

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR 1564/18

In the matter between:

**GAUTENG DEPARTMENT OF EDUCATION**

**Applicant**

And

**GENERAL PUBLIC SERVICE SECTORAL**

**BARGAINING COUNCIL**

**First Respondent**

**FUZILE MALOYI NO**

**Second Respondent**

**SAOU OBO KRUGER MJ**

**Third Respondent**

**Heard: 7 February 2019**

**Delivered: 27 February 2019**

**Summary: Application to review and set aside arbitration award**

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## JUDGMENT

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**RAPHULU, AJ**

### Introduction

- [1] Mr Kruger, on behalf of whom the third respondent acts, was dismissed for misconduct in the form of gross negligence, in that he signed the applicant's HR7 employee form without checking it, which led to a ghost employee being hired and paid, leading to financial loss for the applicant.
- [2] Mr Kruger was charged with gross negligence for his actions. He pleaded guilty to the charges. The outcome of the disciplinary proceedings was his dismissal, both at the initial proceedings, and on appeal.
- [3] Mr Kruger was unhappy over the sanction and therefore referred an unfair dismissal dispute to the first respondent, wherein the only consideration before the arbitrator was the appropriateness of sanction.
- [4] The second respondent found that Mr Kruger's dismissal was substantively unfair, had retrospectively reinstated him, and awarded him 10 (ten) months' compensation. The applicant has applied to have the arbitration award reviewed and set aside, on the basis that the second respondent conducted a misconduct, alternatively a gross irregularity.

### Analysis

- [5] I have considered the arbitration award and the applicant's submissions as to why it contends that the second respondent conducted a misconduct, alternatively a gross irregularity, and I am in agreement with the applicant in that regard. I am of the view that the decision of the second respondent is not

one that a reasonable decision maker could arrive at, in that the second respondent went far beyond his mandate of examining the sanction, and went on his own trajectory, interrogating the substantive fairness of the dismissal and coming up with his own reasons as to why Mr Kruger did what he did.

[6] I have considered the applicant's submissions that the ghost employee would not have been employed but for Mr Kruger's conduct, that financial losses were incurred as a result of Mr Kruger's negligence (admittedly not all directly attributable to Mr Kruger), that the parity rule shows that employees who were found guilty of misconduct similar to Mr Kruger's were dismissed.

[7] I have also considered the third respondent's submissions on the individual circumstances of Mr Kruger, having been new to the responsibility of the appointment of educators, the period of his absence for annual leave and sick leave immediately before the incident in question, his 20 year clean disciplinary record, his having pleaded guilty to the charges and having shown remorse at the disciplinary proceedings.

[8] It is trite law that all relevant circumstances must be taken into account in deciding if the employer's sanction decision is fair. Bearing all relevant circumstances in mind, I am of the view that the sanction of dismissal was too harsh.

[9] In the premises, I make the following order:

Order

1. The applicant's review application is granted;
2. The arbitration award of the second respondent, Fuzile Maloyi N.O., dated 3 June 2018 and issued under case number GPBC 1522/2017, is reviewed and set aside;
3. The arbitration award of the second respondent is substituted with an award that dismissal was too harsh a sanction, that Mr Kruger be reinstated and be given a final written warning;
4. There is no order as to costs.

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L Raphulu

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Advocate N Thokoane

Instructed by: The Office of the State Attorney

For the Third Respondent: Advocate G vd Westhuizen

Instructed by: Erasmus Attorneys