166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: **C365/99**

In the matter between:

DESMOND MALANG	Applicant
And	
MR D I K WILSON N.O. COMMISSIONER CCMA	First Respondent
WYNLAND PRINTERS (PTY) LIMITED	Second Respondent

JUDGMENT

STELZNER AJ

1. This matter came before me by way of an application in terms of section 145 of the Labour Relations Act, No 66 of 1995 ("the Act"). The applicant seeks an order reviewing, setting aside and correcting the arbitration award of the first respondent sitting as a Commissioner of the Commissioner for Conciliation Mediation & Arbitration, alternatively reviewing and setting aside the award and referring the matter back to the CCMA for a fresh decision. The applicant alleges that the findings of first respondent are unjustifiable in relation to the reasons given for them.

2. At the arbitration proceedings the first respondent found that the second respondent had proved on a balance of probabilities that applicant was guilty of the offence of insubordination. He found, further, that second respondent had held both a disciplinary hearing and an appeal, both of which were chaired by one Mr Atkinson, the managing director. It was common cause that the applicant had been employed as a general assistant. First respondent found that at the appeal hearing Atkinson made an offer to reinstate applicant in the position of assistant guillotine operator.

The fact that the decision on appeal was to reinstate the applicant nullified what would otherwise have been regarded as procedural unfairness by virtue of the fact that both the disciplinary enquiry and the appeal were chaired by the same person. However, the first respondent also pointed out that, in any event, as Atkinson was the managing director there was no more senior person in the company to chair the appeal. In the arbitration award the first respondent states that the only allegation of procedural unfairness raised by the applicant was the fact that Atkinson had chaired both hearings. In the circumstances he found the dismissal to be both substantively and procedurally fair and the application was dismissed.

3. The matter came before me on an unopposed basis. The first respondent filed an affidavit clarifying the reasons for his award but stated that he abides the decisions of this court in the review. The applicant had previously been given leave by this court to supplement the grounds for his review by way of a supplementary founding affidavit. The original founding affidavit had been somewhat unclear in regard to the grounds for review and the relevant section of the Act under which the review was brought. The supplementary founding affidavit did not repeat all of the averments contained in the original founding affidavit. When the matter came before me, however, three essential grounds for review were pursued and argued. I deal with each in turn hereunder.

4. Mr O'Dowd, who appeared for the applicant, argued that there were no facts before the first respondent to sustain his finding that applicant had been offered reinstatement at the appeal hearing. He submitted that the facts showed that applicant had been employed as a general assistant and was, at the appeal hearing, offered the position of assistant guillotine operator. He submitted that it was thus quite clear on the facts that what was offered was a different position to that which

applicant had previously occupied. He argued that the offer was thus an offer of re-employment rather than reinstatement. He argued that in the absence of evidence to support the first respondent's finding there was an irregularity in the proceedings such as contemplated in section 145(2)(a)(ii) of the Act.

5. In the affidavit filed by the first respondent he clarifies his finding in regard to the fact that there was an offer of reinstatement by stating that the decision on appeal amounted to reinstatement in "*substantially the same position*". The first respondent's notes which formed part of the record before me indicate as follows on this subject:

"*DM* (the applicant) *was not dismissed – was suspended on full pay. He was offered a job as assistant guillotine operator; he refused it; therefore dismissed. No other opportunity available*."

6. In my view the distinction between reinstatement and re-employment goes to the issue of continuity of employment. An employee who is reinstated is regarded as having continuous service from the original date of appointment, whereas an employee who is re-employed commences afresh as a new employee. On the facts before the arbitrator (as they appear from the limited papers before me – the record consisting of only a hand written notes by the first respondent) it appears that he was correct in concluding that the applicant was offered reinstatement albeit that the job he was offered was not exactly the same as the one previously occupied by him. I have no difficulty with the concept that an employee be reinstated albeit on different terms and conditions of employment. The issue which would flow therefrom would be whether or not it was reasonable or unreasonable in the circumstances for the employee to refuse the offer of reinstatement on different terms. That, however, is

not the issue before me in this matter. I am unable to conclude on the facts before me, therefore, that the first respondent's finding in regard to the offer of reinstatement was unjustifiable or that it constituted a gross irregularity.

7. This leads me to applicant's second ground of review, namely, the fact that first respondent reached the conclusion which he did in respect of the issue of the disciplinary hearing and the appeal being held by the same person. In the first instance it was submitted that the reason given by first respondent to the effect that there was no more senior person to chair the appeal was unsupported by any evidence. (It was conceded, nevertheless, that as Atkinson was the managing director it was hard to imagine the existence of someone more senior within the business). However, it was submitted further that it was clear from the record that there was a third director (the second director having been the initiator of the charges against the applicant) who on the face of it could have chaired one of the hearings. It was submitted, therefore, that the arbitrator's conclusion was wrong in law. If there was someone else of the same seniority he could and should have heard the appeal in Atkinson's stead.

8. I am not satisfied that the conclusions reached by the first respondent can be said to be wrong either in fact or in law. The fact that there was another director who, arguably, could have chaired the initial enquiry or the appeal may be so. The fact still remains, however, that there was no more senior person in the company to chair the appeal after Atkinson had chaired the disciplinary enquiry. The first respondent's conclusion on the facts thus cannot be faulted. The first respondent's conclusion, furthermore, was not that it was, as a matter of law, in the normal course of events fair for the same person to chair both the initial hearing and the appeal. He decided, rather, that because Atkinson offered the applicant reinstatement on appeal it was

clear that Atkinson had applied his mind afresh to the matter and that the applicant had not been prejudiced by the fact that the same person chaired both hearings. I do not think that his application of the law to the facts was either inappropriate or unjustifiable.

9. Finally, it was submitted that the first respondent's finding to the effect that there were no procedural irregularities was unjustified in relation to the evidence before him. It was submitted that the evidence showed clearly that the procedure was unfair in that Atkinson discussed the arguments and evidence with the rest of management in the absence of applicant and his representative and, further, decided the outcome after consulting with the rest of management, including the complainant, in the absence of applicant and his representative. In short it was submitted that faced with this evidence it was totally unjustifiable for the arbitrator to have concluded that the procedure was fair.

10. In regard to this last ground the record does appear to indicate that Atkinson in fact had discussions and made his decision in consultation with management. Such conduct would normally tend to indicate procedural unfairness. However, it appears from first respondent's award that he made his decision on the issue of procedural fairness on the basis that the employee had "*only alleged procedural unfairness in that Mr Atkinson chaired both hearings.*" If that was the only challenge to procedural fairness before him (and this issue is not placed in dispute on the papers before me) and in the light of his conclusions on that challenge, it does not appear that there is anything irregular in the conclusion of first respondent that the dismissal was procedurally fair.

11. Accordingly, applicant has failed to pursuade me in regard to any of the grounds

put forward in support of the application for review under section 145 of the Act. As the matter was unopposed applicant should simply bear his own costs.

12. I might mention further that, even if I were wrong in regard to my conclusions as set out above, this appears to be the kind of case such as is contemplated by the Labour Appeal Court in *Johnson & Johnson v Chemical Workers' Industrial Union* (1999) 20 ILJ 89 (LAC), where one would be inclined, given the refusal by applicant to accept the job offered to him at the appeal, to exercise one's discretion against making any award of compensation even in the event of finding some procedural unfairness.

13. In the circumstances I make the following order:

13.1 The application is dismissed.

13.2 There is no order as to costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 19 August 1999

DATE OF JUDGMENT: 27 August 1999

APPEARANCE FOR APPLICANT: Mr B O'Dowd