

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-APP-AAA-2022/00068

In the matter between:

**MINISTRY OF FINANCE
OFFICE OF THE EXECUTIVE DIRECTOR**

FIRST APPELLANT

and

**THE LABOUR COMMISSIONER
JASON PICKARD
KATHITIRE KENNETH HUMU
RESPONDENT**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD**

Neutral citation: *Ministry of Finance v The Labour Commissioner* (HC-MD-LAB-APP-AAA-2022/00068) [2023] NALCMD 54 (9 November 2023)

Coram: COLEMAN J
Heard: 8 September 2023
Delivered: 9 November 2023

Flynote: Labour Law – Appeal from arbitrator’s award based on generic grounds of appeal.

Summary: Second respondent was dismissed from his employment at the Ministry of Finance by virtue of the deeming provision under s 24(5)(a) of Public Service Act, 1995. Deeming provision triggered because employer effected employee's arrest.

Held: That the Arbitrator did not err or misdirect himself and the appeal is dismissed.

ORDER

1. The appeal is dismissed.
2. The first appellant herein and respondent in the arbitration proceedings should be taken to be the Minister of Finance and not Ministry of Finance.
3. There is no order as to costs.
4. The matter is removed from the roll and regarded as finalised.

JUDGMENT

COLEMAN J:

Introduction

[1] This is an appeal against an arbitration award handed down on 13 October 2022 in favour of second respondent (Pickard). The citation of the appellants is confusing. The arbitration award has the Ministry of Finance (which should be the Minister of Finance) and the Office of the Prime Minister as respondents. According to the notice of appeal filed on behalf the appellants the Ministry of Finance and the Office of the Executive Director appeal against the award. Therefore, it appears that the Prime Minister does not appeal against the award.

Pertinent facts

[2] Pickard was employed in the Ministry of Finance as a Taxation Officer since 16 November 2013. He was arrested on 24 May 2018 because officials of the Ministry lodged criminal charges against him in connection with missing money. He was released on bail on 17 August 2018. When he returned to work he received a letter, dated 4 July 2018, from the Commissioner Revenue Management: Ministry of Finance informing him that he is discharged pursuant to s 24(5)(a) of the Public Service Act, 1995 (the Act).

[3] Pickard immediately pursued his remedy in terms of s 24(5)(b) of the Act, which authorises the Prime Minister, on the recommendation of the Public Service Commission, to reinstate an employee deemed to be discharged under certain circumstances. On 14 May 2020 Pickard was informed that his appeal was unsuccessful. This despite the fact that the Public Service Commission on 22 January 2019 recommended that Pickard be reinstated and advised the Prime Minister that his appeal be allowed in terms of s 26(15)(a)(i) of the Act.

[4] The criminal charges were eventually withdrawn.

Conclusion

[5] The notice of appeal is very generic and raises five grounds of appeal essentially stating that the arbitrator erred in law to grant the award herein and that no reasonable arbitrator would have found that Pickard was unfairly dismissed. This was countered on behalf of Pickard by the assertions that the arbitrator had only Pickard's version before him and that he answered the disputed factual questions correct.

[8] It is common cause that Pickard was discharged by reliance on s 24(5)(a) of the Act. This sub-section stipulates the following:

'(5) (a) Any staff member who, **without permission of the executive director** of the office, ministry or agency in which he or she is employed –

(i) **absents himself or herself** from his or her office or official duties for any period exceeding 30 days, **shall be deemed to have been discharged** from the Public Service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of employment.” (emphasis added).

[9] The appellants’ case is that Pickard absented himself from his official duties without permission and without notifying his supervisor. The evidence shows that he was arrested at his workplace on the basis of criminal charges instigated by his superiors and with full knowledge of his supervisor. The criminal charges were later withdrawn. In addition, in response to Pickard’s appeal to the Prime Minister in terms of s 24(5)(b) of the Act he was told it was unsuccessful while the Public Service Commission recommended that he be reinstated. There is no evidence why the recommendation was not followed.

[10] The deeming provision in s 24(5)(a) of the Act has potentially radical consequences for an employee in the public service. It should be approached with circumspection and applied restrictively. It should also not be seen as an easy tool to get rid of someone. I agree with counsel for Pickard that the evidence clearly establish that his absence was not wilful but due to his arrest instigated by his superiors at work. Therefore, he should have been reinstated on the recommendation of the Public Service Commission.

[11] In my view there is no basis to interfere with the arbitrator’s award.

[12] Consequently, I make the following order:

1. The appeal is dismissed.
2. The first appellant herein and respondent in the arbitration proceedings should be taken to be the Minister of Finance and not Ministry of Finance.
3. There is no order as to costs.
4. The matter is removed from the roll and regarded as finalised.

G COLEMAN

Judge

APPEARANCES

APPELLANTS:

T Kasita

Instructed by the Office of the Government Attorney
Windhoek

SECOND RESPONDENT:

T Chibwana

Instructed by Brockerhoff & Associates