JUDGMENT

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER:	C558/2006
DATE HEARD:	8 MAY 2008
DATE DELIVERED:	9 MAY 2008

In the matter between

STRYDOM:	APPLICANT
and	
WITZENBERG MUNICIPALITY	RESPONDENT

JUDGMENT

PILLAY D, J:

Can an employee insist on being employed in the same workplace that he alleges has induced his depression? The facts in this review invoke this question.

In this review, the Applicant, employee, had been employed as a Town Clerk until December 2000. After a merger of several councils to form the first respondent employer, the employee acted as its Municipal Manager from October 2001 whilst holding the position of senior administration officer. He objected to his designation as he considered himself to be more qualified than a senior administration officer. The employee was also unhappy about other issues, for instance, being investigated along with others for certain alleged irregularities even though nothing came of the investigation.

For about three and half years before October 2004 the employee was absent for about 98 days. Between 28 May 2004 and 29 April 2005 he was

absent for about 315 days. He submitted medical certificates by Dr van Niekerk, a psychiatrist, who certified that he suffered major depression. The employer did not dispute his diagnosis.

On 12 January 2005 the employee applied to be medically boarded. To succeed in such an application, the employee had to satisfy the board of the retirement fund considering his application that he was incapable of working. Despite asserting to the board that he was unfit for work, the board refused his application on 12 April 2005.

On 28 April 2005, the employer requested the employee to return to work. He failed to return to work. Following an incapacity enquiry on 25 July 2005 the employer dismissed the employee on 31 August 2005. The third respondent arbitrator upheld the dismissal.

The employee challenged the award on the ground that the arbitrator committed gross irregularities, firstly, by allowing Ms De Beer, the employer's representative at the arbitration, to testify after the employer's principal witness, Mr Du Plessis, had testified. Secondly, the Arbitrator allegedly drew an adverse inference from the employee's refusal to testify. Furthermore, the award was not reasonable, rational or justifiable because the arbitrator failed to apply the law on incapacity dismissal and did not find that the employer followed unfair procedure. More specifically, the arbitrator did not find that the employer failed to consider alternative positions for the employee. In addition, as the employee had indicated at the incapacity hearing that he was due to see a psychiatrist five days after the hearing, the employer should have delayed its decision until he obtained an updated report. The employee also alleged that the incapacity hearing was coloured by allegations of misconduct. Accordingly, neither the arbitrator nor the employer came to a proper conclusion. The chairperson of the enquiry also misconstrued his duties by declaring that it was not his duty to decide whether the employee was fit for work when that was precisely what he was required to do. So it was submitted for the employee.

When he informed the employer that he was applying to be medically boarded, the employee also reserved for himself all his rights. Although he did not specify what he meant, the Court assumes that he expected the employer to treat him fairly. In view of his application for medical boarding and its possible outcomes, he could not have reserved for himself the right to work or to be remunerated without tendering his services.

As it transpired his application for medical boarding was refused because he was found to be fit to work. The employee did not return to work. He stayed away and returned only to attend his incapacity hearing.

Typically of all employees who do not succeed with their applications for medical boarding, this employee too was in a catch twenty-two situation. He had to assert that he was permanently unfit for work in order to succeed in his application. When he failed in that application, he had to assert that he could perform some work in order to resist an incapacity dismissal successfully. The more persuasive the application for medical boarding, the weaker the prospects of accommodating him in a way that he would remain employed and earn a salary.

The onus of proving the fairness of a dismissal remains always with the employer. An element of that onus is the employer's duty to avoid the dismissal. Accommodating an employee with a disability is the primary way of avoiding a dismissal for incapacity. To determine how to accommodate the employee, the employer needs to know what the employee is capable of doing. For that, the employer depends on the employee and medical advisers. As the employee considered himself permanently unfit the options for accommodating him were limited. The employer accepted the medical advice of the employee's doctors without question. It could have obtained medical reports from doctors of its own choice if it wanted to challenge the employee's doctors.

The employee did nothing to dispel the information the employer had that he was unfit for work of any sort. On the contrary, it is common cause that he

could not work in his assigned job as a senior administration officer. Furthermore, the cause of his major depressive disorder, melancholy and symptoms of post-traumatic stress disorder was the stressors at work. Dr van Niekerk's prognosis was that the employee's condition would deteriorate if he remained exposed to the same stressors. At best, he would recover partially in two years time to work in a position with less responsibility. The medical boarding panel surmised that he might not return to his workplace but might find work in the open labour market. Consequently, the employer did not expect the employee to return to work under the very conditions that induced his illness.

Mr Niehaus, for the employee, submitted that the employer had clerical positions available but had not offered them to the employee because it knew that the employee would not accept any of them; clerical posts paid less than administration posts. Furthermore, the employee would have had to endure the same stressors in a clerical position as he did as an administration officer.

At no stage before or after his dismissal did the employee tender his services for any position whatsoever. Nothing prevented him from tendering to work either at conciliation or arbitration when he allegedly heard about the clerical posts being available. The employer accommodated the employee in the most reasonable way: It gave the employee paid sick leave for about ten months.

The singular difference between this case and Standard Bank vs Ferreira, unreported Judgment, JR662/06 dated 25 December 2007 is the attitude of the employee in each case. Ferreira was desperate to keep her job. She applied for medical boarding only because Standard Bank was reluctant to accommodate her by adjusting her work environment. Indisputably, the employee in this case does not want to work for this employer. Whether he wants to work at all is also questionable considering that he applied voluntarily for medical boarding.

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This case is similar to the decision of the U.K. Employment Appeal Tribunal in the Royal Bank of Scotland PLC vs Mrs S McAddie UK EAT/0268/06/ZT, 29 November 2006 which the Supreme of Judicature, Court of Appeal, Civil Division, UK EAT/A2/2006/2662 dated 31 July 2007 upheld. The mental ill health of the employee in both cases was induced by conditions at work. The Supreme Court of Judicature approved the following conclusion of the Employment Appeal Tribunal in the following paragraph:

> **"**The crucial point is that neither the doctors nor Mrs McAddie herself was suggesting that there was any possibility of the employment continuing. Mrs McAddie was saying the opposite and in emphatic terms. There was, in truth, no alternative to dismissal. In these circumstances, we must allow the appeal and dismiss Mrs Addie's claim. We do not do so without feeling real sympathy for her.
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> The Tribunal found that the bank failed to carry out its own grievance procedures properly. Even if that factor contributed to rather than wholly causing Mrs Mc Addie's breakdown in health, it is very regrettable that that has led to her losing her employment after 20 years loyal and valued service."

The arbitrator's concluded similarly on the merits in this case in the following extract from the award:

> "But, the submission by Respondent that this is a case of an employee that was not happy at work and sought to escape by an application for permanent disability is irresistible. I must also side with the Respondent here. It contends the Applicant's apparent willingness to return to work is based on the fact that he had realised that his disability claim would not succeed and that he is having difficulty in securing alternative employment. Again, I take into account that Applicant did not testify and his present position is unknown. Given his silence, I must consider that which is before me and I cannot rule that this contention by Respondent is an unreasonable one.

It also appears to be strange that Applicant would now be willing to return to a position that caused him so much stress and pressure that he stayed away from work for more than a year and where the prognosis for recovery was set for 2007. Why is he prepared all of a sudden to accept a position that he did not want at an employer that he did not want to work for? Applicant elected not to testify and to explain this."

Turning to the employee's failure to testify at the arbitration, in the above extract the arbitrator clearly does not draw an adverse inference. He merely notes that the evidence of the employer called for an answer from the employee. The Court agrees with the arbitrator.

With regard to the submission for the employee that the chairperson misconceived the nature of his duties by declaring that he did not have to decide whether the employee was fit for duty, the Court points out that neither these proceedings nor the arbitration review the chairperson's reasoning. The arbitrator heard the dispute *de novo* and had to consider the chairperson's reasoning as part of all the material before him.

Furthermore, read in context, the chairperson meant that he was not medically qualified to pronounce on the employee's fitness for work and, in any event, the issue for his determination "(went) beyond that". He had to decide whether a continued employment relationship was possible given the employee's absenteeism, the employer's operational needs and the undisputed medical evidence. Although the chairperson referred to the employee acting fraudulently in submitting a report to the Department of Labour for Workmen's Compensation neither that nor any other misconduct influenced the arbitrator's decision. There was no other conclusion but the one that both the chairperson and the arbitrator came to.

Against the overwhelming undisputed evidence, the arbitrator's ruling to allow Ms De Beer to testify does not amount to any irregularity. Ms De Beer's evidence was on a peripheral issue. The issue was whether the employee or his representative informed the arbitrator that the employee was

due to consult his psychiatrist five days after the hearing. The employee could have defeated authenticity of Ms De Beer's evidence firstly, by testifying himself and secondly, by producing the report of his psychiatric examination following the alleged appointment he had five days after the incapacity hearing.

In the circumstances, the application for review is DISMISSED WITH COSTS

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PILLAY D, J

Date signed: 27 May 2008

APPEARANCES: