Legalwise Insurance SA v Kleinot NO & others (2020) 41 ILJ 2862 (LC)

Citation	(2020) 41 ILJ 2862 (LC)
Case No	JR502/15
Court	Labour court
Judge	Norton AJ
Heard	February 18, 2019
Judgment	August 15, 2019
Counsel	*Attorney R Orton* for the applicant. Third respondent represented by a union official.
Annotations	No annotations to date

Flynote : Sleutelwoorde

Code of Good Practice: Dismissal (schedule 8 to the LRA)—Dismissal for incapacity—Item 10 and item 11—Employer obliged to follow guidelines set out in code when determining whether to dismiss employee for incapacity arising from ill-health.

Code of Good Practice: Dismissal (schedule 8 to the LRA)—Dismissal for incapacity—Item 10 and item 11—Guidelines and principles applicable—Issues to be determined at incapacity hearing whether employee able to do work; to what extent employee able to perform duties; feasibility of adapting employee's work circumstances to enable him or her to perform duties; and, if no adaptation suitable, whether other suitable work available.

Dismissal—Incapacity—Illness—Employer obliged to follow guidelines set out in items 10 and 11 of Code of Good Practice: Dismissal (schedule 8 to LRA 1995) when determining whether to dismiss employee for incapacity arising from ill-health.

Dismissal—Incapacity—Illness—Onus on employer to prove incapacity on balance of probabilities—Onus not extending to criminal test of proving beyond reasonable doubt that employee incapacitated.

Headnote : Kopnota

The third respondent employee, Ms S, was employed by the applicant legal insurance company as a filing clerk. In January 2014 she fell off a chair at work and injured her back. The company sent her for an occupational therapist assessment. The therapist reported that Ms S was unable to perform her job as filing clerk, and recommended that she be given light duties, work reduced hours, exercise, visit a chiropractor and biokineticist, and lose a significant amount of weight. In July the company's insurer approved her disability claim, which was 75% of her salary. However, the payment of this claim was discontinued when Ms S failed to submit medical reports updating the insurer on her condition, and she returned to work in February 2015. The company sent her for a further occupational therapist assessment, and the therapist reported that there was an insignificant change in her medical status. The company scheduled an incapacity hearing in March which revealed that Ms S could no longer perform her filing duties; that there had been little improvement in her condition and that she could only work for two to three hours a day. It offered her an alternative position as a receptionist in Witbank, which she declined. The company then terminated her employment in April. Ms S referred an unfair dismissal dispute to the CCMA, where a commissioner found that her dismissal had been substantively unfair, and awarded her reinstatement plus nine months' backpay.

On review, the Labour Court noted that it was trite that items 10 and 11 of the Code of Good Practice: Dismissal establish the relevant guidelines and principles applicable to dismissals for incapacity. Relying on those principles, as applied by the courts in earlier decisions, the court noted that the following issues must be determined at an incapacity hearing: (1) Is the employee able to do his or her work? (2) To what extent is the employee able to perform his or her duties? (3) Is it feasible to adapt the employee's work circumstances so that

he or she can continue to perform his or her duties? (4) If no adaptation is suitable, has the employer enquired whether there is any other suitable work for the employee?

The court found that the company's enquiry chairperson had asked the right questions when he conducted the incapacity enquiry and weighed up the evidence. He had ascertained that Ms S was not able to fully perform her duties as a filing clerk; that she could only perform about 30% of the capacity required; that she had been given lighter duties and an additional person had been employed to do the rest of her job; that it was not feasible to adapt the work environment; and that an alternative position had been found for Ms S, but that this was unsuitable.

The court accordingly found that the commissioner should have found that Ms S's dismissal was fair. However, it was clear that the commissioner had materially erred when she found that the company should have taken positive steps to ensure that Ms S lost weight, saw a biokineticist and adapted her pain medication — there was no onus on an employer to do so. She had also erred in finding that the company should have bought Ms S a new chair — that would not have assisted her in doing her job which entailed walking up and down stairs, bending over and carrying files. In addition, the commissioner had ignored the evidence of two occupational therapists who pointed out that Ms S did not have the physical strength and health to continue in her position of filing clerk.

The court found further that, while an employer bore the onus to show on a balance of probabilities that an employee was incapable of performing her duties, that onus did not extend to a criminal test of proving beyond reasonable doubt that the employee was incapacitated. Furthermore, the commissioner had committed a material misdirection by, on the one hand, chastising the company for not assisting Ms S, and on the other hand, finding that there was a lack of compelling evidence that Ms S was indeed incapacitated and incapable of performing her duties.

The court was accordingly satisfied that the company had established that the commissioner had committed a reviewable defect which warranted interference by the court.

Case information

Application to the Labour Court to review an arbitration award handed down by the CCMA. The facts and further findings appear from the reasons for judgment.

Cases Considered

Annotations:

Exarro Coal (Pty) Ltd t/a Grootgeluk Coal Mine v Maduma & others (2017) 38 *ILJ* 2531 (LC) (referred to)

Gordon v J P Morgan Equities SA (Pty) Ltd & others (2018) 39 *ILJ* 393 (LC) (referred to)

Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others (2012) 33 *ILJ* 1081 (LAC) (considered)

Parexel International (Pty) Ltd v Chakane NO & others (2018) 39 *ILJ* 644 (LC) (referred to)

Parmalat SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2017) 38 *ILJ* 2586 (LC) (referred to)

Shoprite Checkers v Commission for Conciliation, Mediation & Arbitration & others (2015) 36 *ILJ* 2908 (LC) (referred to)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) (referred to)

Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration & others (2008) 19 *ILJ* 1239 (LC) (referred to)

Statutes Considered

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995 s 145(2), schedule 8 item 10, item 11

Attorney R Orton for the applicant.

Third respondent represented by a union official.

Judgment reserved.

Judgment

Norton AJ:

Introduction

[1] This case concerns a review of an arbitration award in which the CCMA commissioner found that the employer had unfairly dismissed the employee incapacitated by a fall at work, and ordered backpay of R117,166.95 and reinstatement from 1 March 2016.

[2] The applicant is Legal Expenses Insurance South Africa trading as Legal Wise — a legal insurance company.

[3] The first respondent is K Kleinot the CCMA commissioner whose arbitration award forms the subject of the review application argued before me.

[4] The second respondent is the CCMA.

[5] The third respondent is Ms Shezi, the injured employee, represented by the trade union, BIFAWU.

Factual background

[6] Ms Shezi was employed by the applicant as a filing clerk. She struggled carrying files and boxes (some weighing up to 13 kgs) up and down three flights of stairs between her office and the storeroom. She experienced back pain.

[7] On 17 January 2014 Ms Shezi fell off a chair at work and was injured (the chair collapsed). She was taken to Flora Clinic, where X rays were taken and she was diagnosed with 'lumbar spine strain and muscle spasm'. The fall aggravated a pre-existing injury called 'lumbar facet joint syndrome'.

[8] She returned to work in March 2014, and was given more sedentary tasks such as faxing documents. The applicant assisted Ms Shezi to apply for a temporary disability benefit from Momentum, the applicant's insurer.

[9] In May 2014 an occupational therapist, Ms Whitlock, assessed Ms Shezi's functioning at work and concluded: 'Her functional ability lies in sedentary to light work physical demand range. Hence on account of the step climbing, lifting and carrying demands, Mrs Shezi does not have the functional ability to perform her own job as a filing clerk at the Legalwise hub. The correct decision was made when she was given alternative duties from March 2014.' Ms Whitlock noted that Ms Shezi continued to struggle with pain management. The occupational therapist recommended a reduction in working hours to six hours per day on three days per week, exercise, visiting a chiropractor and biokineticist and significant weight loss.

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[10] In July, Momentum approved the disability claim. Ms Shezi was informed of the need to file further medical reports to sustain the disability benefit.

[11] The payment of the claim (75% of salary) was discontinued in November, regrettably because Ms Shezi did not submit a medical report updating the insurer on her condition.

[12] On 9 February 2015 Ms Shezi returned to work. She did not have a doctor's certificate that she was fit to resume her duties. Ms Shezi had been away from work of just over one year.

[13] The employer sent her for a second occupational therapist assessment. The second report showed insignificant change in the condition and medical status of the employee.

[14] On 25 March 2015, Mr Grobler from Labour Net facilitated an incapacity enquiry as per paras 10 and 11 of the LRA's Code of Good Practice: Dismissal. Mr Grobler considered whether or not Ms Shezi was capable of performing her work, and if not, the extent to which the work could be accommodated. He also considered whether alternative work was available.

[15] His enquiry revealed that Ms Shezi could no longer perform her filing duties, and there had been little improvement in Ms Shezi's condition. The applicant needed a filing clerk for eight hours a day but Ms Shezi could only work two to three hours a day. The applicant offered her an alternative position, as a receptionist in Witbank but the distance was too far.

[16] On 10 April 2015 the applicant terminated Ms Shezi's employment. Ms Shezi then referred an unfair dismissal dispute to the CCMA.

[17] At the arbitration, Ms Shezi and her representative, Mr Nhlapo, gave evidence that the applicant had reported the injury to the Compensation Commissioner late. The pre-existing injury related to her hip and not her back. They argued that she was discriminated against because she had a grade 11 certificate and not a matric. The applicant had failed to reasonably accommodate Ms Shezi, and this was

discriminatory.

[18] The employer testified that Ms Shezi could not cope with the demands of her position after the fall. She was required to carry boxes, walk up flights of stairs, and bend over and pick up files. The applicant employed an additional person to carry out these tasks. The applicant placed Ms Shezi on light duty which included faxing documents, and reduced her hours of work, but ultimately the employer was in a position where it was paying two wages for one position and that was economically untenable.

[19] The employer could not reasonably accommodate her, and the alternative position in Witbank was simply too far to be considered.

The arbitration award

[20] The arbitrator expressed the view that the Code of Good Practice: Dismissal obliges the employer to adapt and assist an employee who has sustained an injury on duty and adapt the work if possible. The arbitrator submitted that the applicant should have assisted the third respondent by assisting her see a dietician, a biokineticist and

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support her losing weight. The employer should have bought her a new chair.

[21] The arbitrator found that there was no categorical report from a doctor to conclude that Ms Shezi was disabled and permanently so. The employee, the arbitrator held, was not afforded an opportunity to demonstrate what she could and could not do.

[22] The arbitrator found that the incapacity hearing procedure was fair, and that she was not discriminated against in terms of the Employment Equity Act. [1]

[23] The arbitrator found that the dismissal was substantively unfair, in the way the employer had handled the injury on duty, and because the employer did no support Ms Shezi in her recovery. There was no medical evidence, so the arbitrator found, that Ms Shezi was incapable of performing her job.

[24] The arbitrator awarded backpay of R117,186.85 (nine months' pay) and reinstatement to 1 March 2016.

[25] The award was handed down on or about 10 February 2016.

The review application

[26] In general, the employer submits that the arbitrator: failed to apply her mind to the evidence before her; exceeded her powers; and failed to justifiably and reasonably determine and assess the dispute fairly.

[27] The applicant advanced the following grounds of review:

27.1 The arbitrator's view that the employer should have taken steps to implement recommendations for the well-being of the employee (including weight loss, managing pain medication and consulting a biokineticist) was irregular and unreasonable.

27.2 The arbitrator erred by finding that the employer should have bought the employee a chair with lumbar support.

27.3 The arbitrator found that there was no 'categorical report from a doctor showing that the employee was disabled' and the arbitrator erred in the light of the facts which pointed to the employee's continued disability.

27.4 The arbitrator found that the employer failed to discharge the onus of proving that the employee was incapable of performing her duties. This according to the applicant is at odds with the law of onus, as well as the surrounding factual circumstances.

27.5 The arbitrator committed a material misdirection by on the one hand chastising the employer for not assisting the employee to implement various medical remedial steps; and on the other hand the arbitrator finds that there was a lack of compelling evidence that the employee was incapacitated and incapable of performing her duties.

27.6 The arbitrator found that it was possible to further adapt the workplace. This was according to the employer unreasonable and at odds with the evidence presented.

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27.7 The arbitrator acted unreasonably and exceeded her powers by ordering the relief of reinstatement and backpay of nine months.

The nature of review proceedings

[28] The Labour Court may set aside an arbitration award if the arbitrator has committed a defect in the arbitration proceedings. Section 145(2) of the LRA sets out the types of defects warranting intervention: the arbitrator committed misconduct in relation to his or her duties; the commissioner committed a gross irregularity in the conduct of the proceedings; the commissioner exceeded his or her powers, or the award was improperly obtained.

[29] Our courts have considered these provisions, and the above statutory tests have been interpreted to mean that the court may intervene —

29.1 if the award falls outside of the spectrum of reasonableness as per the Constitutional Court's decision in *Sidumo*; [2]

29.2 if a litigant can stablish an irregularity which is material to the outcome of the matter (as discussed in *Gordon v J P Morgan Equities SA (Pty) Ltd & others*). [3]

[30] The Labour Court must establish two issues:

30.1 The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, misconceiving the nature of the enquiry, or assessing factual disputes in an arbitrary fashion.

30.2 The second is whether the applicant has established that the irregularity is material to the outcome of the award — by demonstrating that the outcome would have been different had the arbitrator properly and reasonably assessed the facts in relation to the relevant law. [4]

[31] These grounds for review may overlap and intersect and are not necessarily discrete.

The Code of Good Practice: Dismissal — Incapacity: Ill health or injury and case law

[32] It is trite that the code establishes the relevant guidelines and principles when determining whether a dismissal for incapacity is fair.

[33] The relevant provisions applicable to the case under review in items 10 and 11 of the code are the following:

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> '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 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. …

(3) The degree of incapacity is relevant to the fairness of any dismissal. …

(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 the 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 or injury 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.'

[34] Molomela AJA in the Labour Appeal Court in *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others*[5] comments:

'My reading of items 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.' [6]

[35] In *Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration & others*, [7] quoted in *Parmalat SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*, [8] the Labour Court, having considered items 10 and 11, summed up the steps as follows:

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35.1 Is the employee able to do his or her work?

35.2 To what extent is the employee able to perform his or her duties?

35.3 Is it feasible to adapt the employee's work circumstances so he or she can continue to perform his or her duties?

35.4 If no adaptation is suitable, has the employer enquired about whether or not there is any other suitable work?

[36] In *Parexel International (Pty) Ltd v Chakane NO & others*[9] the Labour Court held that the onus of proving the incapacity in order to justify the dismissal rests with the employer.

Discussion and analysis

[37] Mr Grobler asked the right questions in the light of the code and the *IMATU* and *Standard Bank* cases, when he conducted the incapacity enquiry and weighed up the evidence.

37.1 Is the employee able to do her work?

37.1.1 He ascertained that Ms Shezi was not able to fully perform her duties as a filing clerk in the work environment.

37.1.2 The employer had given her lighter duties and taken on another employee, but in the end could not justify keeping her in employment

37.2 To what extent is the employee able to perform his or her duties?

37.2.1 Ms Shezi could perform at around 30% of the capacity required.

37.3 Is it feasible to adapt the employee's work context?

37.3.1 The employer initially gave Ms Shezi lighter duties such as faxing, and employed an additional person for the filing, but that was uneconomical (two employees for one job).

37.3.2 Adapting the work environment was not feasible.

37.4 If no adaptation is suitable, has the employer enquired about whether or not there is any other suitable work?

37.4.1 An alternative position was available in Witbank as a receptionist but was too far away for Ms Shezi

37.4.2 An alternative was considered but found to be unsuitable.

[38] Noting that Ms Shezi could not continue in her previous position, and bearing in mind that there were no other suitable alternatives, the arbitrator should have found that the dismissal was fair.

[39] With respect to the grounds raised in review, we agree with the applicant that the arbitrator did not properly apply her mind to the evidence which gave rise to an unreasonable result:

Norton AJ

39.1 Ms Shezi had been off work for ten months. Her physical functioning as indicated by the occupational therapists' reports did not indicate that her condition had improved or that she had made the necessary lifestyle changes.

39.2 The arbitrator materially erred when she found that the employer should have taken positive steps to ensure that the employee lost weight, saw a biokineticist and adapted her pain medication. There is no onus on an employer to do so, and it would cast an unreasonable burden on an employer in such circumstances.

39.3 The arbitrator erred by finding that the employer should have bought the employee a chair with lumbar support. Such a chair would not have assisted the employee with her job which entailed walking up and down stairs, bending over and carrying files.

39.4 The arbitrator found that there was no 'categorical report from a doctor showing that the employee was disabled'. Again the arbitrator misconstrues the evidence — two occupational therapists pointed to the need for reduced physical activities — in essence indicating that Ms Shezi did not have the physical strength and health to continue in her position as a filing clerk.

39.5 Whilst the employer bears the onus to show on a balance of probability that the employee is incapable of performing her duties as contemplated in the *Paraxel* case, the onus does not extend to a criminal test of proving beyond reasonable doubt that the employee is incapacitated. That appears to have been the degree of proof required by the arbitrator. In this respect she was misconceived.

[40] I agree with the applicant that the arbitrator committed a material misdirection by, on the one hand, chastising the employer for not assisting the employee to implement various medical remedial steps; and on the other hand, finding that there was a lack of compelling evidence that the employee was incapacitated and incapable of performing her duties. That contradiction surely is an indication that the arbitrator was not properly applying her mind to the evidence before her.

[41] I am satisfied that the applicant has established that the arbitrator committed a reviewable defect which warrants interference from this court.

[42] The arbitrator acted unreasonably by ordering reinstatement, when the evidence showed that the employee was incapable of performing her duties, and the employer was not prepared to accommodate her to work a shorter day. In *Exarro Coal (Pty) Ltd t/a Grootgeluk Coal Mine v Maduma & others* (2017) 38 *ILJ* 2531 (LC) the court held that reinstatement was not an appropriate remedy for an incapacitated employee to

return to a workplace which exacerbated an employee's health vulnerabilities.

[43] In the circumstances I find that the review application succeeds, as the arbitrator misdirected herself by ignoring or giving little weight

to relevant evidence, and failing to apply her mind properly to the issues before her.

Order

[44] I make the following order:

44.1 The review application is upheld.

44.2 The dismissal was fair.

44.3 There is no order as to costs.

Applicant's Attorneys: *Snyman Attorneys.*

1 55 of 1998.

2 *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC).

3 (2018) 39 *ILJ* 393 (LC).

4 The test has been described in *Shoprite Checkers v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 *ILJ* 2908 (LC) at para 10 as follows: '[W]here a commissioner misdirects himself or herself by ignoring material facts, the award will be reviewable if the distorting effect of the misdirection was to render the result of the award unreasonable.'

5 (2012) 33 *ILJ* 1081 (LAC).

6 at para 6.

7 (2008) 19 *ILJ* 1239 (LC).

8 (2017) 38 *ILJ* 2586 (LC).

9 (2018) 39 *ILJ* 644 (LC).