

SOUTH AFRICA / JUDGMENT

Odayar v Wilkes N.O and Others (JR23/23)

[2024] ZALCJHB 350 (9 September 2024)

[2024] ZALCJHB 350**COURT**

Labour Court Johannesburg

BEFORE

P Naidoo

CASE / FILE NUMBER

JR23/23

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****No: JR 23/23****In**

the matter between:

LUVESHNI
ODAYAR
Applicant
and
COMMISSIONER
TREVOR WILKES N.O
First
Respondent
COMMISSION
FOR CONCILIATION MEDIATION
AND
ARBITRATION
Second
Respondent
THE
CENTRE FOR DEVELOPMENT AND
ENTERPRISE
Third
Respondent

Heard:

7 May 2024

Delivered:

09 September 2024

JUDGMENT

NAIDOO, AJ

Introduction

- [1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (arbitrator). In his award, the arbitrator found that the applicant was discriminated against by the third respondent, the Centre for Development and Enterprise (CDE); that the applicant was constructively dismissed and her dismissal was automatically unfair. The arbitrator awarded the applicant 6 months salary as compensation for her dismissal and discrimination amounting to R122 902.26.
- [2] The applicant raised a number of grounds of review, but the thrust of the review application is that the “consequential relief awarded to the applicant should be reviewed and set aside” and this Court should substitute the relief awarded to the applicant with an award of maximum compensation for her constructive dismissal and 24 months compensation for her unfair discrimination. The review application was unopposed and the CDE filed a notice to abide by the Court’s decision.
- [3] Consequently, the factual matrix to which I now refer can be suitably truncated.

Background**facts**

- [4] The applicant was appointed as a Junior Policy Analyst on a fixed-term contract for the period from 22 February 2021 until 28 February 2023.
- [5] The applicant informed the CDE that she underwent cardiac surgery in 2010 and was a chronic cardiac patient before taking up employment.
- [6] The applicant’s evidence was that during the course of employment with the CDE, she had raised discontentment which was dealt with in a series of meetings specifically with her and her direct supervisor, who was the director of research, Mr Schirmer (director). She stated during these meetings that she was unhappy about the allocation of work and because there was no clarity provided as to her role within her team and in regard to certain projects as well as the level of work allocated to her. She was unhappy about not being made a “master of ceremonies” at one instance and she stated that at some point her director had sworn at her which had impacted her dignity. Her director had also, at one point, mentioned that her heart condition was an inconvenience to the CDE. She also mentioned an incident which she regarded as favouritism.

[7] After attempts to address the applicant's grievances were made and they could not be resolved, the applicant's evidence was that the CDE, through their Human Resources representative Helen Atkinson (Atkinson), had begun to place her under pressure to accept what she called 'self-termination' options. After exploring these with the CDE, she elected not to accept either of them. As a result, the CDE reacted by formulating her grievances in the form of an incompatibility hearing against her

and because of the stress created by this, she fell ill and was unable to attend the initial hearings. After a period of sick and

annual leave given to her, however, she had recovered sufficiently to return to work but on the same conditions that had applied previously during lockdown. This entailed that most of the work could be done remotely.

[8] The applicant had provided medical certificates to the CDE in regard to the affected time away where it did not involve annual leave. A medical report from her doctor indicated that she was fit to return to work on 7 December 2021 to work remotely, but not yet to travel to Johannesburg. Notwithstanding her efforts, and those of her legal representatives to reach out to senior members of the CDE, the CDE through its General Manager Ms van den Bergh (van den Bergh), persisted with the demand that she return to work physically. The CDE indicated to her that her sick and annual leave had been exhausted and she would not be paid after December

2021. At the same time, the CDE prevented her access to the system for, according to the applicant, unsubstantiated reasons. She had also not been delegated any work from her director who referred her back to van den Bergh therefore, it was not possible for her to tender her services.

[9] On the basis of the above factual matrix, the applicant stated that she had been unfairly discriminated against because the health condition which had developed during her sick leave involved her heart condition and this was a disability. She stated that there had been an unfair labour practice relating to discipline short of dismissal committed against her because the CDE had failed to finalise the incapacity inquiry at certain points when she had returned to work during December and January. Then on 28 February 2022, she alleged that there had been a constructive dismissal because of the manner in which her grievances were treated, the manner in which she was pressurized to leave and the manner in which she was ultimately prevented from working in circumstances

where she was able to work remotely. She resigned on 8 April 2022.

[10] The applicant referred, on different dates, an unfair labour practice dispute relating to disciplinary action short of dismissal[1]; a constructive dismissal dispute[2] and an unfair discrimination dispute in terms of s 6 of the Employment Equity Act[3] (EEA) relating to a listed ground, namely disability[4]. She requested compensation in respect of all her claims. She did not claim damages.

[11] The unfair labour practice and constructive dismissal disputes were consolidated with the unfair discrimination dispute in terms of Rule 28 of the CCMA Rules. The consolidated disputes were set down for arbitration on 10 November 2022.

The arbitration award

The constructive dismissal dispute

[12] In his analysis as to whether there had been a constructive dismissal, the arbitrator concluded *inter alia*; as follows:

12.1 From reading the transcripts of the meetings between the applicant and the CDE collectively, as well as the other interactions during November 2021, it was clear that the CDE had made every effort to attempt to mediate the relationship difficulties that had arisen because of the applicant's needs, which were expressed several times for a different management style of her director and different approaches of communication and interaction from her team members. After all of these meetings, and attempts it appeared that this was not possible.

12.2 The applicant's interpretation that the CDE's conduct (i.e. making an offer of alternatives to the applicant) amounted to constructive dismissal rendering the working relationship intolerable was not convincing. It was clear that the applicant had an election and there was no coercion by the CDE when presenting her with the alternatives (which were to leave and become an independent contractor or accept termination on a 'no fault basis').

12.3 The threat of an intended incompatibility hearing did not, similarly, amount to constructive dismissal because it was possible for the applicant, after recovering from her medical condition, to return to the office and abide by the hearing process where she may have succeeded before the third party chairperson.

12.4 Where things took a turn was after the applicant recovered from what was, according to unchallenged evidence, a serious health condition. Upon her return to work on 7 December 2021, she provided a medical certificate in terms of which her doctor recommended remote work as she was not able to travel. The applicant had indicated that she was fit to work although not yet to return physically to Johannesburg. After 28 February 2022, there were several indications that the applicant had attempted to log in to the system and did not have access, she sent several messages to her team members and director and alerted the board members of her return to work, albeit remote. There was no reasonable justification for preventing access by the applicant to the system, given that she indicated several times that she was able to work remotely. Even though a hybrid model of return to work had been adopted by the CDE generally, it was possible for the applicant to continue to render her services in the same manner as was done during lockdown and this was the clear medical indications from her doctors. The CDE could very easily have accommodated remote work and the situation of the applicant clearly needed to be accommodated in terms of the already provided medical certificate. To prevent access to the computer system thereby preventing the applicant from rendering her services and also failing and or refusing to pay her as a result was no longer reasonable. This conduct by CDE rendered

the working relationship objectively intolerable. The CDE's conduct during January and February 2022 clearly established a constructive dismissal. The position of the applicant had been rendered intolerable and her choice to resign at this juncture was objectively justifiable as she had exhausted her internal remedies.

The unfair discrimination dispute

[13] The arbitrator next considered whether or not the applicant was unfairly discriminated against on the basis of a listed ground – her disability. After undertaking a detailed and considered recordal of the applicable legislation and case law, the arbitrator concluded *inter alia*; as follows:

13.1 It was never ultimately rebutted or challenged that the applicant's condition was a congenital heart condition which persisted throughout her life. The arbitrator accepted that this was the reason why she was not able to fully return to work physically.

13.2 The CDE's persistent demands for more information and better supported medical reports that explain why she cannot return to work physically could hardly be described as consultation as intended in the Code of Good Practice on Employment of People with Disabilities[5] (Code of Good Practice). Her medical condition attached permanently to her medically and was a disability. The Code of Good Practice places several responsibilities

on the employer when such a disclosure is made. Her congenital heart condition was a physical impairment which limited her ability to perform in a normal manner and therefore was a disability. That it was substantially limiting has been inferred from the fact that the applicant was not able as a result to return to work physically.

13.3 The conduct of the CDE by insisting on further medical information and issuing an ultimatum to return to work physically or to provide this information amounts to discrimination which is causally connected to the applicant's disability. The CDE was aware of the applicant's disability when it insisted that she return to work and when she had done so, by preventing her from working by locking her out of the computer system and consequently not paying her from 28 February 2022. While its purported intent was to accommodate her upon receipt of the medical opinion, it nevertheless failed to accommodate the disability altogether by ignoring the available medical certificate recommending working remotely until the applicant could be cleared to return physically. This insistence, where the CDE already knew what the condition was, was clearly connected to the disability of which it was aware. There was no evidence of why the applicant could not work remotely and therefore, the manner in which the CDE conducted itself towards the applicant specifically after 28 February 2022, amounted to discrimination on the basis of the disability.

The unfair labour practice dispute

[14] In relation to the unfair labour practice dispute, the arbitrator concluded that the CDE had not committed an unfair labour practice by delaying the incompatibility hearing for, inter alia; the following reasons:

14.1 The applicant received a notice to attend an incompatibility hearing on 1 December 2021 and this was never finalised before the applicant resigned on 8 April 2022. Given the festive season and the applicant's leave during this period, there was no material delay.

14.2 It cannot be said that the failure to finalise the hearing was the fault of the CDE because it arose to a great extent due to the fact that the applicant was not medically fit to be able to attend the hearing, not because the CDE was reluctant or unwilling to proceed with the hearing. The explanations provided by the CDE as to why it could not hold the incompatibility hearing were adequate. Significantly, the CDE had in its reply to the applicant's request that the hearing was to be expedited explained that it was awaiting a clear medical indication that she was ready to cope with the stress of the hearing. Throughout the period there was communication with the applicant. The only prejudice to the applicant was the distress which would necessarily accompany any such process.

Determining an appropriate remedy

[15] The applicant requested compensation for her constructive dismissal. In determining an appropriate amount of compensation, the arbitrator reasoned inter alia; as follows:

15.1 The applicant had proved that she was constructively dismissed and because it was related to her disability, it was consequently also an automatically unfair dismissal;

15.2 Compensation where a fixed-term contract is concerned is not based on contractual damages;

15.3 The unchallenged evidence indicated that the applicant had since April 2022 become re-employed and was, therefore, not completely out of pocket due to her dismissal;

15.4 The CDE had identified a need to proceed with an incompatibility hearing. It had attempted to mediate the circumstances leading up to this decision before doing so, and the applicant's conduct was to at least some degree a contributing factor in this equation;

15.5 The CDE did not pay the applicant after she had exhausted her sick leave and more importantly, had not paid the applicant after she had reported to work remotely notwithstanding the medical certificate which she had provided; and

15.6 One also had to weigh up the impact on the CDE being a nonprofit organization with limited resources.

[16] In relation to the remedy for unfair discrimination, the applicant requested compensation. In determining an appropriate amount of compensation, the arbitrator reasoned inter alia; as follows:

16.1 The EEA provides for an award of both damages and compensation and thus, contemplates patrimonial and non-patrimonial loss. The award of damages is based on the actual financial loss suffered and is aimed at restoring the employee to the position she would have been in had the unfair discrimination not occurred. The applicant had not requested nor proved any medical or financial damages.

16.2 Compensation for the purposes of the EEA is awarded for non-patrimonial loss based on injury to human dignity (solatium).

16.3 The applicant had felt in the extreme the impact of the manner in which she had been treated. Although the initial medical, psychological and emotional reaction was due to being faced with the incompatibility hearing, the conduct which gave rise to the discrimination took place after the applicant had convalesced to a material degree.

16.4 The CDE's purported overall social upliftment objectives should be seen as an aggravating factor, however, it remained a nonprofit organization with limited resources.

16.5 There was some evidence of the applicant's contribution to the stress caused to her director (who also had a heart condition) although no evidence was led by the CDE of the alleged distress of her team members.

16.6 The Labour Court and Labour Appeal Courts have been generally more conservative with regard to awarding compensation for non-patrimonial loss:

'Although the EEA provides for no limit on compensation the Labour Appeal Court in a recent decision has set this conservative limit at R50,000,00. See *South African Airways (Pty) Ltd v V and Another* [2014] ZALAC 27; 2014 8 BLLR 748 (LAC); 2014 35 ILJ 2774 (LAC).

206. This quantum fits the circumstances because it is fair and reasonable.'

[17] Ultimately, the arbitrator concluded that fair and equitable compensation would be six months compensation, calculated at six times R20 483.71 per month (six months' salary). In total, the compensation for both the unfair discrimination and the automatically unfair dismissal amounts to R122 902.26. The unfair labour practice referral was dismissed.

Grounds of review

[18] The first ground of review was that the arbitrator committed an error of fact in finding that the scope of the arbitration was limited by the parties' pre-arbitration minute and this minute did not extend the scope to whether or not the purported incompatibility enquiry was substantively justified.

[19] The second ground of review related to the arbitrator committing so-called errors of fact by ignoring material facts that led to the delay in the CDE convening the incompatibility enquiry and his conduct in attributing the delay to the applicant.

[20] The third ground of review was that the arbitrator ignored material facts which, had they been taken into account, would have led to him finding that the applicant 'suffered at the hands of the Third Respondent, which is unfair, and should be compensated for it.' These facts were that:

20.1 the applicant's illness was caused by the CDE's conduct;

20.2 the applicant's illness was aggravated by the CDE's conduct;

20.3 the applicant almost died as a result of the CDE's conduct; and

20.4 the applicant suffered financial prejudice by incurring legal fees, medical costs and residential expenses in respect of the lease of an apartment in Johannesburg on the CDE's instruction.

[21] The applicant's further grounds of review are quoted below:[6]

'7.7 The third ground of review is the First Respondent's gross irregularity by making an error of law in relation to his finding that the Labour Appeal Court had set a conservative limit of R50,000 for awarding compensation for non-patrimonial loss. The compensation awarded in relation to the unfair discrimination is accordingly premised on a wrong legal principle, which renders its subject to review.

7.8 The fourth ground for review is the First Respondent's failure to add the compensation of R50,000 to the 6 (six) months' compensation awarded in relation to the constructive dismissal dispute.

7.9 The fifth ground for review is the First Respondent's finding in relation to the consequential relief awarded to the Applicant in relation to the constructive dismissal dispute by reaching a decision which could not reasonable have been made by a reasonable commissioner directing itself to all of the relevant facts and principles in that it placed blame on the Applicant by finding that the Applicant's conduct was to at least some degree a contributing factor in the equation of the incompatibility hearing.

7.10 The First Respondent failed to consider any of the substantive merits in relation to the ULP dispute in his adjudication thereof, but brought it consideration when it had to consider compensation in relation to the constructive dismissal dispute.

7.11 The First Respondent accordingly placed too much emphasis on factors that was founded on a wrong principle of law and too little emphasis on all those factors which established the Applicant's prejudice.'

[22] During argument, the applicant's attorney abandoned prayers 2 and 3 of the notice of motion (relating to a determination that the applicant was subjected to an unfair labour practice and that she should be awarded maximum compensation for her unfair labour practice) and persisted with prayers 1, 4, 5 and 6 to 8 of the notice of motion. In short, the applicant no longer persisted with a review of the arbitrator's finding that the CDE did not commit an unfair labour practice and a prayer for compensation in

relation thereto. The thrust of the review was that this Court should substitute the relief awarded to the applicant with a determination

that the applicant should be awarded maximum compensation for her constructive dismissal and maximum compensation for her unfair discrimination.

[23] Consequently, the first two grounds of review (connected with the unfair labour practice) fell away and the applicant further, did not persist with a challenge to the award on the basis that the arbitrator failed to determine whether the purported incompatibility enquiry was substantively justified. On this score, the arbitrator found that the applicant's evidence that the threat of an intended incompatibility hearing was a constructive dismissal had been rebutted and it was possible for the applicant after recovering from her medical condition to return to the office and abide by the hearing process where she may have succeeded before the third party chairperson. Expecting the arbitrator to determine the substantive fairness or legitimacy for that matter of the incompatibility hearing which did not proceed because the applicant resigned before it could take place would be irrational. This ground of review was correctly not persisted with.

Analysis

of the grounds of review

[24] Under the third ground of review, the applicant alleges that the arbitrator failed to consider material facts which, had they been considered, would have led to the arbitrator finding that "the Applicant suffered at the hands of the Third Respondent, which is unfair, and should be compensated for it". In giving the applicant the benefit of the doubt and reading in the contention that the compensation amount awarded to the applicant should have been increased given the presence of those facts, it is necessary to deal with those facts below.

[25] First, it is contended that the arbitrator failed to consider that the applicant's illness was caused by the CDE's conduct. This contention has no merit. The applicant had a congenital heart condition which she argued she disclosed at the commencement of employment.

[26] Second, it is contended that the arbitrator found that the only prejudice that the applicant suffered was the distress which would necessarily accompany being served with a notice to attend an incompatibility enquiry[7] and that he failed to consider that the applicant's illness was aggravated by the CDE's conduct in giving her notice of a proposed incompatibility

hearing and that the applicant almost died as a result of the CDE's conduct. The applicant, with respect, distorts the arbitrator's findings on this score and there is no reference in the award to this being the only prejudice she suffered. It is also evident from the award that the arbitrator considered the significance, import and impact of the CDE's decision to give the applicant notice of an incompatibility enquiry on the applicant and the work relationship. The arbitrator carefully dealt with the sequence of events and was clear and precise as to when he concluded that the conduct which gave rise to the constructive dismissal and discrimination occurred. He concluded (among other things) that although the initial medical, psychological and emotional reaction was due to being faced with the incompatibility hearing, the conduct which gave rise to the discrimination took place after the applicant had convalesced to a material degree. Even to the extent that it is argued that the arbitrator's finding is wrong and the CDE's conduct aggravated the applicant's illness or nearly caused her death, no details of any medical evidence that was led which would support such a profound conclusion is referred to in the founding affidavit or contained in the record.

[27] Finally, it is alleged that the applicant suffered financial prejudice by incurring legal fees, medical costs and residential

expenses in leasing an apartment in Johannesburg on the CDE's instruction. The applicant, however, did not claim damages and only compensation, thus there was nothing unreasonable about the arbitrator failing to take such evidence into account. In the award, the arbitrator deals with the distinction between compensation and damages and records that the applicant did not request or prove any medical or financial damages. This is supported by the referral form and the documentary evidence.

[28] The third ground of review accordingly stands to be dismissed.

[29] The critical issue that the applicant failed to meaningfully address in the founding affidavit was the basis of her challenge to the reasoning of the arbitrator in concluding that the applicant was only entitled to 6 months' compensation as opposed to the maximum compensation on both her automatically unfair dismissal and her unfair discrimination dispute.

[30] The applicant's attack on the award was directed at the arbitrator's so-called errors of fact and law.

[31] Thus, it was further contended that the fourth[8] ground of review is that the arbitrator committed an error of law in relation to his finding that the Labour Appeal Court had set a conservative limit of R50 000.00 for awarding compensation for non-patrimonial loss. This ground appears to be based on a misunderstanding of the award. The arbitrator was referring to what was held in the decision of *South African Airways (Pty) Ltd v Vuuren and Another*[9]. In that case, the Court held that the award made by the court a quo, namely, 24 months' remuneration in respect of the solatium to the applicant was to be set aside and

substituted with an award of R50 000,00. The arbitrator in casu did not commit any error of law in his reference to the judgement. This ground of review falls to be dismissed.

- [32] The fifth[10] ground of review is that the arbitrator failed to add the compensation of R50 000 to the 6 months compensation awarded to the applicant. Again, this is based on an incorrect reading of the award. The arbitrator clearly records in the award that in total, the compensation for both discrimination and dismissal amounts to R122 902.26 computed as being 6 times R20 483.71. The applicant was never awarded R50 000 as a separate amount of compensation. This ground of review accordingly stands to be dismissed.
- [33] The sixth[11] ground of review is that the arbitrator's findings in relation to the "consequential relief awarded to the Applicant in relation to the constructive dismissal dispute by reaching a decision which could not reasonable [sic] have been made ... in that it placed blame on the Applicant by finding that the Applicant's conduct was to at least some degree a contributing factor in the equation of the incompatibility hearing". The succeeding paragraphs under this ground of review suggest that the arbitrator did not place enough emphasis on all those factors which established 'the Applicant's prejudice'. This ground of review is based on a selective reading of the award. In the award, the arbitrator set out a number of reasons for how he arrived at the remedy for the applicant's unfair discrimination and the arbitrator's award set out a number of reasons for how he arrived at the remedy for the applicant's constructive dismissal. Those went beyond what the applicant's conduct was and he set out a number of factors for his decision.
- [34] To the extent that it is claimed that the amount of compensation awarded to the applicant is one that no reasonable decision maker could have arrived at and this Court should substitute the award with a finding that the applicant should be awarded the maximum compensation for her constructive dismissal and the maximum compensation for her unfair discrimination, I deal with the test applicable to reviews of this nature below.

The test on review

- [35] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[12], the court held that s 145 of the Labour Relations Act[13] (LRA) is now "suffused by the constitutional standard of reasonableness", and that the threshold test for the reasonableness of an award was: "... is the decision reached by the commissioner one that a reasonable decision-maker could not reach?..."[14] This means that the award in question is tested against the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[15] In conducting this test, it is always necessary and important for the court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[16], the Court said:

‘... 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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[36] In sum, applying the correct review test has a logical chronology. First, it must be considered if there is a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must next be considered if the outcome arrived at by the arbitrator was reasonable, based on all the evidence and issues before the arbitrator, even if it may be for different reasons or on different grounds as those referred to by the arbitrator. [17] It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the

arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[18]

[37] Section 194(1) of the LRA visits the arbitrator or the Labour Court with a discretion, albeit not unlimited, as to the extent of the compensation that may be awarded. How much compensation is awarded under the LRA is open to judicial discretion.[19] Compensation flows from the findings as to the quality and nature of a dismissal and ultimately, “a whole range of factors must be taken into account to determine whether compensation has to be paid and if so, for how many months”. [20] Indeed, “to compensate or not to compensate and if compensation is to be awarded, for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA”. [21] Accordingly, notwithstanding that the applicant may have been considered for an award of compensation, compensation is the stuff of legal discretion [22] in terms of which “the main criterion is that [it] must be just and equitable” in the circumstances. [23]

[38] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [24], the Constitutional Court held:

‘A court of appeal is not entitled to set aside the decision of a lower court... [made] in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’ [25]

[39] The decision to award compensation in terms of section 193(1)(c) of the LRA is reviewable, and what is relevant is whether a reasonable

decision maker would have arrived at that decision.[26] However, the decision as to the amount of compensation, awarded in terms of section 194(1), constituting the exercise of a narrow discretion, requires that this Court ascertain whether a limited ground for interference exists before it can vary the quantum. Those limited grounds include where the tribunal or court:

- ‘(a) did not exercise a judicial discretion; or
- (b) exercised its discretion capriciously; or
- (c) exercised its discretion upon a wrong principle; or
- (d) has not brought its unbiased judgment to bear on the question; or
- (e) has not acted for substantial reasons; or
- (f) has misconducted itself on the facts; or
- (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’[27]

[40] The assessment of what the employee should have received must, in turn, require the Court to examine factors such as the employee’s length of service with the employer, his or her prospects of finding alternative employment, the financial position of the employer, and so on.[28]

[41] The arbitrator provided detailed reasons for the quantum of compensation awarded to the applicant. These are set out in detail in this judgement but it bears emphasising that the applicant commenced employment on 22 February 2021 in terms of a fixed-term contract which was meant to endure only until 28 February

2023. She resigned on 8 April 2022. She had little over one year of service. She managed to secure employment since April 2022 and was not completely out of pocket as a result of her dismissal. The financial position of CDE and the fact that it is an NGO and has limited resources devoted to achieving social achievement objectives were also significant considerations. The applicant’s illness was not work-related, she had a heart condition which existed prior

to her employment. In addition, having carefully considered the chronology of events that occurred during the employment relationship

the impugned conduct was isolated to a specific period and much of the events which occurred prior to February 2022 were not in and of themselves causative of the constructive dismissal or led to her unfair discrimination. As aggrieved as the applicant was about these facts they came about as a consequence of the fact that the parties had reached an impasse in relation to the applicant’s

discontentment. Having considered the transcripts, the documentary evidence and the applicant’s communications and relationship

with her director and the CDE, there is enough evidence before this Court which demonstrates that the arbitrator's findings were not unreasonable.

[42] I accordingly find that there is nothing which warrants interference with the quantum of the compensation awarded to the applicant and it is just and equitable in the circumstances.

[43] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant Mr C Higgs of Higgs Attorneys

For the respondent: No appearance

[1] Case no: GAJB 4434-22.

[2] Case no: GAJB6884-22.

[3] Act 55 of 1998.

[4] Case no: GAJN8828-22.

[5] GN 1085 of 9 November 2015.

[6] These grounds of review are numbered incorrectly in the founding affidavit hence there is a repetition of the third ground of review.

[7] It is not clear from paragraph 7.5 of the founding affidavit what process is being referred to however, given that the paragraphs

immediately above refer to an incompatibility enquiry, it follows that the contention is that the incompatibility enquiry caused the applicant distress which aggravated her illness.

[8] This appears to be an error in the founding affidavit and while it refers to this as the third ground, it should be the fourth ground of review.

[9]

[2014] ZALAC 27; (2014) 35 ILJ 2774 (LAC).

[10] This appears to be an error in the founding affidavit and while it refers to this as the fourth ground, it should be the fifth ground of review.

- [11] This appears to be an error in the founding affidavit and while it refers to this as the fifth ground, it should be the sixth ground of review.
- [12]
- [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) (Sidumo).
- [13] Act 66 of 1995, as amended.
- [14] Sidumo at para 110. See also Commercial Workers Union of SA v Tao Ying Metal Industries and Others [2008] ZACC 15; (2008) 29 ILJ 2461 (CC) at para 134; Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) (Fidelity Cash) at para 96.
- [15] See: Duncanmec (Pty) Ltd v Gaylard NO and Others [2018] ZACC 29; (2018) 39 ILJ 2633 (CC) at para 43.
- [16] [2013] ZASCA 97; (2013) 34 ILJ 2795 (SCA) at para 25. See also Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) (Gold Fields) at para 14.
- [17] Fidelity Cash supra at para 102.
- [18] Campbell Scientific Africa (Pty) Ltd v Simmers and Others (2016) 37 ILJ 116 (LAC) (Campbell Scientific) at para 32; Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others [2014] ZALAC 82; (2015) 36 ILJ 1453 (LAC) at para 12.
- [19] Fouldien and Others v House of Trucks (Pty) Ltd
- [2002] ZALC 79; (2002) 23 ILJ 2259 (LC) (Fouldien) at para 3
- [20] South African Revenue Service v Commission for Conciliation, Mediation and Arbitration
- [2016] ZACC 38; 2017 (1) SA 549 (CC) (SARS) at para 52
- [21] Fouldien supra at para 50.
- [22] Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) (Johnson & Johnson) at para 40; and Solidarity on behalf of Van Emmenis v Sirius Risk Management (Pty) Ltd [2015] ZALCJHB 304; (2015) 36 ILJ 3175 (LC) (Solidarity) at para 35.
- [23] ibid at para 35.
- [24]
- [1999] ZACC 17; 2000 (2) SA 1.
- [25] Ibid at para 11
- [26] Campbell Scientific at para 32. See also Gold Fields at para 31 and Sidumo supra.
- [27] Kemp t/a Centralmed v Rawlins [2009] ZALAC 8; (2009) 30 ILJ 2677 (LAC) (Kemp) at para 21.

[28] See the criteria listed by the Court in *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) at 981 D-G.

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