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IN THE LABOUR APPEAL COURT

NATAL DIVISION

CASE NO.: NHN 11/2/942

In the matter between:

DURBAN CONFECTIONARY WORKS (PTY.) LTD.
trading as BEACON SWEETS — Appellant

and

CHRISTOPHER ZALISILE MAJANGAZA — Respondent

BEFORE THE HONOURABLE MR. JUSTICE K.R. McCALL

ASSESSORS: MR. M. OOSTHUIZEN
MR. M. PILLEMER

FOR APPELLANT: MR. G.O. VAN NIEKERK
Instructed by Ditz Incorporated

FOR RESPONDENT: MR. R. ZONDO
Instructed by S.A. Mathe,
Zondo & Company

APPEAL HEARD ON : 14 FEBRUARY, 1992

JUDGMENT DELIVERED ON : 18 February 1993.

J U D G M E N T

This is an appeal from a determination by the Industrial Court in terms of section 46(9) of the Labour Relations Act, No. 28 of 1956, ("the Act"). The appellant was the employer of the respondent who was the applicant in the proceedings in terms of section 46(9) of the Act.

The respondent was employed as a guard/watchman by the appellant, in 1984. He signed a written "EMPLOYMENT AGREEMENT" in which certain "Reasons For Dismissal From Service" were listed. One of those reasons was: "Failure to carry out orders given to me by persons in authority."

On the 22nd September, 1988 the respondent was given the task of guarding the railway crossing which links the two factories of the appellant, on either side of a railway line. Although it appears from the evidence before the Industrial Court of Mr Day, the Group Security Manager, that it was not the appellant's normal post to guard the crossing and that he was relieving someone else, the appellant said in his evidence at the second internal appeal that he had been a guard at the crossing gates many times. The respondent, together with other employees in the security department, had been given a written instruction on the 24th March, 1988 setting out duties at the rail crossing. They provided that, on the approach of a train from either direction:-

> "the guard, carrying the red flag, so that it may be seen by all must close all gates having cleared all persons and vehicles from the crossing."

The gates were only to be opened when the train had passed.

The respondent was charged with "Insubordination", it being alleged that on the 22nd September, 1988:-

> "he failed to carry out orders concerning duties at the Railway Crossing given to him; on the approach of a train he failed to clear the crossing of pedestrians and vehicles and close the security gates."

The charge was brought on the 29th September, 1988. A disciplinary enquiry was held on the 17th October, 1988 which was presided over by the said Mr Day. After hearing the evidence of a number of witnesses, who were subject to cross-examination, he found that the respondent had been insubordinate, in that he disobeyed instructions given to him, and, without further ado, he was instantly dismissed. This decision was subject to two appeals under the appellant's disciplinary procedure, in both of which the dismissal was upheld.

In the section 46(9) proceedings the respondent attacked the decision to dismiss him on both substantive and procedural grounds and sought his reinstatement. The presiding officer in the Industrial Court found that the disciplinary enquiry itself appeared to have been properly conducted. He further found, correctly in my opinion, that the evidence was overwhelming that there was a failure by the respondent to wave the red flag to warn those who were about to enter the railway

crossing that a train was approaching, and to close the gates. The evidence was that there was a hyster being driven by an employee in the crossing at the time and that two female employees narrowly missed being run down by the train which approached the crossing. He apparently accepted the evidence by one of the directors of the respondent that an accident at the crossing could have had serious consequences for the appellant, its relationship with the railway authorities and the operations of the appellant company. He found that, although the charge was insubordination, it was common cause that there was no question of wilfulness. In effect, then, he found that there was a negligent failure on the part of the respondent to carry out what, as a security guard, he had been instructed to do and that the consequences could have been very serious indeed.

The learned member of the Industrial Court then considered the question as to whether dismissal of the respondent was a fair penalty in the circumstances. He came to the conclusion that it was not. In doing so, the learned member referred to a number of considerations relevant to the question of the appropriate penalty to be imposed upon the respondent for his dereliction of duty. Whilst he was satisfied that the appellant in good faith considered that dismissal was appropriate he thought that there were factors which may have been overlooked, the main one being respondent's clean record over a period of four years. He raised the question as to whether the ultimate

penalty of dismissal was justified by one lapse of discipline. Although he referred to the fact that it appeared from the evidence of Mr Day and from the record of the appeal proceedings that no opportunity had been given to the respondent to put representations before the presiding officials with regard to the penalty, and whether dismissal was not too severe a penalty, he did not expressly find that this failure constituted an unfair labour practice. He referred to the fact that the Court should not lightly substitute its finding for that of the employer, and that the breach of duty on the part of the respondent deserved a severe penalty. Dealing with the argument raised by the appellant's attorneys that the body of workers might well regard reinstatement of the appellant as an indication that the Court was not taking the matter seriously, he referred to the fact that there was an indication in the evidence of one of the witnesses, Vijay Kathard, who was one of the female pedestrians who narrowly missed being hit by the train, that she would prefer to see the respondent not lose his job, and commented that that may well be a feeling among more employees and not only Vijay.

He referred to the fact that it was regrettable that employers have not introduced into their disciplinary procedures the possibility of suspension without pay as a penalty. Then, seemingly as a compromise, he ordered reinstatement of the respondent on the same terms and conditions as prevailed in

September 1988, but with effect from 1st October, 1989. The respondent had been reinstated pursuant to proceedings in terms of section 43 of the Act with effect from 1st May, 1989. He had been paid a salary in lieu of reinstatement from the 1st May, 1989 to the 31st August, 1989. The learned member of the Court a quo further ordered that the reinstatement order would be held to have lapsed on the 31st August, 1989. The effect, therefore, was that the respondent was deprived of his salary from the date of dismissal, namely, 17th October, 1988, to the 1st May, 1989, and for the month of September, 1989.

In this appeal, counsel for the appellant argued that the only question which this Court has to decide is whether, in the light of the findings of the Court a quo, the penalty of dismissal was justified. I would agree that the main issue which this Court has to decide relates to the appropriateness of the sanction, or penalty, imposed by the Court a quo, but I do not think that the issue is quite as simple as counsel's formulation of it. The correctness of the Court a quo's finding that there had been a serious dereliction of duty on the part of the respondent was not challenged by the respondent, on appeal, and rightly so. In the Court a quo, and, particularly, in the section 43 proceedings, some issue was made of the fact that the respondent had been incorrectly charged with insubordination, which connoted a degree of wilful misconduct, whereas in fact he should only have been

found guilty of failing to carry out a lawful order or instruction given to him by a person in authority. I do not think that anything turns on this point. The respondent was well aware of the nature of the charge against him and he was, in fact, found guilty of disobeying instructions given to him, even though he was said to have been "insubordinate".

Obviously the learned member of the Court a quo would not have been entitled to interfere at all with the appellant's decision to dismiss the respondent unless he found, and determined, that there had been an unfair labour practice on the part of the appellant. Although he did not specifically say so, he appears to have found that the dismissal of the respondent was, in the circumstances, an unfair labour practice. Those circumstances included the respondent's clean record, the fact that this was a single lapse of discipline and the fact that the respondent was given no opportunity to address the question of the appropriate penalty. In the result the learned member failed to distinguish between the procedural irregularity and the personal circumstances of the respondent which ought to have been relevant in deciding upon an appropriate penalty.

I am in respectful agreement with those cases in which it has been held that an appeal to this Court in terms of section 17(21A) of the Act is an appeal within category (ii) referred to in Tikly & Others v Johannes N.O. and Others 1963(2)SA 588(T)

at 590 F-591 A.

It is, "a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong."
cf. Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC) at 576-579.

It seems to me that, in re-hearing the present matter on appeal, in order to decide whether re-instatement was appropriate, it is necessary for this Court to determine:-

(a) whether or not the conduct of the appellant in dismissing the respondent constituted an unfair labour practice as then defined in the Act; and, if so:

(b) the precise nature of the unfair labour practice; and

(c) whether or not the Court a quo was wrong in determining the dispute regarding the unfair labour practice by ordering the re-instatement of the respondent on the terms upon which it did order such re-instatement.

Before us, on appeal, counsel for the respondent contended that the dismissal of the respondent constituted an unfair labour practice on two grounds, namely:-

(a) The appellant's failure to comply with the rules of natural justice, in that, having found the respondent guilty, it took the decision to dismiss him without giving him an opportunity to make representations as to the appropriate sentence; and

(b) that the penalty of dismissal was too severe and harsh in the circumstances.

Counsel for the appellant, whilst not disputing that there had been a procedural irregularity in not affording the respondent the opportunity to make representations on the question of the sanction, argued that the irregularity did not appear to play a role in the findings of the Court a quo and that, in any event, such irregularity was not fatal to the disciplinary proceedings which led to the dismissal. He further argued that the respondent had not specifically raised this procedural irregularity in his application to the Industrial Court as a ground on which he alleged that the dismissal was unfair and, as I understand it, was not entitled to raise it in the Industrial Court or on appeal. I shall deal with that point first.

In his Statement of Case in the Industrial Court, the respondent did contend that his dismissal constituted an unfair labour practice on both substantive and procedural grounds. He did not, however, specifically state that the failure to afford

him an opportunity to make representations at the initial disciplinary enquiry regarding the appropriate sanction constituted an unfair labour practice. The closest he came to raising this issue in his Statement of Case was to allege that:-

> "The proceedings in the appeals were so arbitrary, biased, unreasonable and were so restricted that the Applicant had no sufficient opportunity to state his case."

However, at the hearing before the Industrial Court the precedural irregularity was specifically raised, both in evidence and in argument. Under cross-examination, the said Mr Day, who was called as a witness by the appellant, conceded that the respondent was not given an opportunity to comment on the proposed disciplinary steps to be taken against him and that it had now become the company's practice to ask an employee whether there was anything he wished to say in mitigation. In fact, the form which was used at the enquiry into the respondent's conduct by Mr Day listed the procedural steps to be followed "by the Adjudicator" one of which was stated to be "9. Employee opportunity for evidence in mitigation (N.B. not defence). Record relevant detail." This item was listed after item 7 dealing with reaching a finding and telling the accused the result, thereby indicating that this step was to be followed after the adjudicator had reached his finding on the merits. The record of the proceedings in the Court a quo, which was before us, contains the argument before the Industrial Court by the

representatives of both parties. It is clear from it that the respondent's representative referred to the above evidence and specifically argued that the failure to give the respondent an opportunity to "plead in mitigation" was in itself an unfair labour practice. He further contended that there were a number of factors which had not been considered by the appellant. The appellant's attorney, in his argument, did not object to these issues being raised before the Industrial Court. There is no doubt, therefore, that the question of the procedural irregularity in not affording the respondent the opportunity to make representations regarding the appropriate sentence was fully aired before, and considered by, the Industrial Court and, in my view, it would be taking an unduly technical approach to proceedings in matters such as this to hold that that issue should not have been raised in the Industrial Court and cannot be raised on appeal. Moreover, section 46(9)(c) of the Act requires the Industrial Court to determine the dispute concerning the alleged unfair labour practice, in this case the dismissal of the respondent, as soon as possible. Even if an applicant does not, in his Statement of Case (the requirement for which derives from the Rules of the Industrial Court and not from the Act) raise a particular ground on which he alleges that his dismissal was unfair, but such ground becomes apparent from the information placed before the Industrial Court, it seems to me that the Industrial Court may be obliged to take it into

consideration in deciding upon whether or not the dismissal was unfair, provided it does not go beyond the ambit of the dispute referred to it for determination. I accordingly hold that the respondent is entitled to contend before this Court that the dismissal was unfair on the grounds that the appellant did not afford the respondent the opportunity to "plead in mitigation" or to advance reasons why dismissal was not an appropriate sanction.

The definition of "unfair labour practice" in the Act, as amended, included, at the time of the hearing before the Industrial Court, the following:-

> "Unfair labour practice means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and an employee, and shall include the following:
>
> (a) the dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure: Provided that the following shall not be regarded as an unfair labour practice, namely:
>
> .....
>
> (iii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that such employee was granted a fair opportunity to state his case and a hearing or enquiry would in the opinion of the court not have had a different effect on the dismissal;".

There was a disciplinary enquiry in this matter, and, apart from the question of the nature of the charge, namely,

insubordination, there was no irregularity in the enquiry leading up to the finding that there had been a dereliction of duty on the part of the respondent. However, thereafter the respondent was summarily dismissed without being given any opportunity to present argument or evidence in mitigation and, in particular, to argue that dismissal was not, in the circumstances, the appropriate, or the only appropriate, sanction. The Industrial Court has held that procedural fairness requires that the question of an appropriate sanction be addressed and that the employee be given the opportunity to advance argument on the question.

See: National Automobile & Allied Workers Union v Pretoria Precision Casting (Pty) Ltd (1985) 6 ILJ 369 (IC); Chemical Workers Industrial Union and Another v AECI Paints Natal (Pty) Ltd (1988) 9 ILJ 1046 (IC) at 1051 B-C.

This Court has also held that an employee should be given the opportunity to address the question of the appropriate sanction, and that if such an opportunity has not been afforded to the employee it cannot be said that the dismissal was in compliance with a fair procedure.

See : Empangeni Transport (Pty) Ltd v Zulu (1992) 13 ILJ 352 (LAC) at 358 B-F.

Foodpiper CC trading as Kentucky Fried Chicken v Barbara Shezi (Unreported LAC decision (N) No. 11/2/1631, 26.2.92) at pages 46-50.

No one would suggest that it would not be an irregularity not to allow an accused in a criminal case, who has been found guilty, to make representations on the issue of sentence or to deny the defendant in a negligence case the opportunity to address on the question of damages. Where there is a disciplinary enquiry into an employee's conduct his employment and his livelihood may be at stake. Justice therefore demands that if an employee be found guilty he should be given the opportunity to address the question of the appropriate sanction. There may be exceptional cases in which a disciplinary enquiry itself may be dispensed with but this was not such a case and the appellant has not suggested that it was. Indeed its own procedure for a disciplinary enquiry recognised, at the time, the necessity to allow the employee to plead in mitigation. In the Anglo American Farms case(supra) Thring J. held, at page 586 H that it does not automatically follow that the failure of the chairman of the disciplinary enquiry to elicit relevant mitigating circumstances will result in the dismissal concerned being unfair. That does not mean that a failure to afford the employee concerned the opportunity to present argument or information in mitigation will not render the disciplinary enquiry unfair. In the circumstances of this case, therefore, the dismissal of the respondent was,

for the purposes of the then applicable definition of "unfair labour practice" not in compliance with a fair procedure and was an unfair labour practice.

In my opinion the learned member of the Court a quo, whilst he was correct in finding that the dismissal of the applicant was unfair, ought to have specifically found that it was an unfair labour practice because of the procedural irregularity to which I have referred. Had there been no procedural irregularity it may have been open to the Industrial Court to decide whether or not, in the circumstances, the imposition of the penalty or dismissal itself constituted an unfair labour practice. I am by no means convinced that the Industrial Court would have been justified in interfering with the appellant's decision had the appellant, having afforded the respondent the opportunity to make representations regarding the appropriate sanction and having considered such representations with an open and unbiased mind, nevertheless come to the conclusion that dismissal was the only appropriate sanction. However, because of the procedural defect which preceeded the appellant's decision, that question does not arise in this case and ought not to have been decided by the Industrial Court if, indeed, it was.

Once the industrial court finds that there has been an unfair labour practice, it is encumbent upon it, in terms of section 46(9)(c) of the Act to determine the dispute "on such terms as

it may deem reasonable, including but not limited to the ordering of reinstatement or compensation.

In my view, there may be different means of determining a dispute concerning an unfair dismissal, depending upon whether the unfairness arises out of a procedural irregularity or whether the penalty of dismissal is simply too severe or harsh in the circumstances of the case. In the former case the options open to the Industrial Court in determining the dispute would include:-

(a) setting aside the dismissal and referring the matter back to the employee for reconsideration;

(b) reinstatement with or without retrospective effect;

(c) awarding compensation for the loss occasioned by the unfair dismissal;

(d) finding that, even if there had not been the procedural irregularity, the employee would inevitably have been dismissed and therefore neither ordering reinstatement or awarding compensation.

cf. Farmec (Edms) Beperk (vha) Northern Transvaal Toyota v A.T. Els (unreported LAC case No. NH11/2/2629 (T)) at pages 13-15 of the judgement.

Where, however, there is a finding only that the penalty itself was unduly harsh, the most likely way to determine the dispute is for the Industrial Court itself to impose a less severe penalty.

It may well be that in determining whether the decision of the Industrial Court was right or wrong, this Court must "exercise its own discretion as to what is fair and reasonable in the circumstances" - per Thring J. in the Anglo American Farms case (supra) at page 579 F. See also H.L. Van Den Berg (Pty) Ltd t/a Metpress Manufacturing v Steel Engingeering and Allied Workers Union of S.A. and Others (1991) 12 ILJ 1266 (LAC) at 1271 I - 1272 A.

For example, this Court would not hesitate to interfere with the method chosen by the Industrial Court to resolve the dispute if it found that, contrary to the requirements of section 46(9)(c) of the Act, such method was not reasonable.

In the case of Sentraal-Wes (Ko-öperatief) Bpk v Food and Allied Workers Union and Others (1990) 11 ILJ 977 at 994E, Goldstein J. said:-

> "Prima facie, if an unfair dismissal occurs the inference is that fairness demands reinstatement. And it is for an employer to raise the factors which displace such inference."

See also: Grinnaker Electronics Holdings (Pty) Ltd t/a Grinel v Electrical and Allied Workers Trade Union of S.A. and Others (1991) 12 ILJ 1284 (LAC) at 1293 D-E.

Building Construction and Allied Workers Union and Others v Slagment (Pty) Ltd (1992) 13 ILJ 1168 (LAC) at 1173 D-E.

J.B. Hayworth & Associates CC v Mpanya and Others (1992) 13 ILJ 604 (LAC) at 608 D-G.

Wright v St. Mary's Hospital (1992) 13 ILJ 987 (IC) at 1005 B-D.

This is not a case, in my opinion, in which it can be said that, had a fair procedure been followed, and had the respondent been afforded the opportunity to address the question of the appropriate sanction, the result would inevitably have been dismissal. Whilst it is true that the respondent's dereliction of duty was indeed a serious one which could have had serious consequences for some of his fellow employees, there was evidence to show that the respondent had been a good employee with a clean record over four years of service. It seems that his lack of discipline on this occasion was out of character and unlikely to be repeated. It appears that the respondent's attention may have been distracted by some females to whom he was talking at the time. It may well be that if the respondent had been given the opportunity to address the question of sanction, Mr Day, after weighing up the pros and cons, would have been persuaded that dismissal was not the appropriate sanction in the circumstances. There is, however, no point whatsoever in referring the matter back to the appellant for reconsideration. Having regard to all that has transpired it would be virtually

impossible for it to bring a fair and unbiased mind to bear on the issue.

That leaves, as the only possibilities, compensation or reinstatement. In my view compensation would not be a realistic remedy at this stage. This Court does not have before it the information necessary to enable it to arrive at an appropriate award and the question of compensation would inevitably be clouded and complicated by the time which has elapsed since the dismissal.

I do not think that the decision of the learned member in the Court a quo to order the reinstatement of the respondent, subject to the forfeiture of his remuneration over a period of approximately seven and a half months, was unreasonable. Had the appellant accepted that there was a procedural irregularity and that the dismissal therefore constituted an unfair labour practice it should have realised that some form of redress to the respondent was inevitable. In my view it has not advanced any convincing reasons as to why that form of redress should not be reinstatement. It has not contended, for example, that reinstatement is impossible or impracticable. On appeal it addressed the question of the fairness of the penalty imposed by it and contended that the "reasonable employer" test ought to be applied in judging that penalty. But, having regard to the finding of this Court, that the appellant was guilty of an unfair labour practice, the question is not whether the original imposition of the penalty of dismissal was unfair,

but whether reinstatement is a reasonable way to determine the dispute concerning the unfair labour practice. In my opinion it is, subject to the forfeiture by the respondent of the wages which would result from applying the decision of the Court a quo. I am accordingly of the opinion that the decision of the Court a quo ought not to be interfered with, and that the appeal should fail.

Counsel for the respondent submitted that if the appeal failed the respondent should be awarded his costs. As the respondent has been successful, I can see no reason why he should not be awarded his costs on appeal.

It is accordingly ordered that the appellant's appeal is dismissed with costs.

K.R. McCALL

Insofar as this decision is based on questions of fact, I agree.

M. OOSTHUIZEN

M. PILLEMER