THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: C238/2022

In the matter between:

LE FRANSCHHOEK HOTEL (PTY) LTD	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	First Respondent
BECKET A.L	Second Respondent
GLENFORD FERUS	Third Respondent

Heard: **13 August 2024**
Delivered: 3 March 2025

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 3 March 2025.)

JUDGMENT

FORD, AJ

Introduction

[1] This is an application to review and set aside the arbitration award of the second respondent ("the commissioner"), dated 28 April 2023. The commissioner found the third respondent's ("Ferus") dismissal substantively unfair and awarded him compensation equivalent to 6-months' salary.

[2] Unhappy with that decision, the applicant ("Le Franschhoek") instituted review proceedings in this court, to set aside the commissioner's award.

[3] The application is unopposed.

The facts

[4] Le Franschhoek forms part of the Dream Hotels and Resorts Group. The group owns some 21 hotels, and 100 resorts located mainly in South Africa. It employed Ferus as an executive chef from 18 January 2018, with him earning a gross monthly salary of R32,000.00 at the time of his dismissal.

[5] Ferus oversaw 3 restaurants as well as the training, room service and kitchen staff. His duties included managing the kitchens, training and directing staff, Human Resources duties, controlling all food and beverages, stock-taking, purchase orders, budget management, food production, health and safety, hygiene compliance, planning and testing new menus, consulting with clients and guests and planning menus for events. Ferus occupied a very senior position.

[6] On 9 January 2019, while Ferus was off duty, he received a call from the kitchen staff informing him that the kitchen was on fire. A chip fryer caught fire.

[7] Ferus rushed to the scene. On his arrival he found the fire to be out of control. Drawing on his previous training on fire-fighting, Ferus, as the safety officer for Le

Franschhoek, took control of the situation. He told everyone what to do in order to contain the fire and limit its spread.

[8] He and others formed a queue, each with fire-extinguishers, him in front of the queue – dousing the fire. When fire emergency services arrived, they congratulated Ferus and the staff for the efforts they took to contain the fire, indicating that – but for their efforts, the whole building could have burnt down.

[9] The damage caused by the fire was palpable. The main kitchen burnt down as well as some of Ferus' personal equipment. Notwithstanding the incident, Ferus still had to ensure that hotel guests were catered for, so he set up a temporary kitchen from whence he prepared meals for the hotel patrons. This continued until or about 11h00am, until the hotel manager ordered him and the affected staff to go for check-ups at Mediclinic.

[10] Ferus only returned to work at 18h00pm that day. According to him, he inhaled smoke, which damaged his lungs.

[11] Things continued like normal for the rest of January and February 2019. This is also Le Franschhoek's peak season.

[12] In March 2019, so Ferus explained, the work pressure became less and he started to feel effects of what transpired in January that year. He was struggling to sleep, experienced panic attacks and anxiety. He was absent from work for a few days, thereafter intermittently over the following months.

[13] Ferus discussed the situation with Mr. Chris Snyman, the general manager, who referred him to ICAS (Independent Counselling and Advisory Services) for a consultation. ICAS then advised Ferus to seek treatment.

[14] In April 2019, he went to see a psychologist, Dr. Bill Skinner at the Pines Clinic in Worcester. He also consulted his general practitioner who started him on medication. Dr. Skinner suggested that Ferus sees Dr. Viljoen at the Worcester hospital as an outpatient.

[15] Dr. Viljoen recommended light duty for Ferus, and if not possible, sick leave and inpatient treatment for Ferus from 28 August 2019 - December 2019. The letter in its relevant parts reads as follows:

> The above-mentioned patient was seen at our Outpatient Department on 28/08/2019. Mr. Ferus meets the criteria for a Major depressive episode, with features of marked anxiety. Therefor his functional ability is impaired and he is unlikely to be able to return to duty as before.
>
> If possible, light duty is advised, but if unable in his current occupational duties, sick leave is advised for the period 28/08/2019 until 31/12/2019.

[16] In July 2019, Mr. Snyman sent Ferus for an assessment to Dr. Bennie Marais. He wrote to Mr. Snyman on 25 July 2019, stating, *inter alia*:

> 1. DIAGNOSIS
>
> General Anxiety Attack with panic attacks
> Major Depressive Episode
> Traces of Post Traumatic Stress
> Flashback after the fire in the main kitchen.
>
> 2. PRECIPITATING FACTORS
> The fire in the main kitchen which completely destroyed the kitchen.
>
> 3. …
>
> 4. FUTURE TREATMENT
>
> Mr. Ferus should consult a Psychiatrist for an adjustment to his medication and a 21 day inpatient treatment program in a Psychiatric Clinic. Unfortunately, no Psychiatrist or Psychiatric Clinic deals with the Workman's Compensation Fund (WCA). Mr. Ferus is not on medical aid. I have spoken to a medical officer at the Psychiatric Department of Worcester Hospital. He could be admitted as an emergency case, but treatment in the psychiatric ward would not be appropriate due to the severity of the illness of the other patients.

5. RECOMMENDATION

The best possible and optimal treatment would be a 21 day inpatient treatment at Pines Clinic in Worcester. If the company could arrange for payment and then claim it back from WCA they would most probably be willing to treat him. It is advisable to contact them for quotes first. If it is not possible, treatment at Worcester Hospital is the alternative. It is unfortunately not as optimal as inpatient treatment.

6. …

7. PROGNOSIS

Should Mr. Ferus be treated optimally by a Psychologist in conjunction with an inpatient programme he would be able to function again on the same level as before. Obviously his condition would be re-evaluated after his treatment.

[17] Le Franschhoek gave Ferus two months off to attend to his treatment. He was accordingly not expected to have been at work for the period, August and September 2019, but had to report for duty on 1 October 2019.

[18] Le Franschhoek managed, in the interim, to secure a temporary replacement for Ferus, but that it was not (according to Mr. Snyman) possible to adapt the position to accommodate Ferus.

[19] Ferus stated that he informed Mr. Snyman, via WhatsApp that he was unable to return to work as he was still on treatment. Mr. Snyman denied ever receiving the WhatsApp message from Ferus.

[20] From or about 28 October 2019, Ferus started inpatient treatment at Lentegeur Pscychiatric Hospital. The treatment continued until 22 November 2019. It was Ferus' wish to return to work after his treatment was completed. Ms. Chantelle Stanley, the chief occupational therapist at Lentegeur gave four recommendations in respect of Ferus:

11. RECOMMENDATIONS

(a) It is recommended that Mr. Ferus returns to work with support from his employer to facilitate the return to work process.

(b) It is recommended that reasonable accommodation be made for Mr. Ferus by his employer with regard to his reintegration back into the work environment. These could consist of reducing the amount of kitchen that the client is responsible for. With reducing the kitchen responsibility this will automatically reduce the amount of stress the client experiences. This will also allow for better work hours which would assist the client in his recovery process. This would be until the client is ready for his normal work schedule/duties.

(c) If no accommodation can be made at Le Franschhoek Hotel and Spa with regard to the above, then it is recommended that alternative work placement be sourced for the client that has a less demanding work day.

(d) It is recommended that the client and the employer maintains and open dialogue with regards to the client's recovery process.

[21] On 4 December 2019 Ferus was requested to attend an incapacity hearing. Pursuant thereto, Le Franschhoek terminated Ferus' employment on grounds of incapacity. Unhappy with that decision, he referred an unfair dismissal dispute to the CCMA.

[22] The evidence before the commissioner is a narration of the factual account set out herein, save to add that Ferus confirmed that he was offered an alternative position, which he declined. The position was in a different province and would have meant that he would have been away from his children. There was however another position at Piekenierskloof Mountain Resort, in Citrusdal, but that position was not offered to him. Le Franschhoek stated that the position only became available after Ferus was dismissed.

[23] Ferus stated in addition that, his absence from work was on account of his illness and treatment, and that all the medical certificates, in respect thereof, were submitted to Le Franschhoek.

[24] At the arbitration Le Franschhoek alleged that his childhood asthma illness caused the damage to his lungs, which Ferus denied, stating in turn that the lack of oxygen reminded him of the asthma attacks he suffered as a child.

[25] Ferus was challenged about the absence of direct references to PTSD in the various doctors' letters and he responded stating that acute stress disorder is mentioned.

The commissioner's findings

[26] The commissioner considered Ferus' incapacity from the perspective advanced by the Code of Good Practice on dismissal[1]. She had particular regard to item 10(4) of the Code which states:

> Particular consideration should be given to employees who are injured at work or who are incapacitated by [a] work related illness. The court have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

[27] The commissioner found that the mental and emotional injury and ill health the applicant incurred, which led to his capacity to perform his work, happened during the course of his employment.

[28] The commissioner noted that Le Franschhoek investigated the extent of Ferus' incapacity which was not considered permanent. Further that Ferus would be able to resume his normal duties after receiving the recommended in-patient treatment. In this regard the commissioner stated:

> Had the respondent assisted the applicant [Ferus] and paid for private in-patient treatment (as suggested by the respondent's psychologist in July 2019), the length of the applicant's incapacity and days of absence could have been considerably reduced.

[29] The commissioner found that owing to the injury being workplace related that a greater responsibility rested on Le Franschhoek, stating that:

[1] Schedule 8 of the Labour Relations Act, Act 66 of 1995 as amended, item 10.4

> Considering that the applicant's ill-health was "directly linked to the incident at work" (as stated by the respondent's psychologists), the duty on the employer is more onerous to accommodate the applicant's incapacity and more should have been done to assist him. Although workman's compensation was mentioned by the respondent, the applicant stated that he had received nothing to date, three years after the incident. According to the Compensation for Occupational Injuries and Diseases Act (COIDA), the employer should have reported the incident, and paid the employee (who is temporarily disabled) compensation for the first three months of absence from work, which would then be reimbursed by the Fund. No evidence was provided to prove that this had been done. There was no mention of the respondent assisting the applicant with extended sick leave benefits from the Unemployment Insurance Fund either.

[30] The commissioner found that the occupational therapist recommended that Ferus return to work with support from Le Franschhoek, which was what he wanted, but that Le Franschhoek was unwilling to do so.

[31] The commissioner noted Le Franschhoek's concern that it was detrimental to its operations to continue without the essential services of the head chef, and that it was not easy to find a replacement for the position, due to the nature of the work. The commissioner found though that the appointment of a temporary replacement during the time of Ferus' absence, was not done as an alternative to termination.

[32] She found that if Ferus was given the appropriate assistance, he could have returned to his previous level of performance. She stated:

> Had there been no fire, or had the applicant not risked his own life and health on behalf of the respondent, none of this would have happened.

[33] The commissioner found Ferus' dismissal procedurally fair but substantively unfair, and awarded him 6 months' salary as compensation for his unfair dismissal.

Analysis

[34] Section 188(2) of the LRA. It 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'.

[35] Schedule 8 to the LRA embodies the code in relation to dismissal. Items 10 and 11 thereof provide as follows:

10: Incapacity: Ill-health or injury

(1) Incapacity on the grounds of ill-health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the 5 ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of the dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate incapacity of the employee is more onerous in these circumstances.

11: Guidelines in cases of dismissal arising from ill-health or injury.

> Any person determining whether a dismissal arising from ill-health is unfair should consider-
>
> (a) whether or not the employee is capable of performing the work; and
>
> (b) if the employee is not capable
>
> (i) the extent to which the employee is able to perform the work;
>
> (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or where this is not possible, the extent to which the employee's duties might be adapted; and
>
> (iii) the availability of any suitable alternative work.

[36] Molemela AJA stated in *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others*[2], the following when considering items 10 and 11 of the Code:

> My reading of item 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. I am of the view that the conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available.

[37] A very important consideration in this matter is what Ferus' status was as at 4 December 2019, both in respect of his prognosis and recovery. I will return to this aspect a little later herein.

[38] In this application, Le Franschhoek seeks to have the commissioner's award reviewed and set aside on grounds that the decision is one a reasonable decision-maker, could not reach.

[2] [2012] 7 BLLR 660 (LAC); (2012) 33 ILJ 1081 (LAC) (13 February 2012)

[39] A commissioner's arbitration award is final and binding. It can only be set aside by this court, if it is found that the decision is unreasonable in light of the evidential material placed before the commissioner.

[40] In *County Fair Foods (Pty) Ltd v CCMA & Others*[3], the following is said:

> "However, the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing de novo."

[41] The test for review is trite. Its principles have been set in stone in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4]. In *Sidumo,* the court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: '… *Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[5]

[42] In many review applications instituted in this court, like this one, a plain reading of the papers makes it apparent that the review is cast in terms that very closely resembles an appeal. Especially where it is implied that the commissioner was wrong or misdirected himself. The threshold for a party to succeed in review proceedings, is extremely high. In order to be successful in review proceedings in this court, a litigant must set out the basis on which the commissioner's decision was unreasonable. A commissioner's decision can be wrong, but not unreasonable.

[43] In *Mooki v CCMA and Others*[6] Van Niekerk J, explained that reasonableness does not equate to correctness and that a decision made by an arbitrator that is wrong will pass muster. He said:

> The test established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) and

[3] [1999] 11 BLLR 1117 (LAC); (1999) 20 ILJ 1701 (LAC) at para 11
[4] (2007) 28 ILJ 2405 (CC).
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] (JR772/15) [2017] ZALCJHB 173 (3 February 2017) para 5

affirmed by the Supreme Court Of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae [2013] 11 BLLR 1074 (SCA) empowers this court to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. What this amounts to is an outcomes-based enquiry, a stringent test aimed to ensure that this court is not likely to interfere with arbitration awards. The Labour Appeal Court has made clear that reasonableness does not equate to correctness and that a decision made by an arbitrator that is wrong will pass muster provided it is not so wrong as to be unreasonable (see *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) per Davis JA, who at paragraph 18 of the judgment emphasised the need to distinguish between reviews and appeals).

[44] In the matter before me, it is beyond dispute that Ferus suffered a work-related injury, which caused his incapacity.

[45] The medical experts in their reports are consistent in Ferus' diagnosis and his prognosis for recovery. None of these experts and their conclusions were at any point challenged or disputed.

[46] This places Ferus' circumstances squarely within the ambit of item 10(1) of the Code. The commissioner's reasoning about the Le Franschhoek's duty *vis a vis* Ferus was absolutely correct. There is nothing unreasonable about that finding.

[47] At the time when the incapacity hearing was conducted, it was evident that Ferus was at that point ready to assume his position. All steps advanced by Le Franschhoek to accommodate Ferus had yielded, at least up until 4 December 2019, the desired results.

[48] The delay between the result of the treatment that Ferus was exposed to and the initial diagnosis, is directly attributable, as the commissioner correctly concluded, to Le Franschhoek's lack of assistance which in the particular circumstances visited a more onerous duty on it, in light of the genesis of the injury sustained by Ferus.

[49] By 4 December 2019, Le Franschhoek had not appointed anyone into Ferus' position, which meant the post was still available. Ferus reported himself ready to assume the role, and the experts who treated him confirmed his readiness to do so. There was accordingly no longer a basis for accommodation as required in terms of the Code. Nor was there a basis to refuse Ferus' resumption of his duties. Le Franschhoek's failure to, or refusal to permit Ferus to assume his position constituted a dismissal. This is in a nutshell the conclusion that the commissioner arrived at.

[50] I am unable to find that the commissioner's reasoning and decision in respect of this matter can be assailed on the basis of unreasonableness.

[51] I accordingly find no reason to interfere with the decision of the commissioner and make the following order as a result:

Order

1. The application is dismissed.
2. I make no order as to costs.

Bart Ford
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. De Kock
Instructed by:	CK Inc Attorneys
For the third respondent:	No appearance