



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable

Case no: JR 686/14

In the matter between:

**WESBANK A DIVISION OF
FIRSTRAND BANK LIMITED**

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (CCMA)**

First Respondent

NORMAN MBELENGWA N.O

Second Respondent

JOHANNA TEBOGO KWAPE

Third Respondent

Heard: 19 April 2017

Delivered: 27 June 2017

Summary: Review application. Arbitrator failed to consider evidence that was presented and decided procedural fairness when that was not an issue to be decided. Award is reviewed and set aside.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 24 February 2014 wherein the Second Respondent (the arbitrator) found the dismissal of Ms Kwape (Kwape) substantively and procedurally unfair and ordered that she be reinstated retrospectively.
- [2] Ms Kwape opposed the application.

Background facts

- [3] The background facts are herewith summarised as follows:
- [4] The Applicant is a financial services provider with approximately 2 900 employees. The Applicant employed Kwape on 1 March 1998 and her services were terminated on 24 July 2014 for incapacity due to ill health. At the time of her dismissal Kwape worked as a voice services agent in the voice services department. Kwape was a switchboard operator and her duties included answering phone calls and transferring internal and external calls to the appropriate person or department. It is common cause that the position of voice services agent is considered to be the lightest duty position within the Applicant's structure.
- [5] On 5 May 2011 and on her way to work Kwape was involved in a motor vehicle accident when a motor vehicle driver plunged into her and she suffered serious injuries. It is common cause that the accident was not an injury on duty.
- [6] Kwape was, as a result of the accident, booked off from work for specific periods from May 2011 until July 2013 when the Applicant initiated an incapacity enquiry. The incapacity enquiry was held on 12 July 2013 and after it was found that the Applicant attempted to accommodate Kwape over a period of more than two years, her services were terminated for incapacity due to ill health on 24 July 2013. Kwape lodged an internal appeal and on 12 August 2013 she was notified that her appeal was dismissed and her dismissal was confirmed.
- [7] Kwape referred an unfair dismissal dispute to the First Respondent and only the substantive fairness of Kwape's dismissal was challenged.

The arbitration proceedings:

- [8] It is evident from the transcribed record that the arbitrator recorded, at the onset of the proceedings, that procedural fairness was not in dispute and that he was not going to allow any issues to be raised in respect of procedural fairness.
- [9] During the arbitration proceedings the Applicant called four witnesses and Kwape testified and called one witness. The assessment of the merits of the grounds for the review raised by the Applicant calls for a consideration of the evidence that was adduced.

The evidence adduced

- [10] The Applicant's first witness was its customer services manager, Ms Reddy (Reddy). She testified that Kwape had been struggling with her health since 2011 until 2013 and that she had taken excessive sick leave during this period. Reddy testified that the Applicant engaged Kwape in trying to assist her and to accommodate her. It was undisputed that the Applicant attempted to assist Kwape via the Applicant's wellness program and permanent health insurance (PHI). Reddy explained that PHI was discussed, offered and explained to Kwape on 12 October 2011 and PHI was once again discussed on 23 November 2011 and copies of the necessary documents were given to Kwape to be completed. Kwape returned the incomplete forms and it was discussed with her once again and she indicated that she wanted to discuss the PHI option with her family first.
- [11] In July 2012 the Applicant sent the PHI forms to Kwape's doctors to complete and the forms were sent to the insurer, Momentum. Momentum rejected the PHI application in April 2013 because additional medical information was required and they could not get hold of Kwape's doctors. The Applicant subsequently met with Kwape and explained to her that she could accept Momentum's decision on her PHI application or she could appeal the decision and bring more information such as medical reports from her doctors. Momentum finally rejected Kwape's PHI application in July 2013.

- [12] Reddy explained that apart from PHI, the Applicant also explored alternative positions, but those considered were not feasible or no longer existed. The mailroom could not assist as it was overstaffed at that point, the client operations department had no position available and the marketing position Kwape was interested in, no longer existed.
- [13] In April 2012 the Applicant offered Kwape the option of working reduced hours and proposed that she worked from 08:00 – 12:00 instead of 08:00 – 16:30. Kwape was not interested in this option as it meant a reduction in her income.
- [14] Reddy explained that the Applicant further accommodated Kwape in that she exceeded her paid sick leave and when she took unpaid sick leave, the Applicant still paid her medical aid and pension fund contributions and recovered those payments over a period instead of deducting the total sum once off and leaving Kwape out of pocket.
- [15] In May 2013 Kwape's doctor stated that she was unable to cope in a call centre and recommended that she be transferred to an alternative working environment. Reddy explained that there was no other duty outside the call centre Kwape could be transferred to. She explained that the Applicant operates in different business units and it is not possible to move employees from one business unit to another without the cooperation of the heads of the relevant departments. She contacted other business units, but they were unable to accommodate Kwape and in her business unit, there was no other suitable position Kwape could be accommodated in.
- [16] The decision to terminate Kwape's services was based on the fact that she took excessive sick leave during the period 2011 – 2013 and the fact that the Applicant was unable to accommodate her in a different position.
- [17] The Applicant's second witness was the chairperson of Kwape's incapacity enquiry, Mr Hardijzer (Hardijzer). He testified that the factors he took into account in deciding to dismiss Kwape were that she was absent from work for fifty percent of the time during 2011 – 2013, that Kwape's PHI application was declined and that there was no sufficient reason for Kwape to be medically boarded, that Kwape declined the offer of a half day position, that Kwape was

unsuccessful in her application for alternative positions and the fact that the Applicant was also unable to place Kwape in an alternative position.

- [18] In cross-examination Hardijzer testified that it was fair to dismiss Kwape because the position she occupied was not demanding and it was impossible to find a less demanding position, she was not at work for fifty percent of the time and she was not able to perform in her position due to incapacity.
- [19] The Applicant also called its senior manager in the operations division, Ms de Jager (de Jager) as a witness. She is employed as the call centre manager and her testimony related to the issue of consistency. In respect of Ms Kwadi (Kwadi) de Jager testified that she applied for a vacant position of receptionist at the main reception in the Wesbank building, she went through an interview process and she was appointed. De Jager disputed that Kwadi was accommodated, but insisted that she applied for a vacancy, for which Kwape did not apply. In respect of Michelle van Rheede van Oudtshoorn (van Rheede van Oudtshoorn), de Jager explained that there was another vacant receptionist position available at the Applicant's training rooms and three individuals were considered for this position, namely van Rheede van Oudtshoorn, Elliot and Kwape. Elliot was not interested in the receptionist position as his future plans included a move to an IT position and Kwape was not appointed because her average rating was below benchmark and her absenteeism as there is no replacement for this position and it would have been very difficult to accommodate her in that position. Another consideration was the fact that Kwape did not want to be placed in a more complex position and this position was more complex than the position occupied by Kwape and it required a person who could cope with more responsibilities and difficulties. Van Rheede van Oudtshoorn was appointed as receptionist as a lateral move into an existing vacancy.
- [20] In cross-examination de Jager explained that as much as there was a need to accommodate an employee, there is also a business to run and both interests should be looked after. Kwape requested to be accommodated in a less complex position and the receptionist position was more complex. De Jager testified that Kwape could not be accommodated in the receptionist position as she would not be able to cope in a more complex role and due to her absenteeism, it would not be easy to fulfil the functions of the role. She

explained that she could not accommodate Kwape in a position that was more complex than the one she occupied as she would have struggled even more and it would not have been good for her health or for the Applicant's business operations.

- [21] In cross-examination it was put to de Jager that the Applicant is a big employer and that it was hard to believe that there was not a single position, place or role where Kwape could have been accommodated where there was minimal use of the phone, as recommended by an occupational therapist. De Jager explained that the only available position was in the mailing room, but the mailing room was outsourced as it was a shrinking environment where employees had to move out and some lost their jobs as a result and it was not possible to place Kwape there as there was no position available. De Jager further explained that the possibilities to place Kwape were limited due to the fact that she required a role that was less complex and despite the fact that there were lots of vacancies, those were more senior and more complex positions and in some instances the positions required specific product or system knowledge for which Kwape was not trained. At the level Kwape needed accommodation, there were no vacancies.
- [22] De Jager testified that there were many attempts to accommodate Kwape which included finding an alternative position, sending her to the wellness centre, allowing her to go to the doctor when she had to consult the doctor and granting her excessive sick leave. The medical reports that proposed that Kwape be accommodated in an alternative position where she would not use a phone, could not be complied with as there was no alternative position that could accommodate the need not to use a phone.
- [23] It was put to de Jager in cross-examination that Kwape was able to do the work of a receptionist and that she should have been appointed in the receptionist position Kwadi was appointed in. De Jager responded that the position deals directly with customers, answering of phones and handling of all issues.
- [24] De Jager testified that Kwape could not be reinstated as she is unable to perform her functions due to her ill-health and the Applicant does not have another position available within which Kwape could be accommodated.

- [25] Kwape testified that after the motor vehicle accident of 5 May 2011 she was booked off sick and she explained that the accident affected her to the extent that she could not do some of her duties. She testified that she could not sit, she always had headaches and seizures and her vision and hearing had been affected too. In July 2013 when she was dismissed, she was in a bad condition and she still suffered the same effects, such as seizures and loss of vision and hearing and she was still undergoing treatment for that. In cross-examination Kwape conceded that prior to the accident of 5 May 2011, she suffered from slight headaches and seizures and she was diagnosed with epilepsy.
- [26] The medical doctors Kwape consulted recommended that she be moved to an alternative position where she did not have to deal with telephone calls.
- [27] Kwape testified that since she returned to work in 2011 the Applicant did nothing to assist her and she applied for other positions in other departments. She conceded that she did not qualify for the positions. She testified that in 2011 the Applicant presented her with the possibility of applying for PHI and initially she declined it because it was not properly explained to her. On the second occasion she applied for PHI but it was declined. She testified that she was assisted by the wellness department since 2011 and they assisted her with counselling. Xoliswa, the consultant at the wellness department recommended that Kwape be removed from her department as she was taking heavy medication. The wellness department also recommended that PHI be considered for Kwape. Kwape also communicated with the wellness department the recommendations from her doctors that she be moved to an alternative position.
- [28] Kwape testified that the Applicant indeed referred her to two medical doctors to assess her wellbeing.
- [29] In respect of the alternative positions Kwape confirmed that the marketing department was abolished and that there was no position in the mail room available and that the reduction of her working hours was not assisting her as the issue of answering phones that affected her and caused her headaches, remained. She testified that Wesbank is a huge company and she had 15 years' experience and she could have been accommodated at either Natis,

client operation, group recovery, legal department and insurance department where there is no use of phones but only administration.

[30] Kwape conceded in cross-examination that the receptionist position she said she should have been accommodated in requires someone to answer the phones, deal with clients and bookings and that the Applicant would be prejudiced if the incumbent is not present every day. She also conceded that it would still involve phone calls that cause her headaches and seizures. This should be considered in view of Kwape's excessive period of absence. In cross-examination Kwape conceded that she had been absent for a total of 308 days from May 2011 until July 2013.

[31] Kwape testified that she was never given an opportunity to recover and be accommodated where there was no use of phones. It was put to her that she took 308 days' sick leave and Kwape was asked what else she expected the Applicant to do when there were no positions available to accommodate her and Kwape responded that she expected the Applicant 'to do the right thing.'

[32] Kwape also conceded that she could not work in the call centre again as she felt victimized by the people working there and the call centre was affecting her health.

[33] It is evident from the transcribed record that the arbitrator understood that procedure was not in dispute, yet he allowed Kwape to adduce evidence on the procedure that was followed in her incapacity enquiry.

[34] It is common cause that Kwape was absent from work for a total of 117 days in 2011, 96 working days in 2012 and 95 days from January - July 2013.

The test on review

[35] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is well established and has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. It is ultimately a test of reasonableness. The arbitrator's decision must fall within a range of decisions that a reasonable decision maker could make.

¹ 2007 28 ILJ 2405 (CC) at para 110.

[36] In *Goldfields Mining South Africa v Moreki*² the Labour Appeal Court held that:

“In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.”

[37] The Labour Appeal Court held in *Head of the Department of Education v Mofokeng and others*³ that the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. It was held that:

“To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.”

[38] These are the principles this Court should apply in consideration of the review application.

Analysis of the arbitrator's findings and grounds for review

[39] The transcribed record shows that the arbitrator, at the onset of the arbitration proceedings, narrowed the issues and recorded that procedural fairness was not in dispute and that the issue in respect of substantive fairness was that Kwape's dismissal was unfair because she was not given a suitable alternative position.

[40] It follows that the only main issue the arbitrator had to decide was whether Kwape's dismissal was unfair because she was not given a suitable alternative position.

[41] The arbitrator recorded that Kwape submitted medical certificates recommending that she be placed on light duty as the nature of her work was not assisting her to recover from her illness. The Applicant did not place Kwape on light duty for reasons related to the non-availability of positions in

² (2014) 35 ILJ 943 (LAC).

³ (2015) 1 BLLR 50 (LAC).

which Kwape could be accommodated. In his analysis of the evidence the arbitrator considered the availability of positions and found that the Applicant had a position of receptionist available, which position was given to van Rheede van Oudtshoorn, but that Kwape should have been transferred to that position, given the fact that the Applicant was aware of her situation.

- [42] The arbitrator found that Kwape should have been given an opportunity to occupy the position in compliance with clause 10 of the Code of Good Practice Dismissal. He held that the Applicant's case that the position was complex could not be substantiated in the absence of Kwape having worked in the position.
- [43] The arbitrator further found that if Kwape was appointed as the receptionist, the Applicant could have impressed it upon her that the appointment was a way of accommodating her and if she continued to be absent from work, the Applicant would have been entitled to terminate her services.
- [44] The arbitrator made a number of findings on the PHI and the role played by the wellness department, which are in my view not relevant for the issue he had to decide.
- [45] The arbitrator found Kwape's dismissal procedurally unfair in that the Applicant did not adhere to clause 10 of the Code of Good Practice Dismissal.
- [46] Kwape was reinstated retrospectively.
- [47] The Applicant raised a number of grounds for review and in my view there are three main grounds for review.
- [48] Firstly, and not surprisingly the Applicant took issue with the fact that the arbitrator made a finding on procedural fairness when that was not in dispute and not an issue for him to decide.
- [49] There is merit in this ground for review, more so as the arbitrator recorded that procedural fairness was not in dispute and that he would not allow any matters on procedural fairness to be raised during the arbitration proceedings. Notwithstanding the arbitrator's aforesaid recording and the fact that procedural fairness was not in dispute, he made findings on procedural fairness.

- [50] The arbitrator in deciding an issue that was not in dispute misconceived the issues he had to determine.
- [51] The second main ground for review relates to the arbitrator's finding that Kwape should have occupied the receptionist position and the gist of the Applicant's complaint is that the arbitrator ignored the evidence or failed to have due regard to the material evidence placed before him.
- [52] The arbitrator had to decide whether Kwape's dismissal was substantively fair because she was not given a suitable alternative position. This issue calls for consideration of whether any suitable alternative work or position was available.
- [53] Kwape's various medical reports recommended that she be given lighter duties, three months' temporary incapacity leave, prolonged leave, that she be transferred to an alternative working environment as she is not able to cope in a call centre environment.
- [54] It is undisputed that Kwape occupied the position of a switchboard operator, which was a single function and considered the lightest duty position within the Applicant's structure. The reality is that there was no 'lighter duty' position.
- [55] As Kwape occupied the lightest duty position and could not be moved to a lighter duty position, the issue was to accommodate Kwape outside the call centre, as it was an environment within which she was unable to cope, and to place her in a position with minimal use of phones.
- [56] The Applicant's version was that the options of placing Kwape at client's operations and the mailroom were investigated, but they were unable to accommodate Kwape as they had a full complement of staff. The mailing room was outsourced as it was a shrinking environment where employees had to move out and some lost their jobs as a result and it was not possible to place Kwape there as there was no position available.
- [57] The possibilities to place Kwape were limited due to the fact that she required a role that was less complex and despite the fact that there were lots of vacancies, those were more senior and more complex positions and in some instances the positions required specific product or system knowledge for

which Kwape was not trained. At the level Kwape needed accommodation, there were no vacancies.

- [58] In respect of the receptionist position that was given to van Rheede van Oudtshoorn the Applicant's evidence was that Kwape was not appointed to this position because of her absenteeism as there is no replacement for this position and it would have been very difficult to accommodate her in that position. Another consideration was the fact that Kwape did not want to be placed in a more complex position and this position was more complex than the position occupied by Kwape and it required a person who could cope with more responsibilities and difficulties.
- [59] Kwape requested to be accommodated in a less complex position and the receptionist position was more complex and Kwape could not be accommodated in the receptionist position as she would not be able to cope in a more complex role and due to her absenteeism, it would not be easy to fulfil the functions of the role. The Applicant's testimony was that it could not accommodate Kwape in a position that was more complex than the one she occupied as she would have struggled even more and it would not have been good for her health or for the Applicant's business operations.
- [60] The Applicant's ground for review is that the arbitrator failed to appreciate that Kwape could not be accommodated in a lighter duty post and that all other posts were more complex and based on the medical reports, Kwape would not have been able to function in such positions.
- [61] In my view there is merit in this ground for review.
- [62] The arbitrator stated that de Jager testified that Kwape was not considered for the receptionist position due to the nature of the position and Kwape's rate of absenteeism. De Jager's evidence elaborated on the complexity of the position, the fact that there was no replacement for the incumbent and that the Applicant needed someone to be in the position every day and that Kwape would have struggled with the position as it was more complex and also involved phones.
- [63] Notwithstanding the Applicant's evidence and the arbitrator's recording thereof, he found that Kwape should have been transferred to the position as

the Applicant was aware of her situation and if Kwape continued to be absent from work, the Applicant could have terminated her services.

- [64] The arbitrator's finding ignored the evidence presented as to why Kwape could not be appointed as receptionist, it ignored the fact that by placing Kwape in the receptionist position, it would not have addressed Kwape's concerns and needs to perform lighter duty in a less complex position with the minimal use of phones.
- [65] Kwape conceded in cross-examination that the reception position required someone to answer the phones, deal with clients and bookings and that the Applicant would be prejudiced if the incumbent is not present every day. She also conceded that it would still involve phone calls that cause her headaches and seizures.
- [66] The arbitrator ignored, alternatively failed to have due regard to the material evidence that was placed before him that the position of receptionist would not have been a suitable alternative in the circumstances. In fact, he had no consideration of the issue whether the receptionist position was a suitable alternative, he merely concluded that because it was an available position and because the Applicant was aware of Kwape's situation, Kwape should have been transferred to the receptionist position. This finding is not reasonable and cannot stand.
- [67] Glaringly absent from the arbitration award is any consideration of the question the arbitrator had to decide namely whether Kwape's dismissal was unfair because she was not given a suitable alternative position.
- [68] In my view the evidence adduced by the Applicant showed that at the level Kwape needed to be accommodated, there was no position available and the vacant position of receptionist, was far from a suitable alternative given Kwape's situation and the facts presented in the arbitration proceedings.
- [69] The third main ground for review is in respect of the finding that Kwape should be reinstated.
- [70] The arbitrator ordered the Applicant to reinstate Kwape from 24 July 2013 on the same terms and conditions applicable before the dismissal.

- [71] The Applicant's case is that the arbitrator failed to consider whether reinstatement was appropriate. This is so because he failed to consider that there was a breakdown of the relationship between the parties, he failed to consider the reality of the situation that Kwape was unable to perform her duties and that she took excessive sick leave and still did not recover and whenever she returned to work, she would relapse and that situation continued for more than two years.
- [72] The Applicant submitted that the arbitrator ignored the fact that by July 2013 of the 616 working days Kwape was absent due to ill health for 308 working days. The Applicant's offer to Kwape to work reduced hours to accommodate her illness and recovery was rejected and there was no evidence as to Kwape's current state of health.
- [73] In my view there is merit in this ground for review.
- [74] De Jager testified that Kwape could not be reinstated as she is unable to perform her functions due to her ill-health and the Applicant does not have another position available within which Kwape could be accommodated.
- [75] The undisputed evidence was that Kwape could not work in a call centre and required a position with lighter duty and no phones, which position the Applicant does not have available. Kwape was absent fifty percent of the time and there was no indication that she recovered to an extent that she would be able to perform her duties. These issues should have been considered in deciding whether reinstatement is appropriate.
- [76] The arbitrator failed to consider these material facts, because if they had been considered by the arbitrator, he would have come to a different conclusion. In finding that the employee should be retrospectively reinstated, the arbitrator provided no justification or reason for reinstating Kwape. The arbitrator ordered that Kwape be reinstated on the same terms and conditions as before her dismissal, implying that it should be in the same position she occupied before, which is the position she is unable to cope in. In my view the arbitrator ignored material evidence and misdirected himself. Had he considered the evidence properly, he could not have ordered Kwape's reinstatement.

Relief

- [77] This leaves the issue of relief.
- [78] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Kwape's dismissal was fair.
- [79] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.
- [80] The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.
- [81] I am in a position to decide and finally determine the matter on the record as it is before me.
- [82] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.
- [83] In the premises I make the following order:

Order

1. The arbitration award issued on 24 February 2014 under case number GAJB20680 is reviewed and set aside;
2. The arbitration award is substituted with an order that Kwape's dismissal was substantively fair;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant : Advocate A L Cook

Instructed by : Cowan-Harper Attorneys

For the Third

Respondent : Mr Voyi of Ndumiso Voyi Attorneys