



- (1) Reportable: Yes
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

08 July 2026

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No. C196/24

In the matter between:

SOLIDARITY

First Applicant

SAMAAI, FEROSE

Second Applicant

and

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

DE VLIAGER-SEYNHAEVE, I N.O.

Third Respondent

Heard: 13 May 2026

Delivered: 8 July 2026

Review Application - Dismissal – Incapacity arising from ill health – Reasonable accommodation – Reliance on historical transfers predating incapacity enquiry insufficient to show compliance with obligation to accommodate employee – Employer required to consider accommodation and alternatives during relevant incapacity process – Failure to do so rendering dismissal substantively unfair.

Dismissal – Incapacity arising from ill health - Failure to investigate alternatives to dismissal – Medical boarding as reasonable alternative – Employer refusing to facilitate or consider employee’s application for medical boarding once incapacity process commenced – Commissioner finding dismissal substantively fair – Misdirection in fact and law – Duty to investigate extent of incapacity, accommodation and alternatives short of dismissal – Medical boarding constituting an obvious alternative that required proper consideration – Arbitration award upholding substantive fairness reviewed and set aside – Award substituted with finding that dismissal was substantively unfair and compensation of eleven months’ remuneration.

This judgment was handed down electronically by circulation to the parties’ and/or their legal representatives by email. The date of hand-down is 8 July 2026.

JUDGMENT

MAKHURA, J

Introduction

- [1] The second applicant employee was dismissed by the first respondent (respondent or CPUT) on grounds of incapacity arising from ill health. She subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Following arbitration, the third respondent commissioner found that the dismissal was procedurally unfair but substantively fair and awarded the employee compensation equivalent to one month's remuneration for the procedural unfairness.
- [2] In this review application, brought in terms of section 145 of the Labour Relations Act 66 of 1996 (LRA), the applicants seek to have the arbitration award reviewed and set aside insofar as it upheld the substantive fairness of the dismissal. The respondent opposes the application.

Background facts

- [3] The employee commenced employment with the respondent in May 1996. At the time of her dismissal, she occupied the position of Administrator: Human Capital. Between January 2015 and 31 December 2018, the employee was seconded and assigned to various positions before returning to her substantive administrator post on 1 January 2019, which she occupied until her dismissal.
- [4] In 2018, the employee was diagnosed with anxiety and depression. She later underwent the amputation of a finger in August 2021 and wrist surgery in April 2023.
- [5] At all material times, the employee reported to Gaynore Boyle, the Team Leader in Human Capital. Boyle reported to Ncediwe Qomoyi, Director: Human Capital Operations and Services, who in turn reported to Adeshini McIntosh, Human Resource Business Partner. These three employees, together with Lucina Reddy, Employment Equity Specialist, testified on behalf of the respondent during the arbitration proceedings. The employee testified in support of her own case and did not call any further witnesses.

Occupational therapist reports

- [6] It is common cause that, following her diagnosis of anxiety and depression, the employee was referred to occupational therapist, Al-Marie Botes, for assessment and support. Botes conducted four assessments and issued reports dated 13 November 2020, 6 December 2021, 5 August 2022 and 1 November 2022. In the first report, Botes identified a significant mismatch between the requirements of the employee's position and her ability to meet deadlines while maintaining the required level of accuracy. The report attributed these difficulties to her anxiety and depression, noting that her symptoms adversely affected her productivity, relationships in the workplace, and capacity to cope with occupational demands. It further concluded that her psychological condition substantially impaired her ability to meet the requirements of most forms of employment at that time.

- [7] The report recommended various interventions, including ongoing psychiatric treatment, a review of her medication, regular psychological counselling, participation in a structured programme focusing on goal setting, time management and coping skills, and case management interventions. The latter included engagement between management and the employee to identify appropriate workplace accommodations, monitor her progress and ensure continued compliance with treatment. Periodic reassessments at intervals of three to six months were also recommended.
- [8] The employee was absent from work due to ill health during the periods 18 January to 5 March 2021, 24 March to 30 June 2021 and 10 August 2021 to 20 September 2021. She was assigned light duties from 10 March 2021 to 31 March 2021. She resumed her full duties on 1 December 2021.
- [9] In the second assessment report, dated 6 December 2021, Botes recorded that the employee had undergone amputation of her left fifth finger following a hospital admission in August 2021. The report further noted that she was attending psychiatric reviews every six months, consulting a psychologist regularly and participating in occupational therapy interventions. According to the report, her psychological state and mood had improved during her absence from work, largely because she was no longer exposed to workplace pressures and deadlines. However, concerns remained regarding her ability to meet deadlines and cope with work-related demands.
- [10] The report concluded that the employee's limitations remained consistent with her diagnoses of anxiety and depression, compounded by the psychological effects of the traumatic amputation and its residual consequences. While further intervention was expected to improve her functioning and occupational suitability, the report cautioned that, given the chronic nature of her psychological condition, she would likely require ongoing reasonable accommodation, particularly during periods of heightened symptoms. As a result, she remained vulnerable within the open labour

market. The recommendations contained in the December 2021 report largely reflected those made in the previous report.

- [11] The subsequent report of 5 August 2022 recommended continued psychological and psychiatric treatment and recorded that CPUT had agreed to fund an online cognitive stimulation programme and additional occupational therapy sessions. It further provided for weekly telephonic engagements between the occupational therapist, the employee and her line manager to facilitate communication, address workplace challenges and monitor progress.
- [12] In her final report dated 1 November 2022, Botes noted that the employee had been exposed to a range of interventions designed to improve her time-management skills, coping mechanisms, communication abilities and emotional regulation. She recorded that:
- ‘With participation in the case management and therapy process, as well as with a change in her medication, improvement was noted in the [employee’s] psychological presentation, in keeping with her self-reported scores indicating improved self-esteem, mild/sub-clinical levels of psychological distress, as well as improved emotional regulation.’
- [13] Notwithstanding these improvements, Botes recommended the continuation of psychological and psychiatric treatment, further occupational therapy interventions and additional communication training involving both the employee and her line manager. She also recommended regular meetings between them to provide feedback, resolve workplace concerns and identify practical solutions to any challenges that might arise.
- [14] The evidence does not indicate that any further occupational therapy assessments or structured interventions were undertaken after the November 2022 report.

Incapacity enquiry

- [15] On 6 June 2023, the respondent issued a notice of incapacity enquiry, calling upon the employee to attend an enquiry concerning the following:

'Since on or about the 17th April 2018 when your case was formally reported to the Wellness Office to date, the institution is of the opinion that all support was facilitated through attempts to try to reintegrate your return-to-work plan in your position, over a 6 month period at a time and which resulted in no success due to not meeting the performance standards.

This was also followed by a final assessment from the OT, namely the Impairment Review to comment on change and improvement in your ability to perform the duties in your nominated occupation which indicated little change in terms of your psychological assessment and that you remained unable to secure a full job match to the requirements of your nominated occupation which is that of an Administrator: Human Capital.

Thus, you are hereby notified that a formal enquiry will be held to afford you to state your case before a decision is made regarding your future employment with CPUT.' (Emphasis added)

- [16] The notice of enquiry stated *inter alia* that the respondent "*will present evidence at the hearing to substantiate the allegations against*" the employee, that she had the right to cross-examine the respondent's witnesses and to present evidence, that if "*found guilty of any of the charges*", the chairperson shall hear the mitigating and aggravating submissions before making a "*recommendation with an appropriate sanction*".
- [17] The enquiry was initially scheduled for 6 June 2023 but did not proceed, primarily because the employee had not been furnished with the documentary bundle.
- [18] On 8 June 2023, the employee addressed an email to the respondent, attaching a medical boarding application form. The email reads as follows:

'Please find attached claim form. Kindly please complete page 4 & 5 of the form and return to me.

Please note that this is the third time that I have requested for this form to be completed.

Please note that this claim is a Sanlam Disability process which is separate/different from the CPUT Incapacity hearing. My wrist has not healed yet.

Please email me reasons should you not want to complete this Claim form.'

- [19] On the same day, Qomoyi responded and informed the employee that the matter was with Employee Relations (ER) and that she should:

'stop communicating with Gaynore and myself and stop copying the DVC's office on your sudden decision to engage. We had engaged you on many occasions since 2021 on this matter and you never wanted to engage. Please accept that your matter has now been escalated to ER and please cooperate to engage at that level.'

- [20] Qomoyi further informed the employee not to expect any response from her office. In reply, the employee disputed the suggestion that she had failed to engage with management, stating that she had been interacting with the Human Capital division since 2019.

- [21] The enquiry was rescheduled for 23 June 2023. Although the employee was on approved sick leave until 26 June 2023, the incapacity enquiry proceeded in her absence.

- [22] On 30 June 2023, the chairperson of the enquiry issued her findings and recommendations. The chairperson found that the employee's duties centred on deadlines and that she had repeatedly failed to meet them, particularly in payroll-related functions, due to her frequent absenteeism on sick leave during critical periods.

- [23] The chairperson concluded that the employee was unable to perform her duties effectively and that her prolonged absenteeism had materially compromised her work performance. She also found that the employee's frequent absence

adversely affected her ability to perform her functions upon returning to work, to the extent that she allegedly struggled to recall aspects of her job. In her view, the evidence demonstrated that the employee was incapable of performing the essential requirements of her position.

- [24] In addition, the chairperson relied on evidence that the employee had allegedly been advised to pursue temporary medical boarding but had failed to do so. The chairperson considered this, together with the alleged support and interventions already provided by the respondent, as indicative that there was little more the respondent could reasonably do to accommodate the employee. She concluded that:

'I find that the employer has done what it could to accommodate the employee by sending her for counselling, an occupational therapist, assisting and advising her of the temporal boarding process, adapting her duties and giving her less work when she returned to work. The employer phased her into her work by starting with lighter duties which they did, however, despite these attempts the employee continued to stay away from work and complaining that she could not perform the lighter duties. This shows that the employee, due to her incapacity, cannot work. The employer has made the necessary attempts to accommodate her, however, the employee has not been forthcoming in that regard...

I have considered the employer's aggravating circumstances and recommend the employee's dismissal...'

- [25] The employee was summarily dismissed on 5 July 2023. She referred an unfair dismissal dispute to the CCMA.

Post-dismissal medical reports

- [26] On 21 July 2023, shortly after the employee's dismissal, Dr Ashraf Jedaar, a specialist psychiatrist, furnished a report confirming that, notwithstanding various therapeutic interventions and adjustments to her medication, the employee remained significantly impaired. Dr Jedaar supported her application for medical boarding.

- [27] Thereafter, on 15 August 2023, Dr W.J. van Zyl, an orthopaedic surgeon, issued a letter motivating the employee's medical boarding application. Dr van Zyl recorded that he had treated the employee following the accident that resulted in the amputation of her finger and confirmed that her injuries had not fully healed. Given the functional limitations arising from the finger amputation and chronic wrist pain, he expressed the view that she was unable to perform the duties associated with her administrative position and recommended medical boarding until such time as she had sufficiently recovered to return to work.

The arbitration proceedings and award

- [28] At the CCMA, the parties concluded a pre-arbitration minute in which they recorded several common cause facts. These included that the employee had suffered from anxiety and depression since 2018, that her left fifth finger was amputated in August 2021, and that between 2015 and 2018 she had been assigned to various positions before returning to her substantive position as Administrator: Human Capital in January 2019, where she remained until her dismissal.
- [29] The issues identified as being in dispute included whether the respondent had followed a fair procedure before dismissing the employee, whether it had implemented the occupational therapist's recommendations, whether reasonable accommodation had been provided, and whether dismissal was an appropriate and fair outcome in the circumstances.
- [30] The respondent's case was that it had reasonably accommodated the employee over an extended period and that no suitable alternative position was available. It further maintained that it had declined to assist with the employee's medical boarding application because she had previously been afforded the opportunity to pursue that option but had elected not to do so.
- [31] The commissioner first considered the procedural fairness of the dismissal, particularly the decision to proceed with the incapacity enquiry in the employee's absence. Having examined the medical certificates and the respondent's

responses to the employee's sick leave applications, the commissioner found that the employee was on approved sick leave until 26 June 2023 when the enquiry proceeded. In those circumstances, the commissioner concluded that conducting the hearing in her absence was unfair and that the dismissal was therefore procedurally unfair.

- [32] Turning to substantive fairness, the commissioner found that the employee was “seemingly” reluctant to accept any assistance and that she only agreed to participate in the occupational therapist's assessment process in 2020. The commissioner accepted the respondent's explanation that the employee's repeated absences hampered the implementation of the occupational therapist's recommendations. She considered the online cognitive programme, occupational therapy sessions and weekly follow-up engagements, and concluded that:

‘From the reports and assessments, it became evident that the problems experienced were not going away. The applicant kept on making errors and booked off on several occasions again ... This suggests that the interventions have not worked.’

- [33] Although no final medical assessment had been obtained after the employee consented to the occupational therapist accessing her medical records, the commissioner took into account the post-dismissal reports of Dr van Zyl and Dr Jedaar. Having considered those reports, the commissioner concluded that it was “correct” for the respondent to accept that the employee “*was not able to perform her work any longer*”. She further found that the employee would only be able to perform a job with no deadlines or pressure. Given the nature of her existing role, the commissioner accepted that her medical condition materially impaired her ability to meet the demands of the position.

- [34] In considering the issue of reasonable accommodation, the commissioner attached weight to the employee's prolonged absenteeism and the fact that her responsibilities had frequently to be assumed by colleagues. The commissioner observed that the arrangement imposed both operational and financial burdens on

the respondent and could not be sustained indefinitely. She further rejected the employee's contention that she had not been reasonably accommodated because of a strained relationship with her line manager and the refusal to transfer her to another position.

[35] As to the availability of alternative employment, the commissioner found that no suitable alternative position existed. She accepted the evidence that other available positions required a higher level of skill and similarly involved deadlines and performance pressures. The commissioner also considered it significant that the employee had previously worked in several departments where concerns relating to performance and absenteeism had arisen.

[36] The commissioner then considered the issue relating to the application for temporary medical boarding. She was critical of the employee's alleged failure to pursue that option when it was allegedly raised with her in 2021 and found it regrettable that the employee only showed interest in the process after she had been notified of the incapacity enquiry. Furthermore, the commissioner found -

'it is unclear if this process would have assisted much in the long run. Even if she was temporarily boarded, the problems would most likely persist upon her return, as Dr Jedaar has confirmed. When the applicant was asked whether she could say whether she would be healthy after such a temporary boarding, she stated that she could not look into the future. It was further testified by the respondent that temporary boarding was a process that needed to be instituted by the employee herself as temporary boarding resulted in a lower salary. The applicant was informed of this process in 2021 and it was her choice to pursue this option or not.'

[37] The commissioner sought to distinguish this case from *Wilcocks v Khawula NO & others*¹ (*Wilcocks*), where this Court recognised medical boarding as an obvious alternative to dismissal that ought to be properly explored. She reasoned that the present case concerned temporary boarding rather than ill health retirement and concluded that there was no evidence suggesting that temporary boarding would

¹ (D2158/16) [2022] ZALCD 4 (1 March 2022).

address the employee's long-standing mental health challenges. On that basis, she found that dismissal was the only viable option and concluded that the employee's prolonged ill health and the failure of the various interventions rendered the dismissal substantively fair.

The grounds for review

- [38] The applicants challenge the award on the grounds of alleged unreasonableness. They contend broadly that the commissioner misconstrued the evidence, committed misconduct and gross irregularities, failed to consider relevant facts, ignored and misunderstood the evidence and the legal principles, and issued an unreasonable award.
- [39] The applicants' primary case concerns the commissioner's finding that dismissal was the only viable option available to the respondent and that medical boarding was unlikely to have provided a meaningful or lasting solution. The applicants argue that the commissioner either ignored or attached insufficient weight to the evidence relating to the employee's attempt to pursue medical boarding and failed to appreciate that it constituted a reasonable alternative to dismissal which ought properly to have been explored.
- [40] The applicants submit further that the respondent's refusal to facilitate or meaningfully consider the employee's application for medical boarding resulted in an incomplete assessment of whether alternatives short of dismissal had been investigated, as required by items 10 and 11 of the Code of Good Practice² (the Code), which govern dismissals for incapacity arising from ill health. More specifically, the applicants argue that, in cases involving dismissal for incapacity caused by ill health, the procedural and substantive enquiries are closely intertwined. Accordingly, once the commissioner found that the incapacity process was procedurally unfair, she ought also to have concluded that the dismissal was

² Schedule 8 of the *Code of Good Practice: Dismissal*, now repealed by GG No 53294 dated 22 August 2025, wef 4 September 2025. In terms of the new Code, incapacity is dealt with under item 21. There is no material difference between the old and the new Code.

substantively unfair because the same deficiencies affected the fairness of the ultimate decision to dismiss.

Analysis

- [41] At the time of dismissal and arbitration, dismissal for incapacity on grounds of ill health or injury was regulated by items 10 and 11 of the Code. Item 10 provides that:

‘(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 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 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...
(Emphasis added)

- [42] The above provisions underscore that the fairness of a dismissal for incapacity arising from ill health depends not only on the existence of a medical condition but also on the extent of the incapacity, the feasibility of accommodation, and the consideration of alternatives to dismissal. The process further requires that the employee be afforded a meaningful opportunity to participate in the investigation and respond to any adverse findings before a decision affecting continued employment is taken.

[43] Item 11 sets out the guidelines in cases of dismissal arising from ill health or injury as follows:

‘Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

(a) whether or not the employee is capable of performing the work;

(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.’

[44] A proper enquiry into the fairness of an incapacity dismissal by the commissioner therefore requires an assessment of the employee's actual ability to perform the work, the degree of any incapacity, the possibility of reasonable accommodation, and the availability of alternatives to dismissal. The onus is on the employer to show that the dismissal was fair.³

[45] Before addressing the principal review grounds, two prominent issues require consideration. The first concerns the true reason for the employee's dismissal and the nature of the enquiry conducted by CPUT. The second relates to the medical condition that allegedly gave rise to the incapacity enquiry. Although these matters were not pursued as independent review grounds, they are material to a proper understanding of the dispute and the commissioner's determination thereof.

Reason for dismissal and nature of the enquiry

³ See: *General Motors (Pty) Ltd v National Union of Metalworkers of SA obo Ruiters* [2015] 5 BLLR 464 (LAC); (2015) 36 ILJ 1493 (LAC) at para 36.

- [46] Qomoyi testified in chief that the employee was *“not reliable”*, was *“lazy”* and did *“not want to work”* and whenever she worked, *“she would not perform to the T”* and that she did *“not pay any attention to detail”*. She testified that the employee *“has been manipulating the system since she was appointed at CPUT by sickness, by laziness, by performance and all that”*.
- [47] According to Qomoyi, the employee’s main difficulty was not her medical condition as such, but her inability to organise and manage her workload effectively. She testified that the employee frequently allowed work to accumulate until deadlines became imminent, resulting in delays and missed deadlines. While acknowledging the employee’s health challenges, Qomoyi maintained that poor planning and inadequate work management lay at the heart of the employee’s difficulties.
- [48] Boyle’s evidence echoed that of Qomoyi. She testified that the meetings and interventions implemented pursuant to the occupational therapist’s recommendations were largely directed at assisting the employee in improving her performance. Boyle similarly stated that the employee tended to postpone work until it accumulated and that she had repeatedly advised the employee on methods of planning and managing her responsibilities more effectively.
- [49] McIntosh testified that her initial involvement in the matter related primarily to the management of the employee’s sick leave, until the matter later escalated *“beyond that to performance issues”*. She further testified that:

‘APPLICANT’S REPRESENTATIVE: So, how did the employer conclude that she is medically incapacitated due [to] ill health without comprehensive reports either from themselves or from the applicant’s doctor?

MS. ADESHINI MCINTOSH: I don’t think that is something we concluded, we made – we were making the case based on – I don’t think any of us are competent to make assumptions, medical assumptions, we were making a case based on the – our experiences and our difficulties and our challenges that we were experiencing.’ (Emphasis added)

- [50] The evidence of the respondent's witnesses reveals a significant disconnect between the stated reason for the dismissal and the evidence advanced in support of it. Much of the evidence focused on allegations of poor performance, unreliability, laziness, lack of diligence and an inability to manage workloads effectively, rather than on the extent of any medically established incapacity. Furthermore, save for the post-dismissal medical reports obtained by the employee with a view to supporting her medical boarding application, no comprehensive medical evidence was presented to the chairperson or the commissioner establishing the degree of incapacity or demonstrating that the employee was permanently incapable of performing her duties. This raises a legitimate question as to whether the dismissal was in truth based on incapacity arising from ill health or on concerns more closely associated with performance and conduct.
- [51] Furthermore, when regard is had to the notice of the incapacity enquiry, the proceedings conducted on 23 June 2023, the outcome report and the evidence presented by the respondent, it is reasonable to conclude that the process assumed the character of a disciplinary hearing rather than a genuine incapacity enquiry.

Which ill health gave rise to the incapacity enquiry?

- [52] It is common cause that the employee was diagnosed with anxiety and depression in 2018, that she underwent the amputation of her left fifth finger in August 2021, and that she subsequently underwent wrist surgery in 2023. Following the finger amputation, her workload was temporarily reduced until her return to full duties in November 2021. The question is which of these conditions formed the backdrop against which the incapacity process was initiated.
- [53] During her evidence, Qomoyi was asked to identify the specific medical condition that formed the basis of the incapacity enquiry and the employee's eventual dismissal. Rather than providing a direct answer, she referred to the outcome of the enquiry and described the matter as one involving "*incapacity for poor*

performance". Her response prompted further questioning because it failed to clarify whether the enquiry was founded on the employee's psychological condition, her physical injuries, or a combination of both.

[54] Even after the question was reformulated, Qomoyi remained unable to identify a particular medical condition as the basis for the incapacity enquiry. Instead, she referred generally to the employee's various health challenges, including mental health issues and physical injuries, while indicating that she preferred to rely on what had been recorded during the incapacity enquiry rather than provide a definitive answer of her own. The difficulty, of course, is that even the chairperson of the incapacity enquiry did not properly address this issue in her outcome report.

[55] When it was put to her that much of her "*evidence related to performance issues and not medical conditions*", Qomoyi responded that the employee:

'will be sick, she will not perform, she will be lazy all those things that's, that's what she has been to us. There ... would be issues of illness, there will be issues of lack of performance, there will be issues of laziness where you see that this person does not want to even know what is happening. She's lazy.'

[56] Boyle's testimony added further uncertainty. In addition to anxiety and depression, the finger amputation and the wrist surgery, she referred to several other ailments allegedly affecting the employee, including eczema, asthma, headaches and irritable bowel syndrome. Boyle also expressed concerns regarding the employee's memory. McIntosh, on the other hand, identified anxiety and depression as the primary condition underlying the incapacity enquiry, while noting that the employee also suffered from asthma.

[57] The evidence as a whole does not establish with any clarity whether the incapacity enquiry was based on the employee's anxiety and depression, her finger amputation and wrist injury, some other medical condition, or a combination of these factors. The inability of the respondent's witnesses to identify the condition that allegedly rendered the employee incapacitated underscores the uncertainty surrounding the foundation of the enquiry itself.

- [58] Notwithstanding these evidentiary difficulties, the commissioner ultimately concluded that the employee's incapacity stemmed primarily from her anxiety and depression and that she was unable to perform her work as a result. That conclusion relied substantially on medical reports obtained after the employee's dismissal, despite the absence of evidence demonstrating that the performance shortcomings relied upon were causally linked to any particular medical condition.

Accommodation and alternatives

- [59] Turning to the primary ground of review, it is trite that upon determination that the employee is permanently incapacitated and that his or her working circumstances or duties cannot be adapted, the employer is required to investigate all reasonable alternatives to dismissal. The applicants contend that the respondent failed to discharge this obligation and did not meaningfully explore alternatives before dismissing the employee.
- [60] The commissioner accepted that the employee was permanently incapacitated. The respondent's case was that it had already accommodated the employee over an extended period. To substantiate this, Qomoyi relied on the employee's secondments to various positions between 2015 and 2018. McIntosh similarly testified that these secondments were intended to accommodate the employee and reflected the respondent's efforts to find a suitable role for her. According to McIntosh, by 2023, the respondent had exhausted the option of moving the employee between positions because previous transfers had not resolved the underlying difficulties.
- [61] Reddy's evidence was that alternative positions within the Human Capital department would not have been suitable because they generally involved greater levels of responsibility and complexity than the employee's existing role. She further testified that, although she was aware that the employee had previously worked in other departments, she had no direct knowledge of those arrangements or their outcomes.

- [62] The commissioner accepted that the respondent had reasonably accommodated the employee. However, the evidence indicates that the employee's transfers between 2015 and 2018 were not implemented as measures to accommodate a medically established incapacity. Rather, they were motivated by concerns relating to her alleged poor performance and workplace difficulties. Those transfers, which happened before the anxiety and depression, the finger amputation and wrist surgery, therefore, cannot be characterised as accommodation measures undertaken in the context of an incapacity enquiry.
- [63] Furthermore, even if those secondments could be regarded as accommodation measures, the evidence demonstrates that no meaningful efforts were made to accommodate the employee or identify alternatives to dismissal during the period from January 2019, when she returned to her substantive position, until the initiation of the incapacity process in 2023 and the subsequent dismissal. The respondent's reliance on events that occurred several years earlier does not establish compliance with its obligations during the relevant period.
- [64] The employee was placed on light duties in March 2021 and again following the amputation of her finger in August 2021. By November 2021, however, she had resumed her full duties. The incapacity enquiry was nevertheless only initiated in June 2023, some 20 months after she had returned to her normal duties. This also occurred after the occupational therapist's assessment report of November 2022 had noted an improvement in her psychological condition. The respondent did not implement the recommendation contained in the November 2022 report. Instead, it elected to proceed with the incapacity process. Against this backdrop, any suggestion that the employee was reasonably accommodated is untenable.
- [65] A significant aspect of the employee's case concerned her attempt to pursue medical boarding. The applicants contend that the respondent was required to consider this as an alternative to dismissal. When it was put to Qomoyi that the respondent had effectively denied the employee access to a benefit for which the institution was specifically insured, she maintained that the option had previously

been offered to the employee and that management was not prepared to revisit the issue once the matter had been referred to Employee Relations to commence the incapacity process. She testified under cross-examination that:

'it is at the time when we had referred the matter to ER ... did you think that [it] was correct for me to open that after we have referred the matter to ER. I was pointing her to the right direction by saying we have referred the matter to ER, we have moved from that point. We had offered you this accommodation we had offered you this ... benefit of the institution ... to apply for ill health and be boarded and we see how that process goes and you rejected it. So now we have referred the matter ... for incapacity.'

[66] The cross-examination continued:

'APPLICANT'S REPRESENTATIVE: You are basically denying the opportunity to which CPT specifically insured which would have been a reasonable alternative to dismissal during an incapacity process. Even exploring that would have been a reasonable alternative. But you decided you are going to put a stop to it?

MS. QOMOYI: Yes.'

[67] Qomoyi regarded the employee's attempt to apply for medical boarding after receiving notice of the incapacity enquiry as another example of what she considered manipulative conduct and therefore refused to support the application at that stage. She said:

'We offer her the ... boarding ... process and she declines it, she does not want to engage, we now refer the matter to ER, she now comes before ER ... and wants to know ... fill in forms. I must now at her terms sign the forms and I am saying no I have referred your matter to ER I will be advised by ER what to do. Then that was my stand and I am standing by that ... That is where the manipulation comes from to me.' (Emphasis added)

[68] Boyle's evidence was broadly consistent with that of Qomoyi. She testified that, after identifying concerns regarding the employee's persistent absenteeism, she referred the matter to the wellness office and implemented certain interventions,

including a temporary reduction in workload. However, neither her evidence nor that of the other witnesses demonstrated that the respondent seriously considered medical boarding or any other alternative to dismissal once the incapacity process had been initiated.

[69] McIntosh initially stated that she was unaware of the employee's attempt to apply for medical boarding. However, during cross-examination, she acknowledged that she had subsequently become aware of the request, although by then the matter had been referred to Employee Relations. She explained that management acted on the advice of Employee Relations because the matter had escalated into a formal incapacity process. McIntosh did not dispute that medical boarding constituted a reasonable alternative to dismissal.

[70] In *Wilcocks*, this Court considered the role of medical boarding as an alternative to dismissal in incapacity cases. There, the employee sought a postponement of the incapacity enquiry to obtain further medical evidence in support of a medical boarding application. The employer declined the request, proceeded with the enquiry, and dismissed the employee. On review, the Court held that where medical boarding is raised as an alternative to dismissal, the employer is obliged to investigate and consider that option fully before terminating employment. The Court held that:

'... Where there is the prospect of medical boarding (put differently, a retirement in terms of the rules of a benefit fund established precisely to cater for medical incapacity), this is an obvious alternative to dismissal that ought to be fully explored. While each case must be dealt with on its own merits, in the present instance, the consequence of Mbambo's failure to explore that option and the arbitrator's endorsement of the approach that she adopted has been to deny the applicant the prospects of determining his eligibility for a benefit for which the third respondent is specifically insured. The decision to dismiss the applicant had the consequence that he was no longer an employee of the third respondent and therefore denied consideration for his eligibility for any benefit that may have accrued to him in terms of the rules of the scheme.

The medical boarding procedure represents an obvious potential alternative to a dismissal, one that is required to be fully investigated before any decision to dismiss is taken. The pre-arbitration minute records that the rules of the Natal Joint Municipal Pensions Fund make provision for retirement on the grounds of ill-health, an obvious alternative to a dismissal. Why that option was not explored is inexplicable. To the extent that Mbambo and the arbitrator considered that the third respondent's procedure conferred a discretion either to dismiss or to invoke the ill-health retirement option, that is not what the procedure provides, nor is that interpretation consistent with what is required by the Code of Good Practice which, I wish to emphasise, considers dismissal a measure of last resort. What the third respondent did was to dismiss the applicant, in breach of its own procedure, and thereby deny him the potential benefit, available only to employees, that might otherwise have agreed in terms of the rules of the pension fund. Put another way, the applicant was at the receiving end of a double whammy.

It follows that by finding that the third respondent's policy conferred a discretion on the third respondent to deny the applicant any consideration for his eligibility for benefits consequent on his incapacity, the arbitrator misdirected himself in relation to the evidence before him. The consequence of this misdirection is that his award falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. That being so, the award stands to be reviewed and set aside.⁴

- [71] The principles articulated in *Wilcocks* are directly applicable to the present matter. Once the employee indicated her intention to pursue medical boarding, the respondent was required to consider and investigate that option as part of its obligation to explore alternatives short of dismissal. Whether the application was related to her psychological condition, her finger amputation, her wrist injury, or a combination thereof, or was likely to assist in the long term did not diminish the obligation to engage with the process meaningfully. Similarly, whether the option was previously raised and the employee did not engage at that time did not

⁴ *Wilcocks* at paras 11 – 13.

diminish the respondent's obligation to engage with this process when the employee raised it, unless there was a valid basis to do so.

- [72] Instead, the evidence demonstrates that the respondent refused to facilitate or consider the employee's application because it believed she had previously declined that option, because the matter had already been referred to Employee Relations, and because management regarded the application as part of a pattern of manipulative conduct. Those considerations do not constitute a valid basis for refusing to investigate a potential alternative to dismissal. The commissioner's acceptance of that approach, and her speculation that medical boarding was unlikely to prove beneficial, amounted to a misdirection both in fact and in law.
- [73] In the circumstances, the respondent failed to discharge its obligation to investigate and consider reasonable alternatives to dismissal. The commissioner further misconstrued the applicable legal principles and incorrectly distinguished *Wilcocks* from the present case. These errors materially affected the outcome of the arbitration and, on this basis alone, render the award untenable and unsustainable, and liable to be reviewed and set aside.

Did the procedural unfairness render the dismissal substantively unfair?

- [74] The applicants contend that, having found the dismissal procedurally unfair, the commissioner ought also to have concluded that it was substantively unfair. They argue that, in dismissals for incapacity arising from ill health, the procedural and substantive enquiries are so intricately connected that a failure to comply with the procedural requirements prescribed by the Code necessarily impacts the substantive fairness of the dismissal.
- [75] In *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality & others*⁵ (*Strydom*), the Labour Appeal Court held that compliance with items 10 and 11 of the Code is fundamental to both procedural and substantive fairness. The Court emphasised that an employer may dismiss an

⁵ [2012] 7 BLLR 660 (LAC); (2012) 33 ILJ 1081 (LAC).

employee for permanent incapacity only after properly investigating the extent of the incapacity and considering all reasonable alternatives short of dismissal.⁶

[76] Similarly, in *Wilcocks*, this Court held that:

'In the case of disputes concerning dismissal for incapacity, the line between substantive and procedural fairness tends to become blurred, if only because most of the substantive obligations imposed by the Code are discharged in the context of the necessary inquiry into the existence of any incapacity and its impact on continued employment.'⁷

[77] The respondent relied on the LAC judgment in *Universal Product Network v Mbatsana*⁸ (*Mbatsana*) to contend that a finding of procedural unfairness does not automatically morph into substantive unfairness. The two enquiries, argued the respondent, remain conceptually distinct, and a procedural defect does not invariably undermine the substantive fairness of dismissal.

[78] In my view, whilst I accept the respondent's legal argument that procedural defects do not automatically lead to substantive unfairness, *Mbatsana* is distinguishable on the facts in that it concerned a dismissal for misconduct. In any event, the LAC recognised that, depending on the nature of the dispute and the particular facts, procedural defects may in certain circumstances have substantive consequences. Ultimately, whether procedural unfairness undermined the substantive fairness is a question of fact that must be determined with reference to the particular circumstances of each case.

[79] In the present case, the commissioner's finding of procedural unfairness was narrowly based on the fact that the incapacity enquiry proceeded in the employee's absence while she was on approved sick leave. Beyond that finding, the applicants did not establish why this procedural defect, standing alone, necessarily rendered

⁶ Ibid at para 7 - 9; see also *Parexel International (Pty) Ltd v Chakane N.O. and others* [2019] ZALAC 50; (2019) 40 ILJ 2334 (LAC) at para 15.

⁷ *Wilcocks* at para 9.

⁸ (JA31/25) [2026] ZALAC 14 (31 March 2026) at paras 19 – 25.

the dismissal substantively unfair. Although the line between procedural and substantive fairness is often blurred in incapacity dismissals, I am not persuaded that the particular procedural irregularity identified by the commissioner was, by itself, sufficient to undermine the substantive fairness of the dismissal. This ground of review, therefore, cannot succeed.

Conclusion

Summary of the findings

- [80] To summarise, the commissioner's conclusion that the employee's dismissal was substantively fair cannot be sustained on the evidence presented. In reaching that conclusion, the commissioner failed properly to apply the principles embodied in items 10 and 11 of the Code and thereby committed a material error of law.
- [81] The evidence establishes that the employee occupied her substantive position continuously from January 2019 until her dismissal in July 2023. The various secondments that occurred between 2015 and 2018 cannot properly be regarded as alternative positions explored during the incapacity process, nor can they be relied upon as evidence that alternatives to dismissal were considered at the relevant time. Those transfers occurred long before the incapacity enquiry and were implemented for reasons unrelated to any contemporaneous investigation of incapacity.
- [82] The evidence further indicates that the employee was transferred between departments because of concerns relating to her alleged poor performance, purported laziness, or strained working relationships with managers. These transfers were therefore not directed at accommodating a medically established incapacity, nor were they undertaken as part of a process aimed at avoiding dismissal on incapacity grounds. Further, the employees' duties or work circumstances were only temporarily adjusted for about three weeks in March 2021 and from August to October 2021. Her duties had not been adapted since November 2021.

- [83] Of particular significance is the respondent's refusal to assist the employee with her application for medical boarding once she elected to pursue that option. Medical boarding constituted a viable and reasonable alternative to dismissal and ought properly to have been explored. The respondent's refusal to engage with that process deprived the employee of a potential benefit and undermined its contention that all reasonable alternatives to dismissal had been investigated.
- [84] In these circumstances, the commissioner's finding that the dismissal was substantively fair was not one that a reasonable decision-maker could reach on the material before her.⁹ The award accordingly falls to be reviewed and set aside insofar as it upheld the substantive fairness of the dismissal.

Remedy

- [85] The applicants urged the Court to substitute the award with a finding that the dismissal was substantively unfair and to grant either reinstatement or compensation. The respondent, on the other hand, submitted that the matter should be remitted to the CCMA for a determination of the appropriate remedy.
- [86] The full record of the arbitration proceedings is before this Court. I am satisfied that this Court is in as good a position as a commissioner to finally determine the matter, and that it is in the interest of justice to do so. On the evidence presented before the commissioner, and for the reasons articulated above, the employee's dismissal was substantively unfair.
- [87] Having considered the nature of the dispute, the circumstances surrounding the dismissal, both parties' acknowledgement of a strained relationship and the period during which the employee has remained unemployed, compensation rather than reinstatement constitutes the appropriate remedy. The commissioner has already awarded compensation equivalent to one month's remuneration for procedural unfairness. In my view, a further award equivalent to 11 months' remuneration is

⁹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

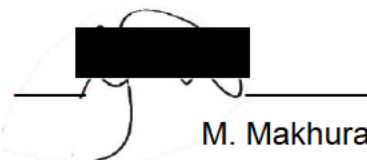
just and equitable, resulting in total compensation of 12 months' remuneration. Calculated at the employee's monthly salary of R45 268.00 at the time of dismissal, the 11 months' additional compensation amounts to R497 948.00.

[88] Neither party persisted with a claim for costs. Having regard to the nature of the dispute, the fact that the applicants were represented by a trade union official, and the requirements of law and fairness, there is no basis for a costs order. Accordingly, each party should bear its own costs.

[89] In the premises, the following order is made:

Order

1. Save for the commissioner's finding that the dismissal was procedurally unfair and the award of compensation contained in paragraph 42 of the arbitration award, the arbitration award issued by the third respondent under case number WECT11544-23 on 5 April 2024 is reviewed and set aside.
2. The award is substituted with the following:
 - i. The dismissal of the applicant, Feroose Samaai, by the respondent, Cape Peninsula University of Technology, was substantively unfair.
 - ii. The respondent is ordered to pay the applicant compensation in the amount of R497 948.00, being the equivalent of eleven (11) months' remuneration calculated at the rate applicable at the time of dismissal.
 - iii. Payment of the amount must be made within 15 court days of the date of this judgment.'
3. There is no order as to costs.



M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr I. Stockenstrom of Solidarity

For the First Respondent: Ms H. Davis

c/o Deneys