IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No: JA3/2003

In the matter between

Ignatius Petrus Kroukam **Appellant**

And

SA Airlink (Pty) Limited **Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] I have had the opportunity of reading the judgment prepared by my Colleague, Davis AJA, in this matter. I agree with him that the appellant's dismissal was automatically unfair and that the respondent should be ordered to reinstate him. However, I do not share the approach and reasoning that lead Davis AJA to that conclusion nor do I share the extent of the retrospective operation of the reinstatement order that he proposes. I also do not share the construction that he places upon sec 193 of the Labour Relations

Act, 1995 (Act No 66 of 1995) ("the Act") with regard to the extent of retrospective operation of a reinstatement order that can competently be made under sec 193 of the Act. Accordingly, it is necessary for me to set out the approach and reasoning that has led me to the conclusion I have reached in this matter. I do so below.

[2] The appellant was employed by the respondent as a pilot in 1994. He was dismissed from the respondent's employment with effect from the 11th May 2001 after he had been found guilty of two alleged acts of misconduct in a disciplinary inquiry. For some time before his dismissal and at the time of dismissal, the appellant was chairman of the Airlink Pilots' Association which was the branch based at the respondent's operations of a registered trade union called Airline Pilots' Association. In this judgment I shall refer to the branch as "**the union**". The appellant took the view that his dismissal was automatically unfair as contemplated in sec 187(1)(d) of the Act in that, as far as he was concerned, he had been dismissed for the active role that he had played as chairman of the union in the union's dealings with the respondent and the role he played in the litigation that he had brought against the company on behalf of the union in March 2001. The respondent disputed this and maintained that the reason for the appellant's dismissal was that he had committed two acts of misconduct of which he had been found guilty. These were that he had been grossly insubordinate to the respondent and had been disruptive influence to the orderly operation of the respondent. A dispute then arose between the parties concerning whether or not the dismissal was

automatically unfair.

[3] In due course the dispute was referred to the Labour Court for adjudication. The appellant maintained that, for the reasons referred to above, his dismissal was automatically unfair. He did not seek to make out a case that, even if his dismissal was not automatically unfair, it was, nevertheless, unfair for one or other reason. The respondent defended the action and maintained its stance referred to above. The Labour Court found that there was no basis for the appellant's contention that he had been dismissed for the reasons that he had advanced and, therefore, that his dismissal was automatically unfair. It dismissed the appellant's claim but made no order as to costs. As it was not part of the appellant's case that, even if his dismissal was not automatically unfair, it was nevertheless ordinarily unfair, the Labour Court did not make any finding about whether the dismissal was unfair on any other basis. The appellant subsequently applied for leave to appeal to this Court against the order of the Labour Court. The Labour Court granted the application for leave to appeal. This, then, is the appeal against the judgment of the Labour Court. Before the appeal can be considered, it is necessary to set out the factual background to the dispute between the parties.

Factual background

[4] There are certain incidents which feature prominently in the factual background to the dismissal of the appellant which, it seems to me,

would be helpful to set out because the charges brought against the appellant were either based on some or all of those incidents or those incidents may throw light on the reason(s) for the appellant's dismissal. These are:

a) the Swazi cabin attendant incident;
b) the interdict proceedings;
c) the memorandum titled: the blessing that became the curse;
d) the lunch incident and the contempt of court proceedings;
e) the threat letter;
f) the psychologist's report incident;
g) the failure to meet flying target;
h) the CEO's lecture to the appellant;
i) the disciplinary inquiry and appeal;
j) Captain Van Schalkwyk's memorandum of the 17th April 2001

The Swazi cabin attendant incident

[5] The respondent and the Government of Swaziland established a business partnership. In terms of the arrangements between the two, the respondent could utilise Swazi flight attendants on its plane on routes between Swaziland and South Africa. In September 2000 the appellant off-loaded a Swazi cabin attendant from an aircraft in which he was a pilot. He did this because apparently the Swazi flight attendant failed to produce a work permit when, as the pilot of the aircraft, he asked for it. This was in September 2000.

The respondent's management took the view that the appellant did this in order to undermine their authority. The appellant was charged with misconduct and was found guilty. The chairman of the disciplinary inquiry recommended that the appellant be dismissed but the respondent's management rejected this recommendation and gave the appellant a final warning which was to be valid for six months from the date of the incident. The warning was given in November 2000.

The interdict proceedings

[6] In March 2001 the union brought an urgent application in the Labour Court for an order interdicting the respondent from acting in breach of a collective agreement existing between the union and the respondent with regard to the recruitment of pilots. The appellant was the union official who signed the founding affidavit on behalf of the union. The respondent opposed that application. The Labour Court granted the required order interdicting the respondent from recruiting pilots in breach of such collective agreement.

The memorandum titled: "the blessing that became a curse."

[7] Another feature of the background to the dismissal dispute between the parties is a certain memorandum which bore the title: "**The blessing that became a curse**" which Captain Van Schalkwyk, the respondent's client pilot, addressed to the cockpit crew and copied

to Capt Roger Foster, the respondent's chief executive offices, and Captain Moorosi, the operations director. The memorandum was dated the 24th March 2001. In the first paragraph Captain Van Schalkwyk stated that he was writing the memorandum in his capacity as Chief Pilot. Operations and Standards of the respondent. He explained therein that his "**mission**" was to inform the pilots "**of the current state of affairs, and to show you that you need to take action in order for you to have a fair opportunity to fly the ERJ (operated by SAAR (Metavia) and to have a prosperous future at SA Airlink**.".

[8] Captain Van Schalkwyk divided his memorandum into a number of sections. He gave one section the heading: "**Costly for Everyone.**" In the first paragraph under this heading he referred to the events of the previous week which he said had been exhausting for everyone. The previous week must have been the one in which the union had brought an urgent application in the Labour Court against the respondent for an interdict. In the memorandum Captain Van Schalkwyk assured all the pilots that he knew that they were all worried about their future at the respondent **"and whether you will have an opportunity to fly the amazing new ERJ 135 operated by SAAR (Meta via).**" He called upon the pilots to believe that he and the rest of the management were committed to offering the pilots "**a prosperous future at SA Airlink**." He said: "**We have proved before, that we were able to negotiate acceptable terms with SAAR (Metavia) to be offered an**

opportunity to fly the ERJ".

[9] In the next two paragraphs Captain Van Schalkwyk wrote the following which may be relevant to some aspects of this matter:

> "**SA Airlink top management has a responsibility to the SA Airline shareholders, which demand proper management of huge amounts of money. Their first focus must be to ensure a profitable and professional new business venture. I have no grounds to question their business decisions, as they see a much larger picture than I (or any other individual) see. <u>The labour issue of the past few weeks absorbed most of their energy and time with the result that their ability to plan the future has been compromised severely.</u> This has a direct impact on all the employees of SA Airlink.**
>
> **This labour issue is getting too costly for you, and me, and the top management of this company**!" (Underlining supplied).

<u>The lunch incident and the contempt of court proceedings</u>

[10] It is convenient to deal with the lunch incident simultaneously with the contempt of court application. Subsequent to the granting of the order referred to above, the appellant had a discussion with one Captain Moorosi and another member of the respondent's management about the matter which was the subject of the order of

the Labour Court. Such discussion took place in the cafeteria within the company during lunch time. Captain Moorosi had insisted that such discussion be on an off – the record basis and the appellant had agreed to such condition and the discussion had then taken place on the basis of such agreement.

[11] Later, the union brought a contempt of court application against the respondent, Captain Moorosi, and Captain Forster. The order sought by the union was for the committal to jail of the members of the management of the respondent cited. The appellant was the one who deposed to the founding affidavit in that application. In the affidavit he mentioned that there had been a discussion or meeting between himself and Captain Moorosi at lunch-time in the cafeteria on the day in question. He also said that he had asked Captain Moorosi that they should discuss the matter which was the subject of the then existing order of the Labour Court. He stated in the affidavit that Captain Moorosi's reply was that there was nothing to discuss.

[12] When Captain Moorosi saw the appellant's affidavit, he took the view that the appellant had acted in breach of the agreement in terms of which the discussion had been off-the-record. Capt Moorosi regarded such conduct as constituting insubordination. He later decided that the appellant should be charged with misconduct for such conduct. At least part of the insubordination with which the appellant was charged which led to his dismissal was based on the appellant's alleged breach of the agreement to treat the

discussion or meeting concerned as off-the-record. The contempt of court application had been prompted by the fact that the respondent was continuing to recruit pilots which the union believed the respondent was contractually precluded from recruiting and which the union maintained the respondent was precluded by the order previously granted by the Labour Court from recruiting.

The threat letter

[13] On 28 March 2001 the contempt of court application came before the Labour Court. The appellant and the respondent's attorney had a discussion within the premises of the Labour Court which, according to the respondent's attorney, resulted in an agreement between the two that the contempt of court application would be settled on a certain basis. However, subsequently the respondent's attorney understood the appellant to have reneged from such agreement. Accordingly, the respondent's attorney wrote a letter to the union's attorneys in which he stated, among other things, that the appellant's conduct in this regard would not be "**forgotten**". During the trial the respondent's attorney took the witness stand to explain what he meant by this. He explained that what he meant was that in his dealings with the appellant in the future, he would not forget that the appellant had previously gone back on his word.

The psychologist's report incident

[14] Another incident is one relating to the appellant being required to submit a psychologist's report. At some point either towards the end of March or early in April but prior to 11 April 2001 the appellant undertook to supply Captain Van Schalkwyk with a psychologist's report relating to his health. Such report was important to the respondent's management because they could not allow the appellant to fly an aircraft unless they were certain that he was fit to do so. For some time the appellant failed to submit the psychologist's report. Captain Van Schalkwyk was getting frustrated by the appellant's failure to submit the report. He grounded the appellant pending the submission of the report. When, despite Capt Van Schalkwyk's specific instructions to the appellant to submit the report by a certain Monday or Tuesday, the appellant still failed to submit it, Capt Van Schalkwyk decided to take disciplinary action against the appellant because he regarded such conduct on the appellant's part as insubordination. This incident was one of the incidents upon which the first charge in the disciplinary inquiry which later followed was based.

The failure to meet flying target

[15] It also needs to be stated that during the previous year or the 12 months preceding the appellant being charged with misconduct in April 2001, the appellant had flown less than 950 hours. This is relevant to the second charge that the appellant faced in the disciplinary inquiry that will be referred to shortly. Apparently in any airline the normal number of hours that a pilot may fly in any

12 months is 1000 but the respondent had fixed the target at 950 hours per 12 months. It is common cause that the appellant had flown less than the required target. However, it was also common cause that there were other pilots who had also flown less than the target. In other words those pilots were also in the same position as the appellant. It was also common cause that they were not charged with misconduct for this whereas the appellant was charged with misconduct for this. It was said by the respondent to fall under the second charge in the disciplinary inquiry of April 2001.

The CEO's lecture to the appellant

[16] On the 12th April 2001 the appellant was called and told that he was going to be charged with misconduct. The appellant was accompanied by a Captain Paul Smith, a colleague of his, to the office where he was going to be handed a notice calling him to a disciplinary inquiry to face certain allegations of misconduct. Such notice would be an equivalent of a charge sheet in a criminal matter. When the appellant arrived, Captain Foster gave him a long lecture before giving him the notice to attend a disciplinary inquiry. The appellant testified thus about that lecture: "**The CEO presented us with information pertaining to the vision and the goals of the company also pointing out what damage the litigation and the contempt of court proceedings and that, this was lack of respect for the CEO and that this forced them to take, the words he used, his eye off the ball."** (Underlining supplied). The appellant was then asked whether those were the

CEO's exact words. He answered in the positive and went on to add the following as part of what the CEO had said on that occasion: **"And thereby losing crucial deadlines pertaining to the license application for certain routes."** The appellant stated that, after the CEO had completed the presentation, he was then served with the "**charge sheet**". He said that the presentation went on for about 30 or 40 minutes, or even longer.

The disciplinary inquiry and appeal

[17] As already stated the charges which were brought against the appellant were gross insubordination and being a disruptive influence to the orderly operation of the organisation. In due course the inquiry was held. Captain Roger Foster played the role of a complainant. The chairman of the inquiry was an official from an employers' organisation of which the respondent was a member. Evidence was led. The minutes of the disciplinary inquiry in the record are written in an illegible handwriting. They have not been transcribed. A note has been made by the transcribers that they are not easily transcribable. No explanation has been given why the author thereof could not have been asked to read his/ her handwriting to the transcriber. That should have been done. It is unacceptable that it was not done. The appellant was found guilty of the two acts of misconduct with which he had been charged and was dismissed. The appellant noted an internal appeal. The appeal was dismissed and the finding and decision of the chairman of the disciplinary inquiry on sanction were confirmed.

Captain Van Schalkwyk's memorandum of 17 April 2001

[18] Another feature of the background to this matter is a memorandum which Captain Van Schalkwyk addressed to "**all cockpit crew**" on the 17th April 2001. This memorandum was written after the appellant had been given notice of the disciplinary inquiry but

before the disciplinary inquiry could start. Captain Van Schalkwyk began that memorandum with the words: "**As you are, I am tired of litigation and legalisms (sic) …"** A reading of the memorandum reveals that Captain Van Schalkwyk's evidence that through this memorandum he was trying to appeal to the pilots to co-operate with the management and to commit themselves to the company is probably true. As one reads the memorandum one can see the frustration that the management was feeling as a result of the litigation. In this regard reference can be made to some paragraphs in that memorandum. Two of the paragraphs read thus:-

> "Even with the New Hope of a somewhat restored relationship between the pilots and the SA Airlink management, we have lost a lot in the past few weeks and the Microject project has suffered some setback.
>
> **The Court order issued due to the APA litigation, prohibits the implementation of the Business Plan as conceived by the Board of Directors, for the utilization of the ERJ's. This is no small matter, as this project can only be viable if our group qualifies for certain Tax Incentives. As matters are standing (sic), due to the declariters (sic) within the Court order the group will not qualify for the incentives. Should the order be irreversible (with the pending appeal, or APA negotiations) then the ERJ project in its current form will probably be revoked."**

Captain Van Schalkwyk went on to say, among other things, that the respondent had missed a licensing council hearing which had been scheduled for the 2nd April. He blamed this on what he referred to as the "**APA litigation**" which he said had distracted the respondent's management and absorbed their attention. He said that the result thereof was that the respondent had missed the "**Bulawayo route**" as a start up and that "**Ndola/Livingstone**" would have to be a joint venture.

[19] As already stated the appellant subsequently referred a dispute concerning his dismissal to the Labour Court for adjudication. As also already stated, the Labour Court dismissed his claim but made no order as to costs.

The appeal

Was the appellant's dismissal automatically unfair?

[20] The fundamental question that must be answered in this matter is whether the appellant's dismissal was automatically unfair. If, as the Court a quo found, the answer is that the dismissal was not automatically unfair, the appeal must fail. If, however, the answer is that the dismissal was automatically unfair, the next issue for determination will be the relief that should be granted to the appellant if any should be granted to all. The determination of the question whether or not the dismissal was automatically unfair depends upon what the reason for the appellant's dismissal was.

Sec 187(1)(d) of the Act provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to sec 5 or, if the reason for the dismissal is –

"**(a) – (c) …**

(d) that the employee took action, or indicated an intention to take action, against the employer by –

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;"

<u>What was the reason for the appellant's dismissal?</u>

[21] The appellant's case both in his statement of claim and in his evidence included an allegation that the reason why he was dismissed was the active role that he played in representing the interests of the union and its members in his dealings with the respondent and in the litigation which the union initiated against the respondent in March 2001. In support of this allegation the appellant referred to the presentation that Captain Foster had made to him on the occasion of the delivery of the "**charge sheet**" to him, the fact that Captain Van Schalkwyk had repeatedly suggested to him that he should resign or consider resigning as chairperson of the union as well as to the letter from the respondent's attorney to him informing him that his conduct would not be forgotten.

[22] The respondent's stance has always been that the appellant was dismissed for the misconduct of gross insubordination and for

being a disruptive influence to the orderly operation of the respondent. When one has regard to the respondent's stance, it all sounds very legitimate and innocuous. However, it is necessary to delve deep into it in order to understand the precise nature of the conduct on the part of the appellant which the respondent covers when it says that the appellant was guilty of gross insubordination and of being a disruptive influence to its orderly operation. In other words it is necessary to inquire into the precise nature of the conduct on the appellant's part that the respondent regarded as misconduct taking the form of gross insubordination and being a disruptive influence to its orderly operation.

[23] Before I can consider what the respondent's witnesses said in their oral evidence which may reveal what the respondent meant when it said that the appellant was dismissed for gross insubordination and being a disruptive influence to the orderly operation of the organisation, it is necessary to consider what was said in the disciplinary inquiry and the internal appeal by representatives of the respondent and by the chairmen of the disciplinary inquiry and the internal appeal because what they said in those fora may throw light on what the respondent meant and, therefore, on the true reasons for the appellant's dismissal. It will also be necessary to have regard to what the appellant alleged in his statement of claim and what the respondent's response to that statement was in so far as these may throw light on what the respondent understood to constitute gross insubordination and being a disruptive influence.

What was said by the respondent's representatives in the disciplinary inquiry?

[24] In the respondent's written closing argument, which had been prepared by Miss Jean Lubbe, the respondent's human resources manager, but which, it seems, was presented to the inquiry by Captain Foster, the respondent made, inter alia, the following points:

- that the appellant had admitted that he had agreed to treat the discussion of the lunch incident with Capt Moorosi as off - the record and yet he had referred to it as a meeting in his affidavit which, continued the closing argument, was an act of gross insubordination.

- that the appellant had admitted that he had undertaken to Captain Van Schalkwyk to submit the psychologist's report but, when he was asked on the 10th April about the report, he claimed to have said that he would be taking advice as to whether or not to submit it but Capt Van Schalkwyk's version was that the appellant had refused to present the report and had said that he would take advice on the matter. It was contended that the appellant's conduct constituted an act of gross insubordination.

- that the appellant had admitted that his work performance, which was said to be 697 hours of flight time in the previous 12 months and 48 hours during the month of March 2001 fell far short of the respondent's productivity efficiency targets of 950 hours per year and 86 hours per month; it was argued that this poor performance was disruptive of the operation of the respondent.

- that neither the appellant nor his representative had challenged the statements that on several occasions the

appellant had "**shown no confidence (sic) and a breakdown in trust in management – he had on several occasions called for the resignation of key personnel including the operations director, the chief pilot and he had required the arrest and detention of his operations director and his chief executive**." The argument went on to say that the appellant's ground of justification for all of these was that he had acted in his capacity as a shopsteward.

- that the appellant had admitted that a requirement for the resignation of the chief pilot after only four months in office "**during a time of dynamic change requiring intense management of the change process was entirely unreasonable, and that Captain Van Schalkwyk had done an excellent job in the circumstances."** The particular paragraph in the written argument concluded with a statement to the effect that such irrationality demonstrated a **"breakdown in trust without reason and disruption without reason**."

[25] There is also a document in the record bearing the heading: Heads of Argument. The document is dated Monday, 23 April 2001. It also reflects that it was prepared for use at or in connection with the disciplinary hearing of the appellant. It does not bear anyone's name. The document contains matters or points which Captain Moorosi apparently submitted in support of the charge of gross insubordination as well as those apparently submitted by Captain Van Schalkwyk in support of that charge. The document also contains matters or points under a heading relating to the charge of being "**disruptive influence to the orderly operation of the organisation".**

[26] In the first bullet point under that heading it is stated: "**Insubordination is in (sic) its own right a disruptive influence to the orderly operation of the organization.**" The significance of this statement is that even alleged acts of insubordination were seen as disruptive of the orderly operation of the organisation. Along another bullet point it was stated in the document that on at least three occasions the appellant had "**called for a vote of no confidence in, or for the resignation of management**." It went on to state that between July and November 2000 the appellant had "**voted no confidence (sic) in Capt Smith, then a training captain and Mr Moorosi and called for the resignation of the executive manager of human resources**." It went on to say that the appellant had **"publicly announced this view which had caused disunity and degradation of morale within the company which has been disruptive to the orderly operation of the organization**."

Along the next bullet point it was stated in the document that the appellant had "**recently called for the arrest and detention of both the Operations Director and the CEO. This action caused disunity and degradation of morale within the company, which has been disruptive to the orderly operation of the organization."**

[27] During the trial there was some confusion as to who the author of the document referred to in the preceding paragraph was. It is clear from its contents that whoever prepared it purported to do so on behalf of the respondent. Its contents are either the same points that have been made in some or other document of the respondent or the points it makes are consistent with the respondent's case

against the appellant as documented in various documents or as testified to by some of the respondent's witnesses. There is no doubt that the document sought to present the respondent's case against the appellant. In fact its contents are in line with the respondent's case.

[28] In due course the chairman of the disciplinary inquiry delivered his ruling –which he called a judgment. He found the appellant guilty of the two charges of misconduct with which he had been charged. In what can only be regarded as an explanation of how he reached his findings, the chairman wrote thus in part in the document containing his ruling:

> **"The complainant stated that the above offences were committed by Captain Kroukam. He submitted that any of the above offences were committed under the banner of the Airline Pilot's Association Union as the accused was therefore acting in his capacity as chairman of the organisation and therefore the shopsteward of the organisation."**

[29] In the second page of the document containing his ruling and what he purported to advance as reasons for his finding, the chairman of the disciplinary inquiry wrote in part:

> **"Captain Kroukam has on several occasions requested the resignations of several key employees. I have to agree that Captain Kroukam is first most (sic) an employee of the company therefore(sic) the company (sic) has become**

disruptive to the company's operation.

On a balance of evidence (sic) presented I therefore find Captain Kroukam guilty as per the above charges."

The reference to "**the company has become disruptive**" is obviously an error. What the chairman meant was that the appellant had become disruptive to company's operation. It is clear from the part of the chairman's reasons for his finding quoted above that he regarded the fact that the appellant had called for the resignation of certain key personnel of the respondent – allegedly on several occasions – as part of the conduct on the appellant's part with which he was charged under the second charge of being a disruptive influence to the orderly operation of the respondent. Otherwise, his mentioning that the appellant had on several occasions called for the resignation of certain key personnel of the respondent and then immediately saying that the appellant had become a disruptive influence to the company's operations would make no sense.

[30] If one considers the chairman's reasons or motivation for his findings, it is clear that he did not mention the appellant's failure to submit the psychologist's report that was presented as part of the conduct which was covered by the charge of gross insubordination. However, the chairman did refer to the appellant's alleged breach of the off – the record agreement in regard to the lunch incident. He dealt with the second charge as well. After the chairman had found the appellant guilty of all the allegations of misconduct that

he had faced in the inquiry, he invited the parties to submit mitigating and aggravating circumstances.

[31] A document containing argument in mitigation was submitted to the chairman on behalf of the appellant. A document containing argument in regard to aggravating factors was submitted to the chairman by Ms Lubbe on behalf of the respondent. The first point made on behalf of the respondent in such document was that the appellant's conduct was not an isolated event but was part of an ongoing strategy to disrupt. The second point was that **"(o)n numerous occasions [the appellant] questions and challenges management which makes orderly operations extremely difficult**." This provides a reflection that, when the respondent talked about the appellant being a disruptive influence to its orderly operations or when the respondent preferred the second charge against the appellant, namely, that he was a disruptive influence to the orderly operation of the organisation, what it meant included the appellant's alleged conduct of challenging and questioning the respondent's management. Another point made was that the result was a breakdown of the relationship between the two parties.

[32] It was also pointed out in the document dealing with aggravating circumstances that the appellant had continuously disobeyed instructions regarding company procedures and policies. Another point made was that there was a "**complete and mutual breakdown in the trust relationship which is essential in any employment relationship and more specifically in this position**

of line captain." The last point made in the document was that **"(i)n the light of his previous final written warning, on the same offence not even six months prior to this event, we believe that in terms of progressive discipline, we are of the opinion that the chairman has no alternative but to recommend summary dismissal."**

What the chairman of the disciplinary inquiry said and ruled

[33] In due course the chairman issued his ruling on sanction. In the document containing the ruling he recorded the mitigating factors submitted by the appellant and the aggravating factors submitted by the respondent including the factors referred to above as having been submitted on behalf of the respondent as aggravating factors. They included the one to the effect that on numerous occasions the appellant had challenged and questioned management which was said to make orderly operations extremely difficult. The chairman said that he took into account all the mitigating and aggravating factors that had been presented to him. This also means, in my view, that the fact that the appellant was challenging and questioning the respondent's management was taken into account against him as well.

[34] The chairman also took into account the final written warning. He said: "**Captain Kroukam has a previous final written warning for the same offence less than six months ago**." He then stated that he found that the only way to rectify the situation was to

recommend the dismissal of the appellant with immediate effect and without notice. It later transpired that the final written warning had expired. It appears that the chairman of the disciplinary inquiry recommended a dismissal and the respondent's management had power to accept or reject the chairman's recommendation.

The internal appeal

[35] There was an internal appeal hearing. The appeal chairman confirmed the finding and sanction given by the chairman of the disciplinary inquiry. There is no specific statement by the chairman of the internal appeal that needs consideration.

Certain statements made in the pleadings

[36] In due course the appellant referred the dispute to the Labour Court for adjudication. One of the sections of the appellant's statement of claim had as its heading "**background to the [appellant's] dismissal]".** It consists of paragraphs 8 to 15 of the statement of claim. In it the appellant begins the background by stating that in March 2001 the union and the respondent had entered into "**a protracted and highly acrimonious dispute over what the [union] alleged to be the unilateral change to the terms and conditions of employment of its members".** It goes on to allege that the appellant as chairperson of the union played a pivotal role in representing the union and its members' interests during the dispute.

[37] In the above regard it is stated in the statement of claim that, among other things, the appellant:

- represented the union in meetings with the respondent;
- instructed attorneys on behalf of the union and its members to interdict the respondent;
- signed all affidavits in the proceedings before the Labour Court;
- represented the union and its members at court;
- chaired meetings of the union members during the course of the dispute;

- in general acted on behalf of the union and its members.

The appellant also refers to the bringing of the contempt of court proceedings against the respondent and some of its management personnel and the fact that in those proceedings he was the one who instructed the attorneys and signed affidavits on behalf of the union. Those proceedings, he alleges, ended on the basis that the original order of the Labour Court in the interdict proceedings was varied by agreement between the parties and, thereafter, the underlying dispute was settled through the process of mediation.

[38] In paragraph 23 of his statement of claim the appellant contended that his dismissal was automatically unfair by virtue of sec 187(1)(d) of the Act. Sec 187 (1)(d) of the Act provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to sec 5 of the Act or, if the reason for the dismissal of the employee is that "**the employee took action, or indicated an intention to take action, against the employer by**

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;"

Thereafter the appellant set out what he alleged the respondent had done. He alleged that the respondent:

"**23.1 acted contrary to the provisions of section 5(1) in that it has discriminated against the [appellant] for exercising rights conferred by the LRA;**

23.2 prejudiced the [appellant] because:

23.2.1 of the [appellant's] membership of the

association;

23.2.2 of the [appellant's] participation in the lawful activities of the association

23.2.3 he has disclosed information that the [appellant] is lawfully entitled to disclose;

23.2.4 he had exercised rights conferred by the LRA

23.2.5 he participated in proceedings under the LRA"

The appellant further alleged as follows in paragraphs 23.3 to 23.5:

"23.3. **Further, the Respondent has interfered with the [appellant's] right to participate in the lawful activities of the association;**

23.4. The Respondent has interfered in the [appellant's] right to hold office of the association;

23.5. The Respondent has interfered with the [appellant's] right to carry out the functions of a trade union representative in terms of the Act and the collective agreement between the [respondent] and the association."

[39] The respondent delivered its response to the appellant's statement of claim. In its response the respondent admitted that a dispute arose between the union and itself in March 2001 concerning what it called structural changes but denied that there was any

"**acrimony"** on its part or that it exhibited any acrimony towards the union or the appellant. However, the respondent alleged that at the time of the dispute the appellant had appeared to take it personally and "**appeared exceedingly hostile and aggressive towards the respondent and its personnel**." With regard to the contempt of court proceedings, the respondent alleged that the Labour Court had made no finding on the contempt of court application and the matter had been settled amicably.

[40] The respondent alleged among other things that there was simply no issue between the parties resulting from or pertaining to the appellant's membership of the union. The respondent went on to allege that in fact one of the proposals made by itself to the union as part of an attempt to resolve the underlying dispute between itself and the union was that a recognition agreement be concluded between the union and the other company involved in the dispute with the union, namely, SA Airlink Regional and this was accepted by the union and such agreement was concluded. The respondent also alleged that as a matter of fact it had no dispute with, or complaint against, or, any issue with, the union or any of its members or representatives resulting from membership or activities of the union. It alleged that in fact it welcomed the membership of and the activities in, the union which it further alleged was always made clear to all parties.

[41] Under paragraph 14 of its response to the appellant's statement of claim, the respondent stated that it was imperative to state the

circumstances which had given rise to the appellant's suspension and charges and then set them out in paragraphs 14.2.1 to 14.3. The respondent made the allegation in par 14.2.1. that during the dispute the appellant had dealt with the matter as a personal attack on him and had been "**extremely hostile and aggressive towards the respondent's management, and grossly insubordinate**". In par 14.2.2 the respondent acknowledged that the appellant had been a representative of the union and that, as such, he had been both entitled to and required to engage the respondent and in fact 'do battle' with the respondent on such basis. However, the respondent alleged that this did not entitle the appellant "**to commit misconduct and be grossly insubordinate."** In par 14.2.3 the respondent alleged that the appellant had represented to the respondent's management that he wanted "**an off-the record**" discussion, he had enticed the management into a meeting and thereafter had used the content of such meeting in litigation against the respondent. The respondent also referred to the appellant's failure to fly 950 hours in the previous 12 months prior to March 2001. It also stated that the appellant had been subject to a final written warning on a related issue.

[42] Of further particular significance in the respondent's response to the appellant's statement of claim are paragraphs 14.2.7, 14.2.8, 14.2.10, and 14.3. They read thus:

"14.2.7 **The [appellant], on several occasions in meetings with the respondent's management, stated that he had no confidence and trust in the respondent's management.**

The [appellant] himself in fact indicated that there was no trust relationship between himself and the respondent's management. It is clear that on this issue alone, a continued employment relationship was clearly completely untenable.

14.2.8 The [appellant], with regular occurrence, demanded the resignation of senior personnel of the respondent, in particular the Chief Pilot and Operations Director, without any proper reason or basis. These are the persons with whom the applicant must deal on a day to day basis, not only in his capacity as representative of the Association, but also in the fulfilment of his normal duties. To continue a normal employment relationship, under these circumstances, is simply impossible;

14.2.9 …

14.2.10 The [appellant] in fact embarked upon a deliberate campaign [of] harassment and challenge of the respondent's management, not as union representative; but in pursuit of a personal vendetta;

14.3 The [appellant] in fact abused his position as Association chairperson, to pursue his own agenda. The applicant should in fact set an example to his fellow members. This is clearly reprehensible conduct."

[43] Under paragraph 21 of the respondent's response to the appellant's statement of claim the respondent denied having ever acted contrary to the provisions of sec 5 of the Act nor to have ever discriminated against or acted against or prejudiced the appellant as

a result of his exercise of his rights provided for in the Act. The denial by the respondent gives rise to the question: How does one reconcile this denial by the respondent with:

a) the fact that part of its case against the appellant as set out in its response to the statement of claim and in the written closing argument in the disciplinary inquiry was that the appellant had:

(i) expressed a vote of no confidence in the respondent's management;

(ii) challenged and questioned the respondent's management's decisions, and

(iii) had sought the arrest and detention of certain members of the management of the respondent including its chief executive officer (which was a reference to the appellant's role in bringing contempt of Court application on behalf of the union against the respondent and certain of its officials).

[44] It seems to me that the answer is either that the respondent did not think that the appellant had a right to do any of those things even as a union representative or the respondent accepted that he did have a right to do all of those things as a union representative but its view might have been that, when he did those things, he was not acting in his capacity as a union representative but was pursuing a personal vendetta.

[45] It is necessary even at this stage to make the point that in the trial the respondent did not present any reasons upon which a finding can be made that the appellant was acting in pursuit of his own personal goals when he allegedly challenged the management, called for the resignation of certain members of the respondent's management or personnel, expressed a vote of no confidence in certain members of the management or personnel of the respondent and when he played the role he did with regard to the litigation of March 2001 including the contempt of court application. It may be that he was acting in his personal capacity on one or two occasions in regard to some or other incident but there can simply be no doubt that most of the time he would have been acting in his representative capacity when he did most of those things.

[46] When one has regard to what representatives of the respondent said in the disciplinary inquiry, what the chairman of the disciplinary inquiry said in his reasons for his finding of guilt and in his reasons for the sanction that he recommended, as well as what the respondent said in its response to the appellant's statement of claim, it seems to me that, what the respondent regarded as misconduct and the conduct with which the appellant was charged in the disciplinary inquiry either by way of the charge that he was grossly insubordinate or that he was a disruptive influence to the orderly operation of the organisation included the allegations that the appellant had:

(i) challenged and questioned decisions made by the respondent's management

(ii) had expressed a vote of no confidence in the respondent's management;

(iv) called for the resignation of certain personnel of the respondent or of certain members of the respondent's management;

(v) through the role that he played in the bringing of the contempt of court application on behalf of the union against the respondent, and some of the members its management, including its chief executive officer, sought the arrest and detention of its chief pilot and the chief executive officer.

[47] I now turn to consider the oral evidence given by the respondent's witnesses to determine what their understanding was of the objectionable conduct with which the appellant was charged under the two charges in the disciplinary inquiry and which led to his dismissal.

[48] In this regard Captain Van Schalkwyk gave evidence of what the appellant had done which fell under the charge of gross insubordination. It is necessary to have regard to that evidence and the evidence of others which may reveal the nature of the conduct of the appellant which, as far as the respondent was concerned, constituted gross insubordination and being a disruptive influence to its orderly operation.

[49] Captain Van Schalkwyk gave the following incidents or acts by the

appellant as falling under the charge of gross insubordination:

(a) he said that the appellant had refused to execute an instruction from management. This was a reference to the appellant's conduct as alleged by the respondent that the appellant refused to submit his psychologist's report; later he said that the relevant conduct in this regard on the appellant's part was the appellant's refusal to go to another psychologist when he, i.e. Captain Van Schalkwyk, had instructed him to.

(b) he referred to a meeting in January/February 2001 in which there was a discussion on the shortage of air crew which existed at the time where, according to Captain Van Schalkwyk, the meeting became very heated and the appellant "**ended being very, very aggressive with, with a finger pointed in my face, and I slowed the meeting down and I adjourned the meeting;"** when Captain Van Schalkwyk was asked whether the act of insubordination was the appellant's alleged waiving of his finger in his face, Captain Van Schalkwyk replied: "**and yelling at me**." He could not remember exactly what the appellant had said to him when he yelled but did remember that the tone of the voice was not an acceptable one. Captain Van Schalkwyk was asked why he had not charged the appellant with misconduct soon after this incident and he replied that it was still early days after his appointment to the position of chief pilot. He added that that incident was not enough on its own to warrant charging the appellant with misconduct.

(c) he referred to "(**t)he fact that [the appellant] had … called for the resignation or a no confidence vote for six of the executive management of the respondent where he challenged and just (inaudible) the whole of the executive management of the Company**". Captain Van Schalkwyk testified that the first time when the appellant had called for the resignation of certain management personnel was in 1998/9; when Counsel for the appellant expressed surprise that the appellant was charged in 2001 with something that had happened in 1998/9, Capt Van Schalkwyk gave a long-winded comment which made no sense in relation to the question asked.

(d) he referred to the appellant's conduct in off-loading a

Swazi cabin attendant from an aircraft in September 2001; later Capt Van Schalkwyk seemed to say that the appellant was not charged with misconduct in regard to that incident in the April 2001 disciplinary inquiry but that his conduct in such incident was, nevertheless, a factor;

(e) he stated that the appellant had become difficult to manage. It was put to Capt Van Schalkwyk that that somebody was difficult to manage did not constitute insubordination. In reply Capt Van Schalkwyk said there was a point where "**one decides that I cannot manage this person anymore**." Capt Van Schalkwyk was then asked whether, when that point was reached, that person could be said to be grossly insubordinate. Capt Van Schalkwyk answered: "**Then we wanted to bring an end to the interaction and the interaction being gross insubordination.**"

(f) he referred to a "**conversation in response to Captain Abri's … issue where I was telephoned, yelled at, called and sworn at**"; he also referred to foul language of a lavatorial nature that he said the appellant had used to him to say something had to stop. In regard to this occasion, Capt Van Schalkwyk conceded that the appellant had been acting in his capacity as the leader of the union but, continued Capt Van Schalkwyk, "**I still do not expect an employee of the company to yell to the executive manager or chief pilot swearing using swearing language**."

[50] It is necessary to point out that to a question as to what it was that had led to the appellant being charged, Capt Van Schalkwyk's answer was that he thought it was a history of "**aggression,**

challenging management, being impossible to manage…". In other words, according to Capt Van Schalkwyk, the appellant's conduct which the respondent was objecting to and which it regarded as the being basis for his being charged with gross insubordination and could provide a basis for the appellant's dismissal was conduct that the respondent labelled as "**a history of aggression, challenging management and being impossible to manage…"** It was after Captain Van Schalkwyk had given this answer that he was asked to specify the incidents which were meant to be covered or which were covered by the charge of gross insubordination and he gave the incidents referred to above

[51] Apart from Capt Van Schalkwyk's understanding of the incidents which fell under the charge of gross insubordination, reference can also be made to Capt Roger Foster's own understanding of the incidents that fell under that charge. What Captain Foster regarded as conduct or incidents that fell under the charge of gross insubordination can be found in the document containing the respondent's closing argument in the disciplinary inquiry which has been referred to above already. Under cross-examination Captain Foster did concede that the matters or incidents that he referred to in the document related to the guilt or otherwise of the appellant, although at other points of the cross-examination he said that such incidents or matters were "**aggravating factors**" and did not relate to the question whether or not the appellant was guilty of gross insubordination. Be that as it may, the fact of the matter is that, as was pointed out by Counsel for the appellant in the trial and

conceded by Capt Foster during the latter's cross-examination, the document which contained aggravating factors and the document which contained closing argument and contained various incidents were two separate documents.

[52] The matters or incidents contained in the document on which Captain Foster relied to seek a finding by the chairman of the disciplinary inquiry that the appellant was guilty of, I think, gross insubordination, were the following:

(a) the appellant's alleged breach of the off-the record agreement;

(b) the appellant's alleged refusal to submit a psychologist's report

(c) the appellant's conduct that "**on several occasions [he had] shown no confidence and a breakdown in trust in management."**

[53] Captain Foster wrote in the document that the appellant had on several occasions called for the resignation of key personnel including the operations director, the chief pilot and that he had "**required the arrest and detention of his operations director and his chief executive**." Captain Foster wrote that the appellant's justification for these "**disruptive actions"** was that he had acted in his capacity as shopsteward. In his capacity as complainant in the disciplinary inquiry Captain Foster sought to illustrate that as the appellant's affidavit had been signed in both his capacity as employee and in his capacity as a shopstward, it had been difficult to separate these two roles and differentiate which disruptive

actions were attributable to which persona. Captain Foster further wrote that Captain Kroukam had admitted that a requirement for the resignation of the chief pilot, after only four months in office during a time of dynamic change requiring intense management of the change process, was entirely unreasonable, and that Capt Van Schalkwyk had done an excellent job in the circumstances. Captain Foster said that this "**irrationality**" demonstrated a breakdown in trust without reason and disruption "**without reason**."

[54] When one has regard to the incidents which both Captain Van Schalkwyk and Captain Foster regarded as covered by the one or other charge that the appellant faced, it is clear that included in Captain Van Schalkwyk's list are the allegation that the appellant had called for a vote of no confidence in certain members of the management of the respondent, that he had also called for the resignation of certain members of the respondent's management and that he had challenged and questioned the whole of the executive management. When one has regard to Captain Foster's list of conduct or incidents which he said were covered by one or other of the charges of misconduct, it is clear that the appellant's call for the resignation of certain personnel, the institution of the contempt of court proceedings against the respondent and some of the respondent's management were some of the incidents, as far as Captain Foster was concerned, which were covered by one or other of the two charges that the appellant faced in the disciplinary inquiry.

[55] In his written closing argument in the disciplinary inquiry Captain Foster wrote that the appellant had "**required the arrest and detention of his operations director and his chief executive officer**" and described these as "**disruptive actions**". Captain Foster's description of the appellant's conduct in calling for the resignation of certain personnel of the respondent and in "**requiring**" the "**arrest and detention**" of the "**operations director and chief executive officer**" as "**disruptive actions**" coincides with the second charge that the appellant faced in the disciplinary inquiry, namely, that he was a disruptive influence to the orderly operation of the respondent as an organisation. It is therefore clear that the appellant's role in the litigation was seen as part of what the appellant had done wrong.

[56] Immediately after the passage referred to in the preceding paragraph is another paragraph in Capt Foster's document containing written closing argument in the disciplinary inquiry which, in my view, reveals exactly what the appellant's conduct referred to earlier in that document was which the respondent meant to fall within charge of gross insubordination that the appellant was facing. He wrote in that paragraph that the appellant had sought to justify his actions on the basis that they were done in his capacity as a shopsteward. In the next two sentences of that paragraph Capt Foster went on to say:

> "It is clear that **all counts of insubordination and disruption, which are the subject of this and previous complaints have been in his capacity as employee. The shopsteward**

> **was not employed to pilot the aircraft from which Capt Kroukam had dismissed a cabin attendant in 2000, nor in the illustrations of insubordination and disruption [referred to] herein above."** (Underlining supplied)

It is clear from the last portion of the last sentence in this paragraph that Captain Foster was saying that the incidents or behaviour or conduct on the part of the appellant that he had referred to earlier in that document constituted illustrations of the insubordination and disruption with which the appellant had been charged in the disciplinary inquiry. Those illustrations include the fact that the appellant had expressed lack of confidence in certain members of the management, that he had called for the resignation of certain members of the management and that he had "**required the arrest and detention of his operations director and his chief executive**."

[57] It seems quite clear from the above that both Capt Van Schalkwyk and Capt Foster considered that the alleged acts of misconduct with which the appellant had been charged included his conduct in expressing a vote of no confidence in certain members of the management, in calling for the resignation of some of the members of the management and in seeking to have the operations director and the chief executive officer of the respondent arrested and detained. The latter obviously refers to the contempt of court application. Now that the respondent's understanding of the conduct or incidents with which the appellant was charged in the disciplinary inquiry which led to his dismissal, has been

established, it is now necessary to determine what the reason(s) the appellant's dismissal was or were.

What were the reasons for the appellant's dismissal?

[58] The chairman of the disciplinary inquiry was not called to testify in the Court a quo. Accordingly, one is denied the benefit of the evidence of the person who made the decision relating to the guilt of the appellant. However, the document containing his ruling does give one more than an idea of what weighed with him.

[59] In that document the chairman recorded that evidence had been led by the complainant as well as by the appellant's representative. He also recorded that closing statements had been submitted to him by the complainant or his representative as well as by the appellant's representative. He wrote that he took into account the "**above evidence as well as evidence led in the inquiry.**" I think the reference to the "**above evidence**" probably referred to statements and closing statements because thereafter he referred to evidence led in the inquiry. He also referred to the lunch incident as well as the appellant's failure to fly 950 hours in the previous 12 months to March 2001. Then the chairman wrote: "**Captain Kroukam has on several occasions requested the resignation of several key employees**." This means that one of the factors which the chairman considered had rendered the appellant guilty of one or both of the charges that he was facing was that he had on several occasions called for the resignation of certain key personnel in the

respondent.

[60] After the chairman had found the appellant guilty of the charges of misconduct with which he had been charged, he invited both sides to make submissions on mitigating and aggravating circumstances before he could decide on the sanction. In a document which Ms Lubbe, submitted on behalf of the respondent to the chairman of the disciplinary inquiry dealing with aggravating factors, the second aggravating factor that she gave in her list was that **"(o)n numerous occasions [the appellant] questions and challenges management which makes orderly operations extremely difficult."** This tied in with Capt Van Schalkwyk's evidence under cross-examination that the appellant's conduct which led to him being charged was a "**history of aggression, challenging management …"** In the document containing his ruling on the sanction, the chairman of the disciplinary inquiry recorded both the mitigating and the aggravating circumstances which both sides had submitted to him. These included the statement that the appellant questioned and challenged the respondent's management. The chairman stated in the document that he had considered all the mitigating and aggravating factors submitted to him before deciding upon the sanction.

[61] Among other things Captain Van Schalkwyk testified that **"(t)he issues that are crisp and the issues that are listed as being the cause for the dismissal was (sic) not union matters; did not refer to the court case … it was purely a matter of managing**

the [appellant]. I found it and obviously from the court document it shows that other people as well found it very difficult to manage the [appellant]. I found him aggressive and challenging, yelling disrespectfully which is not the end of the world, but this was disruptive to the point where one ends up not being able to conclude a conversation with the [appellant] being aggressive and challenging". So the theme of the appellant's "**sin**", that is, that he was "**aggressive**" and was challenging management's decisions, reared its head again. When, thereafter, Capt Van Schalkwyk was asked to describe the appellant's attitude towards the respondent's management, he stated that "**there was friction between the [appellant] and management, where management is challenged at all times, all decisions are challenged, individuals are challenged, the requests are made for resignations, probably five, six people in the company."** (Underlining supplied).

[62] Earlier on I referred to the fact that in the document containing his closing argument in the disciplinary inquiry, Captain Foster referred to the appellant as having sought the arrest and detention of the Operations Director, Captain Moorosi and himself, the chief executive officer. As already stated, this was a reference to the contempt of court application against, among others the respondent and the chief executive officer. In his evidence Capt Van Schalkwyk testified that the bringing of the contempt of court proceedings against the respondent and some members of the

respondent's management represented a "**crescendo or the pinnacle of the pressure and the dealings with the company and the Airlink Pilots' association**."

[63] Captain Van Schalkwyk testified that, when the appellant refused "**on the Tuesday**" to submit the psychologist's report or when he said that he would seek advice, he, i.e. Capt Van Schalkwyk, realised that he could not manage the appellant. Capt Van Schalkwyk said that he realised that: "**I have difficulty in working with him, there is a history of him taking matters in his own hands… then I just reached the point on that after that meeting … that I cannot manage this man anymore and we need to bring a stop to it**."

[64] At some stage Capt Van Schalkwyk was asked under cross -examination whether his evidence was that the respondent's attitude was that, if a union official called for an official of the respondent to resign because, for example, he was not sensitive to the needs of the union, that constituted an act of gross insubordination. In response Capt Van Schalkwyk said that he would have to give the question some thought. He went on to answer by asking why there was a history of one person "**consistently saying resignation, resignation, resignation, when that person is not part of the equation, nothing like that is ever said. So it might be a person using the cloak of his union trying to make statements."** In effect Capt Van Schalkwyk did not

answer the question.

[65] Another matter that must be considered in the determination of the reason for the dismissal of the appellant is the presentation that Captain Foster made to the appellant on the occasion of the handing over to the appellant of the notice calling him to the disciplinary inquiry. It is clear from Captain Foster's own evidence about the content of that presentation that he was very unhappy about the fact that there had been the litigation that there had been between the union and the respondent. That litigation included the contempt of Court application. Captain Foster felt that the litigation had interfered very significantly with the management's work. He felt that the respondent's management or its business had been severely compromised. It is also clear from his evidence and that of the appellant that in that presentation Captain Foster was expressing to the appellant his disapproval of the litigation.

[66] With regard to the presentation by Captain Foster to the appellant, Captain Foster was asked under cross-examination why he considered the occasion of the handing over of the disciplinary notice to the appellant an appropriate forum to make a presentation to him about how much damage the litigation had caused to the respondent. Capt Foster replied that "**we**", by which he might have meant the respondent's management or both the respondent's management and the union, "**had been in a process which from a strategic point of view compromised the company. This was seen as on-going difficulties from a labour point of view not**

related, but obviously following on and still causing the company difficulties." He went on to say: "**And we wanted to high-light you know what harm gets done when industrial disputes are at play in the form that it had taken through that dispute, and try and discourage this type of taken (sic) the law into their own hands."**

[67] What emerges quite clearly from Capt Foster's answer to the question is that one of the things he sought to do by making the presentation that he made to the appellant was to convey to the appellant his disapproval of the litigation and, in his words to "**discourage it."** In my view what Captain Foster was doing through making that presentation to the appellant was in effect to say to the appellant: You have hurt us very badly through this litigation. Now it is our turn!

[68] Captain Foster was asked under cross-examination what had "**taken the law into their own hands".** This was a reference to what he had said earlier as quoted at the end of the last quotation of his evidence in the paragraph immediately before the paragraph preceding this one. Captain Foster's answer was that they had "**just been in this whole process of litigation with the pilot union and despite that we get to agreements in a casual forum that is off the record completely and then whatever gets discussed and said in off record forum gets used as evidence. I think that is also the reason why one had to highlight the significance of the**

legal proceedings in that forum." I wish to pause here and say this. I cannot make head or tail of this answer by Captain Foster to answer the question that had been asked, namely, what had "**taken the law into own hands**".

[69] Captain Foster was then asked to explain in effect the link between the charge of gross insubordination and his "**eye off the ball**" statement in the presentation. His answer was that the "**eye off the ball**" statement "**came more to do with the intensity of the litigation."** He said that the respondent had embarked upon a strategy for rolling out a plan for Africa **"… and the liberalization aspects of that were not coming through at the pace at which we had expected them to …**" He then went on to say: "**And any form of labour dispute, insubordination, disharmony in the company takes management's eye off that ball. It was an intense time. SA Airlink is a small company and it requires direct hands on involvement by all of its …(inaudible) to be spending time on the tedious type issues is not spending time on strategic progress."**

[70] If one has regard to the fact that the respondent's management thought that through his role in the contempt of court application the appellant had wanted the arrest and detention of certain key personnel and that the respondent's management had perceived such conduct on the appellant's part as an act of gross insubordination and as conduct that was disruptive of the orderly

operation of the respondent, one is left in no doubt that the presentation was intended at least in part to demonstrate to the appellant that the respondent's management was then responding to the appellant's act of spearheading the litigation on behalf of the union. In this regard it is significant that such presentation was made only to the appellant (except for the person who was with him at the time) and was not made to more people in the union. The appellant was the one who had played a leading role in the litigation on both occasions and he was the one to whom the presentation had to be made.

[71] Another matter that must be taken into account is the fact that the appellant was charged with misconduct relating to the second charge because he had failed to fly 950 hours in the 12 months preceding March 2001 and yet by the admission of the respondent's own witnesses there were other pilots who had flown less than 950 hours during the same period who were not charged with misconduct. All the respondent's witnesses conceded under cross-examination that failure to fly 950 hours did not constitute misconduct. Captains Van Schalkwyk and Foster either could not give any explanation as to why the appellant was charged with misconduct for this when others in the same position were not or they suggested that the question be put to the disciplinary officer, Ms Lubbe.

[72] When Ms Lubbe testified, she, too, conceded that such conduct did not constitute a disciplinary matter but said that it was a matter of

poor performance. However, she did not explain why the appellant was charged with this as misconduct when other pilots in the same position were not charged. In my view the respondent's management used this conduct to charge the appellant because they were fed up with him because of his alleged aggressiveness and the fact that, as far as the respondent was concerned, he was challenging too many of their decisions and was ever expressing a vote of no confidence in the management and, when he was not calling for their resignation, he was seeking their arrest and detention.

[73] It is now necessary to have regard to at least some of the evidence which emerged when the appellant gave his evidence. Before dealing with the appellant's evidence it is necessary to make two observations. The first one is the fact that part of the case that the appellant had pleaded in his statement of claim and, therefore, the case that the respondent came to answer in the court below was that the respondent had dismissed him because of his exercise of his rights conferred upon him by the Act and that the respondent's conduct in this regard was a violation of sec 5 of the Act. Of course, all of this was directed at seeking the ultimate finding that the dismissal was an automatically unfair one. The second observation is that the respondent was the party that began with the leading of evidence and the appellant only testified after the appellant's witnesses had testified and the respondent had closed its case. Part of the significance hereof is that, when the respondent led its evidence, the case that it sought to meet was that

which was set out in the appellant's statement of claim and in the pre-trial minute.

[74] Under cross-examination the appellant specifically referred to Capt Van Schalkwyk's memorandum of the 17th April where among other things Captain Van Schalkwyk said that the appellant had recently called for the arrest and detention of both the operations director and the chief executive officer and further said that such action had caused "**disunity and degradation of morale**" within the company which had been disruptive to the orderly operation of the organisation. The appellant also testified that what Captain Van Schalkwyk was saying in that memorandum in this regard was something about which evidence had been led in the disciplinary inquiry. The appellant was asked as to who had given such evidence in the disciplinary inquiry. He answered that Capt Foster had done so. He was then asked whether he was saying that Captain Foster had said in the disciplinary inquiry that because the appellant had asked for him to be committed to jail for contempt, he should be dismissed for that. In reply the appellant said that, if his memory served him well, "**the way it was put was that in the context that the company sees that as gross insubordination and lack of respect to the CEO**" He went on to say that Captain Foster had said that the company could not allow that to happen. The appellant added that that was "**the essence of the case.**"

[75] After this the respondent's attorney asked the appellant whether what he had just said was Capt Foster's evidence in the disciplinary

inquiry was an important factor in his case. The appellant answered in the affirmative. The respondent's attorney then pointed out that the appellant had not included that factor in his evidence in chief and had not mentioned it under cross-examination the previous day. He also pointed out to the appellant that he, that is the appellant, had taken the bundle of documents – I assume that that was the bundle of documents being used in Court – home the previous night to read them, and that prior to that he had never mentioned this factor.

[76] The appellant answered that he was not "**volunteering**" the information after he had read the bundle as suggested by the respondent's attorney. He said that that information "**has been I cannot call it common cause, but certainly very open as you have quite rightly read it from our papers to the pleadings**". He said it was "**an element**" of his case all the time. The appellant then said that that evidence was "**covered in the disciplinary inquiry as I said**."

[77] With regard to the respondent's attorney's complaint to the appellant that he had never before mentioned that part of the reason for his dismissal was that he had sought the committal to jail of the CEO for contempt, the appellant must have been correct when he said that in the disciplinary inquiry the respondent had relied on, among other things, the fact that on behalf of the union he had through the contempt of court application sought the committal to jail of, among others, the Chief Executive Officer. I say this

because in the document containing closing arguments in the disciplinary inquiry prepared by or presented by Captain Foster dated 25 April 2001 it was stated, among other things, "**Neither Capt Kroukam nor his legal representative challenged statements that he had on several occasions showed no confidence and a breakdown in trust in management – he had on several occasions called for the resignation of key personnel including the operations director, the chief pilot and he had required the arrest and detention of his operations director and his chief executive**."

[78] In fact the respondent's attorney was mistaken when he put it to the appellant that Captain Foster had not been asked about this issue under cross – examination. He was. First, the appellant's Counsel asked him whether, when the respondent considered the appellant's actions in April 2001 in terms of the trust relationship between the appellant and respondent, the incident of September 2000 was taken into account. Captain Foster's answer was that "**all factors must have a bearing and six months is not a long period of time within which trust can be restored**. **So my answer to that question would be yes, it was a factor."** He was then asked what he meant by the statements in the relevant bullet point in the document where it says that neither the appellant nor his legal representatives had challenged certain statements. This was a reference to the portion of Capt Foster's closing argument in the disciplinary inquiry which is quoted in bold at the bottom of the

paragraph immediately before this one. Captain Foster said he was referring to the fact that in several interactions that he had had with the appellant, the latter had made statements that he had no confidence in the trust relationship and in the management capability of the leadership of the flight operations department of the respondent. Capt Foster also stated that in particular the appellant had asked for the resignation of Captain Moorosi.

[79] In case the respondent's attorney's putting of certain things to the appellant about the contempt of Court application suggesting that he or the respondent was being taken by surprise with the appellant's evidence that his case included a complaint that his role in the contempt of court application was a factor in the respondent's decision to dismiss him, that is put to rest by the fact that a reading of the record where the respondent's attorney led Capt Van Schalkwyk's evidence in chief reveals that the respondent's attorney knew this to be the appellant's case. He reminded Captain Van Schalkwyk that in March 2001 there had been "**court action**" between the union and the respondent. He then reminded him that "**it is also common cause from the pre-trial minute that the [appellant] was the one who drove that process on behalf of the trade union and who signed all of the Court documents in this regard.**" He then said that "**the inference that the pleadings [and] the pre-trial minute seeks to achieve is that that was an instrumental cause, being the subsequent dismissal. Can you give us your comment on?"** Captain Van Schalkwyk denied that allegation and said that the

cause for the dismissal had nothing to do with union matters. He said that the problem was managing the appellant. He said that he found him "**aggressive and challenging, yelling disrespectful …**" He said that the appellant was "**disruptive to the point where one ends up not being able to conclude a conversation with the [appellant] being aggressive and challenging**." Soon thereafter Captain Van Schalkwyk, while answering a question relating to the settlement of the underlying dispute, said that the dispute went to the Labour Court. He said that there was "**ambiguity on the interpretation of the findings of the Court**. **An urgent interdict was filed against the company at which stage it was really the crescendo or the pinnacle of the pressure and the dealings with the company and the Airlink Pilots' Association.**"

[80] In this evidence in chief the appellant testified that he had made statements to the effect that he had no confidence in the management of the respondent but stated that he had done so as chairman of the union after deliberations with the union's committee. He said that those statements were made in regard to the technical staff. He denied having called for the resignation of the chief pilot, Capt Van Schalkwyk. He was asked whether he had ever called for the resignation of the operations director and his answer was: "**Not in my personal capacity**." When he was asked to elaborate, he referred to administrative arrangements that had apparently been made very inefficiently in connection with a trip overseas for training where members of the union had found, for

example, that certain hotel arrangements had not been made with the result that in one instance a female pilot had been expected to share a room with a male pilot. He suggested that the call for the resignation of the operations director was made against this background of dissatisfaction with his work and was made in his official capacity as chairman of the union after the union's committee had deliberated upon the matter.

[81] To prove that he was dismissed for his union activities, in his evidence the appellant also relied on the fact that Captain Van Schalkwyk suggested to him on a few occasions that he should consider resigning as chairman of the union. Captain Van Schalkwyk testified that such suggestions were on considerations of the appellant's own health and were only made after the appellant had himself suggested that, maybe, he should consider resigning as chairman of the union. The appellant conceded that, prior to such suggestions by Capt Van Schalkwyk, he had suggested that maybe he should resign. He started thinking about the option of resigning as chairman of the union because he was under tremendous pressure. In fact he testified that he went as far as putting the suggestion to the union leadership but it was not accepted. There is no basis for rejecting Captain Van Schalkwyk's evidence that he had made those suggestions out of concern for the appellant's health. Accordingly, Captain Van Schalkwyk's explanation must be accepted.

[82] In support of his claim that his dismissal was based on his union

activities and the role that he played in the litigation of March 2001 against the respondent, the appellant also referred to the respondent's attorney's letter in which a statement was made to the effect that his actions or conduct would not be forgotten. The appellant testified that this was a threat that some action would be taken against him because he had denied that he had concluded an agreement with the respondent's attorney with regard to the contempt of court application or the training of new pilots on the 28th March. When Captain Foster was asked about whether the respondent's attorney had been acting on the respondent's instructions when he wrote that letter to the appellant or the union, he answered in the affirmative but, when the respondent's attorney took the witness stand and testified about this letter, he said that he had acted on his own when he wrote that letter and that the respondent had nothing to do with it.

[83] Although the appellant's Counsel seems to have disputed the respondent's attorney's explanation or evidence in this regard, whatever he said provided no effective challenge of the respondent's attorney's explanation in this regard. There is no sufficient basis to reject the explanation even though it does leave one with some question mark, particularly because the respondent's attorney said that the appellant was denying an agreement that the two of them had reached, yet a reading of the respondent's own evidence suggests that no agreement had been reached, as the appellant had apparently said that he would take the matter to the union. Accordingly, the appellant's reliance upon that

statement in the letter is not supported by the evidence and must be rejected.

[84] It seems to me that, by the 12th April 2001 the respondent's management had had enough of the appellant and wanted him out of the company. They were fed up with him because, as far as management was concerned, he had expressed a vote of no confidence in some members of the management, had called for the resignation of some of the members of the management, had, on behalf of the union, instituted litigation that had compromised certain plans of the respondent and litigation which could have resulted in the arrest and detention of some members of the senior management of the respondent, had been "**aggressive**" towards management and was challenging all the decisions that the management were seeking to make in the interests of the respondent.

[85] A consideration of all of the evidence I have referred to above leads me to the conclusion that at least some of the reasons why the appellant was dismissed were that as far as the respondent's management was concerned he had:-

(a) challenged and questioned too many of the decisions made by the respondent's management;

(b) called for the resignation of certain personnel of the respondent;

(c) expressed a vote of no confidence in certain members of the respondent's management; and

(d) played a key role in the bringing of a contempt of court application against the respondent and, among others, the respondent's chief executive officer.

I am not prepared to go so far as to say that all the reasons or the only reason why the appellant was dismissed is reason(s) or are the reasons that would render his dismissal automatically unfair. This is because out of the various incidents upon which the respondent seemed to rely to justify the dismissal, there was, in my view, conduct which an employer could legitimately, even if wrongly or unfairly, rely upon to charge an employee with misconduct and which could legitimately albeit unfairly lead to a dismissal. In such a case the reason for dismissal would be legitimate even if one would not be able to say, as we were urged by Counsel for the appellant to say, that the employer's case against the employee was so weak that it would be justified to infer that the employee was dismissed for his union activities rather than for such behaviour.

[86] In my view a court should be slow to infer that the reason why an employer has brought disciplinary charges against an employee or the reason why an employer has dismissed an employee is or are illegitimate reason(s) such as union activities unless there is sufficient evidence to justify such a conclusion. A court should be even slower to come to that conclusion in a case where it does seem that the employer may have had a basis to bring disciplinary charges against an employee even if the court would not have done the same had it been in the employer's shoes. Obviously, in a case where a proper basis exists for a Court to make such an inference, the Court should not hesitate to make it.

[87] In this case one of the respondent's complaint is that, with regard

to the lunch/cafeteria meeting, the appellant and Captain Moorosi had agreed that the discussion would be off - the record but that, subsequently, the appellant disclosed in an affidavit used in the contempt of court application something that he alleged Captain Moorosi had said at the meeting. In paragraph 6.7 of that affidavit the appellant wrote: "**Later in the course of the same day, I also approached Moorosi in the canteen at SA Airlink. I said to him that I hoped that the parties could put the litigation aside and talk about the issues so that a resolution of them could be reached. Moorosi replied, as he had done to Quantrill, that there was nothing to discuss.**" If, as is the case, the two parties had agreed that their discussion was off the record, neither the appellant nor Captain Moorosi was at liberty to disclose the content of such discussion in an affidavit. By saying that Captain Moorosi had said that there was nothing to discuss, the appellant disclosed part of what was said in the meeting and, in so doing, he acted in breach of the off-the record agreement.

[88] In my view the respondent was justified in feeling aggrieved in this regard. The statement that the appellant attributed to Captain Moorosi in paragraph 6.7 of the affidavit might have given the impression of rigidity or inflexibility on the part of the respondent or Captain Moorosi when approached for a discussion of a possible settlement of the matter which might not put the respondent or Captain Moorosi in a good light. However, I must point out that, even though I take the view that Captain Moorosi had a legitimate cause for complaint in this regard, I do not necessarily say that this

was the type of conduct for which it was competent in law for the respondent to bring a charge of misconduct against the appellant. Maybe it was. Maybe it was not. It is not necessary for me to decide that issue.

[89] Captain Van Schalkwyk also testified that there was no trust left between the respondent and the appellant. It may be that this was said in support of a contention to the effect that the appellant's dismissal was not automatically unfair or it may have been said for the purpose of persuading the Court below, and, therefore, this Court as well that, even if the dismissal were found to have been automatically unfair, the Court should not order the respondent to reinstate the appellant. Assuming that there is no longer any trust relationship between the appellant and the respondent, it would be important to examine what the reason therefor is because, if the reason is an illegitimate reason, the matter may warrant to be approached in a certain manner which may be different from the manner in which it would be approached if the position is that the reason for the loss of trust is simply a bona fide and legitimate one. So, let me deal with the issue of what the reason for the loss of trust would be if there were such loss of trust.

[90] In the light of all of the evidence I find that the principal or dominant reason for the appellant's dismissal was that the respondent was not happy with the role that he was playing in seeking to represent the interests of the union and its members in his or the union's dealings with the respondent as well as with the

role that he played in bringing the interdict application and the contempt of Court application on behalf of the union in March 2001. The respondent took the appellant seeking "**the arrest and detention**" of the operations director and chief executive officer of the respondent when he played the role that he did in the contempt application. It seems that the breach by the appellant of the off-the record agreement in regard to the lunch meeting was also a factor. Indeed, it seems that there were also occasions when the appellant used swear words or abusive language in speaking to members of the management and this, too, had irritated, exasperated or even angered some members of the respondent's management.

[91] Despite such incidents, I am of the view that, when all the circumstances are taken into account, the principal or dominant reason for the appellant's dismissal is the one I have given above. I am of the view that, where, as in this case, the reason or reasons for the dismissal of an employee comprise one or more reasons that would render the dismissal automatically unfair and one or more reasons that would not render the dismissal automatically unfair but the reason or reasons that would render the dismissal automatically unfair can be said to be the dominant reason or reasons, the dismissal is automatically unfair.

[92] In this case there is, in my view, no doubt that the reasons that would render the appellant's dismissal automatically unfair such as that he was challenging and questioning the management's decisions, that he was expressing a vote of no confidence in certain

personnel and certain members of the management of the respondent, the role he played in the litigation including the contempt of court application and his calling for the resignation of certain personnel of the respondent constituted the dominant or principal reasons for the appellant's dismissal.

[93] It seems to me, therefore that, if there is or was no trust relationship between the parties, such trust relationship would have been destroyed by the respondent's unacceptable and illegitimate reaction to the appellant's exercise of his rights as a union official or representative and his exercise of his rights to play the role that he played in the bringing of contempt of court proceedings against the respondent and some senior members of the respondent's management when he believed that the respondent and its senior members of management.

[94] In my view it would undermine the protection that the Constitution and the Act seek to confer on union officials or representatives and employees against victimisation for the exercise of their constitutional and statutory rights to accept a proposition the effect of which would be that an employer may destroy a trust relationship by victimising an employee and then benefit from such illegitimate and unlawful conduct. The proposition that even if the Court concluded that the employee was indeed dismissed for an illegitimate and unlawful or unconstitutional reason, he must still lose his job because the illegitimate conduct of the employer has destroyed such trust relationship is, in my view, unacceptable as a

matter of policy. An employer who acts in breach of such fundamental rights must, as a matter of policy, not be allowed to benefit from his unacceptable conduct. An approach of a Court which allows such conduct to prevail may itself be in conflict with some of the values and principles which make up the foundation of our post-apartheid society.

[95] In any event I do not think that there is sufficient evidence to support the contention that there is no longer any trust between the parties. What the respondent's senior management found unacceptable on the part of the appellant was partly, if not mainly, that, according to the management, he was challenging their decisions all the time. In this regard he was doing his job as a union representative and, if the respondent's managers of the time could not handle or manage a union official who challenged management's decisions all the time, then, maybe, the respondent should either bring in advisors who will help its management on how to deal with or manage such union officials or otherwise the respondent may well have to consider employing managers who have the expertise and skill to handle and manage such union officials. Obviously, the union and its members will at all times be constantly looking at their representatives to determine whether they are the best people to represent their interests. But as long as the union or its members believe that a particular official satisfactorily represents their interests, the employer cannot force a change of representatives by dismissing those whose style or approach causes him discomfort or inconvenience.

Did the reason(s) for the appellant's dismissal as found above render the appellant's dismissal automatically unfair?

[96] The next question is whether the main or principal reason or reasons for the appellant's dismissal rendered the appellant's dismissal automatically unfair. At this stage of the judgment it is necessary to identify the statutory provisions which conferred on the appellant the rights that he would have sought to exercise when, according to the respondent, he challenged and questioned the respondent's management, expressed a vote of no confidence in some members of the respondent's management or other personnel, called for the resignation of some members of the respondent's management, brought an application to the Labour Court to interdict the respondent from acting in breach of a collective agreement and initiated on behalf of the union the contempt of court proceedings against the respondent and some members of the senior management of the respondent. In this regard it must be borne in mind that the appellant was a shopsteward. He may have been called an association representative in terms of the recognition agreement between the union and the respondent. What matters is that he was an official representative of the union and its members employed by the respondent.

[97] In terms of the recognition agreement, concluded prior to the current Act, between the respondent and the Airline Pilots' Association "**as represented by the Airlink Pilots Association**

(APA) Branch" the respondent undertook to "**ensure that no employee shall be victimised or prejudiced or intimidated in his employment in any way by virtue of his election or appointment as an association representative or his membership of the Association or his participating in lawful association activities**." (Clause 5.2) Clause 5.5 read thus: "**The Company recognises the association's rights and responsibility to conduct its own affairs in accordance with its constitution as well as the association's role to represent the interests of its members and to work for improved conditions of employment."** In terms of clause 5.6 the union recognised "**that the company has, and shall continue to have, the right to conduct its normal managerial functions subject to the provisions of this and previous written agreements.**" (Underlining supplied).

[98] Clause 2.5 of the recognition agreement defined an association official as meaning "**any person whether or not he is a member of ALPA – SA, elected, co-opted or appointed to the National Executive Branch Committee, Portfolio Committee or any Subcommittee of ALPA – SA in terms of its constitution, or any of its constitutions, or any full time employee of ALPA – SA."** Association representative was defined in clause 2.6 of the recognition agreement as meaning "**any association official mandated by AJPA – SA or any branch formed in terms of its constitution to represent it at a negotiating forum or any other**

dealings between the Company and the association." The word "**association**" was defined as meaning "**the Airline Pilots' Association – South Africa as represented by the Airline Pilots' Association (APA) branch, constituted in terms of the relevant clause of its constitution."**

[99] Although the appellant based his claim that his dismissal was automatically unfair on sec 187(1)(d) read with sec 5 of the Act, it is appropriate to first refer to certain provisions of the Constitution that are relevant to his claim. Sec 23(1) of the Constitution ("**the Constitution**") provides that **"(e)veryone has a right to fair labour practices."** Sec 23(2)(a) and (b) of the Constitution provide, respectively, that **"(e)very worker has the right to form and join a trade union and to participate in the activities and programmes of a trade union**." Sec 23(4)(a) and (b), respectively, provide that **"(e)very trade union and every employers' organisation has the right to determine its own administration, programmes and activities' and "to organise**".

[100] In the Act reference can be made to sec 5(1), (2)(c)(iii) and (vii).

Section 5(1) precludes discrimination against an employee for exercising any right conferred by this Act. Sec 5(2)(c) precludes an employer from prejudicing an employee because of past or present or anticipated "**participation in the lawful activities of a trade union"**. Section 5(2)(c)(vi) precludes an employer from prejudicing an employee because of past, present or anticipated exercise of any right conferred by the Act. Sec 5(2)(c)(vii) precludes an employer from prejudicing an employee because of past, present or anticipated participation in any proceedings in terms of this Act. Reference can also be made to

organisational rights provided for in chapter III of the Act.

[101] Section 187(1) of the Act provides that **"(a) dismissal is automatically unfair if the employer in dismissing the employee acts <u>contrary to section</u> 5 or, if the reason for the dismissal is**" and thereafter eight reasons are listed. The fourth one, listed under sec 187(1)(d), is that a dismissal is automatically unfair if the reason for the dismissal is "**that an employee took action or indicated an intention to take action, against the employer by**

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act."

It needs to be pointed out that the interdict proceedings that the union brought against the respondent were brought in terms of sec 64 of the Act. Accordingly in playing the role that he played, the appellant was exercising a right which is conferred on him as a union representative – in fact as an employee as well. In playing the role that he played in the bringing of the contempt of court application, the appellant was exercising a right which sec 163 of the Act confers on a party in whose favour an order of the Labour Court has been granted and who seeks to enforce it by way of contempt of court proceedings. Section 163 is headed: "**service and enforcement of orders of Labour Court.**" It then provides: "**Any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court."**

[102] Having regard to the reason(s) that I have found to have been the dominant or principal reason(s) for the appellant's dismissal and the provisions of the Act that I have referred to above which I have found the respondent to have breached, in dismissing the appellant, I am satisfied that the appellant's dismissal was automatically

unfair. In my judgement, there was ample evidence upon which the Court a quo could and should have found the appellant's dismissal to have been dominantly or principally for prohibited reasons that rendered the dismissal automatically unfair.

[103] However, even if the reasons that I have found to constitute the dominant or principal or 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.

How the Court a quo dealt with the matter

[104] The judgment of the Labour Court is 97 pages long. In the first 77 pages the learned judge summarised the evidence of each witness who gave evidence and covered most of the essential aspects of each witness' evidence. Towards the bottom of page 77 of the judgment he set out what the issues were before him. In this regard he stated that the question was whether or not the appellant's dismissal was automatically unfair by reason of two grounds upon

which he said the appellant had relied. From about the middle of page 78 of the judgment he began a discussion of the issue of onus. In the course of such discussion he emphasised once again what the appellant's case before him was, and what it was not. This discussion went up to the top of page 82 of the judgment. It is only from the middle of page 82 of the judgment that the learned judge began an analysis of the evidence and arguments presented in the matter. Accordingly, it is the last 15 pages of the judgment that should reveal the reasons why the Court a quo reached the conclusion that it reached.

[105] The Court a quo stated that the appellant relied on two grounds to support his case that his dismissal was automatically unfair. The one was that he was an active chairperson of the union and was, in essence, "**the face of the union."** The other one was the role that he played in the litigation that the union brought against the respondent in March 2001. The Court a quo further stated that it was not the appellant's case that he was dismissed for his union membership or for the mere fact that he held the position of chairman of the union. The Court a quo also recorded that it was not the appellant's case that the respondent was trying to eliminate the union.

[106] The Court a quo dealt at some length with the issue of onus. Indeed, during argument before us quite some time was devoted to that issue. However, in the view I take of this matter, not much really depends upon that issue. In my view there is sufficient

evidence proving that the appellant's dismissal was principally due to the active role he played as chairman of the union and the role he played in the union initiating litigation against the respondent and some of its high ranking officials.

[107] I now turn to consider some aspects of the judgment of the Court a quo on the merits. With regard to the respondent's complaint that the appellant acted in breach of the off-the record agreement when he made certain statements in his affidavit, the Court a quo found that Capt Moorosi had conceded under cross-examination that the relevant paragraph in the affidavit did not deal with the contents of the discussion that had taken place. It seems to me that the Court a quo misconstrued Captain Moorosi's evidence under cross-examination. He made no such concession. He specifically referred to the last sentence of paragraph 6.7 of the relevant affidavit. In that sentence the appellant specifically disclosed what Captain Moorosi had said, or had allegedly said, namely, that there was nothing to discuss. The disclosure thereof was clearly in breach of the off - the record agreement to which the appellant was party.

[108] Furthermore, the Court a quo had no regard whatsoever to the fact that part of the respondent's case, not only in the disciplinary inquiry, the internal appeal but also in the trial was that the appellant was guilty of gross insubordination and/or of being a disruptive influence in that he had challenged management's decisions, he had expressed a vote of no confidence in some members of the management, had called for the resignation of

certain members of the respondent's management and, through the contempt of Court application, had sought the arrest and detention of certain members of the management. All of these are things that the appellant would most of the time have done in the course and scope of his functions as a union representative. These things would have qualified either as union activities or as the exercise by the appellant of rights conferred upon him by the Act as he claimed in his statement of claim. The Court a quo did not take into account the fact that the respondent's management felt very strongly about the effect of the litigation upon the operations of the respondent or upon its ERJ strategy. The Court a quo also did not have regard to the question why Captain Foster had chosen to make the presentation that he made to the appellant on the occasion of the handing over of the disciplinary notice to the appellant.

[109] The Court a quo also took no account of what the chairman of the disciplinary inquiry said about the appellant's (alleged) call for certain members of management to resign. The Court a quo also overlooked the question as to why the appellant was charged with misconduct for failing to meet the flying time of 950 hours target when the respondent's own witnesses, including the chief executive officer and the chief pilot, conceded one after the other under cross-examination that failure to meet such flying target did not constitute misconduct and when the respondent's witnesses conceded that there were other pilots who had failed to achieve that same target but who had not been charged with misconduct. This is particularly important because, once the concession had been made

at the trial by one or more of the witnesses of the respondent that there had been other pilots who had also failed to achieve the 950 hours flying target, the situation called for the respondent to provide a witness who would advance an explanation or justification for its decision to charge only the appellant with misconduct and not charge the others as well. The respondent elected not to provide such explanation or justification. In those circumstances the absence of an explanation or justification gives credence to the contention that the reason why the appellant was charged and others were not charged is that the respondent wanted to get rid of the appellant because it was fed up with him for, among other reasons at least, his active role as chairman of the union and his role in the litigation of March 2001. In my view the Court a quo erred in not taking all of these factors into account in determining the reason(s) for the appellant's dismissal.

Relief

[110] The next question that needs to be dealt with is the relief that should be granted, if any should be granted at all. The appellant seeks an order of reinstatement. The respondent opposed the request for an order of reinstatement. In this regard, even before I consider the basis upon which the respondent opposes the appellant's reinstatement, it is necessary to bear in mind that in our law reinstatement is the preferred remedy where there has been an unfair dismissal. In terms of sec 193(2) of the Act the Labour Court, and, therefore, this Court as well, sitting in judgment of the

Labour Court in an appeal from that Court, "**must require the employer to reinstate or re-employ the employee"** unless one or more of the situations set out in paragraphs (a) to (d) of sec 193(2) exists. Those situations are where:

> "**(a) the employee does not wish to be reinstated or re-employed;**
>
> **b) the circumstances surrounding the dismissal are such that continued employment relationship would be intolerable;**
>
> **c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or**
>
> **d) the dismissal is unfair only because the employer did not follow a fair procedure."**

[111] Paragraph (a) does not apply because the appellant does wish to be reinstated nor does par (e) because procedural fairness was not an issue in this matter. In my judgement paragraphs (b) and (c) also do not apply because there is no evidence upon which it could properly be said that a continued employment relationship between the appellant and the respondent would be intolerable or that it is not reasonably practicable to reinstate the appellant. The evidence led by the respondent as to why the appellant should not be reinstated was that his reinstatement would entail that he should be sent overseas for a certain training because he would not have been flying for a long time. It was said that such training would be very costly. Although there seemed to be no certainty about what the

cost would be, evidence suggested that it would be under R 100 000 00. However, it transpired during the cross-examination of the witness who gave that evidence that the appellant would have been sent to that kind of training overseas anyway even if he had not been dismissed. In any event such cost would not, it seems to me, provide circumstances that are such that a continued employment relationship would be intolerable nor would such cost render it not reasonably practicable for the respondent to reinstate the appellant.

[112] Another piece of evidence led in support of the respondent's opposition to the appellant's request for reinstatement was in effect that, if the appellant was reinstated, he would go around boasting that he "**beat the management in their own game**". That is absolutely no basis to deny an employee the important remedy of reinstatement in a case where he otherwise should be reinstated. I am also aware that a long period has lapsed since the appellant was dismissed. He was dismissed in May 2001. This means that a period of four years has lapsed since he was dismissed. The judgment of the Labour Court was delivered in November 2002. None of the delay can be attributed either to the appellant or the respondent.

[113] On appeal this Court must, generally speaking, make such decision as it thinks the Labour Court should have made on the evidence before it at the time that it made its decision. In this case that was in November 2002. Generally speaking, it cannot make an order that the Labour Court could not have made at that time but which,

maybe, it can make now. I put this as a general rule. I do not rule out the possibility that there may be exceptions to this general rule. However, I do not have to decide that because there are definitely no circumstances in this case which would justify a departure from that general rule.

[114] None of the situations set out in sec 193(2)(a) – (d) exists in this matter. That being the case this Court is enjoined by sec 193(2) to grant the appellant an order of reinstatement. In this regard it is important to emphasise that the language of sec 193(2) is such that, if none of the situations set out in paras (a) to (d), exists, the Labour Court, and, therefore, this Court, or, an arbitrator, has no discretion whether or not to grant reinstatement. In the words of sec 193(2) the Labour Court or the arbitrator "must require the employer to reinstate or re-employ the employee" whose dismissal has been found to have been unfair. That embraces both dismissals which have been found to be automatically unfair and those which have been found to be, shall I say, ordinarily unfair. Ordinarily unfair dismissal in this context does not include those which have been found to be unfair solely because the employer did not follow a fair procedure because those fall under the exception in paragraph (d). It refers to those dismissals which are not automatically unfair but nevertheless lack a fair reason.

[115] The statement that the Labour Court or this Court or an arbitrator has no discretion in regard to whether or not to grant reinstatement where none of the situations set out in sec 193(2)(a) to (d) applies,

must be understood against the background that this was part of a deal which was concluded by organised business, labour and Government at NEDLAC when the Bill which later became the Labour Relations Act, 1995 was deliberated upon. In that forum organised labour, organised business and Government considered, debated and deliberated upon the question of what kind of a labour relations regeme they thought was the most appropriate for South Africa, bearing in mind the problems that had been experienced under the Labour Relations Act, 1956. That included the question of the dispute resolution dispensation for labour disputes. They reached an agreement on what later became the Labour Relations Act, 1995. Courts and other tribunals which are involved in one way or another at different levels in the resolution of labour and employment disputes must, generally speaking, seek to uphold the deal concluded in that forum as reflected in the Act and be slow to adopt any interpretation that may undermine that deal.

[116] The absence of a discretion on the part of the Labour Court or an arbitrator to deny reinstatement to an unfairly dismissed employee in the absence of anyone of the situations set out in sec 193(2) must be understood against the background that reinstatement was made a statutory primary remedy in unfair dismissal disputes in return for organised labour's agreement that there should be a capping of compensation that could be awarded to unfairly dismissed employees which was a huge concession and sacrifice on the part of organised labour and workers. In the explanatory memorandum ((1995) 16 ILJ 278) which accompanied the Labour Relations Bill,

before the Bill was passed into the present Act, the following is part of what the drafters of the Bill had to say at 316 about the problems regarding remedies which existed under the old regeme:

> "**There are also problems concerning the courts' decisions regarding remedies. The courts have on numerous occasions shown a reluctance to reinstate workers who have been unfairly dismissed because of the period of time that has passed between the date of dismissal and the date of the court order. This is a cause of dissatisfaction among workers and undermines the legitimacy of the adjudication process as an alternative to industrial action. It also creates problems for employers. Reinstatement orders have on occasion been granted years after the dismissals occurred. For the employer, who in the interim has engaged an alternative labour force in an endeavour to maintain production, the consequences of such an order, particularly in the case of mass dismissals, are self-evident. The alternative of compensatory awards presents its own difficulties. In the absence of statutory guidelines or caps on compensation, which are the norm in other countries, the courts have used tests applied in personal injury claims to assess losses. Awards have become open-ended and, in the case of the dismissal of executives, sometimes amount to hundreds of thousands of rands.**

[117] At 320 of the explanatory memorandum it is stated that the Bill gave statutory support for reinstatement as a primary remedy where the dismissal is found to be unfair. It is then said that this is appropriate when adjudication takes place shortly after the dismissal. It went on to set out "**a number of benefits in providing for reinstatement as a primary remedy."** In the second of seven bullet points against which the benefits were set out, the benefit set out was:

> **"it allows for legislative capping of compensation awards. Without reinstatement, compensation must be open-ended and calculated on a delictual damages basis. Because the draft Bill offers reinstatement as a primary remedy, it caps compensation awards."**

[118] In the light of the above it, therefore, seems to me that, with regard to what remedies courts and other tribunals would have power to make in regard to dismissals that are found to be unfair, the main objection on the part of organised labour was that courts and other tribunals must ensure that, except in certain specified situations, workers were given their jobs back when they have been dismissed unfairly, whereas one of organised business' objectives was that Courts and other tribunals should not have power to make huge awards of compensation against employers and that, therefore, the compensation that they can award should be capped. The deal arrived at, as reflected in sec 193(2) and sec 194, was that workers should be reinstated and the courts and other tribunals should not

have any discretion to deny an unfairly dismissed employee reinstatement except in specified situations and that there should be a limitation on the amount of compensation that Courts and other tribunals could award to employees. In the light of all the above I consider that the appellant should be granted an order of reinstatement.

[119] The next question is whether the order of reinstatement should operate retrospectively and, if so, up to what date retrospectively and whether the respondent should be ordered to pay any compensation to the appellant. During argument on these questions, other questions arose. These related to the meaning of an order of reinstatement or its effect, the meaning of a retrospective order of reinstatement or its effect and the meaning of compensation under sec 194. There was also the question whether a reinstatement order can operate retrospectively for longer than 24 months in the case of an automatically unfair dismissal and 12 months in the case of an ordinarily unfair dismissal.

[120] These questions arose because Counsel for the appellant and the respondent's attorney were seeking to deal with the question of what order the Court could make if it sought to ensure that the appellant was paid backpay and the amount of backpay that could be ordered by the Court. The one source of confusion was whether, if an order of reinstatement operated retrospectively, that would have the effect that the employer was ordered to pay the employee the remuneration that the employee would have been paid for the

period covered by the retrospective operation of such order. Another question was whether, if that is so, that would mean that, where an order of reinstatement has been granted, it is not competent for a court or an arbitrator to award compensation to the employee in terms of sec 194 of the Act or whether both orders can be made in the same case. Yet another question was whether, if an order of reinstatement was made which did not operate retrospectively to the date of dismissal, that would mean that the employee's service with that employer has been interrupted but from the date of the operation of such order he is to receive all the rights, benefits and privileges which he used to enjoy before he was dismissed. This also raised the question of how different that scenario is to a scenario where the order is that of re-employment to the same post as the employee occupied before dismissal.

[121] Counsel for the appellant submitted that, if an order of reinstatement was made, it should operate with retrospective effect to the date of the appellant's dismissal, namely, the 11th May 2001. From that date to the 17th October 2002, which was the date of the delivery of the judgment of the Court a quo, it is just over seventeen months. As that period is below 24 months, the question whether it is competent to make a reinstatement order that operates with retrospective effect for a period longer than 24 months in the case of an automatically unfair dismissal and for a period longer than 12 months in all other unfair dismissal cases does not arise. The reference to 24 months and 12 months arises out of the fact that in terms of sec 194 of the Act compensation that is awardable

to an employee whose dismissal has been found to be automatically unfair is capped at an amount equivalent to 24 months' remuneration and that of an employee whose dismissal has been found to be unfair for lack of a fair reason or because no fair procedure was followed in the employee's dismissal is limited to a maximum of 12 months remuneration.

[122] Davis AJA has expressed the view in his separate judgment that it is competent for the Court to make an order of reinstatement that operates with retrospective effect up to the date of dismissal even if that goes beyond 24 months or 12 months retrospectively, as the case may be, because, particularly in a case such as the present one, the Court may wish to ensure in effect that an employer who has dismissed an employee for a reason that renders the dismissal automatically unfair is dealt with firmly to show that such conduct will not be tolerated by the Court. I am unable to agree with this reasoning. This proposition ignores the fact that, if one has regard to sec 194 of the Act, provision has already been made in the Act for an employer who is found to have dismissed an employee for a reason that renders the dismissal automatically unfair to be ordered to pay double the amount of compensation that an employer who has unfairly dismissed an employee but not for such a reason may be ordered to pay.

[123] It can be argued that backpay which an unfairly dismissed employee gets paid when an order has been made for his reinstatement with retrospective effect constitutes in effect

compensation for unfair dismissal in the same way as compensation provided for under sec 194 of the Act constitutes compensation for unfair dismissal to an unfairly dismissed employee who is awarded compensation under sec 194 of the Act. If that is so, thus would run the argument, a reinstatement order of the retrospective operation of which goes beyond 24 months or 12 months, as the case may be, would amount to an award of compensation for unfair dismissal which exceeds the relevant maximum prescribed by sec 194. The argument would be that such a retrospective operation of an order of reinstatement would undermine the capping of compensation prescribed by sec 194 of the Act.

[124] It would further seem that the construction that the only limitation on the extent of the retrospective operation of an order of reinstatement is the date of dismissal ignores the purpose of sec 194. The purpose of sec 194 is to limit the financial risk that an employer has when involved in an unfair dismissal claim. To secure organised labour's agreement to the limitation of such financial risk, employers made a concession at NEDLAC when the Labour Relations Bill was negotiated, that reinstatement would be the primary remedy in unfair dismissal cases. As already stated above, sec 193 gives effect to that agreement as far as reinstatement being the primary remedy in unfair dismissal cases is concerned. Sec 194 gives effect to that agreement in so far as it relates to ensuring that the employer's financial risk in terms of payment to the employee is limited to either 24 months'

remuneration or 12 months' remuneration, as the case may be.

[125] If it is accepted, as I think it should be, that at least part of what the retrospective operation of a reinstatement order means is that the employer must pay the employee backpay for the period covered by such retrospective operation and that in a case where the arbitrator or the Court awards a dismissed employee compensation under sec 194, such compensation is or at least part of such compensation is backpay, then the proposition that an order of reinstatement can operate retrospectively to the date of dismissal even if this goes beyond 24 months or 12 months retrospectively, as the case may be, would not only undermine but would also defeat the whole purpose of sec 194 of the Act. I am unable to see what purpose of the Act would be served by a construction to the effect that, if an employee is granted reinstatement, there is no limitation to the employer's financial risk in terms of backpay, but, if the same employee is awarded compensation and is not granted reinstatement, the employer's financial risk is limited to 24 months remuneration or 12 months' remuneration, as the case may be. I prefer the view that the employer's financial risk is limited in either case.

[126] One way in which sec 194 would be undermined if an order of reinstatement which operates with retrospective effect beyond 24 months or 12 months, as the case may be, was made would be this one. An employee who no longer wants to be reinstated but only wants to be paid compensation would indicate that he wants to be

reinstated with retrospective effect to the date of dismissal which would go beyond 24 months or 12 months, as the case may be. After the Court has granted him a reinstatement order with such retrospective effect and he has been paid his backpay covering the period of retrospectivity going beyond 24 months or 12 months, he would resign. In that way he would have been able to get paid what in effect would be compensation for unfair dismissal that would be in excess of the relevant maximum prescribed by sec 194. it seems to me that sec 193 should be construed to mean that an order of reinstatement can operate retrospectively to the date of dismissal or up to 24 months or 12 months backwards, as the case may be, whichever is the earlier. This construction will harmonise the provisions of sec 193 and 194. It would seem to me that that is the correct construction of sec 193. The two sections must be construed in such a way that the one does not undermine the other or defeat the purpose of the other.

[127] I do not think that sec 195 of the Act changes any of the above. Sec 195 of the Act reads: "**An order or award of compensation made in terms of this chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment"** It seems to me that the backpay which flows from the retrospective operation of an order or award of reinstatement does not constitute an amount that such employee can be said to be entitled to in terms of any law, collective agreement or contract of employment as provided for in sec 195. In our law an employee is

not entitled to have the Labour Court or an arbitrator order that the reinstatement order (in his favour) operate with retrospective. There is no such right. Once the Labour Court or an arbitrator has decided to order the employee's reinstatement, it or he has a discretion whether to order that the reinstatement order operate with retrospective effect. In the exercise of that discretion, the Court or the arbitrator may decide that such reinstatement order should or should not operate with retrospective effect to the date of dismissal or might order a limited retrospective operation of the reinstatement order or might order no retrospective operation of the reinstatement order at all.

[128] In the light of all this it seems to me that, prior to the Court or an arbitrator ordering that a reinstatement order made in favour of an employee shall operate with retrospective effect in favour of the employee, the employee has no right to, and therefore, cannot be said to be entitled to, any amount in that regard in terms of any law, collective agreement or contract of employment. what the employee is entitled to is to make an application to the Court or the arbitrator to exercise its or his discretion in favour of ordering that the reinstatement be with retrospective effect. Once an order has been made, the employee becomes entitled to such amount in terms of an order of court or an arbitration award and not in terms of any law, collective agreement or contract of employment as contemplated by sec 195 of the Act. I am accordingly inclined to think that any backpay that an unfairly dismissed employee gets paid when there has been an unfair dismissal claim gets paid such

amount not because he is entitled to it in terms of any law or any collective agreement or contract of employment but because he is entitled to it in terms of an order of Court or an arbitration award made in the exercise of a discretion.

[129] In the light of the above it would therefore seem that backpay flowing from the retrospective operation of an order of reinstatement made under sec 193 of the Act does not constitute an "**amount to which the employee is entitled in terms of any law, collective agreement or contract of employment**" as contemplated by sec 195 of the Act. It seems that the "**amount that the employee is entitled to in terms of any law, collective agreement or contract of employment**" that sec 195 refers to does not include an amount that the employee is entitled to in terms of an order of court or in terms of an arbitration award. It seems to relate to amounts such as unpaid wages for the period prior to the dismissal, notice pay, severance pay, pension or provident fund or amounts in terms of the unemployment insurance Act, 1996.

[130] The view I have expressed above on the relationship between sec 193 and sec 194 is no more than a prima facie view that I hold. For purposes of this case it is not necessary to decide the issue. For that reason I refrain from expressing a definitive view on it. The reason why it is not necessary to decide the issue is that the period from the date of the appellant's dismissal to the date of the delivery of the judgment of the Court a quo is less than the 24 months contemplated in sec 194. The appellant has asked for an order of

reinstatement that operates with retrospective effect from the date of his dismissal. As that date is within 24 months from the date of the delivery of the judgment of the Court a quo, it is competent. Accordingly, the question whether an order of reinstatement can be made retrospective beyond 24 months where the dismissal has been found to be automatically unfair does not arise. The next question is whether the reinstatement should operate with retrospective effect to the date of dismissal or to any date or whether it should not be retrospective at all. This Court must decide this question in the way it thinks the Court a quo should have decided it when it delivered its judgment on the 17th October 2002 or would have been required to decide it if it had concluded that the dismissal was automatically unfair.

[131] In this matter I would ordinarily have been inclined to order that reinstatement operate with retrospective effect to the appellant's date of dismissal. However, there are, in my view, two matters that must be taken into account against the appellant and in favour of the respondent in this regard. One is that, subsequent to his dismissal, the appellant worked for Intensive Air for five months earning about R 18 000, 00 per month. That would amount to R 90 000, 00. In his heads of argument the respondent's attorney submitted that the remuneration that the appellant earned during this period of five months should be deducted from whatever compensation or backpay the Court may order the respondent to pay to the appellant. Counsel for the appellant did not submit to the contrary in their heads of argument on this issue nor did they do so

during oral argument. I can see no reason why it should not be taken into account and shall, accordingly, take it into account.

[132] Another matter is the appellant's conduct in not taking up a job offer that he testified was made to him which would have paid him either the same or even a better salary than the salary that the respondent used to pay him. The respondent's attorney submitted in his heads of argument that this conduct by the appellant must be taken into account against him with regard to the determination of compensation or backpay that the Court may consider ordering the respondent to pay. By his own admission, the appellant had been made an offer of employment by another airline which would have paid him remuneration that would have been above his remuneration at the respondent and all he had to do to get this job was to say: "**I want the job"** and yet he did not take the job. The appellant conceded that, had he taken that job, he would still have been working for that company at the time of the trial in this matter. In re-examination the issue was not dealt with.

[133] The only reason that the appellant gave for not taking up the offer made to him by the company concerned was that, in his words, **"I could not entertain under the circumstances of [these] proceedings taking place."** There was no clarification of what he meant. It is not clear why he could not take up such job and make suitable arrangements with such employer to attend court when the trial in this matter began or make suitable arrangements necessary to enable him to attend such consultations as he may have needed

to have with his lawyers in order to prepare for the trial in this matter. The Court was not told what difficulties or problems he envisaged he could encounter if he took that job and still pursued the litigation in this matter if he still wanted to pursue it either to get reinstatement at the respondent or to get compensation. This is not to suggest that the appellant should have abandoned his claim for reinstatement in the respondent's employ simply because another company had made him a competitive offer or even a better offer of employment. The suggestion is that, as he was unemployed at the time while waiting for the trial in this matter, he should have taken that job. If he was successful in this litigation, he could then choose whether he would stay with such employer or would go back to the respondent's employment. The point is that in the meantime he would not have suffered any loss of income from the time he took up employment with such company to the date of the delivery of the judgment of the Court a quo. In fact he would have earned a higher income. His decision not to take such job broke the causal connection between his financial loss and the respondent's conduct in dismissing him as it did. With regard to such loss the appellant can be said to be the author of his own misfortune. The respondent cannot be held liable for that part of the loss because it was within the appellant's control to prevent it. The appellant did not testify to the effect that he knew that the prospective employer had or would have had an objection to him attending his trial in due course or taking time off to consult with his lawyers. It would be wrong to assume that such employer would have had objections when no evidence was adduced to this

effect.

[134] I note that in his judgement Davis AJA does not take the view that this conduct on the part of the appellant disentitles him to certain retrospectivity of the reinstatement order. He says this is because it is not clear what the terms of such employment would have been. In my view it is not permissible to adopt that approach because it has never at any stage been the appellant's case that his conduct in this regard should not be taken into account because the terms of such employment were not clear. At any rate the terms of employment would be relevant if there was an indication that they may have been or were less favourable to the appellant than those he enjoyed in the respondent's employ prior to the dismissal. There was no such evidence. On the contrary, all indications are that the terms and conditions of employment with such company would have been better in terms of remuneration. I have no doubt that, if the terms and conditions of employment with such employer would have been worse off than those which had governed the appellant's employment prior to his dismissal by the respondent, he would have said so in his evidence. He did not. The reason he did not is because that was not a factor in his decision. Furthermore, Davis AJA offers another reason why he disregards this conduct on the appellant's part. He says he wants to bring about finality in the matter. I do not think that it is permissible in law to not take into account a legitimate factor that should be taken into account for reasons of finality. A factor is either legitimate or illegitimate. If it is legitimate, it must be taken into account. If it is not, it must be

ignored but not the other way round.

[135] The question of when the appellant would have commenced duty with the company that made him the offer that he did not take does not appear to have been canvassed at any stage with the appellant during the trial. However, his evidence was that for the first seven months after his dismissal he did not get a job. Calculating from the 11th May 2001 when he was dismissed, seven months would go up to November or thereabout. So, for that period, he was not employed despite the fact that he was looking for employment. He testified that after the period of seven months, he got a job as a pilot with a company called Intensive Air. That employment went for five months. He was paid R 18 000,00 per month. That would total R 90 000,00. After five months, that employment came to an end because Intensive Air was liquidatd. The period of five months would have stretched from about December 2001 or early in 2002 to about the middle of 2002. The trial took place from the 12th to the 16th August 2002. It would seem that the offer of another job that would have paid the appellant better than he had been paid by the respondent must have occurred sometime after he had lost his job with Intensive Air and the trial. It seems that whatever the appellant would have earned in such employment before the trial or the delivery of the judgment of the Court a quo would have been a salary for a period of between two and five months, depending on whether one uses the trial dates or the date of the delivery of the judgement. It therefore seems to me that a retrospectivity of a

reinstatement order that operates with retrospective effect for a period of seven months, which is the period that he was unemployed before he got a job with Intensive Air would also be as close as possible to a fair and equitable order.

[136] With regard to costs I am of the view that the appellant has been substantially successful. Furthermore, this was a case where the litigation was sparked by conduct on the part of the respondent that is offensive and repugnant to what our Constitution and the Act envisage for the workplace. Legal costs incurred by a victim of such conduct in order to affirm his fundamental rights should be recovered from the perpetrator of such conduct. In my view the requirements of law and fairness dictate that the respondent should pay the appellant's costs.

[137] In the premises the order that I would make would be the following:

1. The appeal is upheld with costs.

2. The order of the Labour Court is hereby set aside and replaced with the following order:

"(a) The applicant's dismissal by the respondent is hereby declared to have been automatically unfair

as contemplated by sec 187(1)(d) of the Labour Relations Act, 1995;

(b) **The respondent is ordered to reinstate the applicant to the position he held in its employment immediately before his dismissal on the 11th May 2001.**

(c) **The order in (b) above is to operate with retrospective effect to the 17th March 2002.**

(d) The respondent is ordered to pay the applicant's costs."

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ZONDO JP

Appearances:

For the appellant	:	Adv K.S Tip SC (with Adv C. Orr)
Instructed by	:	Cheadle Thompson & Haysom
For the respondent	:	Mr S. Snyman
Instructed by	:	Snyman Attorneys
Date of Judgement	:	16 September 2005

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Case No. JA 3/03

IGNATIUS PETRUS KROUKAM
Appellant

And

S A AIRLINK (PTY) LIMITED
Respondent

JUDGMENT

DAVIS AJA

Introduction:

[1] Appellant was employed by respondent as a pilot. He was dismissed on 11 May 2001 after he had been found guilty of insubordination and constituting a disruptive influence to the operations of respondent. At the time of his dismissal he was the chairperson of the Airlines Pilot Association ('the union'). Appellant contended that his termination of employment constituted an automatically unfair dismissal in terms of section 187(1)(d) of the Labour Relations Act 66 of 1995 ('the Act') in that he had been dismissed for union activities as well as initiating litigation against respondent and on behalf of the union. On 31 May 2001 appellant referred the dispute concerning his dismissal to the Commission for Conciliation, Mediation Arbitration ('CCMA'). However the CCMA failed to conciliate the dispute within the time period contemplated in terms of section 191(5) of the Act, and the dispute was thus referred to the Labour Court for adjudication.

[2] After a careful and comprehensive analysis of all the evidence **Francis J** found that the allegation made by appellant that he had been dismissed for union activities was 'clearly without merit'. The applicant 'did not produce any evidence in this regard other than his personal feelings and perceptions. This is simply not good enough'. With the leave of the court ***a quo***, the appellant appeals to this Court.
[3] I have had the considerable privilege of reading the meticulous judgment of my brother **Zondo JP**. After anxious consideration, I have set out my own reasoning and order that I would grant. I have done this because I adopt a different approach both to the manner in which an automatically unfair dismissal should be considered by this Court and in respect of the relief to be granted in such a case. With regard to the first issue, I prefer to deal with the evidence on the basis of the onus of proof as provided for in the Act. In respect to the issue of relief, there is, in my view, a need to interrogate the meaning of sections 193-195 before turning to the facts in this dispute. The structure of these sections holds the key to the nature of the relief to be granted in this case.

Factual Background.

[4] Since 1994 appellant was employed as a pilot by respondent. He held the rank of captain and was the third most senior pilot employed by respondent. From 1997 until the date of his dismissal on 11 May 2001 appellant held the position either of chairperson or deputy chairperson of the union.

[5] In February 2001 the union and respondent became involved in a dispute over the crewing of certain Embraer jets which had been purchased by respondent. The union considered that these jets had to be crewed and the pilots trained in accordance with the collective agreement between respondent and the union which provided that all such appointments were to be made on the base of seniority of the pilots. Seniority was measured from the time that the pilot joined an airline. According to appellant this constituted the global norm for the determination of advancement in the airline industry.

[6] Respondent maintained that the jets had been purchased by an entity known as Metavia Airlines (Pty) Ltd and would be operated under the name SA Airlink Regional. On this basis, respondent contended that Metavia was not bound by any agreement which had been entered into between respondent and the union and that accordingly Metavia was entitled to select which of respondent's employees it preferred to offer employment. Any pilot who wished to fly the jets had to then resign from the employment of respondent and assume employment with Metavia.

[7] The union disputed the contentions advanced by respondent and launched an urgent application on 13 March 2001. Appellant was the deponent to the founding affidavit. The union obtained an order that the requirement that pilots resign from the employment of the respondent in order to fly the jets was a device being used by

respondent to avoid its obligations in terms of the collective agreement entered into between respondent and the union. The Court declared this requirement to be a unilateral challenge to the terms and conditions of employment of the union members and interdicted respondent from proceeding with the selection scheme for the period set out in terms of section 64(1)(a) of the Act. An order was granted on 19 March. Respondent filed an application for leave to appeal on the following day and undertook that the application for leave to appeal would not suspend the effect of the order.

[8] Office-bearers of the union including appellant attempted to engage respondent in discussions about ways in which to resolve the dispute but these initiatives proved to be unsuccessful.

[9] On 26 March 2001 the union launched a further urgent application. The appellant was again the deponent to the founding affidavit in which he referred to the fact that he had discussions on 22 March 2001 with Duke Moorosi, the respondent's operations director and Oupa Lintveldt, respondent's chief training pilot. In this application the union sought the committal of Roger Foster, respondent's chief executive officer, and Moorosi for contempt of the order granted on 19 March, 2001, alternatively a variation of the order granted which clarified that its effect was to prevent the recruitment of pilots for the jets on any basis other than in accordance with the collective agreements between respondent and the union,

[10] The contempt application was settled in terms of an agreement pursuant to which the issue of the crewing of the jets would be mediated. The agreement was concluded on 30 March 2001.

[11] On 29 March 2001 Lintveldt booked off the appellant from flying duties for the day on account of stress. Appellant saw a psychologist and was again booked off until 3 April by his general medical practitioner. Appellant attempted to fly again as from 1 April and indeed did so until 6 April when Willem van Schalkwyk respondent's chief pilot grounded him.

[12] On 12 April 2001 appellant received a notice to attend a disciplinary hearing on charges of gross insubordination as well as constituting a disruptive influence to the orderly operations of the organization. A notice was given to the appellant by Mr Foster who, before handing over the notice, gave a presentation on the extent to which the earlier litigation had damaged respondent's business. A disciplinary hearing took place on 19 April. Appellant was found guilty on both charges and dismissed. An appeal was heard on 24 May 2001 which confirmed the earlier decision.

Appellant's Case.

[13] Appellant's case turned on an attack upon the key factual findings of the **court a quo.** In summary, **Francis J** found that the litigation in March 2001

against the respondent 'had nothing to do with the applicant's dismissal…..By the time that the applicant was called to a disciplinary hearing on 12 April 2001, the litigation had already in fact been settled….'. **Francis J** held that the only evidence upon which appellant could rely for his contention that union activities lay at the heart of the dismissal was the lecture given by Foster about the consequences of the litigation. In any event, 'all the parties understood that it was in fact the union that was litigating against the respondent'. Accepting that the onus was borne by the employer (respondent) to prove that the dismissal was not automatically unfair, **Francis J** held that sufficient evidence existed to conclude that the appellant was dismissed on the grounds of gross insubordination and of being a disruptive influence to the orderly operation of the organization.

Mr Tip, who appeared together with Mr Orr on behalf of appellant, concentrated his argument on the manner in which the charges brought against appellant were never properly described nor motivated by respondent. Appellant was charged with gross insubordination and with being a disruptive influence on the ordinary operation of the organization but according to Mr Tip, respondent had consistently failed to provide clear justification for these charges.

[14] It appeared from the evidence that appellant had been charged with being a disruptive influence because he had failed to fly 950 hours during a calendar year. In the judgment of the disciplinary inquiry the charge is described thus:

'He is described in the charge as a disruptive influence. When looking at the time sheets as well as the evidence presented by the complainant, he falls short in terms of the productivity efficiency in that in the past 12 months only 697 hours have been worked out of the target of 950, which means by 27%.'

[15] Mr Tip referred to the evidence of Captain Van Schalkwyk, who was the chief pilot of respondent. Van Schalkwyk was asked to explain the nature of the charge that appellant was a disruptive influence. In this connection the following passage of his testimony is particularly illustrative:

'Well, again if I am unfair on you please tell me, I know you obviously did not attend the entire disciplinary inquiry, but it was quite apparent at the disciplinary inquiry that the issue under this charge was the fact that Captain had flown less than 950 hours in the 12 months preceding the inquiry. Do you recall anything of that

nature?

---Yes, I recall that as part of the explanation.

All right, now do you agree, is that the issue in terms of being a disruptive influence, was it one of the issues? --- I probably, it contributes to it, yes.

Contributes to it. --- Yes.

All right, now is that a disciplinary issue or is it an issue of capacity and is it misconduct to fly less than 950 hours? --- No, although pilots have a certain amount of freedom to manipulate their own flying schedule. Once a roster is issued pilots can request changes and swop flights and change their schedules, swop their schedules with other pilots.

But what I am saying is it an act of misconduct to fly les than 950 hours? --- No it is not a misconduct. It shows the effort that the pilot makes to contribute as hard as the rest.'

[16] Mr Tip submitted that the evidence of respondent's chief executive officer, Mr Foster, proved to be equally unsatisfactory. Mr Foster was also asked about the charge of being disruptive. He conceded that Captain Van Schalkwyk was correct that flying less than 950 hours 'could never be a disciplinary issue unless someone had refused to take flights'. He was then asked the following: 'Why did you charge my client with this ostensible, which we now agree could never be an act of misconduct as an ostensible act of misconduct?' He replied 'I think we would need to put that question with respect to the disciplinary officer'.

[17] A similar set of questions was put to Mr Lubbe, the human resources manager of respondent. He described the failure of appellant to fly 950 hours as 'poor work performance'. When he was asked directly 'did you see it as a misconduct', he replied 'No'.

[18] Mr Tip referred to further evidence given by Mr Foster which clearly showed that he was present at a meeting at which appellant had been given the charge sheet. The following passage of evidence, in Mr Tip's view, is of particular relevance:

'Is it correct that at that meeting you did a lengthy presentation to my client, where you indicated how much trouble the litigation of March 2001 had caused the company, that it caused you to take your eye off the ball is the term my client recalls. --- I think that that was common knowledge through the company at the time, there is quite substantial documentation both from my desk as well as from the desk of the chief pilot and the desk of the executive manager, so to have elaborated on that point I think would have been appropriate at the forum. So I would not deny that.

Why would it be appropriate the forum when you are charging my client with gross insubordination to talk about how the litigation had caused so much damage to the company? --- We had been in a process which from a strategic point of view compromised the company. This was to some extent seen as being ongoing difficulties from a labour point of view not related, but obviously following on and still causing the company difficulties.

Yes? --- And we wanted to highlight the importance of harmony, highlight you know what harm gets done when industrial disputes are at play in the form that it had taken through that dispute, and try and discourage this type of taken the law into their own hands.

But how did the act of gross insubordination cause you to take your eye off the ball? --- I think the eye off the ball statement came more to do with the intensity of the litigation; the company was embarked on a strategy for rolling out a plan for Africa, for dealing with Africa… and the liberalization aspects of that were not coming through at the pace at which we had expected them to and in particular whereas our Africa strategy had been launched on the basis of the Swaziland model, we had not put that in place as a contingency for what happens if liberalization of air transportation through Africa did not materialize as quickly as what had been promised. And any form of labour dispute, insubordination, disharmony in the company takes management's eye off that ball. It was an intense time. SA Airlink is a small company and it requires direct hands-on involvement by all of its (inaudible)…. to be spending time on the tedious type issues is not spending time on strategic progress.'

[19] A letter written on 24 March 2001 by Captain Van Schalkwyk to the 'Cockpit Crew' , echoed Foster's concern expressed during his presentation, particularly in the following passage: 'SA Airlink top management has the responsibility to the SA Airlink shareholders which demand proper management of huge amounts of money. Their first focus must be to ensure a profitable and professional new business venture. I have no grounds to question their business decisions, as they see a much larger picture than I (or any other individual) see. The labour issue of the past few weeks absorbed most of their energy and time, with the result that their ability to plan the future has been compromised severely. This has a direct impact on all employees of SA Airlink'

[20] Clearly, appellant had not proved to be particularly popular , neither with respondent's executives nor with respondent's attorney. On 29 March 2001 Mr Snyman, respondent's attorney wrote to appellant's attorney and said ***inter alia*** '… the writer wishes to state his disappointment at the attitude and behavior of Mr Kroukam of your client (sic) which the writer is firmly of the view is in breach of "a gentlemen's agreement" at Court in order to facilitate and motivate the settlement discussions then agreed upon to be held between the parties. To this writer, this is a clear indication of <u>your client's true attitude towards our client, and it will not be forgotten</u>' (my emphasis).

[21] Mr Tip also referred to the considerable lack of clarity as to the nature of the charge of gross insubordination. It appeared that this charge related essentially to a discussion between the appellant , Duke Moorosi who, at the relevant time was the operations director of respondent and Captain Lindveldt. The discussion took place on 22 March 2001. The meeting was of an informal nature in that the appellant, Lindveldt and Moorosi met in the cafeteria of respondent. A discussion ensued which was described as being "off the record" and appeared to turn on the issue as to whether members of respondent might have been in contempt of the court order which had been granted by the Labour Court on 19 March 2001.

[22] Moorosi testified that he informed appellant that: 'We are comfortable with the stand that we are not in contempt of Court, we are going ahead with hiring pilots for the sister company'. Moorosi then testified that these decisions had been taken

pursuant to legal advice received by the respondent. Moorosi's complaint was based upon the founding affidavit deposed to by appellant in support of the union's application that respondent was in contempt of the court order of 19 March 2001, in which the following passage appeared in that affidavit. 'Later in the course of the same day I also approached Moorosi in the canteen at SA Airlink. I said to him that I hoped that the parties could put the litigation aside and talk about the issue so that a resolution of them could be reached. Moorosi replied as he had done to Quantrill that there was nothing to discuss'. In an earlier paragraph in the affidavit, appellant made mention of the discussion which had taken place between Moorosi and Quantrill in which he alleged that Moorosi had stated that respondent "could do exactly what it liked, as it was a separate company'. Thus it could employ anyone it so chose, 'to take up positions on the Embraer jets'.

[23] According to Mr Tip , it was significant that this charge of gross insubordination, based upon the meeting at the cafeteria, was brought seventeen days later and only then after the underlying dispute had been settled. Mr Tip contended further that there was very little further evidence to justify the charge of insubordination. The two charges were, in effect, inexplicably intertwined. In Mr Tip's view, the real motivation for the charges having been brought against appellant was contained in the heads of argument which had been prepared for a disciplinary hearing by Mr Foster and in which the following appeared: 'Captain Kroukam has over the years appeared before several disciplinary commissions. It appears that Captain Kroukam has become bitter and vindictive towards the company especially after the disciplinary action taken by the company in October 2000. Clearly the relationship with Captain Kroukam and the company has become irreconcilable'.

[24] In summary, Mr Tip contested the conclusion reached by **Francis J** concerning the important part that appellant's union activities had played in respondent's decision to dismiss him. In his view, the evidence presented to the **court a quo** could not sustain the charges of gross insubordination or of being a disruptive influence to the ordinary operations of the organization. Appellant's case was that the clear inference to be drawn from the evidence was that his union activities had been the reason for his dismissal.

Evaluation.

[25] In argument before this Court, the key issues were the determination of the onus of proof, and the inferences which could legitimately be drawn from the evidence. According to Mr Snyman, who appeared on behalf of the respondent, an employee must prove the existence of the dismissal and in the present case must prove the existence of an automatic unfair dismissal. The employee bears the onus of proving an automatic unfair dismissal. In Mr

Snyman's view, this proposition was clearly contemplated in the provisions of section 192(1), read with the definition of dismissal in section 186 and the provisions of section 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 section 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 and Others v Afrox Ltd** 1999(20) ILJ 1718 (LAC) at paras 32 where **Froneman DJP** set out an approach in respect of an enquiry relating to an automatically unfair dismissal in terms of section 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 & Others** 1990(1) SA 32 (A) at 39D – 41A; **Minister of Police v Skosana** 1977(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:

> *"[1]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, section 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.

[29] The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most likely cause of the dismissal. Within the framework of this approach , it is now possible to return to the facts of this case and the key finding of the court **a quo**, that the argument that appellant was dismissed for union activities was completely without merit.

[30] The appellant was charged with two offences, namely gross insubordination and being a disruptive influence toward the operation of the organization. At the time of his dismissal he had almost twelve years' service, held the rank of Captain and was the third most senior pilot employed by respondent. At all material times he had been a member of the union, had for a period been its chairperson and played a pivotal role in representing the union and members interests during disputes between the union and respondent.

[31] The evidence indicated that the litigation of March 2001 had culminated in the union attempting to obtain the committal of members of respondent's management including the executive officer for contempt of court. Clearly no previous dispute between the union and respondent had generated anywhere near this level of emotion. Respondent's attorney recorded that the attitude of appellant would not be forgotten. This letter had been written on the instructions of Mr Foster. When appellant was given a copy of the disciplinary charges, Mr Foster engaged appellant in a lengthy discourse concerning the damage that the litigation of March 2001 had inflicted upon respondent, including compromising respondent's expansion plans.

[32] In heads of argument which had been prepared by Mr Foster for the appellant's disciplinary hearing, the following was stated: "Neither Captain Kroukam nor his legal representative challenged the statements that he made on several occasions show no confidence in the breakdown and trust in management – he had on

several occasions called for the resignation of key personnel including the operations director, the chief pilot and he required the arrest and detention of his operations director and his chief executive. His justification for these disruptive actions was that he had acted in his capacity as shop steward. The complainant illustrated that, as Captain Kroukam's affidavit had been signed in both his capacities as an employee and in his capacity as shop steward, it had been difficult to separate these roles and differentiate which disruptive actions were attributable to his persona. Captain Kroukam further admitted that a requirement for the resignation of chief pilot, after only four months in office during the time of dynamic change requiring intense management of the change process, was entirely unreasonable and that Captain Van Schalkwyk had done an excellent job in the circumstances. This irrationality demonstrates a breakdown of trust without reason and disruption without reason.'

[33] This claim by Mr Foster read in the context of the disputes between the union and respondent raises a credible possibility that the reason that respondent wished to dismiss appellant had far more to do with appellant's leadership of the union and the role that he had played in the litigation in March 2001 than with any aspect of his personal work performance.

[34] This conclusion is supported by the absence of any credible evidence, save for one oblique paragraph in the founding affidavit deposed to during the contempt application, to support the charge of gross insubordination. None of the key witnesses, including Captain Van Schalkwyk and Mr Foster, were able to present specific details about the reasons for appellant's dismissal on the grounds of his constituting a disruptive influence. As Mr Tip correctly noted, had Mr Foster come to the view that he could no longer work with appellant then he should have said so and the true basis for dismissal could have been tested in court.

[35] Mr Foster sought to substantiate the charge of appellant being a disruptive influence by reference to his work performance. This contention was adequately reflected in the closing argument made by Mr Foster at the disciplinary hearing:

'He (appellant) agreed that his work performance, at 697 hours over the past 12 months and 48 hours during the month of March fell far short of the company productivity efficiency targets of 950 and 86 hours respectively by 27% and 44% respectively, as well as far short of the company averages. He justifies this poor performance on the basis of sick leave taken as a consequence of stress suffered whilst dealing with union activities, and on the basis of requiring time to attend to the recent litigation lead by APA on the company. As Capt Kroukam is foremost an employee of the company, this poor work performance is clearly disruptive to the companies operation.'

[36] However respondent's disciplinary officer, Ms Lubbe, denied that this allegation of poor performance constituted misconduct and that allegations of the former should be dealt with in the same manner as the latter.

[37] Mr Snyman contended that appellant was in effect an employee 'from hell', who had a history of acrimonious behaviour towards his colleagues. He had breached a confidence with the Operations Director and the Chief Pilot. He had a serious conflict with Capt Van Schalkwyk regarding a psychological report which the latter had requested from appellant. His work performance was poor. The cumulative weight of all these factors justified respondent's action in charging appellant with gross insubordination and being a disruptive influence to the ordinary operation of the organization.

[38] The difficulty with this submission is that, when the evidence relating to his dismissal is read as a whole, the conduct of appellant as an employee appears to have been of far less importance than his role as a union official in the litigation against respondent. In summary, the letter of warning from Mr Snyman of 29 March 2001 to the effect that appellant's 'true attitude towards our clients… will not be forgotten', the lecture given by Mr Foster to appellant concerning the disruption caused by the union's litigation and the very thrust of Mr Foster's argument at the disciplinary hearing all point in the direction of a clear justifiable inference: that the cause of appellant's dismissal was his union activity and the central role he played in the litigation in March 2001. This inference is supported by the inability of respondent's witnesses to provide an alternative, coherent explanation as to the evidential grounds upon which the charges were based. Viewed holistically the evidence supports the conclusion that the dominant cause of appellant's dismissal was his union activities. Accordingly, the dismissal falls within the scope of s 187(1)(d) of the Act and is automatically unfair.

Relief.

[39] Mr Snyman submitted that, even were it to be found that the appellant's dismissal was fair, the award of reinstatement would be a wholly inappropriate order. The working relationship between respondent and appellant had been finally severed. A range of legitimate safety concerns had vexed respondent. In particular, Mr Snyman submitted that appellant had been unable to procure positions with at least two other airlines, solely as a result of psychometric results. Given the stressful working environment in which pilots operated, it could not be expected that the respondent should reemploy the appellant as a pilot. Furthermore, Mr Snyman submitted that, were appellant to be reinstated, it would cause the respondent to incur more than R100 000 in costs of retraining appellant.

[40] As Mr Tip observed, had appellant remained in the employ of respondent he would, in any event, have had to be retrained annually. There was no evidence to gainsay appellant's contention that he had been an exemplary employee and a proficient pilot. The relationship between the executives of respondent and appellant had broken down, as the findings above indicate, primarily as a result of the activities undertaken by appellant on behalf of the union.

[41] To accept an argument that reinstatement was an inappropriate remedy because of a broken working relationship, would, in the circumstances of this case, work significantly to the prejudice of appellant who had been automatically unfairly dismissed. No compelling reasons, other than a broken relationship caused by factors which did not relate to appellant's proficiency as a pilot, were offered by respondent as to why this Court should not order reinstatement. In short, on the evidence, the working relationship had broken down because of activities of appellant which are statutorily protected in terms of s 187 of the Act; hence reinstatement was clearly an appropriate remedy in this case.

[42] Mr Tip submitted that the appellant should be reinstated with full retrospectivity to the date of dismissal. By contrast, Mr Snyman submitted that the order of reinstatement should not exceed twelve months and that accordingly any compensation which the appellant received should be limited to an amount not exceeding twelve months' salary.

[43] Under the Act's predecessor, the Labour Relations Act 28 of 1956 and in particular S 46(9) thereof, it was permissible for a court to order reinstatement and compensation in the same case so long as it was deemed reasonable and fair to both parties. See **Chevron Engineering (Pty) Ltd v Nkambule and Others** (2004) 3 BLLR 214 (SCA) at para 30 and the authorities cited therein.

[44] However, the present dispute must be determined under a different legal framework. It is thus necessary to examine sections 193, 194 and 195 of the Act.

The relevant provisions of section 193 read as follows:

1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a

dismissal is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not

earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

(3) If a *dismissal* is automatically unfair or, if a *dismissal* based on the employer's *operational requirements* is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

The relevant provisions of section 194 read as follows:

1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of

dismissal

2) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal

Section 195 provides as follows:

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment..

[45] Mr Snyman submitted that, where a court order provides for retrospective reinstatement only without compensation, the **status quo ante** is restored, meaning that the employee returns to his or her same position on the same terms of employment without any interruption in service. However, no payment for any remuneration for the interim period between the dismissal and the reinstatement order should be made. According to Mr Snyman, where the court order provides for compensation only without reinstatement, the court then determines an amount of compensation based upon the employee's remuneration by exercising its discretion. There is, however, no restoration to the **status quo ante**. Where the court orders reinstatement and compensation, the reinstatement is not accompanied by any payment or remuneration for the period between the dismissal and the reinstatement Compensation paid is

dependant upon the exercise by the Court of its discretion provided that both the reinstatement and compensation could not be made earlier than the actual date of the dismissal.

[46] Based on this analysis, Mr Snyman submitted that, where a court finds an unfair dismissal to exist and wishes to award both reinstatement and compensation, an appropriate order would be to provide for retrospective reinstatement from the date of dismissal and compensation equal to the period that the employee was unemployed.

[47] Mr Snyman submitted that, were this interpretation to be rejected, and retrospective reinstatement and compensation were to be treated as mutually exclusive, the employee, who did not seek reinstatement as specifically envisaged in section 193(2)(a) of the Act, would automatically be in a less favourable position than the employee who desired reinstatement merely on the basis that reinstatement ***per se*** was sought. An employee who sought reinstatement could then feasibly receive limitless back pay while the employee who did not apply for reinstatement could only receive twelve months' remuneration and compensation in terms of section 194(1) of the Act or 24 months' compensation in terms of section 194(3) of the Act.

[48] As noted, Mr Tip contended for reinstatement with full retrospectivity. In support of this form of relief, he submitted that, on an ordinary interpretation of section 193, the use by the legislature of the word 'or' between section 193(1)(b) and section 193(1)(c) supported the interpretation that an 'or' should also be included between section 193(1)(a) and section 193(1)(b). Thus, the available remedies were cast in the alternative, being reinstatement, re-employment or compensation.

On this reading of s 193, it follows that for "ordinary" dismissals, there was a clear expression for the principle of alternative remedies. If the literal meaning of these provisions defined the field in relation to all dismissals, the question of compensation would not arise at all in the present dispute, since the appellant sought reinstatement. He stood to fall within the ambit of section 193(2).

[49] Respondent sought to invoke s 193(2)(b) and (c) in support of the contention that appellant should not be reinstated. On this line of argument, Mr Tip contended that this Court would then need to decide the effective date of the reinstatement and the extent of the back-pay which formed part of that reinstatement. The only limitation in this regard would be that the reinstatement could not be fixed at a date earlier than the date of the dismissal: (section 193(1)(a)). For this purpose the Court exercises a discretionary power. See **NUMSA & Others v Fibre Flair CC** t/a **Kango Canopies** (2000) 6 BLLR 631 (LAC) at 633 B-E.

[50] This submission finds support in Martin Brassey **Commentary on the Labour Relations** Act Volume 3 at A8: 65: 'Reinstatement and re-employment are mutually exclusive and, since both cannot be awarded it is reasonable to conclude that the three remedies available in terms of section 193(1) are available only in the

alternative. As a result, compensation cannot be awarded when reinstatement or reemployment is ordered and the employee must then be content with the money that flows from the back-dating of such an order'.

[51] The further question then arises as to whether section 193(3) confers a power upon a court to order reinstatement together with compensation. As Mr Tip correctly noted, the policy considerations underlying section 193(3) do not readily emerge from the express wording of the provision. The section confines itself to two kinds of dismissals: those that are automatically unfair and those arising for operational reasons. There would appear to be no policy equivalence or parity of moral judgment between an automatically unfair dismissal and an unfair retrenchment, for example on the basis of a procedural omission. But no distinction is drawn between these two forms of dismissal in section 193(3). There does not appear to be any statutory basis for a distinction in this regard between an automatically unfair dismissal and other forms of unfair dismissal. Indeed as noted, s193(1) applies to all dismissals, whether ordinary dismissals heard by an arbitrator or automatically unfair dismissals and dismissals for operational reasons heard in the Labour Court. In addition, section 193(1) clearly envisages that a court will be confronted by a primary election, namely which category of relief is appropriate to the applicable facts. Section 193(3) thus contemplates that an order may be granted which is ancillary to the main relief granted (i.e one of the three alternatives) in terms of section 193(1).

[52] Once a distinction is drawn between reinstatement and compensation, the meaning and scope of section 194(3) becomes clear. This provision caps the award of compensation, not the amount which may be awarded pursuant to the alternative order of reinstatement, as envisaged in section 193(1).

[53] This distinction was appreciated by this Court in **CEPPWAWU and Another v Glass and Aluminium 2000 CC** [2002] 5BLLR 399 (LAC) where at para 50 **Nicholson JA** said 'the amount of compensation that is awarded to an employee whose dismissal has been found to be automatically unfair must reflect an appreciation of the fact that, save in exceptional circumstances, such employee would be the most deserving of an order of reinstatement with full retrospective effect to the date of dismissal so as to place the employee in the same position he would have been in had he not been dismissed, but also to penalize the employer for dismissing the employee for a prohibited reason'.

[54] **Nicholson JA** went on to say: 'This is because I would have had no hesitation in ordering his reinstatement with full retrospective effect to the date of his dismissal, had he elected to seek reinstatement. The purpose of such order would have been to ensure that the employee was placed, as far as it is possible, in the position in which he would have been in had he not been dismissed. It would also have been imperative to send a clear message to all employers, who may be tempted to dismiss employees for any of the prohibited reasons, that such conduct is totally unacceptable and would be met with severe disapproval by this Court. This is because I would have had no hesitation in ordering his reinstatement with full retrospective effect to the date of his dismissal, had he elected to seek reinstatement. The purpose of such order would have been to ensure that the employee was placed, as far as it is possible, in the position in which he would have been in had he not been dismissed. It would also have been imperative to send a clear message to all

employers, who may be tempted to dismiss employees for any of the prohibited reasons, that such conduct is totally unacceptable and would be met with severe disapproval by this Court.' (at para 52).

[55] In my view, section 194(3) relates to compensation only and has no bearing on an order for reinstatement. Once respondent's contention is rejected, namely that reinstatement is not an appropriate remedy in that a continued employment relationship would be intolerable and thus such relief is impracticable, then reinstatement is clearly the competent remedy in terms of s 193(1).

[56] There is one further section that needs to be considered, in the present dispute. Section 195 provides thus:

"An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment".

The question thus arises: To what extent does this section justify an award of compensation in addition to an amount which may flow pursuant to reinstatement?

[57] On the basis of the analysis employed regarding the relationship between sections 193(1) and 193(3), section 195 could not open the way to an order of both reinstatement and compensation. In the first place, it would run counter to the requirement of the choice which must be made between the three alternatives provided in section 193(1). Secondly, regard must be had to the fact that section 195 is not confined to a particular class of dismissal. If section 195 were to mean that compensation could be awarded as an additional form of relief in the case of an automatically unfair dismissal, it should have precisely the same result in respect of any other dismissal.

[58] For section 195 to be read as permitting compensation as well as reinstatement, it would require the phrase '*any other amount to which the employee is entitled"* to be read as being at least partly equivalent to an order of reinstatement. The difficulty with this approach is to be found when section 195 is considered not in relation to a reinstatement order but in relation to the alternative of re-employment. In that event, there would arise a ***de novo*** contract and there would be no amount to which the employee would be entitled.

[59] If an order of reinstatement is made, then the contract is restored and any amount due would necessarily be part of the employee's entitlement. If a lesser period than reinstatement to the date of dismissal were ordered, that would be exhaustive of the extent of the employee's relief. It would surely be untenable to read section 195 as importing a capacity to recover a reinstatement portion which the Labour Court has decided should not be awarded.

[60] The scope of section 195 should be confined to the situation of compensation where reinstatement or re-employment are not applicable. This would be consistent with the analysis of the Supreme Court of Appeal in **Fedlife Assurance Ltd v Wolfaardt** [2001} 12 BLLR 1301 (SCA) at paras 24 – 25. As **Nugent AJA** (as he then was) held, section 195 would permit an employee who receives compensation under the Act to pursue, in addition, common law or other statutory claims.

[61] In summary, the wording of section 193(1)(a) supports appellant's contention that the Court has a discretion in respect of the retrospectivity of a reinstatement

award. In exercising this discretion, a court can address **inter alia** the time period between the dismissal and the trial . The Court can accordingly ensure that an employer is not unjustly financially burdened if reinstatement is ordered.

[62] There was some suggestion that appellant could have obtained other employment after dismissal. There is considerable uncertainty as to possible terms and conditions that might have been so concluded and hence the monetary effect of such alternative employment. There is also evidence from appellant that the possibility of contract flying positions could not be taken up due to the trial before the court **a quo**.

[63] Two further considerations must be taken into account in the framing of the relief, being:

(i) the delay in finalizing the dispute;

(ii) employment undertaken by appellant after dismissal.

Appellant was dismissed on 11 May 2001. The dispute came before the court **a quo** on 17 October 2002. . Clearly, delays through the courts cannot be blamed on respondent. The reinstatement order must take account of these delays. It is also common cause that after dismissal, appellant was employed for 5 months during which period he earned R18,000 per month.

[64] Accordingly, the order to be made must take account of these delays and the remuneration that appellant earned (and might have earned) during the period from dismissal to reinstatement . But the order should also bring finality to these proceedings. For this reason , I consider that , given all these factors , a backdated period of reinstatement of twelve months from the date of this judgement constitutes a just and equitable order.

[65] In the circumstances, the appeal succeeds and the following order is made:

The order of **Francis J** of 17 October 2002 is set aside and replaced with the following order:

1. The dismissal of the appellant on 11 May 2001 is declared to be automatically unfair in terms of section 187(1)(d) of the Act.

2. The appellant is reinstated in his employment with respondent with effect from 9 September 2004.

3. Respondent is ordered to pay the costs incurred by appellant, including the costs of two counsel.

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DAVIS AJA

WILLIS JA:

[66] I have had the inestimable privilege of reading the various drafts prepared in this difficult matter by my learned brothers Zondo JP and Davis AJA.

[67] Both Zondo JP and Davis AJA arrive, by somewhat different routes, at the same factual conclusion: that the appellant was dismissed primarily as a result of the activities undertaken by him on behalf of the union. I agree with this factual finding. As long as we all arrive at the same destination on the questions of fact, I think it irrelevant for me to indicate which route I prefer. It will be of no assistance to anybody. If, for example, I arrive in Cape Town for a specific purpose, how I did so is irrelevant and of no interest to anyone, save the idly curious. Certainly, I cannot say that either of Zondo JP or Davis AJA is incorrect in following the route which he does. Whether one travels to Cape Town via the Garden Route or the Karroo, each journey will have its own charms. Questions of law are a different matter. On such questions the reasons of judges do matter, not only in the particular case but also for those that may come afterwards.

[68] We all agree that, having come to this particular conclusion, it follows, as a matter of law, that the dismissal is automatically unfair in terms of section 187 (1) (d) of the LRA. This follows from a plain reading of that subsection (read together with subsection 4(2) (a)). I need say no more.

[69] We all agree, that on the facts of this particular case, the Court was obliged to reinstate the appellant. This follows from a plain reading of section 193 (2) of the LRA. Again, I need say no more.

[70] As the author of the unanimous judgment in **NUMSA & Others v Fibre Flair CC** t/a **Kango Canopies**[1] to which Davis AJA refers in his judgment above, I should imagine it comes as no surprise that I agree with the opinion and reasons expressed in that judgment that the Court has an equitable discretion as to the date from when which reinstatement takes effect provided, however, that reinstatement may not be ordered from a date prior to the actual date of dismissal. Zondo JP, Davis AJA and I all agree on this aspect. In my opinion, for the purposes of this case, nothing more needs to be said concerning the principle.

[71] All that remains to be determined is the date of reinstatement.

[72] Having regard to all the facts of this case and, in particular, the pressing need for finality, I adopt, as my own, the reasons of Davis AJA given in paragraphs [61] to

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1 (2000) 21 ILJ 1079 (LAC); [2000] 6 BLLR 631 (LAC

[64] of his judgment. I therefore prefer the order proposed by Davis AJA and cast my vote accordingly.

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WILLIS JA