

IN THE LABOUR COURT OF SOUTH AFRICA(HELD IN CAPE TOWN)CASE NO: C309/2007DATE: 15 JULY 2008

5 In the matter between:

FEDERAL GAMING (CAPE) (PTY) LTD Applicant

and

ADVOCATE JOHN M BROWN N.O. 1st RespondentCCMA 2nd Respondent10 DUSWO obo LIRA LENKOE 3RD Respondent

JUDGMENT

15 PILLEMER, AJ

The applicant is the operator with a casino in Cape Town. It dismissed a member of the 3rd Respondent, a trade union, which on behalf of its member challenged the fairness of that dismissal

20 before the CCMA.

The Arbitrator who issued the award in favour of the member in the arbitration that followed is the First Respondent in this review

in which the applicant seeks to review and set aside the arbitration award.

The employee in question is Lira Lenkoe, a man who is not in
5 good health. He took a considerable amount of sick leave. He
had a problem with his leg in respect of which he sought
accommodation at work but this was unfortunately not possible
and eventually, it seems, following an audit of some kind of his
10 sick leave he was charged with misconduct. Precisely what the
charge was that he faced was not clear but it was expressed in
the charge sheet that was served upon him in the following terms:

“Misconduct relating to incapacity/ill-health which is a
result of 40 days sick from work in a period of 32
months between 1 April 2004 and 30 November 2006.”

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The way in which this was explained at the arbitration was also
confusing and Ms Bester, who presented the case for the
applicant and also testified, explained the misconduct. Initially
she said that what had happened is that the employee had been
20 dismissed in terms of misconduct and referred to the finding of the
disciplinary hearing which said:

“In terms of misconduct you are found guilty for the
following misconduct relating to incapacity.”

In relation to this she was questioned quite extensively by the Arbitrator pointing out to her that misconduct and incapacity are distinct concepts in labour law and you can't really have misconduct relating to incapacity. You're not guilty of misconduct
5 if you are sick and sickness might lead to incapacity but it certainly in itself, if it's genuine, is not misconduct. He had considerable difficulty in extracting from Ms Bester precisely what it was that the applicant complained of and, at the end of the day, it was only when a Mr Roos, who was chairperson of the
10 disciplinary enquiry, testified that there was some degree of clarification.

Mr Roos, who was a senior manager was also the person who presided over the disciplinary hearing. He was the person who
15 imposed the sanction of dismissal. He dealt with the difficulty in the record, particularly at page 110 where he was probed by the Arbitrator to assist him in understanding the nature of the charge that the employee had faced and on which the finding of guilt had been made. In relation to this issue Roos says the following:

20 "You see, Sir, the matter started initially as ill-health, but then after some investigation it became clear that Mr Lenkoe booked off not only for the leg but for various other sicknesses as well. For instance,

sinusitis, ear infection, hypertension and his medical history, according to the doctor, shows nothing about hypertension or diabetes. I came to the conclusion that he intentionally booked off sick and that it is not really related to the leg.”

He was then probed further on that, elaborated upon it and then eventually at page 127 of the record it really boiled down to Mr Roos being under the impression that the employee had to some extent been shamming and had not really been suffering from the illnesses reflected in the medical notes. That really was the *gravamen* of the charge and in relation to the one element where this was highlighted, namely the question of hypertension where one doctor had certified the employee to be suffering from this condition and a little less than two weeks later another doctor had indicated that he was not suffering from the condition of hypertension, Mr Roos said the following and I quote again:

“Like I said, it’s not something that goes away overnight. It’s my reasoning, if Mr Lenkoe really suffered from hypertension then 10 days later a different doctor wouldn’t say, “No sign of hypertension.”

At page 129 Mr Roos clarifies it by elaborating in this way and again I quote:

“It’s not just one thing, Sir, that led to the dismissal, it’s one of the instances that made me suspicious that changed my view that this is not ill-health but it is misconduct, misuse of his sick leave.”

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It was clear that the applicant was not relying upon incapacity as the basis for the dismissal and the employee was not being dismissed because by reason of genuine sickness he was unable to do the work. He was dismissed because it was considered that
10 he was not being frank in relation to some of the sick leave he took and on that basis what had occurred was an abuse and constituted misconduct.

In passing, I mention that this approach is to some extent
15 contradicted by the evidence of Ms Bester who testified at page 66 of the record and I quote:

“We never disputed the fact he was sick. I never said he booked off and he was not sick. I wanted the doctor to confirm if there is a condition that’s permanent
20 because then he could assist with disability claims which we do for currently two people. We do it all the time. He didn’t give that information.”

So, unfortunately, there was this measure of confusion in the way in which the applicant understood its case, or misunderstood its case, is probably a better way of describing it and the confused manner in which it ultimately was presented.

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The Arbitrator participated actively in the proceedings. A complaint is made in the present application that this resulted in unfairness and constituted a gross irregularity and had as its result that the applicant did not have a fair hearing. The
10 arbitrator was, I consider, understandably frustrated with the failure to clearly identify the nature of the complaint which, it seems, was based upon the applicant's own confusion as to precisely what it was. But, nonetheless, this involved the Arbitrator in asking considerable questions of the persons who
15 testified. Generally he did this, as I read the record, in order to get clarity rather than to achieve an answer in a particular direction or another. He frequently expressed his frustration. He referred to aspects quite strongly as nonsense or impossible and he played a very dominant role in the way in which the
20 proceedings were run.

Part of the complaint against him also related to the fact that he was fairly loose in the way he allowed cross-examination,

certainly of Ms Bester. She was cross-examined firstly by the union representative and then on request by the union representative that the employee also be allowed to cross-examine this was allowed. So she had a double session and, of course, she was also faced by fairly continuous questioning from the Arbitrator himself.

It was submitted to me today as well as in the heads of argument that were filed that the impact of all of this was that the applicant was not given a fair opportunity of presenting its case and this rendered the arbitration, for that reason, unfair.

Looking at the record broadly and on a reading of it, I am not satisfied that this was unfair and resulted in an unfair result. At the end of the day the Arbitrator was inquisitorial in his approach, but nonetheless did achieve the answer that the applicant wanted to present, namely that the complaint was that the employee was shamming and abusing sick leave by taking leave when he was not genuinely ill. It is that case which must be the basis upon which he was dismissed because, if it was anything less than that, then plainly it's unfair to dismiss somebody because he's genuinely ill and to do that on the basis that this constituted misconduct, which, if he's genuinely ill, it obviously cannot do.

So I am not satisfied that the Arbitrator's involvement rendered the process unfair or that it constituted an irregularity of the kind which in itself would justify a review without regard to the actual merits of the proceedings.

There was a further complaint in relation to the conduct of the Commissioner and that was that he should have advised the applicant that it needed to call expert testimony to deal with the medical questions and could not simply rely upon the information that it had relied upon in effecting the dismissal. It does not seem to me that there was any obligation on the Arbitrator to do that or, indeed, it's not clear that it would have been appropriate to have sought to introduce a new basis for the dismissal at the arbitration stage. But, in any event, I need not go into that in any detail because no medical evidence was in fact called.

The Arbitrator dealt with the matter in his award under a heading, "Analysis of the Evidence and Argument" as follows and I quote:

"The Respondent bears the onus of proving on a balance of probabilities that the Applicant's dismissal was substantively fair. The following issues were common cause:

1. The applicant suffered from a lower leg lymphodaema which was exacerbated by long periods of standing and that his left lower leg cellulite had been successfully treated. The symptomatic treatment was relieved by left lower limb elevation and no surgical treatment was necessary.
2. The applicant had exceeded his permissible sick leave cycle of 30 days for a period commencing April 2004 to date of dismissal by 12 days.
3. The applicant was booked off sick for a total of 90 days for the 67 month period of his employment."

The Arbitrator then records that the respondent's operation manager failed to monitor the applicant's sick leave. This aspect was challenged in the heads of argument that were delivered, but it seems to me it does accord in general terms with the evidence that was before the Arbitrator. He was allowed to exceed his sick leave and it was only when the audit was done that it was seen that he had taken much more than he ought to have taken over the cycle in question.

The award then continues and I quote:

5 “Mr Roos, the chairperson of the applicant’s disciplinary hearing, testified that he found that the applicant was shamming illness as he was booked off sick for hypertension by one doctor whereas Mr Mbavani states that the applicant was not suffering from hypertension and he had no option to dismiss the applicant for abuse of sick leave. He confirmed the
10 applicant was not dismissed for incapacity.”

It seems to me that the Arbitrator fairly reflected Mr Roos’ evidence in this respect although Mr Roos did say it went beyond the single instance. It was that instance that became central and
15 certainly if that instance had been established, namely that there was some sort of conspiracy between the applicant and the one doctor to put up medical certificates that were false then obviously dismissal for misconduct would have been appropriate, but the case never went anywhere near that far although that was the
20 basis upon which Mr Roos appears to have founded his thinking in the matter. The award continues and I quote:

 “I found the applicant to be a reliable and credible witness and I had no grounds to doubt the veracity of

his sworn testimony. The applicant confirmed that his hypertension was under control as he received medication from local clinic as he could not afford private doctors.”

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I pause to mention that this accords with the applicant’s testimony. He said he saw different medical practitioners and that he saw a particular medical practitioner, the one in question in relation to symptoms that were diagnosed as being caused by hypertension and in respect of that he received medication.

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The Arbitrator then concludes as follows:

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“In the circumstances I have no doubt that Mr Roos, the chairperson of applicant’s disciplinary hearing, had no grounds to find the applicant abused his sick leave. He was not pretending to have suffered from hypertension.”

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The Arbitrator also pointed out that a medical examination had not been conducted, as could have been done by a well-resourced employer, and made the point that Mr Roos was not a medical doctor and his opinion on the question of whether hypertension

would continue to manifest 10 days after it has been diagnosed by a doctor could not be relied upon.

He effectively found that the onus had not being discharged and, in those circumstances, that the dismissal was substantively unfair. He then found that the employment relationship would be able to be continued on a tolerable basis and it was reasonably practicable for the applicant to be reinstated and he granted an order reinstating him together with back pay.

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The applicant had to satisfy the test set out in the Constitutional Court case of Sidumo and another v Rustenberg Platinum Mines Limited and others [2007] 12 BLLR 1097(CC). The test, as set out in paragraph [110] of the majority judgment, and is encapsulated by the question:

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“Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?”

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That’s the question I have to ask myself and I am not satisfied that the applicant has shown that the decision reached by the Arbitrator was one that a reasonable decision-maker could not reach. Indeed, on the information before the Arbitrator, I take the view he came to the correct decision.

In those circumstances, the review must fail. The order I made, accordingly, is the APPLICATION IS DISMISSED.

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PILLEMER, AJ