



ARBITRATION AWARD

Panellist: Isaac Milanzi
Case No.: GPBC 432/2019
Date of Award: 25th September 2020

In the ARBITRATION between:

Kailash Bhana

(Union / Applicant)

And

Department of Planning, Monitoring and Planning

(Respondent)

Union/Applicant's representative:

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was scheduled at the offices of the GPSSBC at 260 Basden Street, Centurion on the 23rd of August 2019. On the 3rd and 4th of September 2020 the matter was conducted via online media. The Applicant, Ms. K. Bhana was represented by Adv. T. Govender. The Respondent, Department of Performance, Monitoring and Planning was represented by Ms. M. Mothlbane, its Employee Relations Officer.

- [2] The hearing was electronically recorded and hand written notes were taken.

- [3] Two (2) sets of documents were submitted. Parties were permitted to submit written heads of argument.

BACKGROUND TO THE ISSUE

- [4] The Applicant was initially employed on a two year fixed term contract from October 2013 to September 2015 in the position of Chief Director: Revitalisation Distress Mining Communities.

- [5] On the 11th of June 2015 the Applicant signed a three year fixed term contract, for the period of 1st October to the 30th of September 2018.

- [6] On the 13th of April 2017 the Applicant was notified that her fixed term contract had been translated to a permanent position and was issued with a permanent contract of employment.

- [7] In November 2017 the Applicant was notified that her permanent contract of employment was cancelled and that she was back to a fixed term contract.

- [8] On the 11th of January 2018 the Applicant and the Respondent entered into a ten month fixed term contract from the 1st of December 2017 to the 30th of September 2018 for the position of Senior Sector Expert: Revitalisation of Distressed Communities.

- [9] At the end of September 2018 the Applicant and the Respondent entered into a further fixed term contract for the period October 2018 to December 2018
- [10] At the time of her dismissal, the Applicant earned a salary of approximately per annum on salary level 14 in the position of Chief Sector Expert: Revitalisation of Distressed Mining Communities.
- [11] According to the Applicant she expected the Respondent retain her in employment on an indefinite basis. However on the 29th of January 2019 she was not retained and her fixed term contract was terminated.
- [12] The Applicant declared a dispute at the GPSSBC and the matter came before me for arbitration. The Applicant seeks reinstatement for what she considers an unfair dismissal.
- [13] This is an **arbitration award with brief reasons** as contemplated in section 138(7) (a) of the Labour Relations Act, 1995.

ISSUE TO BE DECIDED

- [14] I must determine whether or not the Applicant was unfairly dismissed in terms of *Section 186 (1)(b) and Section 188 of the Labour Relations Act, 66 of 1995* ("the LRA").

PRELIMINARY ISSUES RAISED

- [15] None.

SURVEY OF EVIDENCE AND ARGUMENT

- [16] The Applicant bore the onus to prove the existence of the alleged dismissal and commenced proceedings.

THE APPLICANT'S CASE

Ms. Kailash Bhana testified that:

- [17] She employed on a two-year fixed term contract commencing from the 1st of October 2013 to the 30th of September 2015 in the capacity of Chief Director, Distressed Mining Communities.
- [18] On the 11th of January 2015 she was employed on a further three-year fixed term contract for the period the 1st of October 2015 to the 30th of September 2018 in the same position.
- [19] On the 13th of April 2017 she was notified that her fixed term contract had been converted into a permanent position and she was given a permanent contract of employment.
- [20] On the 15th of November 2017 she was notified that her permanent position was cancelled and that she would be placed back onto fixed term employment.
- [21] On the 4th of December 2017 she was given a letter concerning the reversal of her permanent employment status stating that she would be employed on a fixed term contract from the 1st of December 2017 to the 30th of September 2018 or until the permanent post is filled, whichever was the earliest. In essence this contract was giving effect to the three-year fixed term contract for the period of the 1st of October 2015 to 30th of September 2018 that was signed on the 11th of June 2015.
- [22] On the 24th of May 2018 she was invited to an interview for the position that she already occupied i.e. Chief Director, Distressed Mining Communities, which would take place on the 1st of June 2018. The invite was sent by Ms. Jabulile Mchunu of the Human Resources Department, a subordinate of Mr. Nomlala.
- [23] The interview took place on the 1st of June 2018 before a duly constituted interview panel, appointed by the Human Resources Department which Mr. Nomlala headed, consisting of Mr. Dicks, Ms. Josephine Nklako, an outcome facilitator, and the panel was chaired by Mr. Matona. She was the recommended candidate.
- [24] On the 4th of June 2018 she was informed by Ms. Mchunu that she was required to attend a competency assessment. Only the recommended candidate would go for a competency assessment following an interview process. It did not make financial sense for unsuccessful applicants for the position to attend competency assessments.
- [25] To this end, Mr. Nomlala addressed an email to Mr. Caroline Mangwane, one of DG Mpofu's personal assistants, to follow up on the submission made by him to the DG concerning her appointment of the on

a permanent basis to the position of Chief Director, Distress Mining Communities. Mr. Nomlala also indicated that her fixed term contract would be coming to an end soon and that there was a need to give her notice if she was not appointed.

- [26] By the 3rd of September 2018, she still had not received any word on her permanent appointment and addressed an email to Mr. Nomlala following up in view of the fact that she had been interviewed for the position on the 1st of June 2018 and had subsequently completed a competency assessment and her fixed contract was coming to an end on the 30th of September 2018.
- [27] On the 3rd of September 2018 Mr. Nomlala responded that while the submission had been made to the DG for consideration, the DG had called him to discuss the submission and had asked him to write another submission addressing the issues raised by her.
- [28] By the 12th of September 2018 there was still no feedback on her permanent appointment and to this end, Mr. Dicks addressed an email to Mr. Nomlala requesting that the her fixed term contract be extended for a further three months to make provision for the potential delays in signing the recommendation on her appointment by the DG's office.
- [29] On the 28th of September 2018 Mr. Nomlala sent an email advising that the DG had approved the extension of her contract for a period of three months, or until the post is filled, whichever was the earliest, but that the entire recruitment process had to be restarted for the DG to be personally part of the process as allegedly was the case with all Chief Director posts in the department.
- [30] On 28th of September 2018 she called Mr. Nomlala regarding the email exchange and asked him whether it was legal to redo the interview process, given that the panel had already sat, that she was the recommended candidate and that for the past year she was unable to make long term financial decisions for her family. Mr. Nomlala indicated that it was legal since the DG was the delegated authority and she could restart the process if she wanted to.
- [31] On the same day Mr. Dicks responded to Mr. Nomlala's email advising that he did not understand why the process would need to be redone and enquired what the reason was for this. Mr Nomlala responded that the reason was highlighted in red i.e. that the process that the process needed to be restarted in order for the DG to be personally part of the process. Mr. Dicks responded by asking whether the DG did not delegate Mr. Matona to chair the interviews.

- [32] She then received an appointment letter for a fixed term contract from the 1st of October 2018 to 31st of December 2018 (for the period of three months or until the post is filled, whichever was the shorter period). She was later informed by Mr. Dicks that she was again shortlisted for her position, pursuant to the new recruitment process initiated by the DG in November 2018.
- [33] In December 2018 when she followed up with Mr. Dicks, as her immediate supervisor, about the way forward he then reiterated that she had been shortlisted and that she should continue to come to the office in January 2019 since the post had not been permanently filled and there was a lot of work to be done.
- [34] In January 2019 her tools of trade, i.e. her laptop etc. were not taken away from her and she continued to occupy her office space at the Respondent's premises. In addition she travelled to Cape Town, an expense paid for by the Respondent and continued to do extensive preparation and planning for the African Mining Indaba.
- [35] Around 28 January 2019 she noticed that she had not received a payslip, since other colleagues had received payslips and she made a telephone call to the Human Resources Department to follow up on what was going on. She was told by Mr. Willem Victor that she would not be receiving a salary for January 2019 because she was not on the payroll.
- [36] She then recorded the telephone discussion with Mr. Victor in an email addressed to Mr. Dicks, copying Mr. Israel Chappell and Mr. Victor. In this email she expressed her dismay on how the Respondent's indecisiveness had for the past year and four months impacted her personal and professional life and the toll that it had taken on her health, given the inherent stress. She advised that she was pursuing her legal options since there seemed to be no other recourse open to her.
- [37] Also on the 28th of January 2019 Mr. Victor responded, addressing the email to Mr. Nomlala, enquiring whether there had been any communication from Human Resources Department that she should continue to work. Mr. Victor also confirmed that she was not issued with a notice of expiry of her contract (most probably an oversight due to the December leave period according to him) but that the contract extension clearly stated that the end of the contract was the 31st of December 2018).
- [38] On the 29th of January 2019 Mr. Nomlala addressed an email to Mr. Dicks advising that the Human Resources Department did not receive a request from his office to extend her fixed term contract and that while fixed term contracts were not automatically extended it was a pity that she was blaming the

Human Resources Department instead of Mr. Dicks for the non-extension. Mr. Dicks was further advised to submit an urgent submission to the DG through the Human Resources Department for the extension of her fixed term contract effective from the 1st of January 2019 with a motivation as to why he allowed her to continue working without a valid employment contract. Mr. Nomlala concluded the email by stating that he fully understood her unhappiness and frustration since what was happening to her was unnecessary and unfair.

- [39] Also on the 29th of January 2019 Mr. Dicks responded to Mr. Nomlala indicating that he, amongst others, wished that Human Resources Department could provide human resource leadership and guidance on human resources policies and not get into any blame game. He also indicated that he believed that it was remiss of Mr. Nomlala as the Acting Human Resources Director to place blame on what was clearly a lapse in human resources function. He set out the background to her raising the key concerns around her contract of employment since about 2013 and he reiterated that the reason for the three month extension, in the last instance was on the assumption that interviews would be redone for the position, which had not happened, and on that basis there was an assumption that the fixed term contract would be extended since the post was still required including the required job functions. Mr. Dicks took the opportunity to apologise her for the lapse in the human resources' functions and the continued poor treatment regarding her position at the Respondent amongst other things.
- [40] On the 29 of January 2019 Mr. Nomlala wrote to her advising her that it had come to Human Resources Department's attention on the 28th of January 2019 that she had continued reporting for work despite her fixed term contract having expired and despite the lack of approval from the DG. He further recorded that Mr. Dicks was in the process of requesting an extension for the fixed term contract. Mr. Nomlala advised her not to report for duty from the 29th of January 2019 until the authorised delegated official considered the request for extension of her fixed term contract.
- [41] On the 30th of January 2019 Mr. Dicks made a submission to the DG concerning the extension of her contract of employment. In substantiating the urgent request, Mr. Dicks set out the background of how the secretariat came to be established and the crucial work that it had conducted and continued to perform. It was requested that her fixed term contract of employment be extended from the 1st of January 2019 to the 30th of June 2019 or until the position of Chief Senior Expert was filled.
- [42] On the 4th of February 2019 Mr. Nomlala addressed an email to Mr. Dicks and others indicating that the DG had decided not to approve the extension of the contract and instead asked that the process of filling the post on a permanent basis be expedited. Concerning the issue of her reporting for duty in

January 2019 without a valid contract or appointment letter, the DG was not willing to breach government regulations and set a bad precedent by retrospectively extending the contract.

[43] Also on the 4th of February 2019 Mr. Dicks addressed an email to Mr. Nomlala advising that this was extremely regrettable, that he had tried to call Mr. Nomlala to discuss other options and that if the challenge was the retrospective backdating of the contract, could this not be avoided by entering into a new limited duration contract going forward. Mr. Dicks recorded that while this would still prejudice her in terms of her salary for January 2019, he desperately needed her in the post and getting her back into the position was more critical than ever. He recorded that this was permissible to his knowledge and he did not have much confidence in expediting the permanent appointment as sign-off could not be done for the shortlisted candidate since November 2018.

[44] Also on the 4th of February 2019 Mr. Nomlala responded that contracts only get extended if the DG approves this and since she will not extend the contract any longer on the basis that the position should be permanently filled, he directed Mr. Dicks to engage with her (DG) on the decision and to make an appointment with her office.

Mr. Tshepiso Matona testified that:

[41] He was a very senior Government employee at employment level 16. When the Applicant had been converted into a permanent employee, he was the DG of the department at the time. The decision to make the Applicant a permanent employee was subsequently reversed at a time when he was no longer the DG.

[42] He was approached by the Human Resources Department to chair the recruitment panel concerning the Applicant's position. He chaired this panel with two other officials from the department, including Mr. Dicks. The Applicant was the recommended and preferred candidate. Sometime thereafter, he had heard that the Applicant had not been appointed and that the reason for this was because the panel was allegedly not properly constituted. He could not understand why this had been the case since he was told by the Human Resources Department at the time that the reason that he had to chair the panel was because, firstly the Applicant's position was at a level 14 and the chair of the panel had to be at least two levels higher i.e. at a level 16, in terms of the Respondent's policy and that, secondly, since the DG would be making the ultimate decision to appoint the preferred candidate, that she could not also chair the recruitment panel

[43] He understood that the Applicant's role was very important and had a long-term outlook which is why it was necessary for her to be a permanent employee. He did not believe that there was anything irregular about the recruitment panel and him having sat as the chair of the panel concerned.

Mr. Rudi Dicks testified that:

[44] He was the Applicant's direct supervisor. The Applicant's position was an incredibly important one since she was supporting distressed mining communities, following the events that had transpired in Marikana, but it was soon realised that the scope was far bigger and the role of the secretariat developed into a long-term output. To this end, the structure of the Respondent was changed in 2017 to accommodate the secretariat, i.e. the Applicant's position and those of her subordinates to be permanent posts on the organogram.

[45] The Applicant was made a permanent employee during 2017 while Mr. Matona was the DG and he (Dicks) did not agree with Human Resources' perspective, since these were existing employees and therefore a rigorous recruitment process and advertisement of the positions was not necessary since these employees were already occupying the positions concerned.

[46] When the new DG came in she reversed the decision which he did not agree with and insisted that the positions be re-advertised and that a recruitment process take place afresh. While there was obvious dissatisfaction from the Applicant and other employees concerned, he encouraged them to follow the process, while they had two options at their disposal, namely to follow the process and trust in the good faith of the Respondent or take the legal route, which had the potential of destroying the employment relationship. He could not tell the employees what to do, since it was ultimately their decision but he encouraged them to trust in the good faith of the Respondent, which later turned out to be lacking.

[47] There were numerous delays in the recruitment process despite continuous follow-up and ultimately an interview concerning the Applicant's position took place in June 2018. The Applicant was the preferred and successful candidate and thereafter she was sent for competency testing, which was only done for the preferred candidates given the cost implications.

[48] The Applicant's fixed-term contract would have been coming to an end in September 2018 and despite his continuous follow-up with the HR department, no feedback was forthcoming until September 2018 when he sent an email requesting that the Applicant's contract be extended for a further period, to allow the permanent appointment to be confirmed, which was done.

- [49] In December 2018, the Applicant's further extension of her fixed term contract was coming to an end and when the Applicant engaged him as to whether she should be coming to work in January 2019 since her fixed term contract would be coming to an end, he said of course she had to since there was a lot of work that needed to be done including the Applicant's assistance with the Mining Indaba.
- [50] In January 2019 the Applicant flew to Cape Town as part of the Mining Indaba preparations and continued extensive preparation work for the Mining Indaba. Towards the end of January 2019 the Applicant did not receive a payslip and when Human Resources was engaged in this regard they indicated that she was not on the payroll and attempted to blame him for this oversight.
- [51] He conceded that he did not send an email request for the extension of the contract, but that it had been known by all the parties as to the Applicant's position. He wrote a submission to the DG on the 30th of January 2019 reiterating the importance of the Applicant's role in the organisation and the need for a further extension of the fixed term contract until her permanent appointment was confirmed, which the DG did not approve and ultimately, the Applicant was dismissed.
- [52] The Applicant had been treated incredibly unfairly throughout the process and that he was baffled and frustrated at the manner in which the Applicant was treated, given his firm grasp of labour relations policies and laws, given his experience as a labour organiser prior to his employment at the Respondent. There was no decent explanation for the manner in which the Applicant had been treated.

THE RESPONDENT'S CASE

Mr. Ntabozuko Nomlala (Chief Director: Human Resources and Corporate Directorate) testified that:

- [53] The human resources department was responsible for appointing staff members.
- [54] The Applicant's contract terminated because it expired and the Respondent was not required to give her notice. The contract ended naturally on the agreed date.
- [55] In January 2019 the Applicant reported for work despite the fact that her contract had ended on the 31st of December 2018. He became aware on the 28th of January 2019 that the Applicant was at work.
- [56] On the 29th of January 2019 sent the Applicant an email informing her that her contract had ended on the 31st of December 2018. He further informed her that it had come to the human resources

department's attention that despite the expiry of her contract, without approval from the authorized delegated authority, she continued to report for work. He also informed her that her supervisor, Mr. Dicks was in the process of requesting for her contract's extension. He further advised her not to report for duty from the 29th of January 2019 until the authorised delegated official considered the request for the extension of her contract.

- [57] Mr. Dicks was aware what was supposed to be done in relation to extension of contracts because he had several employee who were employed on fixed term contracts. After it was realised that the Applicant was coming to work, they engaged Mr. Dicks and advised him to apply for the extension of the contract.
- [58] On two previous occasions, the Applicant's contract was extended and that was done prior to the end of the contracts.
- [59] Previously the Applicant's was employed on a permanent contract together with two other employees because a new structure was created. The Respondent was supposed to follow the Recruitment Policy but Mr. Dicks recommended that the three employees be absorbed. The human resources department recommended that the Recruitment Policy should be followed but Mr. Matona did not follow that recommendation. When the new Director General, Ms. Mpofu came in, she stated that the policy was not followed and the recruitment process should started afresh.
- [60] He then met and consulted the affected employees about the reversal of their permanent contract. The employees understood the reason for the reversal. He also told them to prepare for interviews.
- [70] The interview panel recommended the Applicant for the post but the DG decided not to approve the appointment of the Applicant.
- [71] The post was subsequently abolished and it no longer exists because it was no longer a priority and as a result of financial constraints. Another reason for abolishing the post was that its output was the same as that of the Chief Director and one of the posts had to be abolished in order to save costs.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [72] *Section 186(1) (b) of the LRA* provides the following:

- (1) *Dismissal means that -*
- (a) *...*
- (b) *an employee employed in terms of a fixed-term contract of employment reasonably expected the employer –*
- (i) *to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or*
- (ii) *to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.*

[73] In evaluating this matter, the first issue to consider is whether there exists a dismissal upon which the jurisdiction of the bargaining council to entertain the dispute would have been based. The second issue to consider if I find that the employee was indeed dismissed is whether such a dismissal was fair or otherwise.

[74] The factual matrix in this dispute are mainly common cause in that the Applicant was employed on successive fixed term contracts that expressly stipulated the dates of termination, save for a short duration whereby her fixed term contract was “converted” to an indefinite contract of employment. The said indefinite contract was subsequently reconverted to fixed term contract. The last of the fixed term contracts ended on the 31st of December 2018. It is further undisputed that from the 2nd of January 2019, the Applicant at the invitation of her supervisor (Mr. Dicks), rendered service for the Respondent.

[75] The issue in dispute is that the Respondent contends that the Applicant was never dismissed but her fixed term contract of employment was terminated by the effluxion of time on the 31st of December 2018. The Applicant on the side contends that she rendered service from the 2nd of January 2019 to the 29th of February 2019 when she was informed that she should not report for duty (i.e. when she was dismissed).

[76] The issue is whether, after the 2nd of January 2019, the Applicant was party to an implied contract that that was indefinite in nature and whether it can be said in those circumstances, that she was dismissed for the purposes of the Act when she was told that she should no longer report for duty.

[78] The Applicant in her testimony was that in December 2018, she was told by her supervisor, Mr. Dicks that she should report for duty in January 2019. The Applicant in January 2019 complied with what Mr. Dicks told her to do. She reported for duty and performed her normal duties. She was further sent to

Cape Town at the expense of the Respondent to prepare for the Mining Indaba. The evidence of the Applicant in this regard was corroborated by Mr. Dicks who stated that, he as the Applicant's supervisor, asked the Applicant to report for duty because there was a lot of work to be done and her services were required.

- [79] The Respondent's evidence was that the Applicant reported to work without any letter authorising her to return to work. This is remarkable, if not astounding in that under these circumstances, any reasonable employee would have carried an instruction issued by her superior that he/she should report to work. The facts that Mr. Dicks was the Applicant's supervisor and that he could issue instructions to her were not disputed. Furthermore, the Respondent's assertion in this regard is unsustainable in that it provided the Applicant with the tools of trade to perform her duties including but not limited to office, computer facilities (laptop, email facilities) and access to its premises. There was no evidence presented to show that the Applicant's access to its premises and/or computer facilities were blocked from January 2019. It further authorized and paid for her trip to Cape Town to organize the Mining Indaba.
- [80] If the Respondent's version that the Applicant was not authorised to come to work is to be believed, then the question that needs to be answered is who granted access to the Applicant to its premises, computer facilities and who authorised and paid for the trip to Cape Town to carry out the business of the Respondent. The resounding and unequivocal answer is that it is the Respondent itself. This clearly indicates that the Respondent received and accepted the Applicant into its service on the 2nd of January 2019 after the agreed date for the termination of the fixed term contract that ended on the 31st December 2018.
- [81] In *Owen & Others v The Department of Health, KwaZulu-Natal* (2009) 30 ILJ 2461 (LC), the Court endorsed the position that if an employer permits an employee to continue working after the date on which the contract would otherwise have expired, the contract will be deemed to have been tacitly renewed on the same terms, except that the contractual relationship is now of indefinite duration. Once this happens, the only way in which the contract can be terminated is by ordinary dismissal, with or without notice or by the employee's resignation.
- [82] The above-mentioned Owen judgment was endorsed by the Labour Appeal Court in *Department of Agriculture, Forestry & Fisheries v Teto & Others*, [2020] ZALAC 19 (28 May 2020) where the Court stated as follows:

“The fact that some of the terms and conditions of the respondents’ employment may have altered is not decisive. They remained employed by the same employer, albeit on different terms. If after the expiry of a fixed-term contract, an employee continues to render services to an employer and receives remuneration for the rendering of those services, the contract is deemed to be tacitly relocated or novated. The new contract may be on varied terms and its duration period must be determined in the light of the circumstances of each case. Unless a contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party. The commissioner correctly held that this is what happened in this case. His reference to the new contract as a “permanent” contract was perhaps a mischaracterisation, but he clearly meant that the new contract was one of an indefinite nature terminable by reasonable notice. His finding that the respondents were employees of DAFF, and thus that he had jurisdiction to determine the unfair dismissal dispute, was unassailably correct; as was his finding that since DAFF failed to lead any evidence justifying the dismissals it did not discharge its onus to prove their fairness”.

[83] In taking the evidence of this case in totality, I find that the Applicant continued to render service after the expiry of her last fixed term contract. Mr. Nomlala who testified on behalf of the Respondent, conceded that the Respondent acted unfairly for not remunerating the Applicant for rendering service in January 2019. He also stated that he asked Mr. Dicks to make a submission to the DG to backdate the Applicant’s contract in January 2019. This is an indication that the Respondent was attempting to remedy the non-payment of the Applicant’s January 2019 salary. It follows then that based on the facts and circumstances of this case, the Applicant’s contract is deemed to have been tacitly renewed on the same terms, except that the contractual relationship was one of indefinite duration terminable by reasonable notice.

[84] It is not in dispute that on the 29th of January 2019 the Applicant was informed by Mr. Nomlala that she should no longer report for duty. This clearly indicates that the Applicant was dismissed on the 29th of January 2019. Consequently, the Council has jurisdiction to determine the fairness or unfairness of the dismissal of the Applicant.

- [85] Section 185 of the Act provides that every employee has the right not to be unfairly dismissed and section 188(2) provides that “any person considering whether or not the **reason** for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair **procedure** must take into account any relevant **code of good practice** issued in terms of this Act.” This is also stated in section 138(6) of the Act.
- [86] In terms of section 192 of the Act **the employee** carries the onus of proving the existence of a dismissal whilst **the employer** has to prove that it is fair. It is trite that the employer has to prove that the dismissal has been fair from a substantive as well as procedural point of view.
- [87] In this matter the Respondent in this matter relied on the fact that the Applicant had not been dismissed and did not tender any evidence to discharge the onus that the dismissal of the Applicant was both substantively and procedurally fair. It common cause that the Applicant was only informed that she should no longer report for duty. Furthermore, there was no evidence presented that the Respondent followed a fair procedure prior to the dismissal of the Applicant.

RELIEF

- [88] Section 193(2) of the Labour Relations Act, 1995 provides as follows:

*“The Labour Court or the arbitrator **must** require the employer to reinstate or re-employ the employee unless-*

- (a) **the employee does not wish to be reinstated or re-employed;***
- (b) **the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;***
- (c) **it is not reasonably practicable for the employer to reinstate or re-employ the employee; or***
- (d) **the dismissal is unfair only because the employer did not follow a fair procedure.”***

- [89] The Applicant was adamant that she wished to be reinstated and there is no reason why his wish should not be granted. The Applicant earned a gross salary of R1,161,423.00 per annum at the time of her dismissal and this is also the amount that she would have earned until the date of this award had it not been for her dismissal.

AWARD

- [90] The dismissal of the Applicant was both substantively and procedurally unfair. The Applicant stated that she wishes to be re-instated in her previous position with the Respondent. From the circumstances of

this case, it seems to me that there is nothing either in law or fairness preventing me from ordering re-instatement in terms of section 193 (1) (a) of the Labour Relations Act 66 of 1995. I therefore make an award in the following terms:

[91] The Respondent **Department of Planning, Monitoring and Evaluation** is ordered to reinstate the Applicant **Ms. Kailash Bhana** in her position as the Chief Sector Expert: Revitalisation of Distressed Mining Communities with effect from the date of her dismissal (29th January 2019) – i.e. on the same terms and conditions of employment that had applied prior to her dismissal except that the contractual relationship now is one of indefinite duration;

- (1) to permit the Applicant to resume her employment on or before 12th of October 2020;
- (2) to remunerate her **for period of twelve months** during which she did not work. I have decided to limit the back pay to the period of twelve months due to the fact that the delay in finalizing this matter was not caused by the parties. The back pay (remuneration) shall not be less than **R1,161,423.00 (one million, one hundred and sixty one thousand, four hundred and twenty three Rand)**, until the resumption of her employment (tax, statutory and other legitimate deductions may be deducted) and provided that the total amount of all remuneration thus due shall be paid to the Applicant on or before 30th of October 2020 and;
- (3) to restore the Applicant's leave and other benefits as if she had not been dismissed.

[92] The Respondent is ordered to pay the amount mentioned in paragraph 91, on or before the 30th of October 2020 to the Applicant, failing which the Applicant may elect to invoke the provisions of Section 143 of the Act to enforce this award.

[93] The Applicant, **Ms. Kailash Bhana**, is ordered to report for duty on 12th of October 2020 or on such earlier date as may be agreed upon in writing between the parties.

[94] I make no order as to costs.



Isaac Milanzi
GPSSBC Arbitrator

