IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA39/2018

In the matter between:

PAREXEL INTERNATIONAL (PTY) LTD	**Appellant**
and	
CHAKANE, T N.O.	**First Respondent**
THE COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**Second Respondent**
MOSIME-MASETI, KEFILWE DOROTHY	**Third Respondent**

Heard: **28 May 2019**

Delivered: **27 June 2019**

Summary: Review of arbitration award - dismissal on account of ill-health principle that an employer not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health and that it may, if it be fair in the circumstances, exercise an election to end the employment relationship restated – held that:

The different medical certificates provided to the employer did not explain why the employee's extended absence from work had been necessary or why her continued absence was justified. On her own version the employee was unable to return to work and was unable to indicate when she may be able to do so. There was no dispute that the employee's position had already been kept open for her for more than nine months. Given these facts, the employer's failure to consider alternatives short of dismissal was not unfair – Labour Court's

judgment set aside and award substituted with an order that the dismissal of the employee was fair.

Coram: Waglay JP, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This is an appeal, with the leave of this Court, against the judgment and order of the Labour Court in which an application to review an arbitration award of the first respondent (the commissioner) was dismissed with costs.

[2] The third respondent (the employee), a clinical research nurse, commenced employment with the appellant, on 1 March 2010. On 29 June 2010, the employee was injured at work and two hours later she fainted. The findings of the appellant's investigation into the incident recorded that "*while working at her desk,* [the employee] *opened the door of the cupboard which hit her on the head because of loose screws at the bottom.* [The employee] *continued working for approximately another two hours when she fainted and hit her head against a desk. She lost consciousness and medical help (ER) was contacted. The screws were fixed at the bottom of the cupboard door. The person also mentioned that she was not feeling well at the night of the accident and it is recommended that [you]? she stays at home when feeling sick.*"

[3] A medical report completed on 30 June 2010 by neurosurgeon, Dr H Relling, recorded that the employee "*fainted and fell on floor, bumped head*". In the same report both "*chronic headaches? migraine*" and "*cervical muscle spasm*" were recorded. A further medical report dated 7 July 2010 completed by neurosurgeon, Dr D Hugo, recorded that the employee had injured her back and neck, that her head had been knocked and that she had suffered concussion as a result of an object falling on her at work.

[4] In a medical note also dated 7 July 2010, Dr N Mofolo stated that after staying overnight in hospital, the employee was discharged with analgesics and that since then she had been off work vomiting with severe headache and lower back pain. The doctor noted that the employee reported a lack of sensation in her left lower limb and wrote: "*P.S. she is a known migraine patient who has been attack-free for two years but the recent headache and vomiting could also be due to recurrence of the migraine as the headache is unilateral (left side)*".

[5] From 1 July 2010 until 30 September 2010, the employee was on special leave and permitted to take her full sick leave cycle quota of 45 days and her annual leave. Dr Hugo treated the employee on 5 November 2010 for pain and reported that she would recover with time. By December 2010, the employee remained off work and the appellant assisted her with an application for permanent disability through Discovery Life. On 3 December 2010, Dr Hugo completed the medical report used in support of the application in which it was recorded that the employee had injured her neck and back in the accident and that she would recover with time. Discovery refused the claim on 10 December 2010 on the basis that the employee's "*functional impairments will improve with time*" and that the impairments did not meet the necessary criteria for disability under the musculoskeletal benefit. By 20 December 2010, the employee had been off work for almost six months. The appellant stopped paying her salary but continued making contributions to medical aid, provident fund and life cover.

[6] On 12 January 2011, a scheduled incapacity enquiry was postponed for the employee to provide the appellant with a medical report regarding her condition. Neurologist, Dr S de Kock, assessed the employee on 26 January 2011 and concluded that her condition concerned a "*co-morbid mood disorder (not PTSD)*". In a letter dated 9 February 2011, Dr De Kock recorded that "*from the history taken it transpires that the patient had pre-morbid mood disorder which is currently her main medical problem. This is not related to the injury on duty but is severe enough to cause severe functional limitations. I*

have referred her to Dr Herman Jordaan (psychiatrist) who will be admitting her at the Optima facility for further assessment".

[7] On 10 March 2011, a further incapacity enquiry was postponed to 14 March 2011 for the report of psychiatrist Dr Jordaan to be obtained. Dr Jordaan reported that the employee's condition was manageable and should not lead to permanent disability. He stated that she should be granted sick leave for one month after her discharge from hospital, subject to re-evaluation by himself or a Dr Bester.

[8] The employee indicated on 14 March 2011 that she could not work given the condition of her leg. The enquiry was postponed to 24 March 2011, being the end of the month recovery period recommended by Dr Jordaan. The employee was informed that she was expected to return to work on that date or provide a sick note if unable to resume her duties. She did not return to work and the enquiry was postponed to 28 March 2011 for the employee to provide the appellant with a letter from Dr Jordaan or any other medical doctor regarding her situation and to indicate whether she could work or not, and if not, for how long she would be unable to work. The employee did not attend the enquiry on 28 March 2011 and it was again postponed to 31 March 2011. The employee indicated that she could not comment on her prospects of recovery as this was subject to the advice of a medical practitioner and that she did not know when she would be able to work again.

[9] The appellant informed the employee that if she could not prove that she is incapacitated or sick she must return to work on 1 April 2011. The employee agreed to resume work on 1 April 2011 and reported for duty until 3 April 2011. This is now nine months later. Three days later, on 6 April 2011, the employee's husband informed the appellant that she could not work due to back pain that had caused a headache and that her eyes were blood red. A further medical certificate from Dr Jordaan was provided to the appellant booking the employee off until 25 April 2011. The appellant informed the employee that her medical situation had placed it in a difficult position and that she was to submit a medical report which was to contain the nature of the illness, the prospect of recovery, and if and when she recovered whether she

would be able to resume normal duties. No report was received and the employee was informed that the incapacity enquiry would proceed on 14 April 2011. On that date, the employee's husband informed the appellant that the employee would not attend the enquiry and accepted that the enquiry could continue in her absence.

[10] On 15 April 2011, the appellant terminated the services of the employee with immediate effect due to her ill-health. The reason provided for termination was that the employee was incapable of performing the work for which she had been employed.

Arbitration and review

[11] At the ensuing arbitration hearing when asked why the doctor had referred her to a psychiatric institution, the employee responded "*I can't state on that because at that time I was still like very, very sick that, the person who, who will know everything in detail is my husband*". The commissioner found that the appellant had failed to discharge the *onus* to prove that the employee was incapable of performing her duties. Issue was taken with the appellant's failure to call Dr De Kock to explain how the finding was arrived at that the employee suffered from a pre-morbid disorder and not one related to the injury; and the fact that the employee would recover in time. The commissioner found that the fact that the employee had reported for work on 1 April 2011 but had been unable to continue working supported an inference "*that the Applicant was capable to perform certain task if her employment circumstances could have been adapted*" given her medical condition. Since the employee had not often been off sick prior to the injury, the commissioner found that it was the injury that affected the employee's health "*irrespective of the nature of the ill-health of the Applicant*". The dismissal of the employee was therefore found to have been substantively unfair. As to procedural fairness of the dismissal, the commissioner concluded that the employee was not provided with an opportunity to participate fully in the process and that the dismissal was therefore procedurally unfair. The employee was retrospectively reinstated into her employment with the appellant, with the appellant ordered to pay her 10 months' back pay.

[12] The appellant took the matter on review to the Labour Court which found that no medical report had declared the employee permanently incapacitated; and that apart from divorcing the employee's mental condition from her work-related injury, Dr De Kock, and Dr Jordaan never conclusively pronounced on the extent of the employee's incapacity. The fact that Dr Jordaan indicated on 10 March 2011 that further investigations would be undertaken had the result that the employee's medical condition was still being investigated. The commissioner was found to have understood the true nature of the enquiry and had rendered a decision that was substantively reasonable. Although the employee was off sick for 10 months, the Court found that the commissioner could not be faulted for finding that the appellant had failed to enquire into the extent to which she was able to perform her work. While she had only been employed for four months when she was injured at work, there was found to be no evidence that the appellant had explored all other possible alternatives short of dismissal. Furthermore, since the employee had been on unpaid sick leave from 10 December 2010 there was found to have been no financial hardship on the appellant and the prolonged absence from work was not shown to have been unreasonably arduous when consideration should have been given to adapting the employee's work to allow her to perform her duties. The review application was accordingly dismissed with costs.

Submissions on appeal

[13] On appeal, it was argued that the Labour Court had erred in finding that the arbitration award was not reviewable when the employee's absence from work was clearly unreasonably long and when a medical report detailing the reason for her absence, her prognosis and when she would return to work was not provided. Since the employee was not willing and able to work and her absence had been unreasonably long, alternatives to dismissal did not exist. The Labour Court, however, erroneously found that the employee had not been shown to have been incapacitated and required the appellant to establish when she was able to return to work. This, it was submitted, placed an undue burden on the appellant.

[14] It was submitted for the employee that the appellant did not conduct a proper investigation prior to her dismissal, nor did it give the employee an opportunity to state her case, when it was not disputed that her injury was work-related. Furthermore, her medical aid was exhausted and she had only sought assistance from the appellant as to recommendations for "suitable facilities" which was not forthcoming. Although she provided a medical reports booking her off work, she was instructed to return to work and the enquiry finally proceeded in her absence. In such circumstances, the employee's dismissal was procedurally and substantively unfair and the commissioner cannot be faulted for finding as much. The decision of the Labour Court was correct and the appeal falls to be dismissed with costs.

Evaluation

[15] It has been recognised by our courts that "*an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. And it may, if it be fair in the circumstances, exercise an election to end the employment relationship*".[1] Item 10(1) of Schedule 8 to the Labour Relations Act 66 of 1995 (the LRA) provides that if an employee is absent for an unreasonably long period, the employer should investigate all possible alternatives short of dismissal.

[16] The employee was absent from work for a period of nine months during which time she provided different medical certificates indicating distinct reasons for her absence. On 30 June 2010, she was diagnosed with chronic headaches or migraine and cervical muscle spasm by Dr Relling. On 7 July 2010, Dr Hugo reported that she had experienced concussion. On 7 July 2010, Dr Mofolo reported vomiting with severe headache and lower back pain, noting that the employee reported a lack of sensation in her left lower limb and that she was a known migraine patient. Having previously treated her for pain, on 3 December 2010, Dr Hugo recorded that the employee had injured her neck and back and that she would recover with time. On 26 January 2011, Dr De Kock recorded that the employee suffered from a co-morbid mood disorder, being her main medical problem, which was not related to her injury on duty

[1] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* (2014) 35 ILJ 406 (SCA) at para 31.

but was severe enough to cause severe functional limitations. Dr Jordaan followed up on this report, without stating what condition he was reporting on, to indicate that the employee's condition was manageable and should not lead to permanent disability.

[17] The appellant proceeded by way of an incapacity enquiry to determine whether the employee's absence from work had been unreasonably long or not. Implicit in such a determination was a consideration of the reasons advanced by the employee for her absence and the extent of such absence. Since very distinct reasons had been provided by different doctors for the employee's absence, the appellant requested the employee to provide it with a medical report indicating the reason for her extended absence, the prognosis for her recovery and if she was to recover, the period within such recovery could be anticipated. Yet, in spite of offers of assistance made by the appellant to the employee, no such medical report was provided by her.

[18] Although Mr Khang suggested in argument that the employee's condition was all related to the injury on duty, there was no evidence placed before the commissioner to support such a contention. The fact remained that in failing to provide a report as to the reasons for her absence and an assessment as to when her recovery could be expected, the employee frustrated a proper consideration as to the basis for her extended absence.

[19] The appellant was not required to hold the employee's position open for her indefinitely when she had failed to provide any clear basis as to the reasons for and anticipated extent of her continued absence. The employee herself asserted that she could not return to work and could after nine months give no indication when she would be able to do so. The ensuing incapacity enquiry, which proceeded by agreement, found that she been absent for an unreasonably long period and that she could not perform the work for which she had been employed.

[20] It is self-evident that whether an employee is willing and able to work and when she may be in a position to do so are material considerations to which regard must be had when considering an employee's incapacity, whether she

has been absent from work for an unreasonably long period of time and whether alternatives to dismissal exist. The employee's extended absence from work was not explained by way of a properly detailed medical report. The different medical certificates provided to the appellant did not explain why her extended absence from work had been necessary or why her continued absence was justified. On her own version, the employee was unable to return to work and was unable to indicate when she may be able to do so. There was no dispute that the employee's position had already been kept open for her for more than nine months. Given these facts, the appellant's failure to consider alternatives short of dismissal was not unfair. A proper assessment was made by the appellant having regard to the facts of this matter as to whether the situation warranted dismissal and dismissal was shown by the appellant to have been fair.[2]

[21] In finding that the appellant had failed to explore alternatives to accommodate the employee, the commissioner failed to have regard to the conspectus of the material before him with due regard to items 10 and 11 of Schedule 8. The clear evidence was that the employee was incapable of returning to work and the employee accepted as much. By finding that the appellant had failed to consider alternatives to dismissal, the commissioner disregarded the evidence regarding the reasons for and the extent of the employee's absence from work, as well as the lack of any medical evidence to indicate why such an extended absence had been justified and when she could return. By so doing the commissioner adopted an erroneous approach to the matter, while ignoring the undisputed evidence before him. This constituted a reviewable irregularity insofar as the decision arrived at was one which a reasonable decision-maker could not reach on the material before him.[3] The Labour Court erred in finding that the arbitration award was not reviewable and for these reasons, the appeal must succeed.

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[2] *NUM v Libanon Gold Mining Co Ltd* (1994) 15 *ILJ* 585 (LAC).

[3] Section 145(2) of the Labour Relations Act 66 of 1995 (the LRA); *Herholdt v Nedbank* 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2015] 1 BLLR 50 (LAC) at para 33; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC) at paras 78 and 79.

[22] Having regard to considerations of law and fairness there is no reason as to why the employee should be burdened with the costs of the matter, more so when in relation to the costs of the appeal she had been successful at arbitration and before the Labour Court.

Order

[23] In the result, the following order is made:

1. The appeal succeeds.

2. The order of the Labour Court is set aside and replaced as follows:

'1. *The review application is upheld*.

2. The award of the first respondent is reviewed, set aside and substituted as follows:

'The dismissal of the third respondent, Ms K D Mosime-Maseti, is found to have been procedurally and substantively fair."

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Savage AJA

Waglay JP and Coppin JA agree.

APPEARANCES

FOR APPELLANT: Mr S Snyman of Snyman Attorneys

FOR RESPONDENTS: Mr Khang of Mphafi Khang Inc.