Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C 174/2019

In the matter between:

WESTERN CAPE NATURE CONSERVATION BOARD T/A CAPE NATURE	**Applicant**
and	
THE COMMISSION FOR MEDIATION, CONCILIATION & ARBITRATION	**First Respondent**
COMMISSIONER F A CRAFFORD (N.O.)	**Second Respondent**
MARSHA DYERS	**Third Respondent**

Date of Set Down: 10 March 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 3 March 2022

Summary: (Review – Misconduct – incapacity raised on behalf of the employee at the disciplinary inquiry stage – confirmed diagnosis of incapacity only obtained a year after the employee's dismissal – Procedural fairness – initial medical certificate too vague and speculative to warrant postponing enquiry –employee given an opportunity to provide a proper medical assessment on appeal, but opportunity foregone – dismissal procedurally fair – Substantive fairness – conclusion that incapacity rendered undisputed misconduct non-blameworthy not one that no reasonable arbitrator could reach – evidence of diagnosis and rehabilitation obtained after dismissal properly considered in line with *Strydom v Witzenberg Municipality*.)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review an arbitration award in which the arbitrator found that the third respondent, Ms M Dyer ('Dyer') was substantively and procedurally unfairly dismissed by the applicant ('Cape Nature').

Background

[1] Ms M Dyer ('Dyer'), a field ranger with sixteen years service, was dismissed on 17 July 2017 by the Western Cape Nature Conservation Board ('the board') after being found guilty of a number of charges. These may be summarised as:

1.1 Gross negligence on 25 April 2017 she took a quad bike which got stuck outside the boundary of the reserve, where she abandoned it without making any arrangements to have it collected and without reporting it to her manager.

1.2 On the following day, she was insubordinate, or fail deliberately to comply with procedures by driving the bike without permission and without it being licensed on a public road.

1.3 She was further insubordinate in failing to hand over the keys to the quad bike two staff members on 26 April.

1.4 She was absent without leave for 15 days during March, 9 days during April, 12 days during May, and 2 days in June 2017.

1.5 She refused to complete routine documentation such as leave forms, attendance registers, declarations of interests and the like.

1.6 On 18 May she damaged the employer's property by flinging a steel cabinet onto the floor in the finance and administration office.

[2] The facts on which the charges were based were not seriously disputed. However, the unauthorised absenteeism was found by the enquiry chairperson to have been 33 days in three months. The quad bike charge related to her driving off with the quad bike, when she was supposed to be assisting with moving office contents. She also had suffered an injury on duty to her back and should not have been driving the bike. The evidence was that she had specifically been instructed not to drive it because of her injury. The evidence also showed there was no reason for her to be using the vehicle on the day in question, given what she was supposed to be doing. The quad bike got stuck in sand in an area which was outside the reserve and Dyer abandoned it. She did not notify management that she had taken it and could not be found when the nature reserve's office closed that day. When the quad bike was towed out of the sand, Dyer drove off on it and subsequently would not hand in the keys for it despite being instructed to.

[3] In relation to the incident of the damaged steel cabinet, the evidence was that she was the only person in the room when the cabinet was toppled and the chairperson found that either she had deliberately toppled it, or had attempted to move it without proper care, resulting in it being damaged. Dyer was issued with a written warning for this.

[4] Although it was suggested to the employer's witnesses, that Dyer would testify at the arbitration and dispute certain aspects concerning the details of her conduct, she never testified at all. The overwhelming thrust of Dyer's defence was not about what she had done, but whether the employer should have held the disciplinary hearing in her absence given the doctor's certificate. It was further argued that her admittedly irrational behaviour was a consequence of her mental incapacity at the time

rendering her unaccountable for her actions. Accordingly, her dismissal was procedurally and substantively unfair.

[5] Dyer was given notice of the disciplinary inquiry scheduled for 26 June on 19 June, a full week in advance. She did not attend the inquiry and neither requested a postponement nor submitted an apology for not attending. The disciplinary inquiry record reveals that a number of calls and communications were made to try and contact Dyer by the initiator and the chairperson of the inquiry, and all they could ascertain was that Dyer was not at home but could not say where she was.

[6] The initiator, Mr T Ndlovu, the De Mond nature reserve manager ('Ndlovu'), tabled a doctor's note to the chairperson indicating that Dyer had been booked off by a general practitioner, Doctor Saayman. The date of the certificate was 22 June 2017, a couple of days after the notice of the enquiry was issued to Dyer. The medical certificate in question was a *pro forma* certificate providing spaces for the medical practitioner to confirm the date when the patient was consulted, namely 22 June 2017.It also provided space for the practitioner to indicate the reason for determining the period during which the patient would be unfit for work owing to a sickness, operation or injury. In this instance, Dr Saayman stated that Dyer was unfit for work from 1 June to 31 July 2017, but did not state if that was based on his knowledge, or if Dyer told him she was unfit for work, which were the alternative options provided for on the *pro forma* certificate. Without specifying whether the certificate was issued on account of illness, operation, or injury, Dr Saayman nonetheless gave the following cryptic explanation about the nature of the illness:

> "Soos u weet is Marsha ongesteld. Ons is saam u baie besorg en het vandag besluit om haar te dwing om hulp te kry. Sien asseblief al die vreemde gebeure die afgelope weke, selfs so vroeg as Maart/April/Mei …(illegible) … as gevolg van 'n mediese siekte…."

[7] The chairperson considered the validity of the doctor's note and found it wanting in a number of respects which were recorded in the following terms:

"The note was dated 22 June 2017 as the doctor's visit and backdated for the employee to be off from 1 June 2017 to 31 July 2017, stating that the employee is unwell. It however did not state what was wrong. After consulting with the doctor, it seems evident that:

a. The doctor has not examined the employee- yet gave 2 months off in terms of the note.

b. The doctor [as stated to the ER and initiator] is of the opinion that the employee may require psychiatric assistance yet all attempts by the doctor to examine the employee or referred the employee to seek assistance had been declined by the employee i[n some cases forcefully as she overpowered the SAPS and refused to go to the doctor or hospital].

c. A psychiatrist, according to the available information, has not examined the employee and as it stands there is no evidence to show the employee has a medical/ psychological condition? was undergoing treatment.

d. Furthermore, there is no evidence to suggest that the physical and mental ailment contributed to the employee's actions for which she has been charged.

e. As it stands, there is no evidence to suggest the employee is unfit to have attended the hearing and present her case."

[8] Later in her decision, the chairperson considered the information provided in so far as it related to Dyer's well-being. She considered it was inappropriate for the doctor to have issued a backdated certificate, which only was done after Dyer had been charged. Moreover, Dyer had worked during the period covered by the certificate from 5 to 9 June 2017 and asked for days leave on 12 June, which showed that she was capable of working at that time. The employer could not be expected to speculate about her condition in the absence of a proper psychiatric assessment, nor could it know if she was being treated for it. The chairperson concluded that everything indicated that Dyer's behaviour was likely to continue.

[9] At the request of the chairperson, Mr T Ndlovu, the resort manager of the De Mond reserve, had consulted with Dr Saayman on 26 June 2017, who

had confirmed that he had not made a physical examination of Dyer, but had seen her on 1 June 2017.

[10] On 27 June, Dr Saayman wrote a fairly lengthy letter in response to Ndlovu's request to him to furnish a report setting out the assessments done on Dyer and when he consulted her. In that document, which was furnished to the company on 28 June, amongst other things, he stated that:

10.1 Dyer had been a patient of his practice of ten years;

10.2 He had become 'suspicious' over the last 4 months that she was not herself, when she came to his practice. This was based on an interaction she had with his personnel when she brought her child to be examined. From the evidence this appeared to have only occurred on 22 June;

10.3 He related hearsay accounts of her 'handling' at other medical facilities in the town as being 'out of the ordinary'.

10.4 On an unspecified date he spoke to Dyer' s husband and sister who had confirmed his suspicion she was short-tempered, paranoid and 'over religious', and believed her own family was conspiring against her.

10.5 She would disappear from home without telling anyone;

10.6 He asked her family members to try and persuade her to come and see him, so he could make a proper diagnosis, but she seemed to be in denial;

10.7 On 1 June 2017 at the instance of her sister, he had gone to see Dyer and consulted with her for 30 minutes. He tried to persuade her to get help, to no avail.

10.8 On 21 June he consulted telephonically with Dr Bruwer, a psychiatrist at Worcester Hospital, who confirmed his suspicions that it seemed Dyer was showing symptoms of mania and that she should be committed for treatment if she would not undergo it voluntarily.

10.9 He succeeded in getting her admitted and sedated on 22 June but she left the hospital of her own accord.

[11] In light of these considerations the chairperson had a discussion with the initiator and employee relations officer and decided to continue with the hearing in the absence of Dyer. After the outcome of the hearing was handed down on 3 July 2017, Dyer was given an opportunity to appeal. On 10 July 2017 Dyer's husband submitted an appeal on her behalf on the basis she was not in a condition to do so herself. The HR Manager responded on 11 July explaining why Dr Saayman's certificate of 22 June had been rejected as it backdated her sick leave and purported to explain her conduct in the previous three months without any examination. The manager noted that Dyer had been hospitalised when the outcome of the enquiry was delivered. Dyer's husband was further requested to furnish a valid medical report substantiating Dyer's incapacity and indicating when she would be able to attend her appeal. The employer waited for more than two weeks for a medical report to be provided. Finally, on 31 July 2017, in the absence of receiving such, Dyer's husband was advised that the appeal submission could not be delayed any longer.

The award

[12] The arbitrator concluded that Dyer's dismissal was substantively and procedurally unfair.

[13] The core of his reasoning was that:

13.1 Ndlovu had in fact accepted Dr Saayman's certificate of 22 June as a valid one, and it was only when it was presented to the chairperson of the enquiry that it was questioned.

13.2 He accepted that the chairperson was entitled to make further enquiries about the certificate, but should not have proceeded with the enquiry in Dyer's absence.

13.3 Ndlovu and his superior were both aware at the time of Dyer's family's concerns about her behaviour and had not contested the certificate when it was submitted and he should have raised it before the inquiry convened and costs were incurred.

13.4 Dr Saayman did examine Dyer contrary to the inquiry chairperson's view.

13.5 The chairperson was advised by Dr Saayman and Ndlovu that Dyer required psychiatric assistance, which should have raised alarm bells with the chairperson. At the very least she could have stood the hearing down and engage its own medical expert to investigate the claim.

13.6 The fact that Ndlovu had asked for a report from Dr Saayman after the hearing on 26 June, including details of Dr Saayman's consultation with Dyer, only served to reinforce the conclusion that the employer did have a concern that Dyer was suffering from a 'pre-existing' condition.

13.7 The report completed by Dr Saayman on 27 June and submitted to Ndlovu on 28 June indicated that Dyer had been sedated and admitted to hospital on 22 June and that formal evaluation and screening took place on 26 June. This confirmed that she was not in a position to attend her enquiry, though the arbitrator wrongly records that she was sedated on 26 June as well.

13.8 The employer's reliance on the case of *Old Mutual Life Assurance Company SA Ltd v Gumbi* (2007) 28 *ILJ* 1499 (SCA) in rejecting Dr Saayman's certificate on the basis it was vague, disregarded the fact that it investigated the certificate and obtained a report from Dr Saayman, so the information before it was not confined to the certificate alone.

13.9 Moreover, the July 2018 psychiatric assessment of Dr C George, a psychiatrist appointed by the board pending settlement discussions between the parties, established that Dr Saayman's observations were correct, which Dr Saayman claimed was also confirmed telephonically by a psychiatrist at Worcester Provincial Hospital on 21 June 2017, when he related Dyer's symptoms to him.

13.10 Contrary to the board's contention, Dr Saayman was a credible witness despite his confusion about certain dates during his

testimony. The subsequent formal diagnosis by Dr George tended to confirm the correctness of his initial diagnosis of Dyer.

13.11 Even though Dyer was not diagnosed as a bipolar disorder sufferer at the time she committed the misconduct, she was never disciplined for previous instances of disregarding authority, rebelliousness and negative, divisive conduct because Ndlovu regarded those as minor irritations, which raised the question why her recent misconduct was treated differently.

13.12 In relation to the charge of unauthorised absenteeism, no evidence was led that the pattern in March, April and May 2017 was excessive in relation to her previous record, and the board should have conducted an investigation into it, with a view either to put her on terms or to identify if there was a problem.

13.13 The evidence of Dyer's peculiar behaviour in March to May 2017, was sufficient for the board to have been aware that there could have been a medical explanation for her conduct and it should have requested a formal diagnosis from Dr Saayman or appointed their own expert to examine her.

13.14 On the evidence of her condition, he was not persuaded that she had purposefully intended to challenge management and staff, and she could not be held answerable for her conduct.

[14] On the question of reinstatement, Ndlovu was no longer the manager at De Mond and the chairperson of the enquiry was not her manager. There was also no evidence from staff allegedly affected by her behaviour to confirm that she was a source of friction and any sense of grievance by such staff could be resolved by human resource intervention between Dyer and those staff. Given Dr Saayman's and Dr George's reports there was no reason why Dyer could not return to a similar position. There was no evidence this would be impractical. The arbitrator then reinstated the applicant retrospectively to the date of her dismissal in 2017.

Grounds of review

[15] The employer took issue with the award in a number of respects. It contends that the award was one that no reasonable arbitrator traitor could have reached on the evidence, that he misconceived the inquiry and failed to address the substantial merits of the matter. The more specific contentions are dealt with below.

Alleged misdirection and the arbitrator's finding of mental incapacity negating accountability

[16] The board argues that the arbitrator misdirected himself by dealing with the matter as one of incapacity and not misconduct. This required him to determine whether at the time of the alleged incidents she lacked capacity to be held accountable for her actions. In the absence of expert testimony on this issue, by someone who had examined Dyer prior to 22 June 2017 there was no evidence before him to support his finding, which was consequently a speculative one. It was only a year later that Dyer was properly diagnosed with bipolar disorder.

[17] Moreover, the arbitrator could never have relied on Dr Saayman's certificate of 22 June 2017 because it purported to deal with events dating back to March that year, which Dr Saayman could not have known was ascribable to an illness he did not even positively identify. At best, the certificate only dealt with the period from 1 June 2017, and even then he had conceded that he had not diagnosed Dyer on that date and had not made a diagnosis before 21 June as to what was wrong with her. The arbitrator could not reasonably have relied on that certificate given Dr Saayman's own confusion about when he saw Dyer and the undisputed evidence of Ndlovu that Dr Saayman had phoned him asking if he was 'in trouble' without the certificate after Ndlovu had seen him on 26 June. The arbitrator unjustifiably preferred the hearsay evidence of Dr Saayman about her interaction with medical personnel and what family members had said to Ndlovu about her behaviour, over Ndlovu's own evidence that she was behaving normally at work.

Inappropriate sanction, or alternatively remedy.

[18] The board argues that had the arbitrator not committed the errors referred to above, he would have concluded that dismissal was the appropriate sanction given the gravity and weight of the acts of misconduct she committed.

[19] In any event, it also argued that reinstatement was inappropriate given Dyer's prior history of disobeying instructions, and the risk she might behave irresponsibly.

Procedural fairness

[20] The employer submitted that the arbitrator could not have justifiably concluded that the chairperson ought to have postponed the inquiry, given the inadequacies of the certificate furnished by Dr Saayman and the lengthy backdating of the certificate in circumstances where Dyer had not even been properly assessed by Dr Saayman.

[21] In any event, it argues that the arbitrator ignored the effect of the appeal procedure in curing any procedural defect in the initial inquiry. In particular, he ignored the fact that Dyer was given more than ample time to supply proof of her incapacity. Instead he limited his findings to considering whether the refusal to postpone the hearing rendered her dismissal unfair.

<u>Evaluation</u>

[22] On the question of procedural unfairness, the nub of the arbitrator's reasoning was that the chairperson of the inquiry was clearly aware that there might be a genuine medical reason why Dyer could not be expected to attend the inquiry. Even if the chairperson had justifiable concerns about the peculiar certificate provided by Dr Saayman, once a further explanation had been elicited from him in the form of his report of 27 June, it ought to have been obvious that there was an incomplete medical assessment underway. Had there been no appeal, it could be said that the arbitrator did have justifiable grounds for concluding that the inquiry should have been postponed, pending further clarity on Dyer's condition. However, nearly three weeks passed after Dyer's husband was advised

why Dr Saayman's certificate had been rejected and was advised to obtain a medical certificate substantiating her incapacity and when she might be able to attend an appeal. Nothing was forthcoming despite the fact that it must have been patently obvious that expert medical opinion was required. I agree that the arbitrator did not have any regard to the additional procedural safeguard of the appeal and the failure to make use of that additional opportunity. If he had done so, he would have found it hard to conclude that Dyer had been deprived of a reasonable opportunity to present exculpatory evidence and argument. Accordingly, his finding of procedural unfairness must be set aside.

[23] On the question of substantive fairness, at the time of the inquiry, the only potentially exculpatory evidence before the board was the certificate of Dr Saayman and his supplementary report of 27 June. The certificate expressed an assumption that it was known by the board that Dyer was disturbed and was concerned about her. It also stated that a decision had been made, purportedly on 22 June, to compel her to seek help. Lastly it referred to the strange happenings of recent weeks, some of which dated back to the months of March, April and May 2017, suggesting that these were the consequences of a medical illness, without clarifying what that illness might be. In his letter of 27 June, Dr Saayman expanded on the 'suspicion' he formed during the previous four months that Dyer was 'not herself'. The contents of the letter are summarised in paragraph [11] above.

[24] Neither of the documents contended that Dyer was unable to comprehend whether her actions were justifiable or not, nor was it claimed that she had no control over what she did. More particularly, no specific explanation was provided for her undisputed conduct relating to the quad bike, her unauthorised absenteeism and the damage to the filing cabinet. Nonetheless, Ndlovu himself had been approached by family members three or four times in May 2017 expressing their concern about Dyer's behaviour, mentioning *inter alia* an increase in her aggression. He claimed he could not detect any change and that most of the time she would be at the office but out in the field.

[25] More than a year later, the board's own appointed psychiatrist effectively confirmed, on the information available, that Dyer had indeed suffered a manic episode at the time of her dismissal. He also accepted that she had undergone a change in her normally placid character from early 2017, which ended with her becoming outspoken and uninhibited in her behaviour at work. He further accepted that she had been diagnosed with bipolar disorder and after his own clinical examination of her he was satisfied she would remain stable so long as she continued to take her medication and could return to work. Dr George's clinical assessment carried considerable weight with the arbitrator. He also noted that Dyer had a clean disciplinary record prior to the events she was charged with and sixteen years' service.

[26] Was it wholly unreasonable of the arbitrator to find that, at the time, she did not purposely intend to challenge management and staff by her unacceptable conduct and could not be held responsible for it? By the time it came to the arbitration hearing, it does not seem to have been a controversial proposition that Dyer's unpredictable behaviour might well have been a symptom of mental illness, even if at the time of enquiry itself there was no definitive assessment of her condition, but only a speculative diagnosis. A reasonable arbitrator could justifiably conclude that Dyer's conduct was explicable, albeit with the later benefit of expert opinion and confirmation that she was being medicated for diagnosed bipolar disorder. In the board's founding papers, it took issue with the arbitrator placing reliance on reports made after Dyer's dismissal, contending that he ought to have confined himself to the facts at its disposal at the time.

[27] In *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others* (2012) 33 *ILJ* 1081 (LAC), the LAC set aside an arbitrator's award in circumstances where the arbitrator had not considered new expert evidence introduced at the arbitration showing that the employee was capable of working. The court found that the arbitrator had erred by confining himself to the evidence that was available at the incapacity inquiry. I am bound by this, and by parity of reasoning the arbitrator in this instance was entitled and indeed enjoined to consider the expert evidence clarifying Dyer's condition in making his findings.

[28] It is trite that an arbitration hearing is a *de novo* proceeding and parties are not limited to evidence they led at the time of the hearing. The task of the arbitrator is to determine whether the employer acted fairly in dismissing the employee[1], in this case for misconduct. Accordingly, the arbitrator's factual finding on Dyer's lack of culpability for her conduct must stand.

[29] It was argued in the alternative that reinstatement was too much of a risk and that there had been a history of insubordination and the like. The arbitrator had considered this and noted that Dyer had never been disciplined for that and Ndlovu had in fact minimised her conduct as minor irritations. The evidence of Dr George's report was that as long as Dyer took her medication there was no reason she could not work as normal. In the circumstances it is difficult to see how reinstatement could not be a competent and appropriate remedy.

[30] The arbitrator had reinstated Dyer retrospectively to the date of her dismissal. It should be noted that he had also concluded that she had been denied a fair hearing. However, as to remuneration he limited the period of backpay roughly to the period between Dr George's report being obtained in July and the date of the award. I see no reason to vary this even if the dismissal was procedurally fair.

Order

[1] The finding of the Second Respondent in his award dated 13 February 2019 under case number WECT 13495-17 ('the award') that the Third Respondent's dismissal was procedurally unfair is reviewed and set aside, and substituted with a finding that her dismissal was procedurally fair.

[2] The finding of the Second Respondent in the award that the Third Respondent's dismissal was substantively unfair is upheld.

[3] No order is made as to costs.

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[1] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) at para [79]

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Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant	Mr C Bosch instructed by Guy & Associates
For the Third Respondent	P Tredoux instructed by Kruger & Blignaut Attorneys