Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C867/2017

In the matter between:

ATLANTIS FOUNDRIES (PTY) LTD	**Applicant**
and	
NUMSA obo MORNE BROWN	**First Respondent**
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**Second Respondent**
BELLA GOLDMAN (*N.O.*)	**Third Respondent**

Date of Set Down: 4 June 2018

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 27 August 2020

Summary: (Review – Dismissal for incapacity - test of review on reasonableness and relationship to founding papers – misconstruing correct test of procedural fairness – frequent absenteeism for various illnesses justifiable reason for dismissal – prior to year in question, employee having long history of good attendance - *prima facie* reason existed to believe there might be an underlying cause of such illness, which had not been investigated by a psychologist and where employee participating in an employee assistance program which was still underway - dismissal for incapacity premature – defects in arbitrator's reasoning on substantive fairness not rendering her ultimate conclusion unsustainable)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review an arbitration award. The employee, Mr M Brown ('Brown') was dismissed for incapacity by the applicant ('Atlantis'). The arbitrator found his dismissal was procedurally and substantively unfair and reinstated Brown to the date of his dismissal but reduced the amount of backpay due to him by seven months owing to the duration of the arbitration proceedings.

The award

[2] Brown was dismissed for incapacity on 19 October 2015 after a history of absences for various medical conditions. Atlantis has a procedure for dealing with problems of incapacity, which is outlined below. It should be mentioned that the procedure was introduced early in 2015 to address problems of high absenteeism.

The company's incapacity procedure

[3] The comprehensive company procedure does distinguish between the handling of serious, long-term, recurring or chronic illnesses and high frequency absenteeism owing to sick leave. The procedure followed by the company in Brown's case was the latter. It is useful to summarise what the prescribed procedure entailed for frequent absenteeism owing to illness.

[4] The first step is that an informal meeting should be held with an employee if their level of absenteeism exceeds a standard set by the company from time to time. At that stage the employee should be advised that if their attendance did not improve a formal process which could lead to their dismissal should be followed.

[5] If an employee's absenteeism rate does not improve the guide line prescribes the following steps:

5.1 First formal meeting:

5.1.1 The employee should be issued with a notice to attend a counselling meeting.

5.1.2 An attendance improvement plan is to be discussed at the meeting in which the expected standard is clarified and possible corrective measures taken if necessary and possible, including amongst other things a medical examination.

5.2 Second formal meeting to review the AIP:

5.2.1 This meeting should take place either according to an agreed date or a few weeks thereafter, irrespective of the progress made.

5.2.2 If attendance has not improved to an acceptable level the employee must be warned that his employment contract could be terminated if there was no improvement or if the improvement was not sustained.

5.2.3 At the end of the meeting the employee should be issued with the review of progress against the AIP form and a letter warning of the consequences of failing to prove.

5.3 Third formal meeting:

5.3.1 An HR employee should also be invited to attend:

5.3.2 If attendance has improved to an acceptable level the employee should be encouraged to continue with the

improvement but warned that a relapse "within the next six months result in a continuation of the current process";

5.3.3 If the required standard of attendance has not been achieved a written ultimatum is issued informing the employee that "a continued failure to improve attendance or to sustain improved attendance" will result in an incapacity hearing.

5.4 Incapacity hearing:

5.4.1 The hearing is convened if the employee's attendance "is not improved to a satisfactory level, or who has relapsed after improved attendance not exceeding six months".

5.4.2 The chairperson must make a decision after considering a host of factors relevant to incapacity dismissals.

5.5 Review: If the employee is dissatisfied with the outcome of the hearing, the employee may ask for the decision to be reviewed by the next most senior line manager.

Application of the procedure in Brown's case

[6] Brown had been employed by Atlantis since May 1995. Apart from recuperating from an accident in 2014, Brown had no record of absenteeism for illness prior to 2015. His absenteeism on grounds of illness together with the employer's responses that year can be summarized thus:

Date	**Reason**	**Action by employer**
2 to 3 February	Back pain – doctor's certificate	
10 to 11 February	Back pain - doctor's certificates	
25 March		First informal counselling session
30 April	Influenza- doctor's certificate	

Date	Reason	Action by employer
25 to 26 May	Influenza-doctor's certificate	
7 to 9 June	Bronchitis- doctor's certificate	
10 June		First formal counselling session
23 to 26 June	Medical,condition-doctor's certificate	
12 to 19 July	Pericarditis – doctor's certificate	
23 July		Second formal counselling session-warning issued to improve attendance
7 August	Pericarditis-doctor's certificate	
18 August	Indecipherable doctor's certificate	
21 to 22 August	Shoulder pain-medical certificate	
24 to 25 August	Shoulder pain-medical certificate	
2 September		Third formal counselling session-ultimatum to improve attendance
7 to 9 September	Chest pain-medical certificate	
10 to 11 September	Gastritis-medical certificate Doctor's request for assistance for Brown to see a psychologist.	
8 October		Notice of incapacity hearing
13 October		Incapacity hearing
19 October		Dismissal for incapacity

[7] The arbitrator found that Atlantis failed to formulate an AIP with Brown. As Atlantis points out, it is true, that the counselling forms completed by Brown and Johannes did include a portion dealing with 'corrective measures', the content of which is dealt with below.

[8] . In terms of clause 8.4.1.2 of the Atlantis's procedure, the AIP set out at the first formal counselling session held on 10 June 2015 was supposed to clarify the standard expected of the employee and any corrective measures to be taken.

[9] The section of the counselling form completed at that meeting, which dealt with attendance standards, was completed as follows:

'1. What are the applicable attendance standards that the employee is not complying with?

- ✓ You have been absent from work for 8 amount of days [fill in number of days]
- ✓ You have been absent from work for 3 occurrences during the last 8 weeks.
- ✓ Your absenteeism history has proven that you are frequently absent from work.
- ✓ Your absenteeism is mainly around Mondays and Fridays.
- ✓ Your absenteeism is before and/or after Public Holidays.

  Management perceives the reasons for your absenteeism as plausible.
- ✓ Management perceives the reasons for your absenteeism as non--plausible.

  Management perceives your conduct is a form of incapacity relating to ill health/injury.
- ✓ Management perceives your conduct is a form of misconduct.
- ✓ Your frequent absenteeism is negatively affecting productivity output.

  Your frequent absenteeism is negatively affecting staff morale.'

(emphasis added)

This portion of the form did not appear on the forms for the subsequent second and third consultation meetings.

[10] Johannes recorded on the form that Brown had been counselled for three previous absences and was off twice during the last eight weeks. He also recorded that Brown did not agree there was a problem with his repeated absences over the previous weeks because he could not control when he fell ill, and he pointed out that he had a valid certificate on each occasion.

[11] Paragraph 4 of the form dealt with 'corrective measures'. The contents of paragraph 4 were repeated in the consultation forms for subsequent meetings, except that in the second and subsequent formal consultations,

the words '(Attendance Improvement Plan)' were added on by way of explanation. Paragraph 4 read:

'4. Discuss corrective measures with the employee. Try to reach agreement. Failing agreement, the supervisor/manager may decide on appropriate measures. (Attendance Improvement Plan)[1]

- ✓ The employee must improve his/her attendance to more acceptable levels.
- ✓ Encourage the employee to utilize his/her sick leave for genuine illness.
- ✓ Instruct the employee to communicate his/her absences as per the policy.
- ✓ The employee is required to provide feedback re his/her absence upon return to work.
- ✓ The employee to provide management was sick notes upon his/her return to work.
- ✓ Referred the employee to the clinic for a medical examination.
- ✓ Does the employee require treatment/rehabilitation.
- ✓ other.'

[12] At the first counselling session on 10 June 2015, Johannes ticked the following boxes in the list of remedial actions:

- ✓ The employee must improve his/her attendance to more acceptable levels.
- ✓ Encourage the employee to utilize his/her sick leave for genuine illness.
- ✓ The employee to provide management was sick notes upon his/her return to work.

[13] As far as a plan goes, the first form recorded what was unacceptable to management, namely eight days' absence on three occasions during an eight-week period. What might have constituted a 'more acceptable' level of attendance was not set out. The second remedial measure ticked off also reflected management's view that Brown's illnesses were not genuine but contrived.

[1] Bracketted portion does not appear in the first consultation meeting form.

[14] The second formal counselling meeting was held six weeks later on 23 July 2015. Prior to that Brown was absent twice, once for an undisclosed medical condition and once for treatment for pericarditis. The second formal counselling session had been scheduled for 8 August but it appears these two incidents led to the meeting being convened earlier on 23 July. At this meeting, corrective measures were recorded in the checklist as follows, with a handwritten addition to the last block:

> ✓ The employee must improve his/her attendance to more acceptable levels.
>
> ✓ Encourage the employee to utilize his/her sick leave for genuine illness.
>
> ✓ Instruct the employee to communicate his/her absences as per the policy.
>
> ✓ The employee is required to provide feedback re his/her absence upon return to work.
>
> ✓ The employee to provide management was sick notes upon his/her return to work.
>
> ✓ other. Employee will see a heart specialist, based on the medical check up 26 August 15 (….[2])'

[15] No specific attendance target was set, though it is clear that the employer was unhappy with the Brown's recurrent short absences due to illness and wanted it to come to an end. Naturally an employee can assume their employer would prefer no absenteeism at all, but what would constitute an acceptable reduction in his absences due to illness is not apparent from the pro-forma consultation form completed.

[16] Brown's explanation for the first absence was that he had suffered a loss of appetite and his doctor diagnosed him as suffering from bronchitis. He was subsequently admitted to hospital for

pericarditis. Other than repeating that he had to prove his attendance to more acceptable levels, use his sick leave for genuine illness, and to notify the employer when he was absent and provide feedback and the sick notes on his return, the only difference in the remedial steps going forward

[2] Unreadable entry in brackets.

was to record that Brown would see a heart specialist. Nevertheless, he was also issued with a warning for his former attendance stating that it had not improved satisfactorily and he could face dismissal if it continued. This was the warning which the arbitrator identified as being disciplinary in character. Johannes claimed that the company had accepted the hospitalisation for pericarditis as genuine as he Brown had fallen ill at work, but he struggled mightily to explain why the second counselling meeting was triggered by a further two absences if it was the case that this absence was ignored.

[17] At the last formal counselling meeting on 2 September 2015, following four separate absences, one of which also related to Brown's pericarditis, the counselling form recorded that since February Brown had been off sick for 25 days on 10 occasions and had been admitted to hospital. There was no agreement on remedial steps, and Johannes recorded the following:

- ✓ The employee must improve his/her attendance to more acceptable levels.
- ✓ Encourage the employee to utilize his/her sick leave for genuine illness.
- ✓ Instruct the employee to communicate his/her absences as per the policy.
- ✓ The employee is required to provide feedback re his/her absence upon return to work.
- ✓ The employee to provide management was sick notes upon his/her return to work.

[18] In addition, Brown was issued with an ultimatum which noted that insufficient progress had been made and which stated:

> 'You are hereby informed that unless your attendance shows a satisfactory and sustained improvement within the next six months*, an incapacity hearing will be held, which may result in dismissal.'

The note indicated by the asterisk stated:

> '*It is generally recommended that a period of six months should be given for improvement, but this may be deviated from in appropriate circumstances. HR should be contacted if the standard is deviated from.'

[19] After two further absences in the second week of September 2015, Atlantis issued the notice of the incapacity hearing.

Findings on procedural fairness

[20] The arbitrator found that Brown's dismissal was procedurally unfair for the following reasons. On 10 June 2015, after one particular absence, Brown was issued with a feedback form indicating that management did not accept that the reasons for his absenteeism were plausible and it believed his absences were a form of misconduct. The arbitrator also relied on evidence of the general foreman, Mr J Johannes ('Johannes'), to the effect that he conceded that Brown would not have been dismissed if management did not doubt the validity of his medical certificates, which were always obtained on the second day of his absences.

[21] The arbitrator held that absence without justification should have been dealt with as a disciplinary issue, as a matter of principle and in terms of the employer's own policy. The policy stated, *inter alia*:

> '8.3.6 if there is a suspicion that the absence is not justified, try and obtain the employee's cooperation in obtaining additional facts; for example an impartial medical examination at the company's expense: permission for the company's doctor talking to the employee's doctor all requesting information from the employee's doctor in writing.'

The arbitrator noted that the employer never referred Brown for an independent medical examination.

Findings on substantive fairness

[22] On the substantive fairness of the dismissal, the arbitrator reasoned as follows:

22.1 Even if Atlantis had been correct in following the procedure it did, it failed to consult with Brown about his ailments, nor had it attempted to find a solution and had not considered the prospect of suitable alternative employment for him.

22.2 Steps in the employer's own procedure were not followed as they should have been.

22.3 The procedure was followed in a rote fashion, with Brown's foreman being instructed by HR on when to take each step.

22.4 Despite knowing that Brown had personal problems requiring psychological help and heart problems, Atlantis did not refer him for medical examination before dismissing him, in circumstances where it doubted the validity of his illness claims.

22.5 Given Brown's possible heart condition, the employer should have followed the chronic long-term or recurring illness provisions of its own policy, instead of following the procedure for high-frequency absenteeism.

22.6 No standard of improvement in Brown's attendance were set for him despite the policy prescribing that an Attendance Improvement Plan ('AIP') should have been drawn up.

22.7 Atlantis dismissed Brown before he could complete an Employee Assistance Program ('EAP') and without obtaining any feedback on his progress under that process.

22.8 Atlantis failed to have regard to his previous long work record of 20 years and absence of any serious attendance problems prior to 2015.

22.9 Brown was dismissed on grounds of incapacity though he had been issued for a warning relating to absenteeism when he returned from hospital in July 2015.

22.10 Atlantis deviated from the provisions of its own procedure which prescribed that an employee should be given six months to improve his attendance. Instead, he was subjected to a disciplinary hearing barely a month after being advised that he had to demonstrate a satisfactory and sustained improvement in his attendance within six months, in circumstances where there was no justification for deviating from the six-month period.

Grounds of review

[23] Atlantis's grounds of review are set out in its founding and supplementary affidavit's. Most of the grounds advanced related to alleged flaws in the arbitrator's assessment of the evidence, which it claims amount to irregularities in the conduct of the arbitration. Although the grounds were largely expressed much in the way grounds of appeal, I will assume the intention was to express them as grounds of review. In summary they might be expressed thus:

23.1 The arbitrator reached a decision which no reasonable arbitrator could have done on the evidence before on the basis that:

23.1.1 she materially misconstrued which portion of the employer's incapacity procedure was applicable to Brown's case;

23.1.2 the evidence could not support her conclusion that Atlantis failed to formulate an attendance improvement plan with Brown;

23.1.3 the evidence did not support her finding that Brown was dismissed because his illnesses were not believed to be genuine in the employer's view;

23.1.4 the evidence could not support her finding that Brown had a heart condition or that the employer was aware of it;

23.1.5 the evidence could not justify a finding that Brown was never referred for an independent medical examination;

23.1.6 her conclusion that Atlantis did not consult with the employee about his ailments try and find solutions to his problem or alternative employment could not be justified on the evidence;

23.1.7 in determining that Brown's dismissal was substantively unfair the arbitrator misconstrued the extent of his absences and failed to consider and weigh that against how they affected the company, and

23.1.8 she failed to apply the correct test in evaluating whether or not Brown had timeously advised the company of his personal problems and whether he had been referred to counselling.

23.2 The arbitrator misconceived the nature of the inquiry by construing Brown's conduct as a matter that should have been handled using disciplinary measures.

23.3 The arbitrator erred in law when she held that the employer should have referred Brown for an independent medical examination before dismissing him.

[24] As mentioned, most of the initial grounds of review were cast in the form of alleged errors made in the arbitrator's reasoning or concerned a failure to have regard to material evidence. Although the broad averment is made that these rendered the arbitrator's conclusions unjustifiable on the facts, it is not entirely clear why Atlantis contends that they are fatal to the outcome reached by the arbitrator. It is a concern that some legal practitioners still phrase grounds of review as if they are pleading an appeal. Authoritative judgments of the Labour Appeal Court clarifying the test of review, in cases where the attack is based on reasonableness, should by now be common knowledge amongst practitioners. Practitioners ought to be well aware that it is not sufficient to allege some failure to take account of a material fact or error in reasoning on the evidence to establish a ground of review, viz:

> '[48] Recognition of a material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in

preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'[3]

[25] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC), the LAC has also emphasised that picking away at threads of an arbitrator's reasoning in a piecemeal fragmented fashion is not the correct way to approach a review. Although the court was referring to review based on irregularities in the conduct of arbitration proceedings, it is apparent from the passage cited below that this principle is applicable to any review premised on grounds of unreasonableness:

> '[18] In a review conducted under s 145(2)*(a)*(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.
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> [19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.
>
> [20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or consideration of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities,

[3] *Pepcor Retirement Fund & another v Financial Services Board & another*2003 (6) SA 38 (SCA) at 58-9 paras 47-48, cited with approval by the LAC in *SA Medical Association on behalf of Pietz v Department of Health, Gauteng & others* (2017) 38 *ILJ* 2297 (LAC) at 2310-2311, in the context of a review of an arbitration award.

did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork'[4]

(emphasis added)

[26] Further, it is not for the court to have to 'repackage' poorly pleaded grounds of review in the correct manner, where a party is legally represented. This is not merely a formality. The jurisprudence requires more of a party wishing to demonstrate the unreasonableness of an arbitration award than simply an iteration of alleged omissions and errors in reasoning on the part of the arbitrator, which counsel will attempt to give coherence to, only when heads of argument are filed. While an appropriate degree of allowance might be made for a layperson, there is no justification for practitioners, who are required to have the necessary expertise, to rely on the court to extrapolate what is missing from their chain of reasoning in setting out grounds of review.

[4] At 949-950.

[27] The current test of review which relies on flaws in the arbitrator's reasoning has been clearly articulated in the *Gold Fields* decision above and further articulated in the LAC decision in *Head of Department of Education v Mofokeng & Others.*[5] The judgements serve as clear guides to formulating grounds of review. In *Mokokeng* the LAC stated:

> '[32] … Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
>
> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to

[5] (2015) 36 *ILJ* 2802 (LAC) at 2813-4.

> lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination. '

(emphasis added)

[28] A clearer articulation of the connection between the allegedly flawed factual findings and the distorting consequences thereof only emerged in Atlantis's heads of argument. Additional grounds of review were also raised in the heads of argument, but the court can only have regard to those which were raised in the founding or supplementary affidavits.[6] Consequently, anything beyond the pleaded grounds of review is not dealt with.

Evaluation

Misconstruing the inquiry into procedural fairness

[29] Both parties agreed that the arbitrator was required to determine if Brown's dismissal on grounds of incapacity was fair. However, the crux of the arbitrator's finding that the dismissal was procedurally unfair was because she found that management disbelieved his illness was genuine, she believed Atlantis should have treated as a disciplinary matter and followed a disciplinary procedure. Consequently, she concluded that in following the incapacity procedure, the employer had acted unfairly. Plainly, the arbitrator misconstrued the test for procedural unfairness that she ought to have applied. Instead she ought to have simply measured whether the steps taken by Atlantis in dealing with Brown's incapacity prior to dismissing him were procedurally fair in keeping with the test for procedural fairness in incapacity dismissals.

[6] See *Tao Ying Metal Industry (Pty) Ltd v Pooe NO & others* 2007 (5) SA 146 (SCA); (2007) 28 *ILJ* 1949 (SCA) at 1979, para [98], and e.g. *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & other*s (2015) 36 *ILJ* 3045 (LC) at 3049, para [5].

[30] That said, it is apparent that, at the outset, management did not believe Brown's illnesses were genuine as reflected in the form completed at the first formal consultation and Johannes candidly testified that he doubted Brown would have been dismissed if it was not for scepticism about the genuine nature of his illnesses. No doubt this influenced the arbitrator's finding that Brown's absences should have been treated as misconduct and that his dismissal was procedurally unfair. On review, Atlantis tries to argue that it nonetheless proceeded to follow the incapacity route, on the basis that Brown's diagnosed illnesses were genuine, its scepticism was dispassionately put aside, and his dismissal was justifiable purely on an incapacity basis.

[31] The next question is whether, notwithstanding the arbitrator's erroneous approach to evaluating procedural fairness, she could still have reasonably concluded on the evidence that Brown's dismissal was procedurally unfair if measured against the correct test for procedural fairness. This raises a second difficulty in her reasoning.

[32] Atlantis contends that it was nonsensical for the arbitrator not to appreciate that Brown's absence owing to illness was of a regular, intermittent variety and dealing with it as a case of chronic illness, or incapacity resulting from injury as she seemed to suggest Atlantis should have, was unwarranted on the facts. Because the arbitrator believed Brown's heart condition and his request for psychological assessment indicated that further investigation was required rather than simply treating his incapacity issue as a recurrent pattern of illness for which no solution could be found, she felt the process followed by Johannes, who was acting on HR instructions, was inadequate and avoided consideration of whether there was any underlying cause for the recurrent absences. The difficulty in the arbitrator's reasoning is that an underlying psychological reason for the physical manifestations of some of his illness only arose as a possibility in mid-September 2015 and Brown had given no inkling of this before then. By that stage the final counselling meeting had been held and he was already under a final ultimatum.

[33] Even if the arbitrator was of the view that there was more to Brown's absences that the initial diagnoses indicated, Atlantis argues that Johannes and the company could not have been aware of that until very late in the process. Consequently, it is difficult to see why it could be faulted in following the process for regular, short absences on account of illness. For that reason also, it could not have been found on the evidence that Atlantis did not follow the right procedure.

[34] Some of the other criticisms of the arbitrator's reasoning relate to those aspects of procedure which impact also on substantive fairness, and are dealt with in the discussion below.

Findings on substantive fairness

[35] Can it be said that the arbitrator could not have possibly concluded that there was no attendance improvement plan that was formulated? It is indisputable that Brown was told to improve his performance and by implication what was *not* acceptable. He was also warned not to abuse sick leave. Johannes understood this to constitute the plan. That may not have amounted to much of a remedial program but it did set out some parameters of what management required. Neverthelss, even if it cannot be said there was absolutely nothing to guide Brown going forward, whether this amounted to a plan in a meaningful sense is a matter that reasonable arbitrators might differ on.

[36] Was the arbitrator's finding that Brown was never referred for an independent medical examination without any justification? This point is intimately connected with an attack on another of the arbitrator's findings, namely Atlantis that did not consult with Brown about his ailments and try and find solutions to his problem or alternative employment.

[37] Atlantis argues that since the counselling form contained a tick box which states, "Does the employee require treatment/rehabilitation", it was highly improbable that Brown was not asked about any corrective measures or assistance the employer could provide, contrary to his testimony. However, Johannes's evidence under cross-examination was that Brown was not specifically asked if he wanted to be referred to the EAP, nor did

he request it. He disagreed that Brown's recorded request to see a doctor to make an appointment with the hospital during the final counselling session was because Brown needed a doctor's referral to see a psychologist. As far as Johannes knew, this was a reference to a follow-up on the pericarditis treatment Brown had received. I do not understand how it can seriously contended that Brown must necessarily have been asked if he needed any assistance merely because the relevant box was not ticked, especially as Johannes's own evidence in support of an engagement between them on this issue was poor.

[38] On 11 September 2015, the same day Brown was issued with a medical certificate for gastritis and about a month before the notice of the incapacity enquiry was issued, Brown's doctor wrote a letter expressly requesting assistance for Brown to see a psychologist as Brown's medical aid did not provide for that. The doctor was of the opinion that the recurrent chest pain Brown had consulted him about might have a psychological cause. Johannes denied that Brown had related any of this to him, or that he told him he was having personal problems, but Atlantis accepts that the doctor's request was given to Johannes on 16 September 2015.

[39] Ms L Limerick ('Limerick'), an HR staff member, said that providing financial assistance for a psychologist would have required approval, probably after assessment by a social worker. She could not say that such approval would have been forthcoming. It was not disputed that Brown had already had one consultation under the EAP at the time the financial request for a psychological consultation was made, but Limerick testified that once the ultimatum had been issued it would not have altered the scheduling of the incapacity hearing, even if the EAP was incomplete.

[40] In the circumstances, whatever weight should have been attached to it, it cannot be said that the arbitrator's conclusion that Atlantis itself never sought to refer Brown for an independent medical examination was completely unwarranted on the evidence that was placed before her. It is true that the decision of the chairperson of the incapacity enquiry suggests otherwise. However, on the record filed, no evidence was led to confirm

what transpired at the enquiry itself. The mere fact the inquiry outcome was in the bundle of documents, does not mean anything in that document was confirmed in evidence at the arbitration.

[41] In any event, Atlantis argues the arbitrator erred in law when she held that it was obliged to have referred Brown for an independent medical examination before dismissing him. Atlantis's own incapacity procedure did provide for the company to require an employee to obtain an independent medical opinion in cases of serious illness, but that cannot be relied on to create an obligation to obtain independent medical advice in Brown's case, as there was no claim by him that he was incapacitated by some form of serious illness which was the underlying cause of most of his absences.

[42] The arbitrator referred to the case of *Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 1239 (LC) in support of the contention that Atlantis was obliged to have paid for Brown to see a psychologist. She saw an analogy between the bank and Atlantis on the basis of their supposedly comparable financial ability to pay for a specialist.

[43] The *Standard Bank* case concerned a very different set of facts. In that matter, the court clearly held that the responsibility lay on the bank to pay for a report of an occupational therapist, in circumstances where it knew the employee had been incapacitated by a car accident whilst on duty. The court found on the evidence that the bank *would* have paid for such a report, not merely that it *might* have, but the bank did not want to authorise it because it was intent on dismissing the employee and the report might have forced it to consider other options.[7] In that case, unlike in this one, there had been also been extensive engagement by the employee about her condition with management over a long period of time. The employee had been trying to demonstrate that, with the appropriate adaptation of her work, she was capable of continuing to work and had made a number of proposals in that regard, whereas the bank was refusing to implement any

[7] At 1248 para [34] and 1250 para [44].

of the changes she had proposed which would have enabled her to do so.[8] In that case an OT report would have been critical in deciding whether or not there was no alternative but dismissal, and the court held that the bank had deliberately ignored the advice of doctors on four occasions on the need to obtain an OT report.[9]

[44] In Brown's case, before he had been issued with a notice to attend an incapacity hearing, he made an admittedly belated request for assistance to see a psychologist, though it appears this enquiry was based on the doctor's own recommendation and provisional diagnosis. It was also acknowledged that he had seen a social worker under the company's EAP and was due to see the social worker again at the time the enquiry took place.

[45] The arbitrator's finding that Brown definitely had a heart condition, was not justifiable even though the company did not dispute that he had been hospitalised for it, and had not intended that the episode should be taken into account in his absenteeism history. Similarly, her criticism of Atlantis for not consulting with him about his ailments was not warranted in the sense that at the time of his dismissal, no overarching cause of his illnesses had been identified, to which a solution might be suggested. Nevertheless, it is true is that Atlantis proceeded to dismiss Brown without seeing if there might have been an underlying cause for some of his absences, in circumstances where he was using the EAP and where Atlantis had received a medical opinion that his symptoms might have a psychological explanation that required a specialist's diagnosis, but this had not yet occurred.

[46] In *General Motors SA (Pty) Ltd v National Union of Metalworkers of SA & others* (2018) 39 *ILJ* 1316 (LC), the labour court summarised the principles applicable to incapacity dismissals based on frequent absenteeism for illness.

> '[12] Given the applicants grounds for review, it is also necessary to summarise, in brief terms, the legal principles applicable to sick absence.

[8] At 1250-2, paras [45] to [58].

[9] At 1273, para [144].

In *AECI Explosives Ltd (Zomerveld) v Mambalu* (1995) 16 *ILJ* 1505 (LAC); [1995] 9 BLLR 1 (LAC), the Labour Appeal Court said the following:

> 'It seems to us that the company, having accepted the authenticity of the medical certificates, was entitled to rely only on incapacity. It was entitled to dismiss the applicant "for his incapacity to perform his job where such incapacity [was] due to persistent absence from work because of genuine ill health" (per Tebbutt J in *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1992) 15 *ILJ* 304 (LAC) at 312I-J). The test for substantive fairness was stated by Tebbutt J at 313A-D to be the following:
>
> > "The substantive fairness of the dismissal depends on the question whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include inter alia the nature of the incapacity; the cause of incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on other employees; and the employee's work record and length of service." '

[47] The case both affirms the principle that frequent absenteeism for illness is a justifiable reason for absenteeism and that the cause of the incapacity and likelihood of improvement are factors to be considered in determining the substantive fairness of the dismissal. Given that, was the arbitrator's conclusion that Brown's dismissal was substantively unfair, unsustainable on the evidence? In circumstances where a medical opinion has been expressed that some of the Brown's physical illness might have had a psychological origin, which required psychological expertise to determine, and where he was undergoing consultations with a social worker under the employer's own EAP, which was not yet complete, it does not seem to be a conclusion the arbitrator could never have reached. Even if Brown had been reluctant to raise the nature of his personal problems with his foreman, the EAP provided a channel for doing that and it could not have been assumed after one session that an attempt to address them had

been made but failed. The evidence can support a conclusion that the incapacity hearing should have at least been postponed pending the outcome of a psychologists' consultation and to see if the EAP process yielded any improvement. If Atlantis was not willing to pay for a psychologist, and assuming without deciding that it was not obliged to, it could at least have advised Brown that it would consider a psychologists' report on if he obtained one and if the report provided grounds for believing his frequent absenteeism could be resolved. Atlantis was not in a position to just assume that such a line of inquiry and potential treatment was pointless. Further, given Brown's prior unblemished history of work attendance over twenty years the change which occurred in his attendance in 2015 was plainly an aberrant departure from a long standing trend and required a more considered approach. Atlantis's failure to provide an opportunity for these processes to take place also provides support for the arbitrator's view that the employer had simply followed the steps in its procedure in an automatic fashion.

[48] Thus, despite a number of significant limitations in the arbitrator's reasoning, it cannot be said these meant that her ultimate finding of substantive unfairness was unsustainable on any plausible reading of the evidence, even if her finding on procedural fairness cannot be sustained.

Order

[1] The finding of the third respondent in her arbitration award of 9 November 2017 in case number MEWC 10286 that the dismissal of Mr M Brown ('Brown') was procedurally unfair is reviewed, set aside and substituted with a finding that his dismissal was procedurally unfair.

[2] The findings of the third respondent that Brown's dismissal for incapacity was substantively unfair and the consequential relief awarded by the third respondent remain unchanged.

[3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives -

For the Applicant:	**C S Bosch instructed by Gavin Weiner and Associates**
For the Third Respondent:	**T Bandile of NUMSA**