THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN

Of interest to other judges
Case no: C 179/2023

In the matter between:

JARED WALKER	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
SHAHIDA MOHAMED (COMMISSIONER)	**Second Respondent**
WNS GLOBAL SERVICES (PTY) LTD	**Third Respondent**

Heard: 30 April 2024
Delivered: 14 May 2025

Summary: (Review – unfair discrimination on medical grounds – no differential treatment – insufficient evidence for any reasonable arbitrator to conclude the employer could be held liable for harassment based on medical grounds amounting to unfair discrimination – application dismissed)

JUDGMENT

LAGRANGE, J

Nature of the application

[1] This is an opposed review application. The applicant, Mr J Walker ('Walker') has applied to review an award in which the arbitrator found that he was not discriminated against on ground of his medical condition. As she found that he was not discriminated against on that basis, she did not need to go further to decide if the alleged discrimination was unfair.

[2] Walker represented himself and drafted his own application papers and the submissions which he only presented in court when the application was heard. In his written submissions, he expands on some of the factual allegations made in the course of evidence during the arbitration. As the court can only consider what was placed before the arbitrator in the way of evidence, any additional factual averments made in Walker's written submission cannot be considered.

[3] The court raised a number of issues about the state of the record, which was lacking any transcription of the evidence of the employer's witnesses and the bundle of documents used in the arbitration. Walker's explanation was that he did not even look to see if the bundle of documents was part of the record lodged with the registrar, nor did he examine the transcript to see if it was complete, which is quite an astonishing omission even for a lay person. It was explained at some length to Walker that given the deficiency in the record, he needed to consider if he wished to supplement it with the missing portions or argue his review based on what he had placed before the court. He was cautioned that if he chose to proceed, without supplementing the record, he could not refer to evidence which was not in the transcript of oral testimony or, at the very least, was mentioned in the arbitrator's award and not disputed by either party. He chose to proceed rather than requesting a postponement to supplement the record. The employer, the third respondent ('WNS'), was amenable for the matter to be argued on this basis despite the transcript and documentation being incomplete.

Summary background

[4] What follows is a brief account of the available evidence pertaining to the review.

[5] At the time of the events giving rise to Walker's complaint in September 2022 he was a call centre agent, having commenced working for WNS in August 2016. At the time he was working from home on account of his medical condition. He suffers from depression and anxiety attacks and was taking medication for his condition.

[6] He had provided a doctor's certificate which recommended he worked at home. He suspected the original certificate was deliberately mislaid by WBS and on 7 September 2022 he obtained another. He claimed the firm harassed him by telling him that the doctor's note was not sufficient. The HR business partner, Ms S Roodt ('Roodt'), claimed that the doctor's letter recommendation merely related what Walker had told him but did not motivate why his condition was caused by his work. A team leader allegedly phoned him and told him they did not care about his condition and accused him of insubordination. His sister, Ms T Walker ('Ms Walker'), who also worked at home with him, confirmed overhearing a call from someone who told Walker that they needed him to come in to work and he had to go to the doctor again because he was needed back at work. She did not hear all the conversation but did hear the other person saying that Walker could not keep talking about his medical condition and that they were not concerned about his medical condition. Walker had complained about the call, and, on his own version, his operations manager had called him about his complaint. However, in his evidence he did not elaborate on the upshot of that discussion. He agreed he was already working from home at that stage.

[7] After the disciplinary enquiry had concluded he submitted another medical certificate on 7 November. He had been permitted to work from home since 1 November, while he was adjusting to new medication. At the time of the arbitration he was still working at home, despite the firm wanting everyone working at the office. He complained that he had suffered an angina attack in November which, based on his own research, he

attributed to the stress he had been subjected to by WNS. He firmly believed, and still does, that he had been subjected to the disciplinary enquiry as a ruse to work him out of the firm because of his medical condition. It was only after the failed disciplinary process that the firm took his condition seriously.

[8] During September, WBS was conducting an investigation into suspected instances of call avoidance by a number of operators who worked from home. Walker was one of them. He was called into the office on 26 September to respond to allegations arising from the investigation. He assumed he was called in to discuss his medical condition, only to find himself confronted with an allegation that he was avoiding calls He suffered a panic attack and was sent home. It was common cause he had a panic attack. It was a matter of dispute if the investigation continued or whether it resumed the next day. In any event, after the meeting regarding suspected call avoidance was held, he was suspended, pending his enquiry which was held on 20 October 2022. In all, seventeen operators working from home were investigated for alleged call avoidance. Roodt testified that, when call avoidance was suspected, the company could not exempt employees from disciplinary processes because they were suffering from certain conditions.

[9] Walker did not dispute that, at the end of the investigation meeting, when he had motivated why he should not be suspended during the disciplinary enquiry he had said that he had made an honest mistake. Walker merely stated that he was still under duress at the time and could not figure out how he could be accused of call avoidance.

[10] Although he was eventually afforded the opportunity his laptop for the purpose of preparing for his enquiry, he declined to attend the office for to do that, because he did not see the point if someone was looking over his shoulder while he did that. He conceded that he had been granted two or three days to come to the office to prepare for the case and that he had chosen someone he wished to attend the enquiry with him.

[11] Walker was acquitted of the charge of call avoidance, because it was discovered that the call data on which the firm was relying, was the result

of a system error and not on account of not taking calls. In his argument he claimed that when he was interviewed during the investigation stage, he had called in the IT consultant to explain that it could be a system error. However, despite this and the undisputed evidence that he consistently met or exceeded targets and achieved high performance ratings, the employer went ahead with the disciplinary enquiry nonetheless. In his evidence, Walker did claim that he raised the issue that system errors that were the origin of the call data indicating call avoidance during the investigation prior to his suspension.

[12] He called a former IT support associate, Mr M Isaacs ('Isaacs') to give evidence on his behalf at the arbitration. His evidence confirmed that in Walker's case as in others it was a system error which had created the impression that operators were avoiding calls. However, he did not remember Walker calling him before the investigation meeting. Isaacs also testified that when he discussed the investigation process with management and they investigated it, it turned out that it was tenured agents who were being 'targeted' by the investigation. Under cross-examination he agreed this did not make sense but blamed new operations personnel for this strategy. He claimed he told management the evidence against Walker was inaccurate and in answer to a leading question from him, confirmed management was adamant they wanted to get rid of Walker. He mentioned that other agents, aside from Walker, were also experiencing stress as a result of the system issues. When he was pointedly asked in re-examination by Walker whether he felt WNS took account of his medical condition or that management was using call avoidance as a plot to aggravate his anxiety and get him fired, Isaacs simply answered that all they were concerned with was call avoidance and nothing else.

The award

[13] The salient findings of the arbitrator may be summarised as follows.

[14] She found that Walker's status as an employee working at home had not changed , which led her to believe WNS was accommodating his medical

condition. Had the firm wished, it could have charged him for insubordination for not returning to the office when instructed to do so.

[15] The documentary evidence showed that that the investigation took place on 27 September 2022 and not the previous day. On the question whether he had presented exculpatory evidence to the investigators to avoid suspension, did not detract from the employer's right to do its investigation and take the necessary steps.

[16] WNS had in fact found him not guilty of call avoidance and the chairperson of the enquiry had recommended his return to the office.

[17] It was understandable that any employee subject to an investigation, suspension and an enquiry would be anxious. However, the angina attack he suffered two weeks after the enquiry could not be assumed to be a result of the firm's actions, in the absence of evidence of a medical expert.

[18] In a claim of unfair discrimination, the first question to answer was whether an employee was treated less favourably than similarly situated employees. In this instance, Walker was subject to the same processes as other employees who were suspected of possible call avoidance. Hence there was no act of discrimination.

Grounds of review

[19] Walker raised four grounds of review, namely:

19.1 The arbitrator only considered his claim of discrimination of unfair discrimination on medical grounds and ignored his other claims of "unfair labour practice, … harassment, workplace bullying, victimisation and false accusations."

19.2 The arbitrator dismissed his claim of medical discrimination, despite the evidence of himself and his witnesses.

19.3 The arbitrator took the WNS's side even though one of its witnesses, Adre Gallant ('Ms Gallant'), "lied" and "dodged questions".

19.4 The outcome of the arbitration was pre-determined as the Commissioner seemed to be biased towards WNS, disregarded his evidence, was sarcastic, and believed WNS's word on everything.

[20] Having explained the court's difficulty in not having the transcript of Ms Gallant's evidence before it, given Walker's decision to proceed with the application in spite of the deficiencies in the record, he accepted that he could not proceed with third ground of review. It needs to be mentioned that the fact that a witness might have lied and being evasive, without more explanation, is in any case not sufficient reason to set aside an award on review.

[21] The second ground is phrased as if it was a ground of appeal, but given Walker's lack of expertise, I will assume in his favour that his contention amounts to a claim that no reasonable arbitrator could have found he had not proven he was subject to unfair discrimination on medical grounds.

[22] The fourth ground of review is essentially a sweeping claim of bias lacking any particularity, except in relation to the allegation that the arbitrator was sarcastic.

[23] I will deal with the fourth ground first, except in so far as he claims that the arbitrator disregarded the evidence he led, which will be dealt with when considering his second ground of review. His remaining contention regarding bias was that the arbitrator was sarcastic. He did not specify the factual detail underlying this until he presented his argument. He explained, and apologised, that he was actually referring to the arbitrator allowing Roodt, who was the firm's representative in the arbitration, to ask his sister, after she had expressed her view on his medical condition, "*Is that still your medical opinion?*"

[24] What in fact happened, is that Roodt had asked Ms Walker, based on an answer she gave to her brother in examination-in-chief, whether it was her opinion that the stress he had been caused by the call avoidance episode is what had caused his anxiety attack and angina condition. When Ms Walker reaffirmed that was her opinion, Roodt pointedly asked *"So in your medical opinion, that is what caused him anxiety?"* Ms Walker

immediately addressed the innuendo in the question, by stating it was her personal opinion based on living with her brother, and that she was not a medical practitioner so could not offer a medical opinion. In principle, Roodt was perfectly entitled to challenge the witness's ability to give a medical assessment of her brother's condition, though she might have done so without the sarcastic spin. Ms Walker capably deflected the barb in the question by making it clear she was not pretending to give expert medical opinion. The arbitrator might have cautioned Roodt about the way she asked the question, but she did not continue to question the witness in that vein. I see nothing improper about the arbitrator deciding not to comment immediately rather than waiting to see if Roodt persisted in that manner. The arbitrator's conduct was not manifestation of bias on her part and does not provide a basis for setting aside the award.

[25] Turning to the second ground, the question on review is whether no reasonable arbitrator could have decided there was no discrimination on medical grounds? The arbitrator dealt with the issue after setting out both parties' evidence. She began by asking if he had suffered adverse treatment by the company and concluded that WNS had in fact accommodated his medical condition by allowing him to continue to work from home. Although she might have begun her analysis with whether he was treated any differently from other agents who might allegedly have been avoiding calls, if his medical condition was acknowledged and accommodated, it cast doubt on the argument that the WNS was not prepared to tolerate his needs, if that meant he could not work at the officer.

[26] Turning to discrimination, she rightly focussed on a central pillar of the case: was Walker treated differently from others he compared himself with? Quite reasonably she concluded that all the agents who were possibly responsible for avoiding calls were treated in the same way. They were all subject to an investigation and a disciplinary enquiry. She acknowledges that this would have been a stressful process, even if one was not a person with Walker's condition. She reasoned that it would not have been fair to exempt Walker from the process on account of his

condition as the employer was entitled to take disciplinary measures against him as in the case of everyone else. She notes that he was acquitted, which was at odds with an intention to use the enquiry as a way to get rid of him. Walker chose to view the outcome of the enquiry as an unsuccessful attempt to use a trumped-up charge to get rid of him. On the evidence, it is equally plausible to draw the inference that WNS simply accepted that he was not guilty and therefore there was no reason to impose any sanction on him.

[27] Part of Walker's case was that he ought not to have been subjected to the disciplinary process at all because he explained that the apparent failure to answer calls was owing to a system error during the investigation phase. The arbitrator noted that he had conceded that, in the investigation meeting, he had stated he had made an honest mistake. She also considered whether the company was not entitled to refer the matter to a formal enquiry because he provided evidence which he claimed was exculpatory during the investigation. I am unaware of any principle that precludes an employer from proceeding with a disciplinary enquiry, if it is aware that the employee might have a legitimate defence to a charge. The enquiry remains an appropriate forum to determine whether or not that is the case. The arbitrator's reasoning in this regard is not unjustified.

[28] Considering the preceding discussion, I am not persuaded that no reasonable arbitrator could have found that Walker was not unfairly discriminated against in relation to the holding of an investigation, his suspension and disciplinary enquiry because he had a medical condition. This addresses the second ground and the remainder of the fourth ground.

[29] The first ground is concerned with whether the arbitrator curtailed the scope of the claim he had referred to arbitration. The record does not contain the form in which he referred his dispute to arbitration, but it is common cause that he listed these issues: unfair labour practice, discrimination, harassment, workplace bullying, victimisation and false accusations."

[30] When he explained his claim he said that when he filled out the arbitration form, *"… it was for discrimination. I put here discrimination, unfair labour*

practice and bullying and victimisation. So that was what it was all falling under." The most plausible interpretation of this is that he meant all these issues were part of his claim of discrimination.

[31] He did not specifically identify what he regarded as bullying in the workplace, but he did mention being harassed to obtain further medical certificates and how a team leader phoned him and told him that everybody had problems and the firm did not care about his medical condition and he would be guilty of insubordination if he did not return to work. That is the only allegation he made that might conceivably be described as an instance of bullying which can be construed as a form of harassment[1]. As to what he was thinking of in referring to an unfair labour practice, was never made clear. Nor did he distinctly identify what he was referring to as victimisation, which in a legal sense is normally associated with prejudicial conduct by an employer against an employee for exercising employee rights such as provided for in s 51 of the EEA. He never made out a claim that he was being prejudiced by his employer for the sole reason he was exercising some right.

[32] He stated that the harassment began when he was phoned by the team leader who told him they did not care about his medical condition, his doctor's recommendation that he work at home was not good enough, everyone had problems and accusing him of insubordination. He mentioned it again when the arbitrator asked him to summarise his case of discrimination. Clearly, Walker believed that the team leader's conduct was an act of harassment or bullying related to his medical condition. He also saw it as one component of a comprehensive plot to remove him on account of his health, which culminated in the disciplinary enquiry.

[33] In light of the way Walker conceived all of the employer's conduct as a broad conspiracy It is understandable that the arbitrator focussed on the main claim of differential treatment, which he identified as the culmination of its plan to rid itself of him. To the extent that Walker expected her to

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[1] See e.g, Clauses 4.5.2 and 4.7 of the Code of Good Practice on the Prevention and elimination of Harassment in the Workplace, Notice no R 1890, GG 46056, dated 18 March 2022

deal with the harassment as a separate claim of discrimination, it is clear she failed to do that. She did not consider whether the conduct of the team leader, which did not concern differential treatment, was a form of harassment amounting to unfair discrimination under s 6(3) of the Employment Equity Act, 55 of 1998 ('the EEA'). Had she done so, the next issue is whether, a reasonable arbitrator could still have found that, even if the alleged harassment as a form of unfair discrimination was considered, it would not have resulted in a different outcome[2]? For Walker, as the applicant in the review, on the test articulated first in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] he needed to show that no reasonable arbitrator could have concluded there was no discrimination based on medical grounds, taking into the alleged harassment by the team leader as well.

[34] To succeed in a claim based on the alleged unfair discriminatory conduct of an employee, it is not enough to prove that an employee committed the act of unfair discrimination. To hold an employer liable for an act of harassment by an employee, the following must be established in terms of s 60 of the EEA:

> *60 Liability of employers*
>
> *(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.*
>
> *(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.*
>
> *(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the*

[2] *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC) at paragraphs 31 to 34.

[3] CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 *ILJ* 2405 (CC) at paragraph 110.

> *employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.*
>
> *(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."*

(emphasis added)

[35] Assuming for the sake of argument, but without deciding the question, that what the team leader said to Walker in the phone conversation, did amount to harassment under s 6(3) of the EEA, was there enough evidence before the arbitrator, which would have necessitated her finding WNS liable under s 60? There was some reference to the fact that Walker had complained about the team leader's conduct and that Walker had been phoned by a manager about his complaint, but there is no evidence about what transpired thereafter. Walker did not allege that WNS had not taken any steps to prevent such conduct recurring. This was not part of his witnesses' evidence, nor does anything on the available record indicate that he challenged the employer's witnesses about any failure by WNS to take necessary steps to prevent a recurrence. There is simply insufficient factual material in the slender record to conclude that no reasonable arbitrator would have failed to find WNS liable for team leader's actions, in terms of s 60 of the EEA.

[36] Accordingly, even if the arbitrator had erred in omitting to consider the alleged harassment by the team leader as a distinct act of discrimination, I am of the view persuaded that no reasonable arbitrator would have failed to find WNS liable for alleged unfair discrimination relating to Walker's medical condition on that ground.

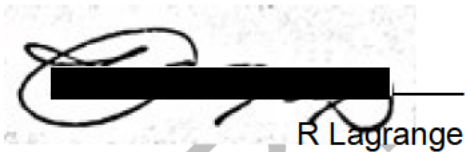
Conclusion

[37] In light of the above reasoning, the review application must fail. I appreciate that Walker is a layperson. and the parties are still in an

employment relationship. Accordingly, it would not be appropriate as a matter of law or fairness to make a cost award against him.

Order

1. The review application is dismissed.
2. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: In person

For the Respondent: M Cogger from Bowman Gilfillan Inc.