REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN PORT ELIZABETH

JUDGMENT

Of interest to other judges

CASE NO: P 528/10

In the matter between:

LEONIE LOURETTA NIEMAND **Applicant**

and

SOUTH AFRICAN POST OFFICE LTD **Respondent**

Heard: 11-12 September 2012
Delivered: 16 May 2014

Summary: ()

JUDGMENT

LAGRANGE, J

Introduction

[1] In this matter, the employer claims that the reason for terminating the applicant's employment was on account of incapacity in that she had exhausted her sick leave allowance and had not returned to work for a period of over 18 months. On 30 April 2010, she was issued with a final notice of termination for refusing or failing to report for duty, to take effect on 3 June 2010.

[2] The applicant, Ms Niemand, claims that, on the contrary, the reason for her dismissal after many years of unblemished service with the respondent was that her incapacity resulted from being treated in a manifestly unfair irregular and victimising manner by the respondent because she had taken action against a shop steward whom the respondent sought to protect and because of significant leave fraud which he had reported and the respondent did not want to address.

[3] She claims that her dismissal was automatically unfair for one or more reasons. Firstly, she contends that the dismissal was automatically unfair as contemplated by section 187 (1) (d) of the Labour Relations Act, 66 of 1995 ('the LRA') because she had taken action, or indicate an intention to take action, against her employer by exercising a right conferred by the LRA. This allegation relates to her claim that it was because she had taken disciplinary measures against a certain shop steward, Mr Mahuwa, and this was a proximate cause for her dismissal. The alternative or further reason for her dismissal being automatically unfair in terms of section 187 (1) (h) of the LRA is that her dismissal amounted to an occupational detriment on account of her having made a protected disclosure as defined in the Protected Disclosures Act, 26 of 2000, ('the PDA'). The disclosure in question concerned her reporting the result of her investigation concerning leave fraud to certain managers of the respondent on 13 June 2008.

[4] In terms of the pre-trial minute concluded by the parties it was agreed that if the court found that the dismissal was not automatically unfair but was based on either misconduct or incapacity the court would be required to determine whether or not the matter is to be referred to the CCMA for the determination of

an ordinary unfair dismissal claim. In essence, it means that the parties did not consent to the court sitting in an arbitral capacity in respect of an ordinary unfair dismissal claim if the dismissal was found not to have been automatically unfair under s 158(2)(b) of the LRA, but left it in to the court to decide if the matter should be sent back to the CCMA to determine the unfair dismissal claim in terms of the CCMA's jurisdiction under section 191(5)(a)(i). It is common cause that when the applicant originally referred the dispute to the CCMA on 1 June 2010 that she claimed the dismissal was either automatically unfair or an ordinary unfair dismissal.

Common cause facts

[5] The parties agreed that a number of facts were common cause, the most salient of which are summarised below.

[6] At the time of her termination by the respondent the applicant had been employed for 37 years, had a clean disciplinary record and was not subject to any disciplinary proceedings at the time. It was also agreed that she had received several Merit awards for her performance. The applicant held the position of a senior supervisor in the Parcel Plus section of the respondent and earned R 13,419.52 per month.

[7] On or about 11 February 2008, the applicant initiated disciplinary action against Mr Mahuwa, but disciplinary proceedings against him were only instituted some time later. Relating to this, on 25 February 2008 she had complained to her manager, Ms Minya (neé Bokako) about Mr Mahuwa's conduct. Around the same time, it was envisaged that the applicant, who had not been working on Saturdays previously would now do so.

[8] In May 2008 the applicant undertook an investigation concerning suspected excessive absenteeism for which she obtained certain documents. On 13 June 2008 she reported the alleged leave fraud she had discovered to Ms Minya and to the general manager based in Cape Town, Mr Kemp. A week later, on 19 June the applicant was asked to work on certain Saturdays by Ms Minya. The latter said she couldn't remember asking Ms Niemand to work on Saturdays but denied that this fresh instruction would have had anything to do with the applicant lodging the grievance over alleged leave fraud. Whether such a

request was attributable to legitimate operational requirements of the respondent is a matter of dispute. On 20 June 2008 the applicant lodged a formal grievance with Ms Miny over the instruction to work on Saturday because she considered it an unlawful and unilateral change to the existing terms and conditions of employment.

[9] Later in July 2008 an investigation into the leave fraud issue was conducted by the respondent. The applicant was neither involved with it nor approached in that regard. The investigation did not result in any disciplinary action being taken against any of her subordinates.

[10] The employer also held disciplinary proceedings against Mr Mahuwa in July 2008 which led to a finding that he was guilty of misconduct and a formal warning was issued to him.

[11] In early July, the applicant also submitted a formal grievance against another employee, Ms Cuntu, an administrative officer. Around the same time the applicant was instructed to investigate certain "missed routines" and to obtain reports from responsible individuals. During the same month, computer Ms Niemand had previously utilised was reallocated to another employee. Similarly,the photocopy machine she had previously used was also reallocated to a different department. The reason for these changes is a matter of dispute but the parties agreed that the Parcel Plus section where the applicant worked was allocated a different workspace because it had swapped work areas with the Registered Letter section. The operational reason advanced by Ms Minya for removing the computer was that when the Parcel Post section within head office moved to the Registered Letter section a new ‘tracking and tracing’ system was introduced, which meant that the applicant no longer required her own computer. It was also suggested to the applicant that only a Level I supervisor needed a computer for transactions, but the applicant said she could not type a letter or send an email using the track and trace computer. What was put to the applicant was that it was a consequence of these changes she was moved out of her former private glass-enclosed office into an open plan office area.

[12] In October 2008, the applicant was verbally reprimanded because of her alleged unauthorised absence on 27 June 2008. The applicant disputed whether the sanction was properly imposed, but did not pursue any avenues of redress in that regard. The parties could not agree if this reprimand constituted proper formal disciplinary action against the applicant.

[13] Shortly afterwards, the applicant consulted her psychiatrist, Dr Prinsloo. The latter booked the applicant off on account of illness and she did not return to work again after 30 October 2008. The next contact she had with the respondent after that date was in June 2009, when the respondent instructed the applicant to see a psychiatrist appointed by the respondent in Grahamstown, which the applicant did.

[14] An incapacity hearing was convened by the respondent on about 6 November 2009, which the applicant, accompanied by her husband (a labour consultant), attended.

[15] Mr Niemand was refused the right to participate in the subsequent incapacity enquiry and the hearing was adjourned in order for the applicant to apply for legal representation, which she did.

[16] In January 2010 the applicant salary was stopped because the respondent was of the view she had exhausted her ordinary sick leave entitlements. It is a matter of dispute between the parties whether the respondent was entitled to do this. A fresh incapacity enquiry was convened in 1 March 2010.

[17] On 13 May 2010 the applicant was sent a letter informing her that, owing to her failure to obey an instruction to return to work, her contract of employment had been terminated with 30 days notice effective on 3 June 2010. The applicant sent the respondent a letter on the same day saying that she had not been given any instruction to return to work. The letter nonetheless advised that she could contact the respondent within the notice period with a view to resume in her normal duties and responsibilities. On 8 June 2010, the termination was confirmed in view of her failure either to resume her duties or to contact the respondent. The respondent further advised Ms Niemand in this letter that she could request a review of the decision to terminate the contract within seven days but no such request was made.

The material evidence

[18] The following witnesses gave evidence at the hearing: the applicant, Ms Minya and Mr S Sonkosi, a Senior HR Manager.

[19] In 2005, the Parcel Plus section in which the applicant worked was moved from premises in Deal Party to Head Office, which was housed in Govan Mbeki building. According to Ms Minya, at that time the applicant's section was restructured and her post as a Level I supervisor was eliminated in terms of the new structure. However, in view of representations from her psychiatrist, Dr Prinsloo, Ms Niemand effectively remained in her previous position where she retained the same salary level, namely that of a Level I supervisor but, unlike other Level I supervisors, had no Level II supervisors reporting to her. Further, also unlike all other supervisors, the applicant did not rotate her position.

[20] The applicant's section was housed together with Insured Post and the Mail Sorting section which were divided by large metal screens. Initially, the applicant was housed in a glass-walled office to begin with which was allocated specifically to her by a senior supervisor. In 2008, the section was moved to where the Registered P section was situated. Although there was a private office in this new area she was not allowed to occupy it and it was used as a tearoom and restroom.

[21] Applicant's detailed evidence began with the period commencing January 2008. On her return from leave she was approached by Mr Mahuwa and another employee who wanted to borrow money from her. In the past she had lent a lot of money without charging interest to a number of subordinates but on this occasion she told them she could not help them for a couple of months and they should try and approach others. After that, Mr Mahuwa's demeanour towards her changed: he would not greet her or respond to her when she spoke to him and started to return late from lunch times. Mr Mahuwa also became insubordinate thereafter and refused to take instructions. He went so far as to challenge her to charge him for this misconduct.

[22] On 25 February 2008, the applicant sent an e-mail to her superiors complaining that Mr Mahuwa had threatened her on 21 February by saying, in the

applicant's words, "He will go after me. I must work on Saturdays and I must leave him alone" She recorded in the e-mail that she had approached Mr Mahuwa's shop steward and asked him to speak to him about the incident. She also related that she had reported the incident to the administration officer but at that stage had submitted her complaint in writing "for record purposes only"..

[23] Shortly afterwards, the applicant said she was called by Ms Minya who told her t she must work on Saturday in two to three weeks time. The applicant asked her if this had anything to do with Mr Mahuwa, which she denied. In her own evidence, Ms Minya also denied instructing the applicant in February to work on Saturdays, and said she did not take instructions from Mr Mahuwa.

[24] The applicant said she had not worked on Saturday as for 12 years while she had been employed in the parcel plus section. The applicant believed that the instruction had been prompted by what had happened with Mr Mahuwa because his wife worked with Ms Minya. According to the applicant she had not worked on a Saturday, in the four years since the move from Deal Party, even though she agreed other Parcel Plus staff including Level I supervisors had been working on alternate Saturdays from about four weeks after the move to Head Office, when truck delivery schedules changed.

[25] The applicant testified that when the Parcel Plus section was moved to the mail centre at head office, the section was not working on Saturdays, but about a month after the move, Saturday work started because truck delivery times changed to include night deliveries. She agreed in cross-examination that all staff in the section including Level I supervisors worked on alternate Saturdays, but she insisted Ms Minya had told her it was not necessary for her to work on Saturdays because there was always another supervisor present who could keep an eye on the section. It was only four years later that the applicant was told she had to work on a Saturday. It was put to her that the instruction to her to work Saturdays had nothing to do with the incident with Mr Mahuwa, but she was adamant that her lack of Saturday duties only became an issue after she had a clash with Mahuwa.

[26] Ms Minya said the fact that the applicant was not working on Saturdays only came to light when it was noticed that the applicant was not paid for Saturday

work. Other staff at the mail centre were unhappy about the fact that the applicant did not rotate and perform duties on alternate Saturdays. Ms Minya seemed to accept that the applicant's contract, which could not be located, did not require her to work overtime. However, it was clearly her own view that there was no reason why the applicant should have been treated differently from other staff when it came to Saturday work. As far as the insubordination of Mr Mahuwa was concerned, she regarded that as a matter for the applicant to handle herself as his immediate supervisor.

[27] The applicant testified that daily review meetings took place at which all Level II and Level I supervisors met. They were instructed to take action on excessive absenteeism in their respective sections. In her section the applicant would do her own reconciliation of absenteeism. The procedure she followed was that if someone was absent she filled in the form with details and the person would have to sign the form on their return. A copy was made and placed on the individual's personal file. She would take the original to Ms Mahuwa, Mr Mahuwa's wife, or Ms Cuntu in the administration office.

[28] The applicant also related that at times when the toner was not replaced in the photocopy machine she normally used she could not make copies of the leave forms. Consequently, she would ask for reconciliation forms from Head Office for the previous twelve months to determine which forms had been captured so she could reconcile those against her own manual record which she maintained. In May 2008, when she was comparing her record of persons who had signed for absenteeism there were discrepancies in the report from Head Office which showed that some of these absences had not been recorded. These anomalies were evident in the case of Mr Mahuwa and two other staff.

[29] These anomalies prompted her to request the leave records of the previous two years as well. The applicant was doing this analysis on her work desk and it was possible for other staff to see it if she left the office.

[30] On 5 July 2008, she was told by a more senior supervisor that her computer was being moved to another section and she must remove her stuff from it. She could not understand why it was being done because she had to manage her section and had used the computer for this purpose for the last four years.

When she asked Ms Minya why the computer and the photocopy machine were being removed, she was simply told it was needed for another section and that they were moving to the Registered Letter section which had more space. Ms Minya conceded during her evidence that nothing about the applicant's job had changed in the first few years after the move from Deal Party to the Mail Centre, apart from the introduction of the Track and Trace system, which was a new development.

[31] Ms Minya also instructed the applicant to work on Saturday and on Sunday during the movement to the new area. She was also advised that she would no longer have her own office and was told when she queried this, was told that she did not need one and could sit on the floor with other staff. She was also advised there had been a complaint from other lower-level supervisors about the fact that she previously had her own glass walled office. On the weekend of 6 June 2008, she worked 19.5 hours but no supervisor from the Registered Letter section was on duty. She did not claim overtime pay for the work that weekend, because over time was not paid as such.

[32] In another incident, the applicant related that she was compiling her final leave report when Mr Mahuwa looked over her shoulder and then took used her desk phone. He dialled four digits and spoke to someone whom she believed was his wife. She completed her investigation and sent an e-mail attaching her report to Ms Minya on 13 June 2008, which he also copied to the Senior Manager in the Eastern Cape, Mr Kemp. In her e-mail she requested that a further investigation be done as soon as possible.

[33] On the same day she filed this report, she sent a written grievance to Mr Kemp complaining that she was being victimised at the Mail Centre. She canvassed the following issues in her grievance:

33.1 She complained that in terms of her job classification (C3/4) she should be treated as other supervisors on Level I, who all had personal computers, but instead she was being treated as a level 3 supervisor; all her communication with client services was done by e-mail on the computer as well as the administrative work and in numerous other tasks she fulfilled in the performance of her functions. Under cross-examination,

she disputed that it was only Level I supervisors who needed computers or that the dedicated "track and trace" computer, which was available for all staff to use was of any use.

33.2 The twelve-year-old photostat machine which was removed from her section had been brought from the depot at Deal Party when her section moved to the mail Centre and had been removed even though its monthly running costs were trivial because the first thousand copies were free. Moreover, the copier was old and unsuitable for the production department to which it was supposedly relocated.

33.3 She felt that the reason for these impositions was that she had been trying to get Mr Mahuwa charged for insubordination since 4 February and every time the hearing was rescheduled either the chairperson, a representative or Mahuwa himself were not available on the specified date. As a result, the hearing had been postponed eight times and four months had passed. In the meantime, Mr Mahuwa continued to disobey her instructions. It should be mentioned that, in her later evidence the applicant stated that nothing had been done about the situation five months after she had asked for disciplinary action to be taken against him.

33.4 The applicant reiterated that it seemed that she was being asked to work on Saturdays because Mr Mahuwa had said she should, even though her own line manager Ms Minya had told he she did not have to if she worked her additional hours in during the week.

33.5 Further, the applicant noted that Mr Mahuwa's wife worked in the same office with Ms Minya and Ms Cuntu. Ms Mahuwa and Ms Cuntu both were involved in the recording of leave. The person with the greatest amount of irregular leave was a Mr Koyana. Over a period of 60 months, on eight occasions, he had taken nineteendays' leave, twelve of which were not captured. On a further seven occasions his leave was incorrectly recorded. Mr Koyana's aunt was a senior HR manager and a friend of Ms Minya.

33.6 The applicant also reiterated her complaint that she no longer had her own office even though one was available in the new location where they

were working, apparently because Ms Minya did not want to place her there.

She ended her grievance by complaining about the stress she was suffering as a result of all these impositions, which was confirmed by her psychiatrist, but she said she was determined not to let Ms Minya 'break her'.

[34] It was under the applicant's cross-examination that it emerged that the reason she was being paid as a Level I supervisor, whereas she was working in a Level II post, was that when her section had been relocated from Deal Party to the mail Centre, on the recommendation of Dr Prinsloo, she was retained in her existing position. According to a letter written to the respondent of 15 November 2005 by Dr Prinsloo, she had identified that the applicant was suffering from major depressive disorder and generalised anxiety disorder and had been receiving psychiatric treatment for the previous ten years. In the report, the psychiatrist stated:

> *"The patient's symptoms are currently well controlled, however she remains very fragile to stressors. She has been functioning well in her current position for 10 years. The patient's illness diminishes her ability to adapt to great changes.*
>
> *It is my opinion that you should therefore remain in her current position, as any drastic changes would result in a relapse of her illness."*

[35] Barely a week after filing her grievance on 13 June 2008, Ms Minya told Ms Niemand that she must start working on Saturday, 21 June 2008. The applicant approached her husband to assist her filing a grievance and he advised her to take a day off, but when she approached Ms Nyati a Level I supervisor with this request the latter turned her back on her and said she did not want anything to do with the request which was between the applicant and other supervisors, In turn, Ms Minya told the applicant to discuss it with a Level I supervisor and then \ said that the applicant must come to work for two hours. When the applicant insisted that she needed a whole day off, Ms Minya said she would discuss it with Level I supervisors and she could take a day.

[36] On the applicant's return to the office on 20 June 2008 she handed in another written grievance (the second grievance) relating to the instruction from Ms

Minya to commence working on alternate Saturdays. In her grievance she stated that she believed the instruction was invalid as it amounted to a unilateral change to her existing terms of employment. In terms of her letter of appointment to Parcel Plus on 18 September 1996 she claimed she was assured in writing that her basic conditions would not be altered without prior consultation with herself or the union. She had worked from Monday to Friday for the past twelve years and had never been required to work on Saturdays. She also repeated her belief that the instruction was related to the threat uttered by Mr Mahuwa and as she was being victimised for performing her duties as a supervisor and taking disciplinary action against him. She asked Ms Minya to withdraw the instruction and warned that she might exercise her rights under the LRA if this was not done.

[37] Nobody spoke to the applicant during the following week and on the 26 June 2008 she handed in a leave application for 34 hours overtime worked. She asked for a day's leave on the following day, being Friday, whereafter she would return to work on the Monday. She filled the form in and left it on the table. When she returned to work on Monday she handed it in to a Level I supervisor, and was told that she had been absent without leave. Her manager Ms Minya said the same thing when she approached her. The applicant's understanding was that because the 'leave' was time off *in lieu* of overtime pay which was owed to her, it was not leave in the true sense of the term and hence did not need approval. Ms Minya testified that she might have orally agreed to grant such leave, but that was still subject to being signed off in writing. Later, she said that the Post Office did not give time off *in lieu* of overtime pay to operational staff, though this was never put to the applicant under cross-examination.

[38] On the same day the applicant went to make some photocopies on the machine in the Administration section because there was no toner in the machine in the Parcel section because the account for that machine had not been paid for three months. The applicant was making copies of various forms that were used and needed twenty copies of each. When the copy paper was finished she asked the senior administration officer, Ms Jackson, for more. When Ms Cuntu saw this she shouted at Ms Jackson not to give the applicant

paper because they did not know what she was doing at the copier machine. When the applicant took the paper, Ms Cuntu questioned what she was doing there. The applicant asked her to come and see what she was copying and Ms Cuntu made her wait for some time before coming to look at what she was copying after which she said she could not make more than 20 copies of any sheet. Ms Cuntu's behaviour towards her had been humiliating, and it prompted the applicant to lodge a grievance against her the following day (the third grievance), to which there was no response. It must be mentioned that later evidence indicated that Ms Cuntu was junior to the applicant, though not a line subordinate of hers. In fact, a month later when Mr Kemp was in Port Elizabeth on 4 August the applicant learnt that the grievance had not yet been captured on the system. It was apparent at this point of her evidence that relating these events was itself causing the applicant some distress.

[39] The applicant said she had not tried to discipline Ms Cuntu herself because even though she was on a lower level than herself, the she was not Ms Cuntu's supervisor. She conceded she had not approached Ms Cuntu's supervisor to take action. Ms Minya's view was that the applicant should have taken it up with Ms Cuntu and she did not even recall seeing the grievance lodged by the applicant

[40] On 7 July 2008, the disciplinary enquiry arising from her complaints in February about Mr Mahuwa's insubordination finally took place in his absence and he was issued with a final written warning for failing to obey an instruction. A few days after this when she asked him for a report for Level I about the wrong routing of files, his response was that level one could wait and he made an entry that she was a racist, for which she charged him again for hate speech and gross insubordination.

[41] At a meeting on 14 July 2008, at which a Level I supervisor, Mr Bazi, Mr Mahuwa and Mr Buso were present, her complaint against Mr Mahuwa was discussed and she was asked to withdraw the charge because it could lead to Mahuwa losing his job. Eventually, it was agreed that Mahuwa would apologise in writing and the applicant would withdraw the charge, but he never did apologise. Under cross-examination, the applicant conceded that she did not insist on the matter going to a disciplinary proceeding because it would have

meant waiting another five months before anything was done, but she conceded that she had a choice whether to do this or not.

[42] On the same day of this meeting, the applicant was called without notice to a meeting about her absence from work on 27 June. Ms Minya was amongst the supervisors present at the meeting. She admitted that she had said the applicant could take leave but said that the applicant should have reminded her. The applicant was adamant she had been reprimanded over this, and insisted she did not need the permission of Ms Minya to take the time off but had only notified her as a courtesy and had filled in the leave form as a precautionary measure. The applicant was also instructed she would have to rotate with the rest of the supervisors in the mail centre on Saturday work duty. It was at this juncture she was told that the photocopy machine and computer must be handed over and these items were removed on 22 July 2008.

[43] On the same day the report by Mr Sonkosi into issues raised by herself was finalised. The issues canvassed in the report concerned allegations made by her in the correspondence she had addressed to Kemp on 13 June 2008 and the claim of alleged victimisation by Ms Minya. Mr Sonkosi's report made no specific finding on the victimisation claim but it did contain some trenchant observations on the different levels of supervision in the Mail Centre. The report also noted the practice of Saturday work over the last few years. More specifically, he recorded under his findings that:

> *" * The relationship and the reporting lines between the parcel section and two Level (1) Supervisors as well as the Senior Manager, Mail Processing is not clearly defined. This is supported by the fact that there are times when Leonie [Ms Niemand] deals directly with the Senior Manager without first approaching the Level 1 Supervisors.*
>
> - *The communication of the changes regarding Saturday work was not done in writing, hence the reluctance to follow-up to ensure that not only the mail processors work on Saturdays but also the supervisor works on Saturdays.*
> - *More than three years, the Saturday shift was allowed to work without supervisor.*

- *The communication of the changes regarding the removal of the computers as winners the photocopy machine should have been done in writing and was some sensitivity as it was a departure from the established practice."*

[44] Although he made no express reference to his findings on the allegation of victimisation, in his evidence in chief, Mr Sonkosi said he could find no connection between the applicant's attempt to discipline Mr Mahuwa and the imposition of the requirement that she must work on Saturdays. Similarly, he could find no connection between the removal of office equipment from the applicant's Department and her complaint about Mr Mahuwa and the alleged leave fraud. He said he had concluded that the removal of the equipment was not unreasonable as the applicant had no need for dedicated equipment for herself. Further, Mr Sonkosi said he had not found any evidence of any deliberate failure to capture leave by the administration offices but he left that to be determined by the investigation. Importantly, he confirmed that the report was for Kemp's attention and was not intended to be an outcome of the applicant's grievance.

[45] In the meantime, Mr Kemp had instituted an investigation into the alleged leave fraud, which was conducted by Mr Sankosi. Mr Sonkosi conducted interviews with the applicant and others. Her report was furnished to him and contained confidential information. However Mr Bazi, sent Sonkosi's report containing the information to Ms Cuntu and then distributed it to the whole Mail Centre. The applicant saw the report in the registered letter section the following day lying on a desk. On 4 August 2008, she then lodged a grievance (the fourth grievance) against MrBazi for distributing the confidential information to someone like Ms Cuntu, whom it did not concern. The applicant asked for an apology and that the person responsible for the documents ending up in the registered letter section should be disciplined. Under cross-examination, the applicant conceded that Mr Bazi's explanation for sending the report to Cuntu because he needed a hard copy of the document as he had no printer in this office made sense, even though she was unhappy with the way it got distributed. Mr Sonkosi testified that his report was not intended either for Mr

Bazi or Ms Cuntu and agreed that it was irregular if it had ended up lying on a desk.

[46] The grievance was handed in at a meeting at which other supervisors were present as was Mr Kemp. He acknowledged receipt of the grievance against Ms Minya and Mr Bazi and said he would like a senior manager from Head Office to handle that. He also asked Mr Sonkosi to handle the grievance against Ms Cuntu. Further, he said that he was instituting a full forensic audit of the Mail Centre's leave. It was also agreed that the applicant would not work on Saturdays until these matters had been addressed. To the applicant's obvious disappointment, she stated that none of these steps materialised.

[47] After the meeting, yet another incident took place when the applicant complained about the noise coming from the depot sorters who worked adjacent to her department. According to her, they made such a noise she could not hear her phone ring. One of them, Ms A Grootboom, was rudely dismissive of her complaint and treated it as a matter of amusement. Grootboom was made acting supervisor of that section a couple of weeks later. A further incident took place involving Grootboom when a request to transfer a few staff from her section to the Parcel Plus section was raised at one of the daily review meetings. Mail Centre supervisors were asked if they had a problem with the transfers, but the applicant was not asked her opinion. In particular she had concerns about the potential transferees' attendance records. The applicant felt she also had a right to be consulted but was ignored. Under cross-examination, she claimed she was actually prevented from making a contribution and that discussions in the meeting took place in Xhosa so she could not understand what was being said.

[48] On 8 September 2008, the applicant was sent a letter to the effect that the resolution of her grievances would be put in abeyance pending the finalisation of the investigation on matters she had raised. The letter was from Mr Ngcongolwana, an Employee Relations manager, who assured her that endeavours would be made to expedite the process and a resolution to be found at the earliest convenience.

[49] The final leave investigation report was tabled in late September 2008. It confirmed that not all leave which had been granted had been properly recorded at head office. Following the report, various procedures were tightened up. The applicant was extensively questioned about whether supervisors such as herself were supposed to have reconciled leave applications granted with Head Office records, but nothing seems to turn on this. It does seem to have been common cause, as the investigation report stated, that leave reconciliations had not been done consistently by supervisors for some years. The investigation revealed that Koyana took five days leave in 2007 which were not captured in the system, but did not take the amount of unaccounted for leave, which the applicant claimed he had. This discrepancy was not explored in the course of the evidence to any meaningful degree.

[50] Under cross-examination, it was put to the applicant that because some leave application forms contained an incident number indicating that Head Office had been contacted and advised of the leave taken but nevertheless Head Office did not have a record of such leave, there had been instances where the incomplete record at Head Office did not reflect a failure by the Administrative office at the Mail Centre to report the leave. The applicant could not directly dispute this, and could only suggest that there might have been an attempt to rectify matters after she had lodged her grievance about leave fraud. Under re-examination, the applicant said she had never seen the final report until the matter came to trial and she had never been asked about the observations made by the author of the report that some of the forms were not received by the administrative officers, which was a claim she is strongly denied, at least in so far as leave forms she submitted were concerned.

[51] Curiously, though Ms Minya had originally been removed from the investigation because she might have been implicated in the leave fraud, she had no interest in reading the report when it was produced and only read it in preparation for trial. She somewhat grudgingly conceded that it might be seen as suspicious that Ms Mahuwa worked with the leave reconciliations and Mr Mahuwa had been absent from work on leave on six occasions without that leave being captured and the original leave application forms were missing. However, she

maintained that there was simply no process to monitor reconciliations in place at the time.

[52] On 20 October 2008, approximately four months after her absence from work on 27 June 2008, the applicant received a report on unauthorised absence from duty for that day. She queried this in the light of the fact that as far as she was concerned, she had been granted permission to be off duty on that day.

[53] On 29 October 2008, the applicant consulted with Dr Prinsloo who told her that she needed to get away from the workplace. The applicant said that although she worked with a lot of good people, every day worked took a bit of herself away every day. The psychiatrist booked her off work for "a major depressive disorder", for a period of three months from 30 October onwards, during which time she said she saw the psychiatrist regularly for treatment. At the same time, the applicant applied for temporary total disability benefits. In the application Dr Prinsloo, described the applicant's current condition in the following terms: "as a result of increasing victimisation at work and the removal of resources in order to execute her work, the patient has been struggling to cope and her depression has deepened despite adequate treatment."

[54] According to Ms Minya it was Mr Bazi who conducted the preliminary investigation on the application in keeping with the Post Office code on incapacity.

[55] On 30 January 2009, Dr Prinsloo, issued a further medical certificate bsased on the same diagnosis in which she stated that the applicant was not fit to work from 1 February to 31 July 2009 on account of her temporary disability. It was only on 15 April 2009 that the respondent sent the applicant a letter, which she received on 23 April 2009, advising her to attend an appointment with an independent psychiatrist, Dr Erlacher, at 17H30 on 27 May 2009 in Grahamstown, even though he applicant lived in Port Elizabeth. The letter asked her to confirm her attendance and whether she required transport. On 14 May 2009 the applicant responded saying that she could not see why it was necessary for her to go to Grahamstown for the evaluation, which was130 km away when there were several psychiatrists available in Port Elizabeth. She pointed out that the appointment could take up to 90 minutes and then she

would be expected to drive home at night on treacherous roads, even if someone else was driving. The applicant requested that the venue and, or alternatively, the time of evaluation be altered to earlier in the day, and sent a copy of a letter to Dr Erlacher.

Ultimately, as there was no response to her request and the applicant arranged to go to Grahamstown, driven there by her husband. She said she was very upset, cried all the way there, and was nauseous while she was at the psychiatrist's office. In the interview she was not allowed to say anything about her work, was told to write a sentence of her choice and was told by the psychiatrist that she could work without him providing her with the report or the opinion.

[56] On 14 September 2009, the applicant was sent a letter signed by Ms Minya stating that the application for temporary total disability for the period 24 December 2008 to 31 July 2009 was declined and would be recorded as sick leave without pay. Further she was advised to return to work with immediate effect. Under cross-examination, it was put to the applicant that it was not in fact the employer that took the decision on whether to approve her application but in fact was Sanlam Insurance which did so after considering the recommendation of consultants known as Pro Active Health Solutions. The applicant denied any knowledge of this, though she conceded that she had given permission to the consultants to contact Dr Prinsloo about her condition. The applicant also did not dispute that, at that stage Ms Minya wanted her to return to work as soon as possible. When asked whether she accepted that Ms Minya had no intention of dismissing her at that point, the applicant's answer was simply that she could have been placed in another division

[57] Ms Minya testified that the employer had then invoked phase 3.3 of the Post Office Guidelines on Managing Absenteeism Due to Excessive Sick Leave ('the Absenteeism Guidelines'). She claimed that the object of doing so was to find a way of how she could return to work. Under cross-examination, Ms Minya was challenged on this assertion because the letter of 14 September merely instructed the applicant to return to work with immediate effect, whereas the Absenteeism Guidelines required her supervisor to arrange a meeting with her

to advise her of the prognosis and to inform her of a date when she ought to report for duty.

[58] On 21 October 2009 the applicant obtained an updated psychiatric report from Dr Prinsloo, which she claims she submitted to the respondent. In her report, Dr Prinsloo expressed the view that from the clinical presentation and history of the applicant "... it is clear that the patient is not capable of functioning in her work setting and I therefore extend her sick leave further". Dr Prinsloo said she disagreed with employer's instruction that the applicant should return to work because she was markedly impaired and a forced return to work would perpetuate the symptoms further. Dr Prinsloo accordingly declared the applicant unfit for work for the period ending 31 January 2010.

[59] On 6 November 2009, a written invitation to a Disability Management Committee meeting was issued to the applicant by Ms Minya. In the letter the applicant was reminded that her application for temporary total disability had been declined and it was "recommended" that she should return to work with immediate effect and would be introduced to her workplace on a gradual basis. The applicant was further advised that if she wanted her own representation at the planned meeting she should advise Ms Minya about the arrangement of that. The invitation further stated:

> *"To enable my office to make proper arrangements of your commencement and all other related matters, you are hereby invited to present yourself at a Disability Management Committee which will take place in the Mini Boardroom at 10:00 on 16 November 2009."*

[60] The applicant said she attended the meeting accompanied by her husband. He spoke on her behalf at the meeting because she was not in a position to speak for herself. The respondent's view was that an application had to be made before her husband could represent her in the meeting. According to the applicant her husband requested copies of the temporary total disability policy, sick leave policy, pension fund rules and incapacity policy of the respondent. He was told those documents would be provided the following week. He agreed that he would wait for them and he would ask for legal assistance for the applicant. The applicant says the documents were never received and the respondent did not dispute this.

[61] At the meeting the issues of the hostile environment and the unresolved grievances were raised directly as matters that needed to be addressed in the context of the disability management meeting. Ms Minya's attitude, as revealed by her testimony, was that, because these issues were raised by the applicant's husband at the November meeting and since he was not a Post Office employee they could be ignored.

[62] Some months later, on 19 January 2010, Ms Minya wrote the applicant a further letter complaining that no application for legal representation had been received and advised her to attend another Disability Management Committee meeting on 26 January 2010. Ms Minya also stated in the letter that the applicant's continued absence from work on full salary was of concern to her and it was important for the parties to address the matter once and for all. This elicited an e-mail response from the applicant's spouse on 20 January 2010, in which he claimed that the understanding at the meeting had been that the application for legal representation would only be made once the relevant documents requested by the applicant had been received. These documents were necessary to assess the need for legal representation and for the preparation of a legal representative, if required. He made an urgent plea for the preparation of the documents by the following day in order to consult with a legal representative and prepare. In any event, he had requested a postponement of the meeting for a period of at least two weeks after the provision of the documents requested.

[63] It is also in January that the applicant complained that she had not been provided with the details of the outcome of the application for total temporary disability and wanted to understand the motivation therefor. Ms Minya was questioned on this but did not see the need for providing it because it was the PHS that decided the applicant was fit to work, and management was approaching the matter on that basis of that finding.

[64] According to the applicant, the meeting was postponed until March. On 27 January 2010, the applicant submitted a formal written application for legal representation. In the letter, she once again complained about the failure of the respondent to provide the documents which had been promised and the difficulties of preparing for the hearing without them. She pointed out that the

matter was one of some complexity, given the fact that her condition was exacerbated by the hostile working environment and the failure of the respondent to address three of her grievances. She also alluded to the fact that the respondent was a large organisation with considerable resources whereas she had no prior experience in dealing with an incapacity process. Moreover, she was currently under treatment and would not be able to handle the matter without legal representation. On the same day, she also sent another letter to the respondent complaining about the fact that her January salary had not been paid. She claimed the respondent ought to continue paying her salary, in accordance with the temporary total disability process, until a final decision had been made regarding her incapacity. She also requested a copy of the report that had resulted in her initial application being declined in September the previous year.

[65] On 17 February 2010, the respondent sent a letter to the applicant complaining that it had come to the attention of the Disability Management Committee that despite her commitment to make an application for legal representation during the meeting she had not done so yet. It further reminded her that her current absence was being treated as sick leave without pay and stated that the policies relating to pensions and absenteeism were irrelevant, given the fact that the matter had been outstanding for so long and that the management at the Mail Processing unit wanted her to cooperate in the process of finding an alternative job. She was further advised that if she wished to make an application for a pension she could do so by means of a formal application to her manager quite separately from the Disability Management Committee process. The applicant was invited to attend a further meeting on 1 March 2010. The invitation was accompanied by a warning that failing such meeting the respondent would have "no other option but to terminate your services in terms of the Code of Good Practice, schedule 8, annexed to the Labour Relations Act 66..."

[66] Ms Minya testified that she did not see an application for legal representation prior to the meeting in March and that she did not consider the further application submitted on 22 February 2010, because she was in meetings elsewhere with management. Had they not been willing to entertain legal

representation they would not have postponed the first meeting. However, despite claiming a willingness to entertain the application, she claimed not to have considered the application for legal representation before the meeting of 1 March 2010, because she was frustrated with the delays which she believed the applicant's husband had caused. The January meeting had not taken place because of his 'arrogance' in her view. The employer was concerned that because of the delays it had continued paying the applicant's salary and she had not responded to its request to offset ongoing sick leave against the her annual leave.

[67] Ms Minya was repeatedly tested on her failure to address the application for legal representation and it was apparent from her answers that she believed it was more important to address the applicant's return to work and the fact that the respondent believed the applicant owed it R 95,000-00, than to deal with what she considered to be delaying tactics by the applicant. It was put to her that there was no real intention of discussing alternative employment possibilities with the applicant, and that the main focus of the employer's concern was on the recovery of moneys owed for an authorised sick leave.

[68] Presumably in reply to the letter inviting the applicant to a further meeting on 1 March 2010, an e-mail was sent by her husband, in which he pointed out that no response had been received to the application for legal representation and he disputed the respondent's view that the policies which the applicant had requested were irrelevant. The e-mail emphasised that finding an alternative job was only one aspect of the process, and that it was necessary for the applicant to be conversant with the process and procedure. Further e-mails were sent to various managers of the respondent following up on these representations.

[69] Ultimately, the scheduled meeting of the committee took place on 1 March 2010. According to the applicant, Ms Minya said that she had received an application for legal representation a week before the hearing but could not be bothered to open it. In any event, she was refused legal representation and her husband was not permitted to remain in the meeting. Ms Minya said that she must give her written consent for the respondent to use her annual leave for sick leave and that she must return to work in stages, by reporting for four

hours per day in the first week, seven hours per day for two weeks thereafter and return to normal hours in the fourth week. The applicant asked to discuss the matter with her husband first and mentioned that she was seeing the psychiatrist on 17 March and also wanted to discuss the matter with her before reverting to the respondent.

[70] The applicant agreed that, in circumstances where the sick leave was exhausted and she had been refused temporary disability, the use of ordinary annual leave was generally the procedure followed. It was also suggested to her that there was no certainty that she would in fact return to her existing position, as her return to work would be subject to monitoring and guidance from the Employee Assistance Program Practitioner, but the applicant insisted that this was not conveyed to her at the time. Further, in another portion of the minutes of the meeting when the chairperson explained the process of her proposed return to work, nothing in that explanation suggests an alternative position was really an option under consideration. However, the applicant did concede that in the letter from the employer dated 17 February 2010, it had stated that the management of the Mail Centre wanted her to cooperate in the process of finding an alternative job. Even so, she insisted that if that was a job in the Mail Centre it would not have resolved anything, but if the issues set out in that letter had been addressed she would have been willing to return. Ms Minya, for her part, maintained she had never stated that the applicant would return to her normal duties, and clearly felt that it was the applicant's responsibility to have raised the issue of an alternative position.

[71] The meeting adjourned at this point. In a letter sent by the applicant a week later on 8 March 2010, she declined to agree to offset the time she had taken off work against her accumulated annual leave. She also reiterated her demand for the reinstatement of her salary, the provision of the respondent's incapacity and temporary disability policies and the outcome report prompting the initial decision to reject her application. Seemingly in response to this, Mr Sonkosi sent an enquiry to Dr M Mpata at head office the following day in an attempt tofor the refusal of the temporary total disability application. However, he was advised that the report was confidential. He conceded that it did not seem fair to refuse to provide the applicant with the reason for the decision.

[72] On the same date this letter was sent to the respondent by e-m\apparently without any reference to it, Ms Minya sent the applicant a letter claiming that, on the contrary, the applicant had consented to the leave offset and was to have written a letter confirming the same by 4 March 2010. The letter also stated that, in the absence of such confirmation, the "status quo" would remain and the applicant was required to resume her duties "as a matter of urgency".

[73] The applicant responded with an e-mail dated 18 March 2010, in which she said the above letter was only received on 11 March and that the respondent had ignored her own letter of 8 March 2010. The applicant's letter of 18 March focused on feedback from her appointment with Dr Prinsloo on 16 March 2010, which she claimed the respondent had agreed she could wait for before having to respond to the staggered return to work proposal. In relation to this, the applicant stated in a letter:

> *"Unfortunately, returning to the same position, surrounded by the same people, with the grievance is still outstanding, would still be a hostile environment for me. My psychiatrist has indicated to me that I will not be able to cope under the same circumstances that [led] to my illness when it became intolerable. I am currently still receiving psychotherapy by Hennie Minnar"*

The letter also repeated the applicant's previous demands and requested a ruling on the application for legal representation during the process.

[74] Ms Minya says it was this letter prompted her to adopt disciplinary action by giving the applicant a thirty day ultimatum to return to work, which was followed by the letter of termination dated 8 June 2010. The applicant never took up the invitation in that letter to ask the Post Office to review its decision.

[75] On 2 May 2010, Dr Prinsloo once again declared the applicant incapable of performing her duties for a three month period ending 2 August 2010, on account of the applicant suffering from a "bipolar mood disorder". This certificate was delivered to the respondent shortly after it was issued. In keeping with the pattern of the respondent's responses, the applicant subsequently received another letter from Ms Minya on 13 May 2010, though dated 30 April 2010, in which it was claimed that at the meeting on 1 March 2010, the applicant was instructed to resume her duties or to contact the respondent after the consultation with her doctor on 16 March. The letter said

that in view of the applicant's failure to resume her duties she was being notified that her employment would be terminated after 30 days with effect from 3 June which would be her last working day. However, the letter still invited her to resume her normal duties during the notice period.

[76] Ms Minya claims to have followed the Absenteeism Guidelines on managing absenteeism due to excessive sick leave in the applicant's case.

[77] On the day the applicant received the letter she drafted a reply which was e-mailed to the respondent on the following day, 14 May 2010. Amongst other things, the applicant disputed that she was instructed to return to work in the meeting of 1 March 2010. On the contrary, she claimed that the understanding - as verified by the audio recording of the meeting - was that, she would only respond to the proposal of a staggered return to work after consulting with a psychiatrist. She then referred to the latest medical certificate issued by Dr Prinsloo and her previous letter responding to the staggered leave proposal, following her consultation with the psychiatrist. The applicant then stated:

> *"However, it is clear from your letter that you have made your decision and that you have terminated my employment on dubious and unfair grounds. Please be advised that I intend to pursue this matter in the CCMA and then in the Labour Court as an automatically unfair dismissal as a result of a protected disclosure that I made concerning that the leave fraud that I reported that [led] to the victimisation that I experienced which resulted in my current condition."*

[78] The applicant emphasised that she believed she was victimised because she had discovered fraud and because of Mr Mahuwa's threats mentioned also that she had laid charges of insubordination against him. She further testified that the regional secretary of the Communication Workers Union had phoned her and screamed at her on the phone, but did not provide any further details of when this took place or what was said by that individual. Clearly, the applicant has a sense that when it came to union office bearers the employer was less inclined to take disciplinary action and that Mr Mahuwa's workplace contacts through his spouse, who held a more senior position than the applicant, might have contributed to the difficulties she had in dealing with him. Prior to these events taking place she says she was trying to do her work to the best of her

abilities and other supervisors at the mail centre had asked her to advise them how they could achieve an ISO 2000 standard because she was the only one who had done so until then.

[79] The applicant said she could never return to work at the Mail Centre and that she was currently engaged in selling jewellery once a month, painting and assisting chronically handicapped persons at a facility in Port Elizabeth.

Evaluation

[80] The crux of the issue to be determined is whether the reason for the termination of the applicant's service was either because she had taken disciplinary measures against Mr Mahuwa, or that she had disclosed information about potential leave fraud taking place at the mail centre which amounted to a protected disclosure. In argument, another alternative reason for characterising the dismissal as one that was automatically unfair was on account of the grievances lodged by the applicant against her manager and other employees. Although I deal with it, victimisation for filing grievances other than perhaps the one pertaining to Mr Mahuwa was not part of the pleaded case of the applicant.

[81] The approach taken by the Labour Appeal Court to cases of automatically unfair dismissal, in which the real reason for the dismissal can never be considered a fair reason, is conveniently set out in the decision in ***Kroukam v SA Airlink (Pty) Ltd***[1]**:**

> *"[26] ...The employee bears the onus of proving an automatic unfair dismissal. ... this proposition was clearly contemplated in the provisions of s 192(1), read with the definition of dismissal in s 186 and the provisions of s 187(1) of the Act. Once the employee had proved the existence of an automatic unfair dismissal, the issues would be resolved. The employer would be unable to rely upon s 188 to prove that the dismissal was fair. To require the employer to disprove the existence of an automatic unfair dismissal was clearly not contemplated by the Act.*
>
> *[26] Mr Snyman placed considerable emphasis upon the judgment of this court in SA Chemical Workers Union & others v Afrox Ltd(1999) 20 ILJ 1718*

[1] (2005) 26 ILJ 2153 (LAC)

(LAC) at para 32 where Froneman DJP set out an approach in respect of an enquiry relating to an automatically unfair dismissal in terms of s 187(1)(a) of the Act as follows:

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law should not also be utilized here (compare S v Mokgethi & others1990 (1) SA 32 (A) at 39D-41A; Minister of Police v Skosana1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue. . . . Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a) . If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.'

[27] The question in the present dispute concerned the application of this test. The starting-point of any enquiry is to be found in chapter VIII of the Act. Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by s 188. If the employee alleges that she was dismissed for a prohibited reason, for example pregnancy, then it would seem that the employee must, in addition to making the allegation,

at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in Maund v Penwith District Council [1984] ICR 143, where Lord Justice Griffiths of the Court of Appeal held at 149 that:

'[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal.'

[28] In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."[2]

[82] It must be emphasised that there is a distinction between the duty to produce sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place, which would defeat an application for absolution from the instance at the end of the employee's evidence, and the overall onus on the employee to prove that his or her dismissal was most probably for the illegitimate purpose. Clearly, if the employee succeeds in establishing a plausible case that the dismissal did take place for the illegitimate reason identified and if insufficient evidence to the contrary is presented, then that plausible case will become the most probable case and the employee will then succeed.

[83] The central question to be determined is whether on all the evidence, one of the illegitimate reasons identified by the applicant has emerged as the most probable cause of her dismissal.

[2] At 2206-7

[84] The applicant filed a number of grievances most of which were not processed to a conclusion. The employer had decided that her grievances would be put on hold pending the outcome of the leave investigation. When the investigation was completed one might have expected the grievance process to resume, but it appeared to have stagnated and no immediate steps were taken to finalise it once the leave fraud investigation had been finalised in early September 2008. The only further development that related to past events, which took place before the applicant went on extended leave on the basis of her psychiatrist's evaluation, was the belated report she received on 20 October 2008 concerning her alleged unauthorised absence in June.

[85] A week later, the applicant was booked off ill and did not return to work again. After that matters moved very slowly for a considerable period. It was only in April the following year that the employer started to respond to the applicant's request for temporary total disability leave. The ruling on this application was only finalised in September 2009 and the applicant was instructed to return to work. When she did not do so on account of her psychiatrist's further assessment, the employer took steps to convene the Disability Management Committee in November that year.

[86] It took several months before that committee finally convened in March 2010. When it convened on this occasion it did so against a backdrop of wrangling over the applicant's rights to representation, the failure to provide the report on which the rejection of her application for temporary total disability benefits was based as well as various policies pertaining to the issue, and the applicant's complaint that her grievances remained unresolved. After the meeting in March the issue between the parties was under what conditions, if any, the applicant would return to work and whether the employer had any serious intention to find alternative work for the applicant which might avoid her being subject to the same conditions to which her illness was attributed.

[87] If one considers the events in the months preceding the applicant being booked off from work in October 2009, it is difficult to avoid the conclusion that her work environment and the unresolved grievances were placing considerable strain on her. Even though the respondent's counsel, *Mr Euiejen*, suggested that it was inconceivable that the employer would have sided with a shop steward

against the applicant, the evidence showed that the employer did drag its heels in taking disciplinary action against Mr Mahuwa, and when he subsequently displayed insubordinate conduct towards the applicant, instead of supporting her in her endeavour to reassert her legitimate authority as a supervisor over him, she was pressurised into accepting a palliative remedy which did not really address the seriousness of the issue.

[88] Similarly, the respondent's failure to act with reasonable speed on the applicant's grievance about what she perceived was her humiliating treatment by Ms Cuntu, another more junior employee, would understandably have created an impression that the behaviour of other staff which undermined her would not be seriously addressed by the respondent. It was apparent from Ms Minya's testimony that she did not see it as part of her responsibility to support the applicant as a supervisor, even though it would clearly have been incorrect for the applicant herself to have taken action directly against Cuntu who did not fall under her line of authority.

[89] It also seems not unlikely that Mr Mahuwa may have exercised some influence on management in the section where he worked. Ms Minya's instruction to the applicant to work overtime came very shortly after Mr Mahuwa had threatened the applicant with the prospect that she would have to work on Saturdays. Ms Minya's explanation that it only came to her attention that the applicant was not working on Saturdays when she noticed she was not receiving overtime cannot be reconciled with her other observation that some staff were unhappy about the fact that the applicant did not work on Saturdays. If she knew that already, why did she only issue the instruction after the situation had already prevailed for a few years and just after Mahuwa had threatened the applicant? Likewise, in June 2008, a further instruction from Ms Minya to the applicant to work on Saturdays followed shortly after the applicant filed her leave fraud complaint.

[90] On the issue of the removal of equipment which she previously used, there might have been a legitimate operational rationale for the measure, but as the July 2008 report of Mr Sonkosi indicated, the matter was not handled with any sensitivity. It is easy to see in the somewhat hostile environment in which the applicant found herself that she might have seen the unexplained and abrupt

removal of the equipment she had been using for years as a malicious act intended to undermine her further.

[91] It is more difficult to say with any certainty that the relocation of the Parcel Plus section within the mail centre necessarily connected to antipathy towards the applicant by her superiors. The utilisation of the available enclosed office at the new location as a tearoom instead of it being offered to the applicant also cannot just be assumed to have been intended as another slight towards the applicant. An issue which complicated the applicant's status and position in the workplace was that she retained her previous grade as a level one supervisor, but was filling a Level II position in view of her own reluctance to move from that position when it was restructured several years earlier.

[92] From the evidence, it is apparent that the applicant often felt she was being treated less favourably than she ought to have been based on a Level I grade, whereas Level II supervisors were not treated like Level I supervisors. This mismatch between the applicant's grade and her functional supervisory level coupled with her perception about which level of supervision she was entitled to expect comparable treatment with, and the perception of other Level II supervisors of how she was treated relative to them, might well have fuelled a degree of resentment towards her to which contributed to the negatively charged environment she was working in.

[93] If one considers the various causes of the applicant's complaint and how Ms Minya interacted with her as well as the failure to deal decisively with her grievances other than to pursue the leave fraud investigation, in my view there is no reason to suppose that matters would not simply have continued in this negative and discouraging way for the foreseeable future in September 2008. Nothing on the evidence indicates that either Ms Minya or other management of the respondent were intending to deal decisively with the applicant’s issues.

[94] Would the applicant have been dismissed if it were not for her conduct in filing her grievances, or in trying to exercise her authority over Mr Mahuwa, or for disclosing what she had discovered about leave reconciliations? If I accept that the mixture of indifference and lack of support displayed by the respondent on the one hand and the apparent vindictiveness of Minya in relation to Saturday

work and the leave taken by the applicant in June, it is quite plausible that the applicant, whose mental health was fragile already, might well have found it an overwhelming prospect to continue working in that environment. In turn, this situation understandably could have precipitated her seeking further medical treatment which led to the application for temporary total disability and ultimately to the convening of the Disability Management Committee and the termination of her services. Thus, her state of incapacity, even though it might be contested by the respondent, is causally linked to the antecedent treatment of her at the workplace. On this basis, it might be said that but for the conduct of the respondent, the applicant probably would not have been dismissed.

[95] However, that is not the end of the matter. The remaining I question is whether it can be said that those actions of the respondent were the main, or a significant, cause of her dismissal in June 2010. It is at this juncture that I have greater difficulty with the applicant's case. Even if it is accepted that the chain of events is causally linked, I am not persuaded that the conduct of the respondent was the main cause of the applicant's dismissal nearly two years after these events had taken place. Even if the sequence of events after the applicant was booked off from work in October 2008, were initially triggered by the respondent's previous treatment of the applicant, those events acquired their own momentum arising, in no small way, from the manoeuvrings of both parties over how the applicant's claimed medical incapacity should be handled. Thus, the dispute over the applicant's entitlement to temporary total disability became an issue which had a bearing on the proceedings of the disability committee meeting and the substantive basis on which any decision might be made by it. The parties were also unable to agree on whether the Disability Management Committee could proceed in the absence of certain other pre-requisites such as the provision of information, being met.

[96] The matter ultimately came to a head over the respondent's insistence on the applicant returning to work, *albeit* on a staggered basis, in the face of the applicant's unwillingness to do so before consulting with her psychiatrist and before the respondent had met her various demands for information. Unwilling to accede to the applicant's requests for information, but possibly willing to discuss an alternative position with the applicant, the respondent nonetheless

insisted on her returning to work in her previous position or face termination. I believe the respondent's decision at that point was more directly connected to the way it perceived the applicant's incapacity and what it was entitled to do under such circumstances than to the events which precipitated the applicant's apparent incapacity nearly two years earlier.

[97] Even though there is reason to believe that Ms Minya displayed a degree of animus towards the applicant, as evidenced by her contemptuous attitude towards her application for legal representation, it cannot be said that was mainly attributable, or significantly related, to her unhappiness with the applicant's conduct in lodging grievances, trying to exercise her authority as a supervisor, and reporting the suspected leave fraud. Ms Minya's attitude at this stage appeared to have more to do with what she believed were the applicant's bad faith attempts to thwart the incapacity procedure the employer had set in motion, in circumstances where the applicant had already been absent from work for an extensive period of time.

[98] Consequently, I am not persuaded that the most probable reason for the respondent terminating the applicant's services was because she made a protected disclosure, or because she wanted to discipline Mahuwa, or because she filed various grievances (bearing in mind that this was not pleaded). In so far as the employer or Ms Minya in particular had taken retaliatory action against the applicant in the form of trying to impose Saturday work on her or take action against her over the day's leave in June, those threats were never followed through.. Even if I assume that the removal of the office equipment she had used for so long had no legitimate rationale and was an act of petty vindictiveness on the part of Ms Minya because of her report on leave fraud, or because she had lodged grievances against her and other staff, there is no reason to suppose that any punitive impulse on Minya's part was not satisfied by these measures and by other actions such as harassing the applicant over Saturday work. The evidence also shows that the respondent was content simply to avoid dealing decisively with her grievances, rather than trying to penalise the applicant for raising them.

[99] It might even have been the case that Ms Minya had hoped the applicant would simply give up and would leave. Had she done so in the last quarter of 2008,

after giving the respondent ultimatums to deal with her grievances decisively and to desist from attempting to pressurise her to work on Saturdays, and if the respondent had remained indifferent and implacable in the face of such demands, the applicant might well have been able to argue a case of constructive dismissal which was automatically unfair. However, the unresolved issues did not reach a culmination point and did not precipitate such action on her part at that time.

[100] Instead, the applicant's actions were dictated by her psychiatrist's medical diagnosis. Her prolonged and increasingly contested absence from work for a period of approximately twenty months, whether medically justified or not, created an entirely new source of strained relations between her and management. In the end it was the dynamics of the events which unravelled in the course of dealing with her incapacity that led to her dismissal. By that stage, I do not believe it can be said that any punitive intentions relating to her actions prior to being booked off ill in October 2008 played a significant role, if any, in her dismissal in June 2010 in the sense identified in *Kroukam*'s case.[3]

[101] In conclusion, I am not satisfied that the most likely reason for the applicant's termination was one of the illegitimate reasons she complained of that would make her dismissal unfair in terms of s 187(1), nor am I convinced they influenced the decision to dismiss her to a significant degree at that stage.

The applicant's alternative unfair dismissal claim

[102] The remaining issue concerns the applicant's alternative claim that her dismissal for incapacity or misconduct was unfair. I tried to avoid making any findings which might have a bearing on the merits of this claim though clearly

[3] At 2188, par [102]:"*However, even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees."*

parts of the record of the proceedings in this matter may obviously have a bearing on the merits thereof.

[103] Unfortunately, this is not a case in which the parties consented to allow the court to determine the alternative leg of the dispute, sitting in an arbitral capacity in terms of s 158(2)(b) of the LRA. In the pre-trial minute all the parties could agree was that the court should determine if the matter should be referred to the CCMA if it was a dismissal based either on incapacity or misconduct. As the court has no jurisdiction to determine an unfair dismissal dispute on either of these grounds, the only alternative is to refer the alternative claim of unfair dismissal to the CCMA.

Costs

[104] Although there is no ongoing relationship between the parties and even though the applicant has been unsuccessful in her claim, the employer's treatment of the applicant prior to her being booked off ill was, on the kindest interpretation, one of indifference at best and vindictive at worst (at least in certain respects). It is true it did respond to her leave fraud report and at least there was some consideration of the issues raised by her in her letter of 13 June 2008, but on her specific grievances there was no evidence of any effort to deal with them decisively. The applicant was justifiably aggrieved about her treatment even if this was not the proximate cause of her dismissal. In the circumstances, I believe it is fair and equitable that both parties should bear their own costs.

Order

[105] In the circumstances :

105.1 The applicant's claim that her dismissal was automatically unfair either in terms of s 187(1)(d) or (h) of the LRA is dismissed;

105.2 The applicant's alternative claim of unfair dismissal either for incapacity or misconduct is referred to the CCMA for determination in arbitration proceedings.

105.3 Each party must pay its own costs.

R LAGRANGE, J

Judge of the Labour Court

APPEARANCES

For the Applicant: S Snyman of Snyman Attorneys

For the Respondent: M Eiujen instructed by Goldberg & de Villiers Inc