REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C932/2013

In the matter between:

BIDVEST DATA (PTY) LTD	Applicant
And	
STATUTORY COUNCIL, PRINTING, NEWSPAPER & PACKAGING INDUSTRY	First Respondent
G. McEWAN N.O.	Second Respondent
MBUYISELO MASITO	Third Respondent

Date heard: 17 September 2014

Delivered: 5 February 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an award under case number PNPI 1715, which was handed down on the 18 November 2013 by the second respondent (the arbitrator). The applicant company seeks that the award be reviewed and set aside and substituted by a finding that the dismissal of the third respondent (Masito) was procedurally and substantively fair. In terms of the award, Masito was reinstated after a

finding that his dismissal was both procedurally and substantively unfair.

[2] The dispute has a long history. It has been twice heard under the auspices of the first respondent (the Council). This court reviewed the first award under case number C887/2011 and remitted it to the Council.

[3] Masito was dismissed for incapacity arising from ill health due to his diabetes. He was employed as a laser operator in the laser printing department of T – Systems, a company that provided printing services to Woolworths (Pty) Ltd. In July 2010 his contract of employment was transferred to the applicant when it took over the Woolworth's printing account.

[4] Masito was 50 years old at the time of his dismissal and suffers from type1 diabetes. In terms of his employment contract with applicant, he was required to work a "continental shift system". This was a three-week shift system comprising shifts of 11.5 hours with the following rotation:

4.1 week one: Friday, Saturday and Sunday (07:00 – 18:30).

4.2 week two: Monday – Thursday day shift (07:00 – 18:30).

4.3 week three: Monday – Thursday night shift (19:00 – 06:30).

4.4 week four: Friday – Thursday: seven days off duty.

[5] Masito started encountering problems with the nightshift due to his diabetes and took an excessive amount of sick leave. In his first 10 months of employment with the applicant, he took 220 hours of sick leave out of his total sick leave entitlement of 240 hours for a 36 month period.

[6] Applicant's industrial relations manager, Belinda Meuldijk, held eight meetings relating to incapacity (ill-health) with Masito in the period from March to June 2010 and after looking at alternatives to Masito working nightshift, the applicant came to the conclusion that they could not accommodate him and dismissed him.

[7] The arbitrator, on the basis that Masito's dismissal was related to his Type I diabetes, called an expert witness, Prof Francois Bonnici (Bonnici). The applicant submits that the award stands to be reviewed as the evidence of this expert witness relied on by the arbitrator was partially off the record and partially on the record. Further, that the evidence was of a general nature and that little if any weight should properly have been attached to such evidence by the arbitrator. Of particular concern to it, is the arbitrator's summary of Bonnici's evidence on page 27 of the award. The 24 lines of the award, summarising his evidence are in fact a verbatim copy of findings in this court in a judgment by Murphy, AJ (as he then was) in his judgment in **Independent Municipal Trade & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC)** a case that was never referred to during the hearing. Bonnici had been an expert witness in that case.

[8] It is submitted by the applicant that the facts in the **City of Cape Town** case are not at all similar to those of the matter before the arbitrator, and neither was the nature of the evidence which Bonnici provided in the two matters. It notes that in the **City of Cape Town** case, Bonnici was testifying in relation to his actual experience treating an otherwise very fit diabetic firefighter, who was only 31 years of age at the time, and he had treated for some 20 years. In this case Masito was never treated by Bonnici and the applicant submits as such that none of his evidence was specifically relevant to Masito's case.

[9] It is further submitted by the applicant that the arbitrator's decision to include a fourth issue in dispute in the proceedings, namely whether the company did enough to investigate the incapacity of Masito at the time, constitutes a reviewable irregularity. This was after three issues in dispute had already been agreed to by all the parties at the start of the hearing of the matter.

[10] The applicant also submits that the award stands to be reviewed because the arbitrator failed to apply her mind to the evidence. The award states that: "The entire incapacity process was based on a false premise that the cause for the excessive sick leave taken by Masito was due to his diabetes." The award then goes on to record that because the reasons provided for his ill-health in relation to his absences during 2010 where apparently all due to issues other

than diabetes or hypertension, the ill-health incapacity process was inherently flawed from the start.

[11] The applicant argues that the award therefore overlooks the fact that the ill-health which Masito suffered and which was the reason for his absences was caused by or related to his type I diabetes. All the medical practitioners involved in the case, who gave evidence confirmed that his apparent inability to work night shifts stemmed from precisely his diabetes.

[12] The applicant also takes issue with the arbitrator's statement that it would be possible for Masito to return to work immediately if reinstated and that the evidence showed this would not be a problem.

[13] The grounds of review also include what are referred to as "mistakes of law". These are:

13.1 First, that the award suggests it was an obligation of the company to provide actual medical treatment to its employee rather than have him assessed and then rely on the expert opinion of its assessing physician Dr West.

13.2 Second, that it is suggested by the arbitrator that the company should be held liable for wrong/incomplete expert advice, which it received and on which it relied.

13.3 Thirdly, that that the award states that "it is always ill-advised for a single person to do the investigation, seek alternatives, make reasonable accommodation and to dismiss, all of which Meuldijk in this instance attempted to do…" It is submitted on behalf of the company that the arbitrator's statement likened the inquisitorial approach of the ill-health incapacity investigation, to a disciplinary scenario, which was not appropriate.

13.4 Finally, it is submitted that the arbitrator's suggestion that the applicant should look at whether there was a suitable alternative position at its holding company was wrong in law in that this is not what is meant by the reasonable accommodation of an employee in the circumstances.

Evaluation

[14] I should state the outset of evaluating the review application in this matter, that the heads of argument for the applicant are 77 pages long, and for the third respondent some 49 pages. In addition to this, I was provided with two full lever arch files of authorities comprising some 831 pages by the applicant. An avalanche of such paper is really of no assistance to the court. What I shall attempt to do in the midst of the reams of information at my disposal, is to focus on the essential questions to be considered in a review application such as this.

[15] First I must comment on the way in which the arbitrator has relied on the expert evidence of Prof Bonninci. I have had regard to the **City of Cape Town** case referred to by the applicant in which the professor gave expert evidence and agree that certain passages from the judgment of Murphy, AJ (as he then was) are taken verbatim from that judgment, with no indication being given as to such reliance. Of particular concern, is the fact that the arbitrator evaluates the evidence of the other medical witnesses in her arbitration using precisely the same words as those used in that judgment, but merely changing the names of the doctors[1]. I also agree with the submissions of the applicant that the fact that the professor had not treated Masito or examined him, but was merely privy to the various medical reports contained in the bundle of documents, appears not to have weighed with the arbitrator.

[16] In fact, the evidence given by Prof Bonnici at this arbitration was short in duration. The gravamen of such evidence is really encapsulated by his view that primary health care facilities could not give Masito the necessary education and tools to control his blood sugar levels. Further, that he deserved to be referred to a tertiary care clinic and at these clinics: “they have access to different insulin analogues, long acting, flat, short acting and that they could educate Mr Masito on a new regime that might be able to avoid high swings.”

[17] I also noted that the Professor’s view on the fact that night shifts can cause havoc to the management of type 1 diabetes if the patient is not appropriately

[1] Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC) at paragraph 31

counselled and treated. In as far as the reasons for Masito's absences for the past two years and whether they were related to diabetes are concerned, the record reflects the following:

> 'COMMISSIONER: I think the question that is being asked, is that how many of the absences that you recorded were unrelated to the type 1 diabetes?
>
> MR ELLIS: We can't express a view on that.
>
> PROF BONNICI; No, no, no.
>
> MR ELLIS: A doctor can only – a doctor will tell us a person is sick or not sick. So …(intervention)
>
> PROF BONNICI: Ja. I mean there's something and I read – I mean it says acute diarrhoea, the other one says, (indistinct) respiratory tract infections. The other one says gastro. The other one says back injury. The other one says nothing. The other one says abscess. The other one says, I can't read – influenza. The other one – so you know, I mean that's all I've got as as a reason for …(intervention)…….
>
> PROF BONNICI: …….I'm a bit unhappy with the reasons of the leave, because very few of these leave record mention inability to work shifts or erratic blood sugars and they all have a medical reason for the leave….."

[18] From the above, the arbitrator found that:

> "Bonnici having examined the medical certificates confirmed that none of the sick leave which gave rise to the incapacity meetings is diabetic specific related."

She also found that:

> "Masito was taking sick leave but not related to him being a type one diabetic – which is the reason for his ultimate dismissal which is inherently unfair."

[19] Masito himself gave evidence regarding his health at the proceedings and in particular the sick leave he took, while being examined in chief. He stated:

"The sick leaves most of the time were caused by the way I eat, the way not doing enough, the shift does not allow me to do some exercising, because I don't get time to do other things that I need to do as a diabetic."

[20] Under cross-examination, the issue of poor self-management was also raised:

> "MR ELLIS: Mr Masito, would you agree with me that your medical condition is your responsibility?
>
> MR MASITO: Yes
>
> MR ELLIS: And is that something that the employer ever said to you in the process? When I say employer, I'm talking about Shaun Abrams, Ms Meuldijk and the like.
>
> MR MASITO: Ms Meuldijk did say that and they said that we will work with you to help you.
>
> MR ELLIS: So if it is your responsibility, what do you think that means?
>
> MR MASITO: It means that I must take charge.
>
> MR ELLIS: Yes. Now at the time some of the issues that were raised were lifestyle issues, that you were not eating right. I think you said sugary stuff is not the problem, it is the fatty stuff that is the problems that correct? In those discussions with Ms Meuldijk and Mr Abrams.
>
> MR MASITO: Yes.
>
> MR ELLIS: It is recorded in one of the minutes, you stated that the sugary stuff is nor the problem, page 171, it is really the fatty foods "that are too tempting for me".
>
> MR MASITO: Yes"

[21] Over and above her understanding and treatment of the evidence of Bonnici, the arbitrator appears to have painted a picture of Masito that was not realistic and could be described as stereotyped. She comments that:

> "Masito is a black male and as Bonnici testified was trapped in the primary health care offered by the state."

[21] A consideration of the evidence given by Masito himself who was employed in a skilled position, paints a different picture. When describing Dr Rhoda his family doctor who had been treating him for many years (who was not called upon to testify, he stated):

> "MR MASITO: He was treating me for the …it was like attending the diabetic clinic. I was attending it direct to him, because I had medical aid, better off than going to the clinic.
>
> MR ELLIS: Yes
>
> MR MASITO: and the monitoring of how much you need to take and all that, what tablets to take and all that.
>
> MR ELLIS: Yes but at this stage your doctor says there, if I can read:
>
> "Problem: recent poor diabetic control largely due to lack of exercise and suboptimal diet."

[22] It would appear from the record that the attendance at the primary health clinic by Masito was in fact after he was dismissed and not during the course of his employment when he had medical aid. It is essentially on the basis of her understanding of the testimony of Bonnici that the arbitrator came to her decision on the reinstatement of Masito. It is illuminating to refer to the final paragraph in her award in this regard, which reads, inter alia:

> "Masito seeks retrospective reinstatement with full back pay. Whilst it was recommended that he only work day shift, the evidence of Bonnici was that it is highly probable that Masito on the correct insulin and education would be able to manage all shifts, as he has done over many years. The incapacity process and the reasons for the sick leave taken are not related to diabetes. The employment relationship is intact and I find no reason not to retrospectively reinstate Masito with effect from 1 December 2013."

[23] Given the evidence before her and her treatment of it, I find that the arbitrator's remedy in view of a finding of a substantively unfair dismissal was not reasonable. Her understanding of the evidence given by Bonnici was deeply flawed as was her reliance on his evidence to decide that Masito could

now work the night shift, given that Bonnici had never examined Masito. This must mean that the reinstatement order stands to be set aside. The issue that I must now deal with is whether the arbitrator's finding that the dismissal was substantively unfair is susceptible to review.

[24] Key to assessing her finding on procedural and substantive fairness is a consideration of the issue of 'reasonable accommodation'. In **Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration & others**[2] the court per Pillay J considered what is required from an employer in an incapacity case as follows:

> "[70] As an employer bears the onus of proving an employee's incapacity to justify dismissing her, the LRA guidelines for incapacity dismissal contemplates a four-stage enquiry before an employer effects a fair dismissal…..
>
> [71] An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee's recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to 'investigate the extent of the incapacity or the injury ... (d) ... all the possible alternatives short of dismissal'.
>
> [72] Stage one: The employer must enquire into whether or not the employee with a disability is able to perform her work. If the employee is able to work, that is end of the enquiry; the employer must restore her to her former position or one substantially similar to it. Where possible, the job should correspond to the employee's own choice and take account of her individual suitability for it. If the employee is unable to perform her work and her injuries are long term or permanent, then the next three stages follow.
>
> [73] Stage two: The employer must enquire into extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work.

[2] (2008) 29 ILJ 1239 (LC)

The employer may require medical or other expert advice to answer this question.

[74] Stage three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee.

[75] During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including 'the nature of the job, the period of absence, the seriousness and of the illness or injury and the possibility of securing a temporary replacement' for the employee.

[76] Stage four: If no adaptation is possible, the employer must enquire if any suitable work is available."

[25] The arbitrator considered reasonable accommodation in her award recording that a number of alternatives were considered by the company. It was thought that Masito should be placed only on day shifts as recommended by the company's occupational health physician, Dr West. A notice went out calling for volunteers to swap the nightshift with him, with an increase of 5% in the shift allowance to compensate for the extra week worked on the nightshift. There were only three volunteers – Ford, Fortuin and Zaheer. Despite this being a temporary arrangement, Ford was discounted due to being a trainee; Fortuin had his own health problems and Zaheer having come from Woolworths was 'perfect'. He did not arrive for his first night on the shift for Masito and was thereafter also disregarded. It was never specifically mentioned that such a volunteer may get the full shift allowance nor was this avenue pursued. The arbitrator agreed with Masito when he said the employer did not do enough in this regard. She states in the award:

"Masito could also have been given the opportunity to ask his colleagues himself, which may have produced a different outcome. The cross-training of operators is pertinent at this point, as had more operators been trained on different machines, then the pool of possible operators would in logic have been bigger. It was abandoned too quickly after Zaheer was absent on the first swap shift. This was after all a temporary measure to see what could be done and never fully tried.

Another alternative considered was to place Masito in a position which did not require him to work nights. This, too, in my view, was not appropriately handled. No one seeks a reduction in their salary. But when faced with accept a Rand amount or dismissal, I am confident that most would accept the Rand amount in these tough economic and jobless times. No specific position was ever mentioned to Masito nor was what he would be earning in that position specified in order for Masito to come to a reasonable decision. It is unacceptable for Meuldjik to have brushed this aside and said apply for any of the vacancies advertised by email. It was incumbent on her, especially given the long service of Masito to have assisted in the process and gone through all the jobs. In her testimony Meuldjiik conceded that had she gone through the company, job by job, she would probably have been able to come up with a position for Masito. The holding company Bid West group was never approached to see if they had pursued even if this was not the usual practice……"

[26] A look at the record does not reveal the concession by Meuldjik that she would have probably have come up with a position. What the record reflects is that while Meuldjik agreed that there may have been administrative positions that Masito was qualified for if every position in the company was considered, there were no vacancies. What does emerge from the cross-examination of Meuldijk however, are two pertinent issues as follows:

26.1 The issue of Masito working shorter hours on the night shift, by not working overtime, was on the table during consultations in particular at the second and third meeting. Masito preferred the option of only

working day shift but did not reject the option of shorter hours. Abrahams, supervisor of Masito said he was prepared to try this on a trial basis as a last resort. Meuldijk concedes that this was never put into practice on a trial basis and that it was never taken off the table by Masito or Abrahams. Her explanation that this was because she did not believe he could work nights shift was belied by the fact that Masito was put back on night shifts proper as a last chance, before his dismissal.

26.2 Despite the long service of Masito (he was first employed by previous owners of the company in 1998), by the second meeting on 25 March 2011 he was informed of the possibility of his dismissal. The incapacity process was just short of three months. Meuldijk testified that it is probably the culture of the company not to dilly dally and that:

"Probably I wanted to get things as much done as possible before the next night shift loomed. So ja, that's all I can say on that. And it is driven by concern, concern for Mr Masito as well as …….(intervention)."

[27] Taking the approach set out in the case of **Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others** [3] the above issues are the reasons (albeit not the same as those highlighted by the arbitrator) that I find sustain her decision that the dismissal of Masito was unfair. The company did not adequately explore the alternatives and/or suitable adaptation to the full night shift, and the inference can be drawn that this was due to the "no dilly dallying" attitude taken by the company. Such renders the decision on procedural and substantive nature of the dismissal reasonable.

[28] I note that applicant's heads of argument were written before the SCA **Herholdt**[4] judgment. This review is considered in light of that judgment and the LAC **Goldfields**[5] matter. I have found the decision in respect of the

[3] (2008) 29 ILJ 964 (LAC) at paragraph 102
[4] Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA)
[5] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC)

procedural and substantive unfairness of the dismissal to be within the bounds of reasonableness, while the remedy of reinstatement stands to be substituted for the reasons stated above. I do not consider the issues raised by the applicant as 'mistakes of law' by the arbitrator to be of the nature of latent gross irregularities as understood in our law[6]. The review ground relating to the commissioner's decision to allow for a further issue in dispute is also without merit given the provisions of section 138 of the LRA.

[29] It is in the interests of justice, given the full record before me, and the history of this matter, that I should substitute the award of the arbitrator and not remit the matter back for a third time. I have already stated that the basis for the reinstatement order by the Commissioner is not sustainable and it stands to be set aside. In such circumstances, and given there is no evidence before me that it would be reasonably practical for Masito to be reinstated into the position he was in, I consider that compensation will be the appropriate remedy for his unfair dismissal.

[30] Given that the finding on procedural and substantive unfairness of the dismissal is upheld (albeit for reasons other than those highlighted by the arbitrator) and that it is only the remedy that must be substituted, I see no reason why costs should not follow the result. I therefore make the following order:

Order:

1. Paragraph 43 of the arbitration award under case number PNPI1715 is set aside and substituted as follows:

    "a. The dismissal of Mbuyiselo Masito was procedurally and substantively unfair.

    b. Bidvest Data Pty Ltd is ordered to pay Mbuyiselo Masito an amount equal to 12 months' salary as compensation being an amount of R18 843.00 X 12 = R 226 116.00. "

2. The payment of compensation must be made within 20 days of this order.

[6] See Herholdt supra at paragraph 21

3. The applicant is to pay the costs of this application.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Edwin Ellis of ENS

Third Respondent: Adv. A Aggenbach instructed by D. Butlion Attorneys