REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1483/2012

In the matter between:

MEDSCHEME LTD **Applicant**

and

VENESSA PILLAY **First Respondent**

ROB MCCANN N.O. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **16 July 2013**

Delivered: **19 November 2013**

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – consideration of current developments of the review test – practical application of review test set out – determinations of commissioner compared with evidence on record – commissioner's decision irregular and unsustainable – award reviewed

and set aside

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – commissioner failing to determine evidence reasonably and rationally – award set aside

Incapacity – ill health – objectives of the process in Schedule 8 – determination as to the compliance with such process – duties of employer and employee - commissioner failing to properly apply legal principles applicable to determination of dismissal for incapacity / ill health

Incapacity – ill health – when dismissal appropriate – proper consideration of alternatives – dismissal justified

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the third respondent). This application has been brought in terms of section 145 of the Labour Relations Act[1] ("the LRA").

[2] The applicant dismissed the first respondent on 5 December 2011 for reasons related to incapacity based on ill health. The first respondent pursued her dismissal as an unfair dismissal dispute to the CCMA and the matter came before the second respondent for arbitration on 23 April 2012; pursuant to which arbitration proceedings the second respondent determined that the dismissal of the first respondent by the applicant was substantively and procedurally unfair; and he, consequently, made a determination in terms of which the applicant was

[1] No 66 of 1995.

directed to reinstate the first respondent with retrospective effect to the date of her dismissal. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant, which application was timeously filed on 25 June 2012.

Background facts

[3] The first respondent commenced employment with the applicant in September 2000, and was employed by the applicant as a call center agent in its Durban contact center. The applicant's call center is an inbound call center in which the applicant attends to telephonic queries from medical practitioners as well as members of the medical aid operated by the applicant about medical aid claims and benefits, and the first respondent is one of the agents who attend to such queries in the call center. The first respondent's manager in the call center was Ursha Singh ('Ursha').

[4] In and during May 2011, the first respondent became ill. She was off work from 3 to 6 May 2011. Then the first respondent was off work again from 11 to 18 May 2011 and this time she submitted a medical certificate recording that she had laryngitis. Having to use her voice over a telephone, this clearly had a material impact on her duties as call center agent.

[5] On 19 May 2011, Ursha, the HR call center manager Judysha Singh ('Judysha'), and the first respondent's supervisor had a discussion with the first respondent about her illness. The first respondent contended that she was very ill and was unable to work in the call center. The first respondent, in fact, asked to be off call center duties for six months and asked to do back office work or banking. It was explained to the first respondent that there was not really sufficient back office work and that she was needed on the telephones. The first respondent was informed that, as at this time, she had 12 days sick leave available. The first respondent was then off sick for the remainder of May 2011.

[6] On 15 June 2011, the first respondent was then hospitalised. She was discharged on 23 June 2011 but remained off work until 1 July 2011 on the basis that she had been booked off work by her doctor. At this stage, all her sick leave had been exhausted and she requested special leave. As a result of all of this, she remained unable to use her voice operating a telephone in the call center.

[7] On 4 July 2011, the first respondent submitted a medical certificate dated 1 July 2011 and which recorded that she had surgery and should be excused from call center duties for a month. At this point, the senior HR manager, Abigail Croy-Williams ('Abigail') was consulted by Ursha, and Abigail advised that a consultation would have to be held with the first respondent to discuss his illness, how to possibly accommodate her, and what to do about the fact that the first respondent had no more sick leave available.

[8] Judysha consulted the first respondent on 11 July 2011. The first respondent indicated that she was unable to do work where she has to speak over the telephone. Judysha explained to the first respondent that there simply was not sufficient back office work and for her to do banking, as she suggested, entailed her having to make outbound telephone calls to service providers which again requires speaking over the telephone. It was discussed that the first respondent stay off work whilst she was 'booked off' from working on the telephone but since her sick leave was exhausted, she could take the 16 days annual leave still available to her or the further sick leave will be unpaid. The possibility of temporary medical boarding was discussed and it was decided that this would be explored with HR. Finally, and in this discussion, it was specifically conveyed to the first respondent that if all these 'interventions' proved unsuccessful, the applicant would be compelled to proceed with formal incapacity proceedings.

[9] Following this discussion on 11 July 2011, the possible alternatives available to accommodate the first respondent were then actually explored by the applicant. The actual nature of the first respondent's illness was also considered and it was

accepted that the first respondent was currently unable to fulfill her duties as call center agent in the call center. In considering alternative means to accommodate the first respondent, it was apparent that due to the nature of the applicant's business, no such alternatives were in fact available. Following a discussion between the first respondent and Abigail about all the above issues, and in an e-mail on 25 July 2011, Abigail recorded that it was apparent that the first respondent was unable to fulfill her duties and that there were no alternatives available. The first respondent was required by Abigail in this e-mail to take her annual leave to cover her absence from work, as her sick leave in the current cycle ending on 31 August 2012 was exhausted (save for one day). It was recorded that any additional absence would be unpaid but the applicant would still pay the first respondent's major employment condition contributions. It was recorded that as soon as the first respondent's doctor certified her as being fit to return to work, she would be welcomed back at work immediately.

[10] The above discussion with Abigail was preceded by a medical certificate submitted by the first respondent that recorded that her voice would be weak for three months and that she would be unable to fulfill call center duties. This was clearly a substantial period of absence and prompted the discussion with Abigail and the e-mail from Abigail. Following the aforesaid discussion between Abigail and the first respondent and the e-mail from Abigail on 25 July 2011, the general manager: human capital of the applicant, Renee Kruger ('Renee'), then became involved and she in turn confirmed in writing to the first respondent that she could utilise her annual leave and/or claim UIF for temporary disability for this envisaged period if illness but if this was not acceptable to her, then an incapacity enquiry would follow to determine her continued employment. The first respondent indicated that she would consider what she would do and revert but then she did not give an answer.

[11] As it is apparent from the documentary evidence, the applicant nonetheless went further and again explored possible alternative positions within which to

accommodate the first respondent but three possible alternatives required her using her voice (which was the problem in the first place) and the fourth was not viable from a work available and cost perspective. This still left the first respondent actually taking her annual leave and then unpaid leave for her whole period of recovery as the only viable option.

[12] By 3 August 2011, the first respondent had still not made a decision on what she was going to do. What was now happening is that the first respondent was reporting for work but doing no work at all. Renee then instructed that incapacity proceedings be instituted against the first respondent. The first respondent then proposed that she should only be used attending to telefaxes. This was explored but was found to have an entirely insufficient work load to dedicate the first respondent to. The first respondent then suggested that she could do the outgoing banking detail calls and the applicant agreed to try this as an option (which was one of the original alternatives considered above). On 4 August 2011, the first respondent then attended to these outgoing calls in respect of banking but it was quickly found by way of monitoring this activity that her voice was so soft and weak that the person at the other end of the telephone could not hear and understand her at all. The first respondent then went off work again.

[13] A first incapacity meeting was then convened between the first respondent and Ursha and Judysha, on 25 August 2011. In this consultation, the nature of the first respondent's illness, being her weak voice, and her period of disability, being at this stage an envisaged three months from end July 2011, was discussed. The first respondent raised no contrary issues or contentions in this respect. The issue of alternatives was then discussed. These considered alternatives were temporary re-deployment in the branch networks office, adjustment to her work load meaningless calls, temporary re-deployment to administration support department and temporary re-deployment to doing only banking outgoing calls. It was confirmed that none of these alternatives were viable and, once again, the first respondent did not contradict this or make any alternative suggestions. The

first respondent was also represented in these proceedings by a NEHAWU representative, who stated that the matter had been referred to the NEHAWU provincial office and that an extension of time was required to receive such office's input. The applicant agreed to allow NEHAWU until 29 August 2011 to submit a response and that a final determination as to what to do with the first respondent will only be made after that.

[14] NEHAWU did not submit a response by 29 August 2011. Attempts to have a teleconference convened on 30 August 2011 with NEHAWU proved unsuccessful. In the end, it was determined by the applicant in a written recommendation as part and parcel of the incapacity consultation process started on 25 August 2011 that the first respondent was temporarily unable to discharge her duties as call center agent due to her illness and that there was no other alternative means to accommodate her. It was recommended as an outcome that her employment contract be temporarily suspended until the first respondent could resume her normal duties but despite this, the applicant would still contribute towards her medical aid and provident fund, subject to the proviso that the first respondent would have to enter into an acknowledgment of debt with the applicant to repay these contributions upon her return to work. An alternative recommendation was that the first respondent's contract of employment be suspended on full remuneration but she would have to enter into an acknowledgment of debt up front to repay the remuneration so paid to her upon her return to work provided the repayment be made in full in the current tax year.

[15] On 7 September 2011 and after the above recommendation had already been formulated, NEHAWU submitted an e-mail response proposing that the first respondent fulfill the duties of banking details quality controller, which was a vacant position at the time.

[16] A consultation was then convened on 8 September 2011 to discuss the above recommendations following the consultation on 25 August 2011, as well as the

proposal by NEHAWU. The consultation was attended by Ursha, the first respondent and her NEHAWU representative and also by Merina Allison representing HR. The meeting was minuted and these minutes formed part of the documentary evidence. The proposal of the banking details quality controller position was discussed and it was pointed out that in terms of the position requirements, the position required a forensic qualification or studying towards such a qualification, as well as quality control or auditing or forensic experience, which the first respondent did not have. Because it was a substantially different position to her current position, the applicant recorded that the first respondent was free to apply for this vacant position and undergo the normal placement and interview process to determine if she was suitable for it. The first respondent refused to agree to this. The written outcome of the 25 August 2011 consultation was provided to the first respondent and discussed with her and she was asked for her comment. The answer from the NEHAWU representative was that the first respondent had been instructed not to sign for the document and not to provide the applicant with any decision. The first respondent was then informed that if she did not make a decision, the applicant would implement the recommendation as from 12 September 2011.

[17] A further consultation was then convened for 12 September 2011, in order to obtain the first respondent's final decision on the recommendations. The first respondent persisted with her refusal to accept any of the recommendations. The first respondent was then informed that the recommendation would be implemented and she had best use this time to fully recuperate and return to work as soon as she was able. On 12 September 2011, the first respondent was then formally suspended without pay pursuant to this recommendation. The first respondent was also formally informed that the applicant had implemented the first recommendation, being that of her unpaid suspension but with the retention of the major contributions which she would have to repay upon her return to work when she was fit to do so. It was also recorded that the first respondent needed

to provide a medical certificate that she was fit to resume her normal duties when returning to work.

[18] The first respondent countered by referring an unfair dismissal dispute to the CCMA against the applicant, on 16 September 2011. The first respondent contended in this referral that she was unfairly dismissed on 12 September 2011. In her referral, she demanded that she be 'reinstated at my work'. This dispute was set down on 12 October 2011 in the CCMA for conciliation (the applicant had objected to con/arb) and the dispute was withdrawn on the basis that the first respondent acknowledged that she had referred the wrong dispute to the CCMA, in that she should have referred an unfair suspension dispute to the CCMA and not an unfair dismissal dispute.

[19] Following the withdrawal of her CCMA dispute, the first respondent had further discussions with one Esme Swart of the applicant at the applicant's Durban offices on 12 October 2011. In this meeting, the first respondent presented a medical certificate recording that she was fit to work as from 17 October 2011. Pursuant to this certificate and in this meeting, it was proposed to the first respondent that if she still did not want to return to work, she could accept a voluntary termination agreement with certain benefits. If she, however, wanted to return to work, she could resume her normal duties on 17 October 2011. The first respondent was given until 17 October 2011 to decide. The first respondent reverted on 17 October 2011 and requested 'clarification' on the issue concerning her returning to work but did not actually tender her services. Marina Allison answered on the same day, recording the above events, and specifically called on the first respondent to come to a decision. Once again, the first respondent conveyed no decision.

[20] Considering that the applicant had been placed in possession of a medical certificate, provided by the first respondent herself, indicating that she was fit for work as from 17 October 2011 but the first respondent had not conveyed to the

applicant any decision about what she wanted to do, the first respondent was then instructed by the applicant on 18 October 2011 to resume her normal duties as call center agent on 19 October 2011.

[21] The first respondent then indeed reported at work on 19 October 2011. She, however, did not report on the basis of resuming her normal duties as call center agent. Instead, she now presented another medical certificate, dated 18 October 2011, which recorded that the first respondent had an intermittent and prolonged (possibly permanent) loss of her normal voice due to a medical condition. The certificate recorded that it was advised that the first respondent should not work in the call center. It was, therefore, clear from this medical certificate dated 18 October 2011 that despite the earlier medical certificate stating she was fit to resume duties, the first respondent was unable to resume her normal duties in the call center. Also on 18 October 2011, the first respondent, NEHAWU, representative sent an e-mail to various persons at the applicant complaining about the treatment that the first respondent was receiving and contending that the incapacity enquiry on 25 August 2011 was unfair.

[22] A consultation was convened with the first respondent on 19 October 2011 to discuss the way forward. The issue of the voluntary separation was discussed because it was clear that the first respondent could not resume her normal duties. The first respondent indicated that she refused to sign any documents. The first respondent was specifically warned that a possible outcome of the current state of affairs could be that of a dismissal. The first respondent then asked for an opportunity to consult her union representative, which was agreed to. The first respondent did so and then reverted to the effect that she had been told not to sign anything as what was happening was an unfair labour practice. After some further discussions about documents (the details are not important), the meeting was adjourned to be reconvened later that afternoon. The first respondent, however, on 19 October 2011, simply left the workplace.

[23] The first respondent then, on the same day (19 October 2011), referred an unfair labour practice dispute to the CCMA. The referral document gave no particulars as to what this unfair labour practice was and the outcome sought was 'to be treated like an employee'. It was, however, clear from the facts that at this point in time, the approach of the applicant simply was a consideration of what to do going forward since the first respondent had submitted a new medical certificate indicating she could not work as a call center agent when she was actually due to start her normal duties on 19 October 2011. Nothing had as yet actually been decided.

[24] Considering the approach the first respondent decided to adopt and on 24 October 2011, the first respondent was then given formal notice to attend incapacity proceedings scheduled for 31 October 2011. The purpose of the enquiry was to determine the reasons for her not being able to discharge her normal duties and how to finally determine this issue. The consultation duly took place on 31 October 2011. Once again, the undisputed minute of this consultation formed part of the documentary evidence in this matter. What happened in this consultation is somewhat perplexing. The first respondent's NEHAWU representative, Waheed Ryklief ('Waheed') was adamant that the first respondent had already been dismissed, when this was clearly not the case. He demanded that HR 'admit' this dismissal and admit that this was an 'error'. After some discussion on this issue, it was confirmed to Waheed that the first respondent was certainly still an employee of the applicant and an active employee on the HR system. It would appear as if the whole issue about the first respondent's employment status, as arose in this meeting, was disposed of on the basis that the applicant would 'obtain clarity' on this and revert.

[25] What is, however, of importance to the current matter is the discussions in this meeting of 31 October 2011 about the ability of the first respondent to resume her normal duties. The first respondent specifically said that she would resume her duties, as long as it was not in the call center. The first respondent then

proceeded to contend that the doctors' note which recorded that she was fit to resume her duties was an error and she wanted it back. The first respondent was advised that the only work for her was in the call center. The meeting was adjourned without any resolution having been achieved. On the same day (31 October 2011), Abigail, in her capacity as responsible manager, confirmed in writing that the first respondent was not dismissed and was still an employee.

[26] The incapacity enquiry reconvened on 2 November 2011. It was again confirmed that the first respondent was not dismissed. Ursha stated that the reason for the enquiry was that the first respondent was not fit to work as call center agent. Ursha stated that four alternatives were explored but they were all unsuccessful. Ursha also referred to the two recommendations made at the end of August 2011 which would afford the first respondent the time to recuperate and resume her normal duties, none of which she wanted to accept. Ursha stated that the first respondent was then suspended until she was fit to return to work. Waheed stated that the applicant should fund a specialist visit for and on behalf of the first respondent to determine the extent of her incapacity. Waheed also raised the banking quality control position, which had already been dealt with and for which the first respondent simply did not qualify and which she in any event refused to apply for in the normal course. It was agreed that the first respondent would visit a specialist for a report.

[27] On 4 November 2011, the chairperson of the incapacity proceedings, being Lubania Ismael ('Lubania'), confirmed her recommendations pursuant to the enquiries held on 31 October and 2 November 2011 in writing to the first respondent. These recommendations specifically entailed the following: (1) The first respondent goes on leave from 4 to 18 November 2011 and that she must decide if her medical condition is such so as to impact on her employment going forward, and also in this time, she could seek a second opinion from a specialist if she considered it necessary; (2) when the first respondent returns on 18 November 2011, she must meet with Ursha so a final decision could be made if

she could fulfill her duties as call center agent or not; and (3) Based on the outcome on 18 November 2011, the applicant will then decide on the way forward.

[28] The first respondent in fact followed these recommendations. She went off work on leave of absence and consulted a specialist, Dr Mahabeer. The follow up meeting, however, did not take place on 18 November 2011, for the reason that the first respondent submitted she had still not received the specialist report. The first respondent's leave of absence was extended to 30 November 2011.

[29] In the interim also, the CCMA conciliation proceedings in respect of the unfair labour practice dispute was set down on 16 November 2011, which dispute could not be resolved and was then referred to arbitration by the first respondent. Significantly and in her arbitration referral, the first respondent now demanded payment of her salary from September 2011 and that no leave days must be deducted, despite all the above events and proceedings. However and of critical importance to this matter, she demanded 'I would like another position in the company'. This referral document was filed on 22 November 2011.

[30] The next enquiry was scheduled on 28 November 2011 for 30 November 2011. In this enquiry, the specialist medical report would be considered. The first respondent's conduct relating to and participating in these further enquiry proceedings is concerning. In preparation for this enquiry, Lubania sent an e-mail to the first respondent on 28 November 2011, asking for a copy of the specialist medical report. Lubania recorded that she had spoken to the doctor on the previous Friday and was informed that the report was ready to be given to the first respondent. Lubania required the report to be delivered to her office that same day. Later the same afternoon of 28 November 2011, Lubania sent another e-mail to the first respondent in which Lubania stated that the doctor's rooms confirmed that the first respondent indeed had the report and the first respondent was required to send the report to Lubania's offices before close of business that

day. At about 14h50, the first respondent e-mailed Lubania and confirmed that she had collected the medical report. Lubania answered immediately requesting when she could have the report. That same evening at 21h03, the first respondent answered by e-mail, recording that the report was incomplete, she had to go for speech assessment and in essence refused to provide the report. In fact, the first respondent goes so far as to record that 'if [she] feel that [she] [has to] conclude her findings without the report its up to [her]', and also records that she would state her case in the upcoming CCMA unfair labour practice arbitration. Lubania answered by again asking for the report. The specialist medical report was not forthcoming.

[31] The enquiry was convened on 30 November 2011. Waheed was present but the first respondent was not. Waheed did not have a copy of the specialist medical report, stating it was not provided to him by the first respondent. Waheed stated that the first respondent was not available. The enquiry was postponed to 2 December 2011 based on when the first respondent would be available and in which enquiry she could bring the specialist medical report.

[32] On 2 December 2011, the first respondent once again did not attend the enquiry and had still not provided the specialist medical report. The first respondent informed Lubania that she was attending a funeral and that Waheed would attend on her behalf and any information must be provided to him. Waheed, who then attended, still did not provide the specialist medical report. Therefore based on the information before her, Lubania as chairperson of the incapacity proceedings then concluded as follows: (1) The first respondent's position was that she could not work as call center agent; (2) the medical certificate produced by the first respondent records that the first respondent has a prolonged loss of a normal voice; (3) monitoring has shown that the first respondent cannot function as call center agent; (4) four possible alternative options were considered, but they are not sustainable; (5) It was agreed that the first respondent provide a 'conclusive' report on her condition, which, despite her having received it, she did

not provide; and (6) the first respondent did not seize the opportunity to show her commitment to management to address this issue. Lubania recommended that the first respondent be dismissed. This recommendation was then implemented on 5 December 2011.

[33] Only on the afternoon of 5 December 2011 was the specialist medical report sent to the applicant. By then, it was too late. However, even if the medical report itself is considered, it in essence adds nothing to the enquiry. It records the first respondent's vocal cords are in fact normal but does diagnose hoarseness. The report even suggests a psychiatric opinion. It does not in any way deal with the issue of the first respondent being able to work in the call center or even if and when she would be fully recuperated. The medical report was, in fact, of no value.

[34] The unfair labour practice case was set down for arbitration on 9 December 2011. It was withdrawn by the first respondent on that date. On the same date, the first respondent then completed an unfair dismissal dispute referral to the CCMA and filed the same on 15 December 2011. In the referral document, the first respondent in fact admitted she could not fulfill her duties as call center agent. The matter was set down for conciliation on 2 February 2012 and remained unresolved. The first respondent then referred the dispute to arbitration on the same date and in this referral recorded that she wants to go back to work 'on an alternative position' (sic).

[35] In the light of the above background facts, I will now turn to the merits of the applicant's review application, starting with the proper test for review, which, as a result of a number of recent developments, needs to be dealt with in detail.

The relevant test for review

[36] As stated, there have been a number of recent developments on the issue of the proper test for review. This seems to be a debate that does not want to come to

an end, with many differing views as to what the test in fact means.

[37] The issue started with the judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] where Navsa, AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held:

> 'It is clear…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[38] In my respectful view, the Constitutional Court in *Sidumo* and *Tao Ying Metal Industries* tried to define the review test as simply as possible, and in essence envisaged a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.

[39] The first judgment of the Labour Appeal Court to authoritatively consider what became known as the *Sidumo* review test was *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[5] and the Court said the following:

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set

[2] (2007) 28 ILJ 2405 (CC).
[3] Ibid at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.
[5] (2008) 29 ILJ 964 (LAC) at para 96.

> out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:[6]

> 'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach….'

The Court in *Fidelity Cash Management Service* then went further and formulated what can be described as an outcome based review test which the Court held the *Sidumo* review test envisaged, where the Court said:[7]

> 'It seems to me that, …. there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not

[6] Id at para 97
[7] Id at para 102

> reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

The Court in *Fidelity Cash Management Service* concluded, which in my respectful view is a clear manifestation of an outcome based review test, as follows:[8]

> '…. Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all H the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[40] Then came a number of different interpretations and applications of the *Sidumo* review test and even more debate. All this culminated in the Labour Appeal Court judgment in *Herholdt v Nedbank Ltd*[9] where the Court held as follows:

> 'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take

[8] Id at para 103
[9] (2012) 33 ILJ 1789 (LAC) at para 36

> account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable.'

This reasoning confirmed a further dimension as to how the LAC now viewed the *Sidumo* review test, which was what can be labeled a process related review. What the LAC in *Herholdt* did was to say that if it was apparent that the arbitrator did not consider a material fact or a material issue, regardless of the outcome, this would be unreasonable and would render the award reviewable. The LAC in *Herholdt* however also added as follows:[10]

> 'Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognizes that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

The above was then also a confirmation of the outcome based review test and in line with what the Court said in *Fidelity Cash Management Service*.

[41] The *Herholdt* judgment then came before the Supreme Court of Appeal, where the SCA in the judgment of *Herholdt v Nedbank Ltd and Another*[11] found that the

[10] Id at para 39
[11] 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) Cachalia and Wallis JJA.

more recent approach set the *Sidumo* review test bar too low when deciding review applications. The SCA concluded as follows:[12]

> 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

What this judgment means is that a process related review test is simply not competent. Issues of process are only important if this would affect the ultimate outcome, to the extent that reasonably speaking a different outcome would have resulted was it not for such failures of process. To put it simply – if the arbitrator ignored material evidence and in considering this material evidence together with the case as a whole, the review court believes that the arbitration award outcome cannot now be reasonably sustained on any basis, then the award would be reviewable.

[42] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has now in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[13] again interpreted and applied the *Sidumo* review test and held as follows:[14]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the

[12] Id at para 25.
[13] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[14] Id at para 14.

> evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

With respect, this clearly postulates that the *Sidumo* review test is limited to an outcome based review test. If there is any doubt about this, the Court in *Gold Fields Mining* proceeded to specifically real with the process related review test and said:[15]

> '…. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s 145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the *Sidumo* test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test.…'

The Court concluded:[16]

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[43] Hopefully the debate with regard to the proper review test can now be put to bed. Considering the point of departure in *Sidumo*, the first interpretation in *Fidelity*

[15] Id at para 15.
[16] Id at para 16.

Cash Management which has now been confirmed and the recent developments of the SCA judgment in *Herholdt* and the LAC judgment *Gold Fields Mining*, I will now set out what I consider to be a proper practical application and solution of the aforesaid theoretical debate. The simple question is – where an applicant for review has received an arbitration award such applicant is not satisfied with and wishes to challenge this award on review to the Labour Court, what must the applicant prove in order to succeed?

[44] In my view, the first step in a review enquiry is to consider or determine if an irregularity indeed exists where it comes to the arbitration award or the arbitration proceedings. The most pertinent examples of such an irregularity would be: (1) where the arbitrator failed to consider material evidence; (2) where the arbitrator in deciding and determining what actually constitutes the evidence properly before him or her materially erred or failed (such as failing to apply probabilities); (3) the arbitrator misconstrued legal principles; (4) the arbitrator's reasoning is flawed; (5) the arbitrator failed to provide proper reasons for the award, or he or she did not deal with the substantial merits of the dispute; (6) the arbitrator failed to consider and determine a part of the case he or she had to determine; (7) the arbitrator irregularly and improperly exercised a discretion he or she was required to exercise; or (7) the arbitrator committed an error or irregularity in the conduct of the arbitration process. The aforesaid is obviously not the only instances of an irregularity that may arise but, in my view, most irregularities would comfortably resort under one of the aforesaid. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record, and comparing this to the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. Once an irregularity is identified, materiality of the irregularity then becomes relevant and must be considered. This means that the irregularity

committed by the arbitrator must be a material departure from the acceptable norm or a material deviation from the actual evidence before him or a material departure from the proper principles of law or a material failure to considered and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy the first step in the review test enquiry. This approach of requiring materiality takes care of the requirement that not every possible individual irregularity that may exist, is contemplated by the review test, as the review test requires the irregularity in the first place to be 'gross'.[17] If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations needs to be made, and the review must fail. If the review court in conducting this first step enquiry however concludes that an irregularity indeed exists, then the review court must move to the second step of the review enquiry.

[45] Therefore, the second step in the review enquiry only arises where the review court should conclude that an irregularity indeed exists. This second step is then, simply put, a determination as to whether this irregularity, if it did not exist, could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still arrive at the same outcome. In conducting this second step of the review enquiry, the review court need not concern itself with the reasons why the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity exists in the first place. The review court, in essence, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless be arrived at by another reasonable decision maker, even if it is for different

[17] See Section 145(2)(ii)

reasons. If, and pursuant to this second step in the review enquiry, the review court is satisfied that the same outcome could not follow even for any other reasons, then the review must succeed, because, simply put, the irregularity would have affected the outcome.

[46] It would for example often be the case that a failure by the arbitrator to consider material evidence would be at odds with the requirement of a reasonable outcome. This, however, does not follow as a matter of course and the second step in the review enquiry I have set out above must always be conducted to ascertain if this is indeed so. Similarly for example, where the arbitrator fails in conducting a proper process in the arbitration, this would often lead to an unreasonable outcome but yet again, this does not automatically follow and the second step enquiry must be conducted. The end result always has to be an unreasonable outcome.

[47] There is a further aspect to consider where it comes to deciding review applications. This is that it must always be remembered that the *Sidumo* review test does not replace the statutory review grounds in section 145.[18] It 'suffuses' the same, and in particular, this 'suffusing' is applicable to the 'gross irregularity' review ground in section 145(2)(ii). As the Court said in *Fidelity Cash Management:*[19]

> 'Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a

[18] Section 145(2) reads: 'A defect referred to in subsection (1), means-(a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers.'
[19] *Fidelity Cash Management* (supra) at para 101.

> decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[48] Even more recently, the LAC in *National Commissioner of the SA Police Service v Myers and Others*[20] said the following:

> 'It should be noted, however, that the standard of review as formulated by the Constitutional Court in *Sidumo* does not replace the grounds of review contained in s 145(2) of the LRA. The grounds of review referred to in s 145(2) still remain relevant.'

[49] What this means is that where it comes to an arbitrator acting *ultra vires* his or her powers or committing misconduct that would deprive a party of a fair hearing, the issue of a reasonable outcome is simply not relevant. In such instances, the reviewable defect is found in the actual existence of the statutory prescribed review ground itself and if it exists, the award cannot be sustained, no matter what the outcome may or may not have been. Examples of this are where the arbitrator should have afforded legal representation but did not[21] or where the arbitrator conducted himself or herself during the course of the arbitration in such a manner so as to constitute bias or prevent a party from properly stating its case or depriving a party of a fair hearing.[22] The reason for this is that these kinds of defects deprive a party of procedural fairness, which is something different from the concept of process related irregularity. Guidance in this respect can also be

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[20] (2012) 33 ILJ 1417 (LAC) at para 41.

[21] See *Colyer v Essack NO and Others* (1997) 18 ILJ 1381 (LC) at 1384; *Commuter Handling Services (Pty) Ltd v Mokoena and Others* (2002) 23 ILJ 1400 (LC) at paras 19 – 20; *Northern Province Development Corporation v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 ILJ 2697 (LC) at paras 20 – 21; *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seeff Properties v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2158 (LC) at paras 23 – 24.

[22] See *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1151 (LC) at para 27; *County Fair Foods (Pty) Ltd v Theron NO and Others* (2000) 21 ILJ 2649 (LC) at para 7; *Mollo v Metal and Engineering Industries Bargaining Council and Others* (2010) 31 ILJ 971 (LC) at para 32; *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others* (2005) 26 ILJ 519 (LC) at paras 16 – 17; *Raswiswi v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2186 (LC) at para 20; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at paras 38 – 39.

found from the judgment in *Sidumo*[23] itself, where Sachs J held[24] that '[t]he commissioner must be impartial and basically fair and reasonable in the conduct of his work'. Navsa AJ in turn held as follows, referring to Section 145 of the LRA:[25]

> 'Of course, section 145 has to meet the requirements of section 33(1) of the Constitution, ie it has to provide for administrative action that is lawful, reasonable and procedurally fair.'

O'Regan J said:[26]

> 'The content of section 33 is straightforward. It requires administrative action to be 'lawful, reasonable and procedurally fair…. The question of purposive constitutional interpretation that thus arises is whether it is constitutionally appropriate to hold the CCMA to these standards. In my view, it is. The CCMA is an organ of state exercising public power. Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of section 23 of the Constitution.'

I conclude on this issue by referring to *Tao Ying Metal Industries*[27] where the Court said, in specifically referring to functions of commissioners, that '… in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

[48] I will now proceed to determine the applicant's review application on the basis of the principles and the two step enquiry in the application of the *Sidumo* review test as I have set out above, as the review case in the current matter is founded on the gross irregularity review ground.

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[23] *Sidumo (supra)* footnote 2.
[24] Id at para 147.
[25] Id at para 89.
[26] Id at para 138 and 139.
[27] *CUSA v Tao Ying Metal Industries and Others* (supra) footnote 4 at para 65.

The reasoning of the arbitrator

[49] As stated above, the second respondent, as arbitrator, found that the dismissal of the first respondent by the applicant was both substantively and procedurally unfair.

[50] On the issue of procedural unfairness, the second respondent proceeded to quote the provisions of Items 10 and 11 in the Code of Good Practice under the LRA and he then draws a distinction between permanent and temporary incapacity. The second respondent concludes that it was 'unclear' at the time of the dismissal of the first respondent whether her illness was permanent or temporary. The second respondent concludes that the applicant had an obligation to investigate the extent of the disability and ways in which to adapt the employee's work to accommodate the employee and this required consultation with the employee. The second respondent then appeared to accept that all of this did happen but what the second respondent concluded to be the applicant's procedural failure was that the applicant did not 'directly investigate' the extent of the first respondent's disability and the prognosis relating to the same. The second respondent concluded that the applicant was obliged to initiate a medical examination to determine if the illness of the first respondent was permanent or temporary and could not just rely on the opinion of a manager of the applicant. The second respondent then finally concludes that the applicant was reluctant to conduct this medical examination because it was initially not prepared to pay for this but later agreed to do so and this meant that the applicant did not follow a fair procedure.

[51] The reasoning of the second respondent on the issue of procedural fairness is somewhat confusing. However, a focused reading of his award suggests that overall, the second respondent accepted that procedure adopted by the applicant was fair, save for one issue only. This is the issue that the applicant had the onus to prove, namely, what the nature of the first respondent's illness was and what

her prognosis was and because the applicant was initially reluctant to pay for a medical opinion to discharge this onus (despite later agreeing to do so), this was procedurally unfair.

[52] It is the second respondent's reasoning on substantive fairness that is particularly sparse, especially, considering all the above evidence placed before him and the actual nature of the enquiry he was supposed to embark upon (as will be addressed hereunder). In fact, the sole basis for the finding of substantive unfairness made by the second respondent is the fact that the chairperson of the incapacity proceedings did not have the final medical report before her when she made her determination in the final incapacity hearing to dismiss the first respondent. The second respondent accepted that the first respondent did not submit this medical report earlier as she should have done but found that the first respondent had provided an acceptable explanation for not proving the medical report in time. The second respondent concluded that it was incumbent upon the chairperson of the incapacity proceedings to first obtain the medical report before deciding to dismiss the first respondent. The second respondent then had regard to the medical report, which was before him, and concluded that from the medical report itself, the condition of the first respondent was of a temporary nature and she was 'well on the road to recovery'. Based only on this aforesaid reasoning, the second respondent concluded that the first respondent's dismissal was substantively unfair.

[53] The applicant has challenged, on review, all of the reasons given by the second respondent for finding as he did. The applicant has contended that the finding that the first respondent had an acceptable explanation for not submitting the medical report timeously was at odds with the actual facts in this matter and a failure to have regard to the proper evidence as a whole in this regard. The applicant has further contended that the failure to provide the medical report in time must be placed squarely 'on the shoulders' of the first respondent and as such, the applicant simply cannot be blamed for not having it. The applicant also

contends that the medical report, in any event, does not indicate that the first respondent's condition was temporary and that she was well on her way to recovery. The applicant further contends that considering what was before the chairperson of the incapacity hearing, there cannot be anything wrong in the decision that was arrived at. As to procedural unfairness, the applicant contends that the basis on which the second respondent found the dismissal to be procedurally unfair is at odds with what the applicant is in fact required to do in terms of Schedule 8 of the LRA to ensure procedural fairness and in any event, the applicant ultimately did agree to pay for the report. The aforesaid being the substance of the review case of the applicant, these contentions will be addressed hereunder.

Merits of the review: substantive fairness

[54] From the outset, it must be accepted that the clear evidence was that the first respondent was in fact completely incapacitated due to ill health to fulfill her duties as call center agent, which was the position she was employed for. Even the second respondent's own reasoning confirms this. The undisputed evidence is that basically from May 2011 to her dismissal in December 2011, the first respondent was largely unable to work in the call center and service practitioners and members over the telephone. The fact is that the applicant was entitled to institute incapacity proceedings for ill health in this case in respect of the first respondent and, properly, did so. The simple truth is that if the first respondent was any time over this period of some seven months able to operate the telephone in the call center and tendered to do so, she would not have been dismissed, and the only reason why she did not do this was because of her illness causing her to be unable to use her voice over the telephone. This is the basic framework within which this matter had to be determined.

[55] The above then being said, I have several difficulties with the arbitration award of the second respondent on the issue of substantive fairness. The first is the

manner in which the second respondent chose to consider and determine the evidence or in fact, better put, his material failures in this regard. The entire reasoning of the second respondent on the issue of substantive fairness is found in one paragraph in his award and in this paragraph, he only deals with one aspect and issue that arose at the very end of all the events and processes in this matter, being the final medical report. With respect to the second respondent, what about all that had gone before and what about how the first respondent conducted herself in this process? A reading of the award of the second respondent on the issue of substantive fairness leaves one with the inevitable conclusion that he simply had blinkers on and ignored the most material part of the evidence and the case he had to determine. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another,*[28] it was said that:

> 'Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

The particulars of these failures of the second respondent in the current matter will be addressed hereunder and in my view this clearly constitutes an irregularity as contemplated by the first step in the review enquiry I have referred to above.

[56] Considering all the facts and evidence placed before the second respondent and, in particular, the undisputed documentary evidence, it is my view that the second

[28] (2008) 29 ILJ 2189 (LAC) at para 8.

respondent, as a matter of general principle, thus excluded or ignored pertinent and material evidence and did not consider all the principles and factors he was required to consider. In *Network Field Marketing (Pty) Ltd v Mngezana No and Others,*[29] the Court said:

> '… By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties'

[57] In *Pam Golding Properties (Pty) Ltd v Erasmus and Others*[30] the Court said:

> 'In his judgment in *Sidumo*, Ngcobo J reaffirmed the role of reasonableness in relation to conduct in these terms:
>
> > "It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2)*(a)*(ii) of the LRA. …."

[58] In the very recent judgment of *Gold Fields Mining,*[31] the Court said:

> '…. The questions to ask are these: … (ii) Did the arbitrator identify the dispute he was required to arbitrate….? (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? and (v) is the arbitrator's decision one that another decision-maker could reasonable have arrived at based on the evidence?

[29] (2011) 32 ILJ 1705 (LC) at para 23.
[30] (2010) 31 ILJ 1460 (LC) at para 6.
[31] *Gold Fields Mining* above n 13 at para 20 – 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….'

[59] The criticisms which can be levelled at the award of the second respondent in this case is not based on piecemeal consideration of individual factors as the Court warned against in *Gold Fields Mining*. The actual criticism of the award of the second respondent relates to his failure to consider material, if not most parts, of the pertinent evidence before him as a whole. The holistic picture that emerges from a simple comparison between the reasoning of the second respondent and the actual and complete evidence before him shows that material evidence was not considered by him, that such material evidence was not dealt with in his award where it comes to his reasoning applied and that he simply did not understand the actual nature of the enquiry he had to embark upon to determine the dispute. In the end, the second respondent simply did not deal with the substantial merits of the dispute. In my mind, there clearly exists a gross irregularity as contemplated by the first part of the review test in this instance. I will deal with the second part of the review test, in order to finally ascertain whether the applicant's review application should succeed, later in this judgment.

[60] The next issue to deal with concerns the issue of the determination of the evidence by the second respondent, so as to ascertain whether this is a gross irregularity. I wish to make reference to what in my view is a particularly apt *dictum* from the judgment in *Sasol Mining (Pty) Ltd v Ngqeleni No and Others*[32] where the Court said:

> '... Some commissioners appear wholly incapable of dealing with disputes of fact - their awards comprise an often detailed summary of the evidence, followed by an 'analysis' that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is

[32] (2011) 32 ILJ 723 (LC) at para 7.

> missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner.'

[61] The second respondent had to determine what constituted the proper evidence before him which would form the basis for his award, by way of considering probabilities. He was equally obliged to resolve factual disputes that existed, again by way of consideration of probabilities and principles relating to credibility. Once he had done this, the second respondent was then obliged to apply the relevant legal principles and address this evidence in his reasoning, so as to arrive at reasonable conclusion. The second respondent, in my view, did none of this, which once again would be a gross irregularity. One pertinent example is the issue as to whether the first respondent was already dismissed on 12 September 2011, which version she persisted with in evidence and which the applicant disputed. The issue is not determined at all. No probability assessment is made. What the second respondent should have done, when it came to all the material facts before him, was, as stated in *SFW Group Ltd and Another v Martell et Cie and Others*:[33]

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

The second respondent did none of this.

[62] The issue of a determination of the probabilities was critical in deciding the nature of the first respondent's incapacity, which, as stated, was common cause actually existed. In deciding whether the incapacity was permanent or temporary and

[33] 2003 (1) SA 11 (SCA) at para 5.

what the applicant was entitled to do about it is distinctly a matter of probability based on a consideration of the evidence as a whole and not just about only considering a final medical report at the very end of the process, which is unfortunately what the second respondent limited his reasoning and consideration to. What the second respondent had to do was to consider all that happened from May 2011 until December 2011 and even that which happened after the dismissal of the first respondent, to determine what was the most natural, plausible and logical inference to be drawn from all such facts and events, on the issues of the nature of the incapacity and what the applicant could do about it. In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[34] it was held that the inference drawn from the evidence has to be 'the most natural or acceptable inference'. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*,[35] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

Considering the actual facts in the current matter, this exercise and for the reasons set out hereunder, can only lead to the natural and logical inference that the first respondent throughout this matter and at all relevant times remained incapacitated from fulfilling her duties as call centre agent.

[63] The judgment in *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*[36] adds a further dimension to determining what is the proper evidence on the probabilities, where it was held as follows:

> 'The fact that the evidence is consistent with the inference sought to be drawn

[34] (2000) 21 ILJ 2585 (SCA) at para 9.
[35] 1985 (3) SA 916 (A) at 939I-J; See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C.
[36] (1994) 15 ILJ 1057 (LAC) at 1064C-E.

> does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A)). In the present case however no alternative inferences have been advanced which have a foundation in the evidence.'

The point that must be made, with specific reference to the current matter, is that the first respondent could actually not establish or advance an alternative inference contrary to the inference that at all relevant times and even when the matter was before the second respondent himself for arbitration, that the first respondent remained incapacitated from fulfilling her duties as call center agent.

[64] I will now deal with what a proper consideration of the evidence and also a proper consideration of probabilities, as would be expected of a reasonable decision maker in considering the evidence as a whole, in fact shows. In my view, had the second respondent considered and determined the evidence in this matter as a whole and in a manner a reasonable decision maker could have done and properly considered and applied probabilities, the following would the only factual matrix the second respondent could and should have arrived at:

(i) The first respondent was completely incapacitated from fulfilling her duties as call center agent as from May 2001 which was still the case when the matter was referred to arbitration;

(ii) The first respondent on her own version did not want to return to her position as call center agent;

(iii) The applicant considered all available alternative means to accommodate the first respondent and in fact tested the banking option was an alternative means of accommodation, without success;

(iv) The first respondent made no proposals of her own as to alternatives. The one proposal made by NEHAWU of the banking quality controller vacancy

that existed, the first respondent did not qualify for but despite this, the applicant was still willing to consider this provided the first respondent comply with the prescribed evaluation and placement process for this position, which she refused to do;

(v) After having been unable to accommodate the first respondent, the applicant treated her incapacity as temporary and proposed a suspension of her employment contract to allow her to recuperate until such time as she was ready to resume her normal duties. The first respondent refused to agree to this;

(vi) The applicant then implemented a suspension of the first respondent's employment contract on the basis that she would be allowed to resume her normal duties as soon as she had recuperated, by presenting a medical certificate that this was the case, and returning to work. The first respondent challenged this by referring a dispute to the CCMA (later aborted);

(vii) The first respondent after being so suspended for a while then submitted a medical certificate that she was fit to return to work and she was then instructed by the applicant to return to work;

(viii) The first respondent then did come back to work but not to resume her normal duties. She sought to contradict and even "withdraw' the medical certificate indicating she was fit to work and instead submitted another medical certificate recording that she was not fit to work in the call center;

(ix) The applicant then again instituted incapacity proceedings which the first respondent challenged with an unfair labour practice dispute referred to the CCMA (which was once again later aborted);

(x) The first respondent in general failed and/or refused to properly participate in the incapacity proceedings and obstructed the same. The first respondent deliberately did not participate in the final consultation proceedings at all;

(xi) The first respondent failed to submit the final medical specialist report because it did not suit her;

(xii) There were in fact no suitable alternative means or positions in which the first respondent could be accommodated;

(xiii) There was no indication when the first respondent could resume her duties as call center agent. In fact, and at all relevant times, she did not want to;

(xiv) There was a protracted period of incapacity consultations with the first respondent, in the end spanning a period of more than seven months;

(xv) Since the beginning of May 2011, the first respondent in effect rendered virtually no services as call center agent until she was dismissed in December 2011.

[65] The above then being the proper factual matrix to form the basis of any determination of this matter, the next consideration is then what could reasonably be the outcome of this matter if these facts are applied to the relevant legal principles relating to dismissal for incapacity due to ill health. In other words, would the consideration of these facts and the application of the prescribed legal principles thereto, ignoring for a moment the gross irregularities by the second respondent, still cause a reasonable decision maker to come to the same conclusion the second respondent came to in this matter. This the second part of the review enquiry referred to above. In my view, for the reasons as will be set out hereunder, there is little doubt that a reasonable decision maker could not have come to the conclusion the second respondent did. I am further of the view

that in terms of what was said in *Gold Fields Mining*, the second respondent actually misconceived the nature of the enquiry he was supposed to embark upon and committed a material mistake of law to such an extent that it rendered the outcome in this matter as unreasonable.

[66] Dealing with the relevant legal principles, the LRA deals with dismissals based on incapacity for ill health in Items 10 and 11 of Schedule 8. The relevant provisions of Item 10 provide as follows:

> ‘(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
>
> (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
>
> (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant….’

[67] Item 11 then prescribes what a commissioner must consider when determining a dismissal for incapacity based on ill health and provides as follows:

'Any person determining whether a *dismissal* arising from ill health or injury is unfair should consider-

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

[68] It is clear that the process to be applied in incapacity proceedings for ill health is not that of a hearing. It is an investigation aimed at determining the nature of the incapacity, whether such incapacity is such as to prevent the employee from doing his or her work and what alternatives are available to accommodate the employee rather than dismissing the employee where the employee indeed cannot do his or her work. Being an investigation, proper participation by the employee in the process is essential. In essence, both parties must be involved in the process to determine all the issues and arrive at an outcome. It is simply not about the employer discharging an onus as in the case of misconduct dismissals but rather a process in which both employer and employee participate and in which an assessment of the employee's situation is conducted in order to arrive at a fair outcome concerning the employee's continued employment. In *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others,*[37] the Court said:

[37] (2012) 33 ILJ 1081 (LAC) at para 6.

> 'It is trite that the code of good practice is binding on commissioners. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (the *Sidumo* case). 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.'

[69] In my view, there is no doubt that the applicant properly assessed the very issue if the first respondent was unable to discharge her duties for a protracted period of time. I am further of the view that this assessment clearly showed that the first respondent was unable to perform her duties as call center agent. This whole issue must also be given proper factual context. Initially, the incapacity of the first respondent was assessed to be temporary and the applicant, after considering a number of alternative measures to accommodate her, then implemented a suspension of the first respondent's contract of employment to give her time to recuperate and resume her normal duties. In fact, in October 2011, a medical certificate was presented by the first respondent recording that she was fit to work and she was then instructed to return to work. This approach and conduct of the applicant is fully in line with the legal principles as set out above. It is then the first respondent that threw the spanner in the works, so to speak. She, in essence, 'withdrew' the medical certificate recording that she was fit to work and replaced it with a medical certificate recording that she was unable to work in a call center for an undetermined period and it was even intimated that this difficulty was permanent. The first respondent was adamant that she could not work in the call center. At this time, the applicant had already explored the

possibility of four alternative means to accommodate the first respondent but none of them were viable. There were no proposals forthcoming from the first respondent in this regard.[38] In these circumstances, the dismissal of the first respondent was as a matter of principle justified. As the Court said in *Witzenberg Municipality*:[39]

> 'I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognized as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.'

[70] Accepting the best scenario for the first respondent, being that her incapacity was temporary, the undeniable state of affairs was that this temporary incapacity at the time of dismissal had endured for some seven months and still there was no end in sight. Added to this is the approach of the first respondent herself that she as a matter of principle could not work in the call center and sought to be placed in an alternative job, which approach must be considered in conjunction with the medical certificate of 18 October 2011 that the loss of her voice was a 'prolonged (possibly permanent)' condition. This was what was before the incapacity chairperson in December 2011 and based on this, in my view, the decision to dismiss the first respondent was entirely justified.

[71] Again accepting for the purposes of the debate that the first respondent's incapacity was temporary, there is another important consideration which completely escaped the second respondent. This is the fact that the applicant was willing to implement an unpaid suspension of the first respondent's contract

[38] Save for one vacancy referred to by NEHAWU which is addressed hereunder.
[39] Id at para 7.

of employment for as long as she needed to recuperate and resume her normal duties. This means that the first respondent could do all that she needed to do to recover against the assurance that once she has recovered, there was her job waiting for her. The applicant was even willing to keep her contributions covered subject to an arrangement to pay back such contributions once she returned to work. This approach of the applicant, in my view, is exactly that which the provisions of Item 10 of Schedule 8 envisage. It is an entirely reasonable and proper approach for the applicant to have adopted. One must now consider how the first respondent responded to this. She refused to accept or agree to anything without reason or without even a shred of alternative suggestion. When the applicant then takes the initiative and implements the solution of an unpaid suspension to give the first respondent time to recuperate, the first respondent challenges this by way of a CCMA referral. The first respondent then goes further and demands in a further CCMA process that she be paid for this whole period she is off despite her not having any leave or sick leave available and not working and on her own version not being able to work. As I have said above, the first respondent needs to properly participate in the process and seek a solution. Her approach was intransigent and obstructive. She made no attempt to arrive at a solution and all she did was to try and derail the proper solutions put forward by the applicant. All these considerations, in my view, equally substantiate the ultimate decision to dismiss the first respondent.

[72] This now brings me to the issue of the final medical report of Dr Mahabeer, which I will hereinafter refer to as 'the report'. It was common cause that the decision to dismiss the first respondent was made without consideration of the report, which the second respondent considered to be a material failure on the part of the applicant. It was also undisputed that the first respondent did not submit the report in the scheduled final consultations on 30 November and 2 December 2011 but, as referred to above, the second respondent concluded that the first respondent had a proper explanation for not doing so. The second respondent

actually had the report before him and considered it, and concluded the report indicated the first respondent's condition was temporary and she was well on the road to recovery. To the exclusion of all else, this was the basis of the second respondent's reasoning on substantive fairness. I am compelled to conclude, for the reasons set out hereunder, that there is no substance or rationality in these conclusions and reasoning of the second respondent. In addition, these conclusions of the second respondent are entirely unsupported by the facts.

[73] Firstly, the second respondent completely ignored the context in which the report came about. There were incapacity enquiries on 31 October and 2 November 2011 in order to arrive at a final conclusion with regard to the continued employment of the first respondent, as the issue of alternative means to accommodate her had been fully explored by then (as will be addressed hereunder). The basis of these consultations was premised on the fact that the first respondent, on her own version and position, could no longer work in the call center. As a result of all of this and what had gone before, the chairperson in the consultation on 2 November 2011 made certain specific proposals to the first respondent, which were actually confirmed in writing on 4 November 2011 and never contradicted. These recommendations were that the first respondent takes leave to decide on her position going forward – i.e. to try and come up with any other solution. As part of this proposal, it was recorded that 'during this time you could seek a second opinion from a specialist if necessary regarding your condition'. The fact is that it was up to the first respondent to seek a second opinion if she wanted to, and this was to be done so she could report to the applicant's management on how she saw the way forward. So much is specifically said in the recommendation of 4 November 2011 by Lubania, which specifically also records that as matters stood, the medical certificate that the applicant had determined that the first respondent could not work in the call center. The point that must thus be made is that the report would be the first respondent's possible solution and not that of the applicant. If the first respondent

herself considered it necessary, she had to get the report, submit it, and make submissions on her situation going forward based on it, especially considering that the status quo was the medical certificate dated 18 October 2011 that she was likely permanently incapacitated from working in the call center. In my view, in the circumstances of this matter, the duty to provide this report rested squarely on the first respondent and any failure in the submission of the same must count against her, and not the applicant.

[74] The next consideration then is why did the first respondent not actually submit the report? The second respondent, as stated above, concluded that she had a reasonable explanation for not doing so. I am astonished by this conclusion, especially considering the actual facts and events surrounding the submission of the report and the enquiries scheduled to discuss it with the first respondent. The attitude and approach adopted by the first respondent in this regard is equally mystifying. The fact is that the report was ready for collection on 25 November 2011. Lubania had to put pressure on the first respondent to collect it and in essence pleads for the first respondent to send it to her (Lubania) urgently. On 28 November 2011, the first respondent confirmed that she had collected the report but in fact refused to provide it to Lubania and actually stated that she (the first respondent) will state her case at the CCMA proceedings on 9 December 2011,[40] and that if Lubania wanted to proceed with her findings without the report it was up to her. Despite this, and on 29 November 2011, Lubania persists in asking for the report, with no further response from the first respondent. With the enquiry scheduled for 30 November 2011 and the first respondent actually having collected the report on 28 November 2011, she had ample time to submit it and actually decided not to. How this can be construed, by any stretch of the imagination, to be a reasonable explanation, is beyond belief.

[40] These were the unfair labour practice proceedings in which the first respondent demanded payment for the time she was of work and that no leave days be deducted

[75] To add insult to injury, the first respondent then does not even attend the enquiry on 30 November 2011 and said that Waheed could attend in her stead. The first respondent did not even provide Waheed with a copy of the report. The proceedings were postponed to 2 December 2011 when the first respondent would be available and could attend with the report. Again, on 2 December 2011, the first respondent states that she was not going to attend the enquiry and any information must be 'passed on' to Waheed who still did not have the report. I find all of this entirely unacceptable and this is, in my view, nothing else but deliberate obstructive behaviour by the first respondent. If the first respondent was indeed serious about the report and that it meant that she could avoid termination of employment, she would have attended the enquiry. In fact, considering this was the final stage of an investigation to determine her future, she was compelled to attend this enquiry. How this could escape the second respondent, who completely ignored all of this, is inexplicable.

[76] A specific point must be made about the testimony presented by the first respondent in the arbitration as to why she never attended the final enquiry. The first respondent contended that when she was notified of the enquiry to be held on 30 November 2011, she was already in Port Shepstone for a funeral.[41] The first respondent under cross examination said she was in Port Shepstone from 29 November 2011 to 2 December 2011.[42] The fact is that the first respondent was actually informed of the enquiry to be held on 30 November 2011, on 28 November 2011, when she had collected the report. At this time, she was not in Port Shepstone. In any event, there was simply no reason for her not to have returned from Port Shepstone on the postponed enquiry date of 2 December 2011 when it was actually indicated by Waheed that she would be available. It is in my view quite apparent that the first respondent deliberately decided not to attend these enquiries.

[41] See transcript page 83.
[42] Transcript page 106.

[77] This then bring me to the issue of the content of the report itself. With the utmost of respect to the second respondent, I simply cannot fathom how he can conclude, after reading the report that the report indicates that the first respondent's incapacity is temporary and she is well on the way to recovery. The report simply does not say this and no proper reading of the report can lead to such a conclusion. In fact, if anything, the report seems to suggest there is little wrong with the first respondent other than hoarseness. The report even suggests that the first respondent be referred to a psychiatrist. What the report does not do at all is to deal with the first respondent's capacity to fulfill her functions as call center agent, or whether she is actually recovering, or if she is recovering, how long this will take. One is left with the distinct impression that the above is actually the reason why the first respondent did not want to submit the report, especially considering her e-mail response to Lubania on the evening of 28 November 2011 in which she selectively quotes from the report, contends it is incomplete and refuses to provide it. The simple fact is that the report does not advance the case of the first respondent whatsoever or actually in any way assists in the determination of this matter. The conclusions the second respondent sought to draw from the report is unsustainable.

[78] The only remaining consideration in terms of Item 10 of Schedule 8 is the issue of alternative accommodation of the first respondent. There is little doubt this was properly considered. Considering the evidence as set out above, four alternatives were explored but were not viable. The applicant actually explained why there were no other alternatives available, and this was not contradicted. It may be pointed out that the first respondent agreed to give one of these alternatives, being that the first respondent attend to the banking which required her to make outgoing calls, a try, which the applicant then implemented and monitored but this was quickly found not to be viable as the first respondent could not be heard over the telephone. The first respondent made no other proposal save for one by her union NEHAWU, being that she be appointed in a vacant position of banking

quality controller for which she did not qualify. The applicant was even willing to consider her for this provided she went through the proper application and appointment process for the position, which the first respondent then refused to do. The final alternative which the applicant considered and ultimately implemented when the first respondent again refused to agree to anything was the temporary suspension of her employment to give her time to recuperate, which has been fully addressed above. It is, therefore, my view that the applicant fully and properly explored the issue of alternatives, no thanks to the first respondent, which consideration the second respondent had no regard to.

[79] One final point needs to be made. Even in her CCMA referral documents in terms of which the first respondent referred her dismissal to the CCMA for conciliation and then arbitration, she never contended that she could resume her duties as call center agent. In fact, she demanded in such documents to be placed in an alternative position. This illustrates that even at arbitration referral stage, the first respondent, on her own version, did not consider herself able to fulfill her position as call center agent.

[80] Based on all of the above, I consider the following dictum from the judgment in *Witzenberg Municipality*[43] to be in point insofar as it concerns the conduct of the second respondent, where the Court said:

> 'I have, in the aforegoing paragraphs demonstrated how the commissioner failed to consider certain evidence that was put before him. If an arbitration hearing is a hearing de novo, then there is no valid reason why the additional evidence that was presented at the arbitration hearing was not considered. Failure to consider all the relevant evidence clearly resulted in the employer's failing to do a proper assessment of the employee's capability to continue working, as contemplated in items 10 and 11 of schedule 8. When consideration is paid to all the above circumstances, it stands to reason that the decision of the commissioner was one

[43] *Witzenberg Municipality* (supra) at para 25.

> that a reasonable decision maker could not reach and thus fell to be set aside on review.'

This, with respect, is exactly the point in the current matter. Everything that I have referred to above demonstrates the extent of the second respondent's failure to consider the evidence before him. In fact, I would even conclude that the failure by the second respondent is such so as create doubt about whether he actually understood the nature of the enquiry he had to make and the issues he had to determine. Either way, the conclusion of the second respondent is simply not a conclusion a reasonable decision maker could reach. The simple fact is that the conclusion of the second respondent cannot be sustained on any other basis and for any other reason, considering the proper factual matrix and the application of the relevant legal principles as set out above.

[81] The judgment in *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council and Others*[44] also dealt with the concept of incapacity, albeit in a context other than ill health. In my view, however, there is simply no reason why the following principles as enunciated by the Court in this judgment should not equally apply to the determination of a dismissal for incapacity based on ill health, where the Court said:[45]

> 'Manifestly, the question as to whether a dismissal in the circumstances of the present dispute is substantively fair depends upon the facts of the case. An employer needs to consider the reasons for the incapacity, the extent of the incapacity, whether it is permanent or temporary, and whether any alternatives to dismissal do exist.
>
> In this case, the appellant had no idea as to how long the incarceration would endure. Further, the skilled nature of fourth respondent's position made it commercially necessary for the appellant to make an expeditious decision about

[44] (2010) 31 ILJ 1838 (LAC).
[45] Id at paras 11 – 14.

> fourth respondent's future and the imperative to ensure that a similarly skilled person could assume the responsibilities.
>
> A large organization may be able to take a somewhat more generous approach to the particular problem of this case, namely to keep an incarcerated employee's position open until his return, in that such an organization may have 'deep financial pockets'. But, in principle, it cannot be the case that the law has developed an inflexible rule; that is that incapacity which is outside of the control of the employee cannot be a cause for dismissal.
>
> In my view, given the facts of the present dispute, it was not reasonable to expect appellant to have kept the position open and available to fourth respondent for an indefinite period of time, particularly in circumstances where he held an important position within the organization.'

In the current matter, the applicant actually made it clear that it simply could not allow the situation with the first respondent not fulfilling her duties to continue indefinitely. The applicant actually made it clear that it needed an agent in the call center. That is after all the very purpose of a call center, being that the agent operates the telephone to attend to queries. The applicant was entitled to bring matters to a head.

[82] The applicant, in coming to a final conclusion in this matter, accepted and relied on the medical certificate of 18 October 2011. This it was entitled to do. That being the case, reference can be appropriately made to *AECI Explosives Ltd (Zomerveld) v Mambalu*[46] where it was held as follows:

> 'It seems to us that the company, having accepted the authenticity of the medical certficates, 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 and General Reinsurance Co of SA Ltd* (1994) 15 ILJ 304

[46] (1995) 16 ILJ 1505 (LAC) at 1510B-F

(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 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 the 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 the other employees; and the employee's work record and length of service."'

[83] In determining this matter, and having due regard to Item 11 of Schedule 8, the second respondent should firstly have considered whether the first respondent was capable of performing the work, which clearly, on the undisputed evidence, she was not capable to do. Secondly, the second respondent should have considered the extent to which the first respondent was able to perform the work and considering that she was a call center agent that could not use her voice, she was completely unable to perform the work. The second respondent should thirdly have considered the extent to which the first respondent's work circumstances/duties might be adapted and once again, considering the nature of the work and the nature of the incapacity, this was not possible. Finally, the second respondent should have considered the availability of any suitable alternative work, which issue is fully dealt with above, and nothing was available. The problem is that the second respondent considered none of the above. He did not make these enquiries. Instead, he only considered the fact that the applicant should have obtained the medical report and in his view, the medical report showed the first respondent was recovering. This is clearly a failure on the part of the second respondent to consider what he was required to consider in terms of Item 11. As I have said, the proper application of the enquiry envisaged by Item 11 can only read to a conclusion that the dismissal of the first respondent in this

case was substantively fair and this is the only conclusion any reasonable decision maker could come to in the circumstances of this matter.

[84] Considering all of the above, I am thus compelled to conclude that the second part of the review enquiry must lead to a finding that the award of the second respondent is indeed unsustainable and thus reviewable. The outcome arrived at by the second respondent because of the irregularities that existed cannot be substantiated for any other cause or reason. I conclude that the only reasonable outcome a reasonable decision maker could come to, if these irregularities did not exist, is that the dismissal of the first respondent by the applicant was substantively fair. I am further of the view that what the second respondent did was to unduly and unreasonably narrow the enquiry he had to make, to such an extent that he actually deprived the applicant of a fair and reasonable determination of the issues placed before him to determine.

The merits of the review: procedural fairness

[85] As stated above, the second respondent's finding of procedural unfairness is limited to the conclusion that there was an obligation on the applicant to conduct a medical examination of the first respondent to determine if her illness was permanent or temporary and because the applicant was reluctant to do this as it was initially not prepared to pay for this medical examination but later agreed to do so; this conduct was procedurally unfair.

[86] Again, this reasoning of the second respondent has no proper foundation in fact. There was in fact no duty on the applicant to conduct a further medical examination, as it already had a medical certificate dated 18 October 2011 submitted by the first respondent herself recording she was unable to work in the call center, as well as the first respondent's own and clear contention that she could not work in the call center. I again refer to what I have already addressed above as to how the medical report actually came about. In the end, the second

respondent's reasoning is completely devoid of proper factual context and thus an irregularity.

[87] Furthermore, considering the nature of the incapacity process, as fully addressed above in this judgment, the issues relied on by the second respondent on which he bases his conclusion of procedural unfairness simply cannot establish procedural unfairness. The fact that the applicant may have initially refused to pay for a medical report and then later agreed to do so simply cannot render the dismissal procedurally unfair. What the undisputed recommendation of Lubania dated 4 November 2011 records is that a process was recommended in terms of which a medical report would be procured and submitted by the first respondent if she wanted. The first respondent never disputed this recommended process and actually followed it. This further dispels any existence of procedural unfairness.

[88] However, what must stand squarely in the way of any finding of procedural unfairness is the conduct of the first respondent herself pertaining to the medical report. The fact is that she did not submit it and that she did not participate in the enquiry process specifically scheduled to deal with it. I have already dealt with the first respondent's unacceptable behaviour in this respect. The effect and consequence of this state of affairs is that if there was any failure or defect in the process pertaining to the submission and consideration of this final medical report, it must be placed squarely at the doorstep of the first respondent and the applicant cannot carry any blame.

[89] The Court in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metrofile (Pty) Ltd*[47] dealt with employees not participating in disciplinary proceedings in the case of misconduct and said:

> '…. once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or refuse to attend the enquiry. Should the employee refuse to attend the enquiry such employee

[47] (2004) 25 ILJ 231 (LAC) at para 55.

> must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made.'

In my view, the same principles must apply to an employee that does not attend or participate in an incapacity investigation despite being called upon by the employer to do so.

[90] Similarly and in *Fidelity Cash Management Service,*[48] it was held at follows:

> 'The reason why, generally speaking, an employee is not obliged to attend his disciplinary hearing is that a disciplinary hearing is there to comply with the *audi alteram partem* rule before the employer may take a decision that may affect the employee or his rights or interests adversely. An employee can make use of that right if he so chooses but he can also decide not to exercise it. However, if he decides not to exercise that right after he has been afforded an opportunity to exercise it and a decision is subsequently taken by the employer that affects him in an adverse manner, he cannot be heard to complain that he was not afforded an opportunity to be heard.
>
> The fear that the employer may take an adverse decision against the employee without the employee stating his side of the story is the reason why employees normally attend their disciplinary hearings. All an employer can do, if an employee fails to attend his disciplinary enquiry, is to proceed with the disciplinary enquiry in the employee's absence and make such decision as he considers to be right in the light of all the evidence before him.'

Again, I believe the same considerations must apply to incapacity proceedings and participation (or non participation) by employees therein.

[91] The judgment in *Old Mutual Life Assurance Co SA Ltd v Gumbi*[49] can also be equally applied to the current matter and I refer to the following pertinent extract from the judgment:

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[48] *Fidelity Cash Management Service* (supra) at paras 40 – 41.
[49] (2007) 28 ILJ 1499 (SCA) at para 16.

'All these facts ineluctably lead to the conclusion that the employee wanted to have the hearing aborted so as to prevent the fulfillment of the condition - a fair disciplinary hearing - upon which dismissal by the employer was contractually dependent. In our law a contractual condition is deemed to have been fulfilled where a party deliberately frustrates its fulfilment. By analogy this may also be the position in a statutory setting. In *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A) Holmes JA said at 378G-H:

> "I come now to the issue of fictional fulfilment of the condition upon the occurrence of which the money was to be paid and the shares to be transferred to Poupard and Lobel, ie to say, the grant of mining rights….
>
> In essence it is an equitable doctrine, based on the rule that a party cannot take advantage of his own default, to the loss or injury of another. The principle may be stated thus: Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."

See also *SA Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) in paras 33-36.' (emphasis added)

The point is that the first respondent cannot seek to rely on failures in the incapacity process where she herself was the instigator and cause of such failures.

[92] Even if the first respondent had concerns about the conduct of the applicant in process (and I cannot see how), I wish to refer to what the Court held in *Foschini Group v Maidi and Others*[50] which I respectfully agree with and conclude can be applied directly to the current matter:

'On the evidence accepted by the arbitrator, the respondents' refusal to attend

[50] (2010) 31 ILJ 1787 (LAC) at para 58.

> the disciplinary hearing was unreasonable. Assuming the objection to a material witness, being the enquiry initiator, to be a valid one, the respondents should nonetheless have participated in the hearing and placed their objections on record. It is a trite principle in our law that a party who chooses not to attend a hearing, does so at his or her own peril, and is precluded from later complaining about the outcome of the hearing.'

[93] Based on the above, the second respondent's finding of procedural unfairness constitutes an irregularity. In then moving to the second step, there is simply no manner in which any reasonable decision maker could come to a conclusion of procedural unfairness in this matter. It is in fact only the existence of the irregularities referred to that will support such a conclusion and once eliminated, only a finding of procedural fairness can follow.

Conclusion

[94] Therefore, based on what has been set out above, I conclude that the second respondent's award as a whole simply cannot be sustained. In a nutshell, the second respondent did not consider material evidence, unduly and irregularly narrowed the enquiry he was supposed to make, did not appreciate the nature of the enquiry he was actually required to make, committed material errors of law, and simply failed to consider the totality of circumstances as he was required to do, all of which constitute irregularities. If these irregularities did not exist, there can be no support or substantiation for the conclusions the second respondent came to, on any basis. All of this compels me to review and set aside the award of the second respondent on the basis that the outcome arrived at by the second respondent in terms of such award is such that no reasonable decision maker could come to such an outcome in the circumstances of this matter and I, accordingly, so determine.

[95] Having reviewed and set aside the award of the second respondent, I see no reason to remit this matter back to the third respondent again. All the required

evidence has been led and is on record and as I have said the case is well documented and largely undisputed. Considering that I have the complete record of the totality of circumstances and evidence properly before the second respondent, I believe I am readily able to finally determine this matter. I, therefore, intend to substitute the arbitration award of the second respondent with an award that the first respondent's dismissal was substantively and procedurally fair.

[96] It is thus my conclusion that the applicant was entitled to dismiss the first respondent and such dismissal was substantively and procedurally fair.

[97] Neither the applicant nor the first respondent really pressed the issue of costs before me. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion when it comes to the issue of costs. I exercise this discretion in favour of making no order as to costs, as I am of the view that this would be fair and appropriate in this instance.

Order

[98] In the premises, I make the following order:

98.1 The arbitration award of the second respondent, being commissioner R McCann, and dated 7 May 2012, in the arbitration proceedings between the applicant and the first respondent, under case number KNDB 16564 – 11, is reviewed and set aside.

98.2 The arbitration award of the second respondent, being commissioner R McCann, and dated 7 May 2012, in the arbitration proceedings between the applicant and the first respondent, under case number KNDB 16564 – 11, is substituted and replaced with an award that the dismissal of the first respondent by the applicant was substantively and procedurally fair.

98.3 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Advocate P Kennedy SC
Instructed by:	DLA Cliffe Dekker Hoffmeyr
For the First Respondent:	Advocate N Basson
Instructed by:	Cheadle Thompson & Haysom