evidence and arguments

[6] The respondent led the evidence of two witnesses who testified under oath. They are Mr Owen Walsh, the

respondent's Production Manager who was the presiding officer at the applicant's disciplinary hearing; and Ms Hendrieta Janse Van Rensburg, the respondent's Quality Manager who was the applicant's line manager. The applicant led her own evidence and that of her witness, Mr Werner Cowley, the respondent's Lab Coordinator. Only a summary of the gist of the parties' evidence is referred to below.

[7] The respondent's evidence, in a nutshell, is that the applicant was scheduled to work between March and April 2020 but failed to do so. This was during Level 5 of the national lockdown imposed by the South African Government to limit the spread of the corona virus, Covid-19. The respondent is one of the companies that were issued with permission to continue operations due to its production falling under the food value chain

which was declared as essential in terms of the national state of disaster Regulations. Its evidence is that, while the pandemic was new for it and the country at large, it managed, at short notice, to put together personal and production safety and compliance protocols to guide its employees and disseminated information and personal protective equipment to all its employees. It cancelled all leave for its employees, denied others who needed to take leave and ensured that all were at work to meet its production demands, in line with it being declared a service essential to meet the country's food requirements. It made exception by allowing pregnant employees and those with chronic illnesses and other underlying conditions, to stay at home for a period. It argues that the applicant did not fall in those categories and her continued stay away from work without authorisation to do so, from the date of Level 5 of the national lockdown, was unreasonable and amounted to a dismissible misconduct.

[8] The applicant's evidence is that the new pandemic, Covid-19, brought with it fear for those with underlying medical conditions. She respected the respondent's call for its employees to work through Level 5 of the national lockdown. However, as a person who stays with an elderly parent and an asthmatic child, she feared exposing her child and parent to the disease. Her manager knew of her child's medical condition. She asked to be given leave and when that was denied, she offered to take unpaid leave and that was also denied. In the end she was forced to take a decision to follow lockdown rules and stay away from work to protect herself and her family. She considered the respondent's insistence that she should continue working as unreasonable and unfair, more so as no PPE was provided to employees at that time but only sanitiser and social distancing of 1.5 meters which was often difficult to maintain, especially in the Lab where she worked and where all the products are tested for quality standards.

[9] The applicant further testified that the disciplinary hearing was unfair as the presiding officer was not objective but interjected and spoke on behalf of a witness, and he was not supposed to have chaired the hearing as he is not from a different department to the one the applicant worked in. The presiding officer allowed the disciplinary hearing to be interrupted and adjourned as they needed to attend a management meeting as managers. She was also never provided with the minutes of the disciplinary hearing until after the CCMA conciliation meeting.

Analysis of evidence and arguments

[10] The applicant was disciplined for *Absence Without Leave*, which is commonly referred to as AWOL. It is common cause that she was absent from work from 27 March until 17 April 2020, when she was issued with a notice to attend a disciplinary hearing. The first sitting of the disciplinary hearing was on 21 April and concluded on 29 April 2020.

[11] It is common cause that on 15 March 2020 the President of the Republic of South Africa announced that the corona virus pandemic was declared a national disaster and introduced a package of extraordinary measures to combat this grave public health emergency. At the time 162 000 people

had tested positive for the virus across the globe, and South Africa had 61 confirmed cases. On 23 March 2020, the President announced a national lockdown for 21 days with effect from 27 April 2020, with only essential services allowed to operate. The President called on companies to take care of their workers during this time and called on all South Africans to act in the interest of the nation and not in their own selfish interests. The country's approach was to ensure that the elderly and those with comorbidities are protected from infection due to their compromised immune systems. By this time, the South African confirmed infection cases had increased from 61 to 402. As I write this, the South African numbers are at 725 000 infections with 19 276 deaths.

[12] When the Covid-19 information was shared with employees within the respondent's workplace, the applicant took it upon herself to explain her personal circumstances to her manager and asked to be considered for leave. When her manager declined her leave, she was taken to the plant manager where she pleaded for consideration but was again denied leave. In essence the respondent management had taken a decision to implement the President's call that those services considered essential should continue operations without disruption. To this end it cancelled all leave and refused to grant leave to any employee requesting time off at this critical time. An example was given of two young employees who were concerned of being alone and on their own, being away from family and wished to travel and be with family at this time.

[13] The applicant's situation was not ordinarily that of a person just scared of an unknown virus and wishing to be in the comfort of family at this time. She had explained to her manager that, as she was aware, her young child suffered from asthma and she stayed with her vulnerable elderly mother. She sought to be considered for time off, as she wanted to avoid commuting to work for fear of being infected and exposing her family.

[14] What strikes me as odd is that the respondent showed no willingness to consider the applicant's request on

its merits, check how much time she needed to be away, whether that would cause disruptions to the operations in the Lab where she worked, and whether the respondent could tolerate the applicant's absence for that long. Evidence led by the respondent is that there were 16 employees employed in the Lab. It simply stopped her in her tracks and told her to continue working and was not willing to engage on her request. The applicant understood that she was not sick and could not take sick leave. She understood that her request for annual leave was denied, as part of the blanket cancellation of annual leaves, and she offered and requested to be granted unpaid leave. She was willing to sacrifice her salary to protect her family, but that offer was not even entertained. She was merely told that nobody was allowed to take leave.

[15] The elements of the offence of absenteeism are that the employee must have been absent from work when contractually obliged to render service, and that the employee had no reasonable excuse for his/her absence. It is trite law that an employee may have compelling reason to absent himself from work even though he has been told that he may not take leave. *Kievits Kroon Country Estate* (*Pty*) *Ltd v CCMA* [2011] 3 BLLR 241

(LC) provides an instructive example of that. The question the Court asked was whether the employee's absence from work was justified. The employer's refusal to grant the employee special leave was considered unjustified and the subsequent dismissal of the employee unfair. This decision was upheld on appeal by the Labour Appeal Court.

[16] I find that the applicant had a reasonable excuse for her absence from work, even though she was contractually obligated to work. The respondent does not deny knowledge of the circumstances that caused the applicant to stay away from work. It merely argues that she was not authorised to be absent, despite such circumstances. It seems that the respondent was more concerned against creating a precedent if they allowed the applicant to take leave and, possibly, open the flood gates for other employees to seek to be considered for leave. That is unfortunately the task entrusted on managers, to manage the workplace by evaluating circumstances and taking decisions based on those evaluated circumstances. It is not a tick box exercise. Equally, precedence is an important principle in our law. However, the principle that *each case is based on its own merits*, is a very important one. That is why courts sit daily to hear merits of cases and decide cases on their own unique facts.

[17] It seems to me that had the respondent considered the applicant's request, and differentiated her situation from that of other employees who simply wanted to be with family at the time, they would have seen justification in her request. The fact that she was even willing to forgo her salary would have been considered less burdensome on the respondent.

[18] I find that the respondent has failed to discharge the onus to prove that the applicant's dismissal was justifiable under these circumstances.

[19] I have considered the applicant's challenge on the conduct of the presiding officer and find nothing unfair with it. It is trite law that disciplinary processes are not court proceedings that should be conducted with legal precision and formalities. They remain processes within the workplace to provide an accused employee with *a mere opportunity to be heard* before a decision on her conduct is taken. These presiding officers are mere line managers who have to balance the need to conduct a hearing with the competing workplace demands, such as production pressures, and are not judicial officers.

[20] I have considered that the applicant had offered and was willing to take unpaid leave. It has been six months since the applicant was dismissed. The country has, since then, moved from Level 5 lockdown to Level 1, with much awareness about safety and precautionary measures against the corona virus. I will order for her retrospective reinstatement with back pay only for the period since 21 September 2020, when Level 1 lockdown was announced. The applicant has throughout made it clear that her family safety was more important than money. I have taken that into account in balancing the financial implication of her reinstatement, so as not to unfairly burden the respondent with a huge cost of her reinstatement.

Award

(a) I find that the dismissal of Ms [****] Beck, the applicant, by Lactalis SA (Pty) Ltd, the respondent, on 29 April 2020, was substantively unfair.

(b) I order the respondent to reinstate the applicant in its employ on terms and conditions no less favourable to her than those that governed their employment relationship immediately prior to her dismissal. This reinstatement is to operate with retrospective [*sic*] from the date of dismissal and will take effect on 16 November 2020.

(c) The remuneration due to the applicant, as a result of the retrospective operation of this reinstatement, is equivalent to one months' pay amounting to R21 057, calculated at the applicant's gross earnings per month at the time of her dismissal, minus such deductions as the respondent is in terms of the law entitled or obliged to make. This amount is to be paid by the respondent to the applicant not later than 30 November 2020.

(d) Ms [****] Beck is ordered to report to work at the respondent's HR manager's office on 16 November 2020 at 9am to tender her services. This date is intended to allow the respondent to make the necessary arrangements for her resumption of duties.

The following case was referred to in the above award: