# JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ……………..had jurisdiction to hear this matter.
2. The arbitration hearings were held on 23 November 2015, 4 April, 24 May and 20 June 2016 at various venues in Durban. The proceedings were recorded in writing and digitally. The applicant was represented by Mr ………….(………. official) while the respondent was represented by Mr …………(senior legal advisor). The former had approximately 13 years of experience in representing parties at arbitration while the latter had approximately 7 years. The proceedings were therefore conducted largely in an accusatorial manner. The interpreters were Mr SL Mthembu (April & May 2016) and Ms TP Mabele (June 2016) respectively.
3. As regards bundles of documents –
	1. The parties handed in a common bundle of documents on 23 November 2015. None of the documents therein were disputed as regards their authenticity or the correctness of their contents. The respondent was asked to prepare typed versions of medical reports (viz pages 23-35) that had been prepared in largely indecipherable handwriting of a doctor;
	2. The typed versions of the documents were handed in on 4 April 2016. These typed documents were perused by the applicant and she indicated that they were correctly transcribed. To the extent that any writing was illegible the parties indicated that they would place no reliance on such scribbles;
	3. A further bundle of documents was handed in on 4 April 2016 purporting to contain the dates of the applicant’s absence from work. The applicant was not in a position to verify whether it was authentic or to say whether its contents were correct;
	4. The respondent handed in a further bundle of documents containing the transcript of the proceedings of the incapacity hearing on 25 February 2015. The applicant accepted the bundle as correctly reflecting the proceedings on that day.
4. A pre-arb was conducted on 23 November 2015. A typed minute thereof was prepared and distributed to both parties on 4 April 2016. After an examination of the said minute, the parties indicated that it correctly reflected the pre-arb proceedings on 23 November 2015. It was read into the record after minor amendments were effected thereto. The parties were asked to keep the minute handy and make regular reference to it during the arbitration to remind themselves of the issues on which there was agreement or dispute as the case may be. (An amended minute was distributed to the parties on 23 May 2016.)
5. The pre-arb minute recorded that the applicant had performed the job of receptionist from 2013. However during the arbitration one of the respondent’s witnesses stated that the applicant had performed that job from 2011. The minute was then amended by consent to reflect the respective versions of the parties.

# ISSUE TO BE DECIDED

1. Whether the applicant was unfairly dismissed. She sought compensation. She indicated that she was not seeking reinstatement as she feared that, if reinstated, she would be ill-treated by the respondent.

# BACKGROUND TO THE DISPUTE

1. The applicant is ………………..(female age 55), holding the substantive post of office attendant. From 2011 (respondent’s version) or 2013 (applicant’s version), however, she performed the job of receptionist. She commenced employment with the respondent on 1 April 1995 and was dismissed on 10 April 2015. She earned R9753.46pm for working a 5 day / 40 hour week. Her highest standard of education is Gr 12. She remains unemployed despite making attempts at finding alternative employment. She has not earned anything from casual work. As breadwinner she had 3 dependants (2 adults and 1 grandchild).
2. The respondent is ……………., a local government body with 26 000 employees. The applicant worked in its corporate HR unit at ………………..
3. The applicant was handed a notice to attend an incapacity inquiry on 3 February 2015. The inquiry sat on 25 February, 10 March and 10 April 2015. The applicant attended all the sittings with an experienced shop steward except the last one which was attended by the shop steward alone as the applicant was indisposed.
4. A finding was made and the applicant was dismissed. The applicant complained that she was not allowed to appeal. The respondent disputed that there is an appeal procedure for incapacity related dismissals. Be that as it may the applicant referred an unfair dismissal dispute with the …………… on 20 August 2015 together with an application for condonation. The application was granted on 10 September 2015 and the matter was set down for conciliation on 30 September 2015 but remained unresolved. Hence the referral to arbitration.
5. The respondent called the following witnesses: …………….(senior recruitment and administration officer of 10 years and employed with the respondent for 32 years. She was the applicant’s manager); ………….. (manager labour relations for approximately 3 years and employed with the respondent for 41 years. He was the chairperson of the inquiry). Only the applicant gave evidence in support of her case.
6. The parties made oral closing submissions on 20 June 2016.

# SURVEY AND ANALYSIS OF EVIDENCE AND ARGUMENT

1. The following was either agreed to, common cause, undisputed or conceded during the pre-arb, evidence-in-chief or the cross-examination:
	1. That the applicant’s original position was that of office attendant. She performed these duties on the ground floor of …………. As office attendant her duties were as follows:
		1. Update the external notice board with vacancies published;
		2. Ensure that adverts are removed on closing date;
		3. Record the number of application forms handed out;
		4. Collate and sort application forms into relevant positions / departments;
		5. Advise members of public concerning any matters pertaining to the position that they are applying for;
		6. Complete monthly costing transfer;
		7. Assist the department with filing of any documents; and
		8. Any other related duties;
	2. The applicant slipped and sustained injuries to her knee and shoulder while on duty in 2011;
	3. She underwent treatment and returned to work some months later;
	4. The applicant experienced difficulty in performing her duties as office attendant and conceded at the inquiry that she was not performing the majority of the duties attached to that post;
	5. From 2011 (respondent’s version) or 2013 (applicant’s version) the applicant was moved to the 10th floor of Shell House as a receptionist. As receptionist she performed the following duties:
		1. Typing;
		2. Welcoming visitors;
		3. Operating switchboard;
		4. Access control;
		5. Receiving and filing of documents;
		6. Receiving job applications;
		7. Sending job application forms to relevant persons in the department;
	6. The move to the 10th floor was as a result of the deputy head of the unit Mr Cyril Mkhwanazi intervening to ensure that the applicant was given lighter and limited duties as receptionist. The applicant referred to him as the “big boss”;
	7. There was no substantive complaint about the applicant’s performance as receptionist. Peters mentioned a number of times that her performance was satisfactory;
	8. Before being finally placed in the reception, attempts were made to accommodate the applicant by her being given filing duties and other duties in the recruitment office. These attempts were not successful;
	9. Applicant performed in the position of receptionist until 19 February 2014 when she went for a surgical operation to her knee;
	10. She never returned to work;
	11. The applicant was absent periodically from 2011 until the date of her dismissal;
	12. Trainees performed the applicant’s duties in her absence;
	13. During 2014 she submitted medical certificates (sick notes) for the following periods: 20.5.14 to 3.6.14; 3.6.14 to 24.6.14; 24.6.14 to 8.7.14; 8.7.14 to 5.8.14; 5.8.14 to 30.8.14; 30.8.14 to 15.9.14; 15.9.14 to 15.10.14;
	14. After this period no sick notes were submitted until the date of applicant’s dismissal;
	15. The respondent had afforded the applicant 80 days paid sick leave in the relevant 3-year sick leave cycle. It was agreed that the applicant had exhausted all forms of leave and she was on unpaid leave from June 2014;
	16. The applicant submitted a medical report from King Edward VIII Hospital dated 17 October 2014 which inter alia stated: “*She* [ie the applicant] *is currently having difficulty continuing work due to pain & difficulty in ADLs. She still requires chronic medication & physio rehabilitation*.”;
	17. A further pro forma medical report dated 6 November 2014 stated that the applicant was “pending rehabilitation” in answer to the following questions: “*3(a) From what date has the employee been fit for her normal work?” and “3(b) On what date is she likely to be fit for her normal work?*”;
	18. A further medical report dated 5 December 2014 stated that the applicant “*currently has difficulty in mobilising due to pain. She still undergoes physio for rehab & … (indecipherable) on analgesics*”;
	19. A letter dated 12 January 2015 was delivered by the respondent to the applicant’s residence. It read as follows: “*Dear Madam, NOTICE OF CONSULTATION Kindly be advised that you are required to attend a consultation with management to determine the extent of your injury / incapacity. You are advised that you may have a representative of your choice at the consultation, who may be a fellow employee, shop steward or trade union official. You are further advised that it is your responsibility to arrange such representation. Details of the consultation are as follows: Date 23 January 2015 Time 10am Venue 10th floor boardroom Shell House, 221 Anton Lembede St. Durban*.” Signed (Ms D Peters) Manager;
	20. The applicant attended the consultation process on 23 January 2015 with her representative Mr D Luthuli;
	21. The respondent did not keep a minute of the issues discussed during the consultation;
	22. The applicant also suffered from asthma. This condition pre-dated the injury;
	23. The chairperson of the inquiry had afforded the applicant a further opportunity of presenting medical evidence on her condition before he made his decision. The applicant submitted a report dated 2 April 2015 which stated that the applicant’s return to work was “*unlikely pending rehabilitation*” in answer to the following questions: “*3(a) From what date has the employee been fit for her normal work?” and “3(b) On what date is she likely to be fit for her normal work?*”;
	24. The chairperson of the inquiry had proceeded with the sitting on 10 April 2015 despite the shop steward indicating to him that the applicant was indisposed. It was not disputed that on this day only the finding of the chairperson was handed down and as such there was no evidence of any prejudice to the applicant;
	25. The applicant had not personally been given a letter of dismissal. While it is customary to hand a letter of dismissal to the affected employee, in this case it was handed to the shop steward in the absence of the applicant. He appears to have accepted the letter without protest. Be that as it reached the applicant via her daughter who is also an employee of the respondent. I cannot find that the applicant suffered any prejudice as a result;
	26. There is no collective agreement regulating the issue of incapacity;
	27. The applicant’s disability did not have any impact on her own safety or that of others in the workplace in the event that an emergency evacuation was required;
	28. The applicant had long service; and
	29. The applicant had a permanent injury.
2. The notice of the incapacity inquiry dated 2 February 2015 alleged that “*You* [ie the applicant] *were not present from work from on or about February 2014 to date, due to your injury. Despite attempts made by the employer to accommodate your injury, it is alleged that you are incapable of performing your job functions*.”
3. The applicant’s representative chose to interpret the notice as meaning that the applicant’s incapacity arose only in February 2014 and as such the duty to consult with, and reasonably accommodate her, arose only after that date. I do not agree with such a strained and artificial interpretation as it was common cause that the applicant was injured in 2011 and a host of interactions had occurred between the parties since that date to alleviate the applicant’s work circumstances.
4. During the pre-arb and when giving evidence, the applicant raised the procedural issue that the chairperson of the incapacity inquiry was not impartial and unbiased. However this issue was not put to ……………in cross-examination. I accordingly cannot make a finding on this issue on the probabilities. (Findings on the other procedural issues are made elsewhere in this award.)
5. During the pre-arb the parties raised the following substantive issues. The evidence on, and analysis of these issues is as follows:
	1. Whether the applicant underwent rehabilitation and whether she informed the chairperson of the inquiry of this:
		1. It was undisputed that the applicant underwent rehabilitation but there is no evidence that she kept the respondent (or the chairperson of the inquiry) informed of the progress she was making;
		2. The report of 2 April 2015 says that the applicant’s return to work is “unlikely pending rehabilitation”. The respondent chose to focus on the word “unlikely”, and submitted that since it was unlikely that she would return to work, the only option available to it was to dismiss the applicant;
		3. I do not agree. A reasonable interpretation of the phrase “unlikely pending rehabilitation” means that the applicant was unlikely to return to work until the completion of her rehabilitation;
		4. Peters stated in cross-examination that she was not sure when the rehabilitation process would be completed, and hence the need to dismiss. I do not accept this explanation because there is no evidence that the respondent attempted to find out when the process would be completed;
		5. This issue is dealt with in greater detail in the next paragraph.
	2. Whether the respondent had initiated a consultation process, and if so, whether it had been abandoned:
		1. There is no doubt that the respondent had initiated a consultation process, and that a consultation was conducted on 23 January 2015;
		2. During the consultation, it was agreed that the following was discussed: the extent of the applicant’s injuries; the period of her absence; her failure to produce sick notes for a number of months; and ways in which the respondent could assist her;
		3. That process ended in the applicant being requested to submit a further report. She submitted the report. It advised that the applicant’s status was “pending rehabilitation”;
		4. It is at this stage that a second consultation meeting ought to have been held with the applicant to inquire about the progress of the rehabilitation; anticipated length of the rehabilitation; and the prognosis of the outcome of the rehabilitation. This was not done by the respondent;
		5. The respondent repeatedly stated that the applicant’s injury was “permanent”. While that may be the case, it was undisputed that attempts were ongoing to rehabilitate her such that she was reasonably fit for work;
		6. With my untrained eye, I had the benefit of observing the applicant over many months and she appeared to have benefitted immensely from the rehabilitation. She did not display any sign of physical disability while the arbitration was being conducted;
		7. Had a further consultation process been held then the outcome may probably have been different. In other words the dismissal may have been avoided. In this regard I keep in mind that dismissal is always the last resort;
		8. The respondent placed great weight on the medical report dated 3 April 2014 which stated that the applicant’s occupational prognosis was “poor”; that the degree of incapacity was “permanent (knee)”; that the likelihood of improvement was “minimal”; that the work environment aggravated her injury; that she had difficulty sitting for too long. *Even this report stated in para 16 that the applicant was undergoing rehabilitation*. I cannot accord this report much weight because by January 2015 it had become outdated since the applicant had undergone rehabilitation for the better part of 2014;
		9. The shortcomings in the consultation process do not lie solely with the respondent. The applicant remained inert during the consultation on 23 January 2015 and did not keep the respondent informed of the progress she made thereafter. She even failed to take the chairperson of the inquiry into confidence. In answer to a question at the inquiry whether she could perform her duties, her answer was: “God could change anything”. I intend taking her inertia into account when reducing the amount of compensation that I intend awarding the applicant;
		10. Finally, I cannot make a finding whether the process was abandoned. What is clear is that the process was not documented. For a large and well-resourced employer such as the respondent this deficiency is to be deprecated.
	3. Whether the applicant was reasonably accommodated; and whether the applicant was consulted on the best manner in which she could be accommodated: I find in the affirmative for the following reasons:
		1. The respondent submitted that the applicant was consulted on what else the respondent could to do accommodate her. But the applicant had failed to make any proposals;
		2. I find in the circumstances that the respondent did indeed make attempts to reasonably accommodate the applicant. With the applicant not making any practical suggestions it was left to the respondent to do the best it could;
		3. Whether those attempts were good enough cannot be determined: even during the arbitration, except for relentlessly criticizing the respondent, no practical suggestion was made by the applicant on what ought to have been reasonably done by the respondent;
		4. The applicant submitted in evidence and in argument that there is an onerous duty on an employer to accommodate an employee who is injured in the workplace. I agree. However that duty cannot be given practical effect where the employee chooses to remain passive while the process unfolds.
	4. Whether the applicant’s duties as a receptionist were heavier or lighter than those of office attendant: During the arbitration the parties understood that “heavier” or “lighter” means more or less physically demanding/taxing. However while making her closing statement the applicant submitted that the job of receptionist was “higher” (meaning that it was on a higher pay scale) and hence heavier. I reject that proposition as being disingenuous. The evidence below is analysed with the ordinary meaning being attributed to the terms “heavier” or “lighter”. I find the job of receptionist to be lighter for the following reasons:
		1. Peters stated that the job of receptionist was lighter than that of office attendant. She was not challenged on this issue during cross-examination;
		2. When the applicant gave evidence she stated that performing the functions of receptionist was “heavier” than that of office attendant. This is in contrast to what she stated during the incapacity inquiry. In any event if the applicant felt that the job was heavier, she ought to have, as a reasonably person, lodged a grievance or complained to her trade union. There is no evidence of either;
		3. The applicant was not alone at the reception desk – she was assisted by someone at most times;
		4. I find in the circumstances that the duties attached to that of receptionist were probably lighter than those of office attendant.
	5. Whether the respondent was inconsistent in the manner in which it dealt with similarly affected employees: The applicant failed to lead any evidence on this issue.
	6. Whether dismissal was the only option available to the respondent: Marincowitz stated that dismissal was the only option. His words were “Once we have followed the procedure then we must terminate.” Having regard to the findings made already, I do not agree.
	7. Whether the applicant could be trusted to perform her duties properly and diligently: There was no evidence led on this issue.
	8. Whether there were costs relating to staffing or training as a result of the applicant’s absence; whether there was loss of productivity; whether there was disruption in the workplace as a result of the applicant’s absence: I cannot find on the probabilities that the respondent suffered any significant prejudice because –
		1. The reception desk was staffed by relief personnel during the applicant’s absence. There was no evidence about any loss of productivity;
		2. Except for saying that the applicant’s absence was disruptive, Peters did not give details.
6. A finding cannot be made on the probabilities on the following issues either because there was no evidence on these issues; alternatively the probabilities were evenly balanced:
	1. Whether the applicant commenced duties as receptionist in 2011 or 2013;
	2. Whether there was any ulterior motive on the part of the respondent in moving the applicant from the ground floor to the 10th floor;
	3. Whether the applicant was moved willingly from the ground floor or was “instructed”;
	4. Whether the respondent is a “caring” employer or not.
7. To a large extent, the respondent discharged its duties in a manner befitting a responsible employer. However it failed in the respects set out above. That renders the dismissal of the applicant to be unfair and I find accordingly. When all is said and done, the onus is on an employer to ensure that a dismissal is fair.
8. The applicant sought compensation. Factors that count towards increased compensation are: her length of service (20 years); her age (55); her modest standard of education (Gr 12); and her relatively low prospects of getting alternative employment due to these factors. The factor that does not favour her has been set out in para 17(b)(ix) above. I find in the circumstances that just and equitable compensation to be an amount that the applicant could have earned over 3 months. That amounts to R29 260.38 (R9753.46 x 3).
9. The applicant indicated at the outset that she would not seek reinstatement because she feared ill-treatment at the hands of the respondent. It must be recorded that there was no evidence to justify this fear.

# AWARD

1. The dismissal of the applicant is unfair.
2. …………………is ordered to pay ……………………R29 260.38 within 14 days of being informed of this award.

Dated at DURBAN on this the 24th day of JUNE 2016.

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R J PURSHOTAM

*Arbitrator*