IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO P640/2000

In the matter between:

TRANSNET LIMITED Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

COMMISSIONER JOHAN NIEHAUS NO Second Respondent

MARITIME INDUSTRIES TRADE UNION OF SOUTH AFRICA Third Respondent

O'BRIEN & OTHERS Fourth to Further Respondents

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JUDGMENT

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JAMMY AJ

1. The salient facts in this matter are succinctly set out in the Heads of Argument presented by Counsel for the respective parties and may be summarised as follows:

2. The Fourth and further Respondents are ex-naval officers who were recruited by the Applicant as tug masters during the period 1996 to 1998.

3. Two factors encouraged that recruitment. The Applicant, prior thereto was in need of tug masters and naval officers were provided with an opportunity to exploit their skills and experience in the private sector. Whereas, prior to their employment by the Applicant, they were not qualified to function as tug masters, a basis for their retention as such was negotiated by the Applicant with the regulating authority, at the time the Department of Transport.

4. Pursuant thereto the Applicant advertised the vacant tug master positions and at much the same time, the Department of Transport issued a "Marine Circular 10 of 1997" ("the Circular"), addressed to all principal officers under the heading "The Employment of Naval Officers on Portnet Tugs."

5. Whereas, prior to the recruitment of the individual Respondents, the minimum qualification for appointment as a tug master was a certificate known as the "Standard Training Certificate for Watchkeeping" ("STCW"), the broad effect of the Circular was to permit the Applicant to employ naval officers on Portnet tugs on certain conditions, inter alia, exemption by the Department, on application by the Applicant, from the stringent qualifying prerequisites, save for the requirement that the officers were required to undergo a training period of six months.

6. The STCW was and remained a prerequisite for tug master functions on the open sea and the exemption related therefore only to activities within port limits. It is appropriate, in that general context, that reference is here made to certain further provisions of the Circular. They are the following:

"The above is an interim measure. Portnet is developing a training programme and plan to take officers through from rating to master. There will be a programme for certificates limited to port operations and another to enable the officer to obtain an STCW endorsement to his or her certificate of competency.

It is the aim of the programme to slot naval officers into these training programmes and in so doing, dispense with the need for exemptions. Should a naval officer want to obtain a Deck Officer certificate of competency with STCW endorsement, the current system and practice calls for him or her to show proof of the following for the issue of a Deck Officer Class 3 certificate of competency....."

7. The granting of the exemption and the other specific conditions of employment set out in the Circular were, as indicated, expressly stated therein to be an "interim measure" pending the full qualification of the ex-naval officers through specified training programmes and the resultant obviation of the need for

exemptions.

8. One of the requirements for the STCW endorsement to the naval officers' certificate of competency was defined as "12 months sea service on trading vessels on long voyages."

9. The Port Operations Certificate restricted the holder to operations within ports whilst the "open sea" STCW certificate was an internationally recognised marine qualification of obvious benefit in the context of the development of the career paths of the individuals concerned.

10. The exemptions under which the Respondents operated were extended from time to time to enable them to obtain the Port Operations Certificate, subject ultimately to a final deadline which, if not complied with, would result in their dismissal. It is common cause that, under protest, the Respondents timeously completed the course.

11. That protest was sourced in their contention that, based on the Circular, which they considered to constitute a material term of their employment, they had accepted that employment on the assumption that they would be trained to attain the STCW qualification. As matters now stood however, that course was not made available to them as an element of their employment.

12. The Second Respondent identified the crux of the dispute referred to him for arbitration as lying in the wording of the Circular relating to the two training programmes in question. Portnet, he concluded, "maintained that it had a discretion as to what qualification it would allow its employees to obtain. Mitusa (the Third Respondent) maintained the discretion was the employee's." The wording of the paragraph, he stated, "can be interpreted to support either one of the opposing positions."

13. In that context, the issue for determination by him, as defined by agreement between the parties, was recorded in his award in the following terms:

"1. Whether or not there was an agreement to the effect that the affected Employees were entitled to undergo STCW Training (Standard Training Certificate for Watchkeeping);

2. Whether or not the Employer's conduct in not allowing the affected Employees to undergo STCW Training was, in the totality of the circumstances, unfair and as such constituted unfair conduct by the Employer-party in relation to training as envisaged in Item 2(1)(b) of Schedule 7 to the Labour Relations Act, No 66 of 1995 as amended."

14. The conclusions reached by the Second Respondent followed a detailed review by him of the evidence presented to him and his Order, in its terms, was a comprehensive one. The Second Respondent expressly found that there was "an agreement in respect of training", ... "that STCW training or equivalent formed part of the Employee's conditions of service" and that "the Employer unilaterally changed the conditions of service." The circumstances in which that occurred, having regard to "the impact the lack of a STCW qualification will have on the career advancement of those affected", he held, amounted to an unfair labour practice as envisaged in Item 2(1)(b) of Schedule 7 of the Labour Relations Act 1995 ("the Act"). The Order that he proceeded to make, in its full terms, read as follows:

"AWARD

I find that the Employer, Portnet, did commit an unfair labour practice as envisaged in Item 2(1)(b) of Schedule 7 to the Labour Relations Act, No 66 of 1995, as amended and I make the following order:

1. Portnet shall allow the affected-Employees to gain such training and experience necessary for purposes of obtaining a STCW endorsement to their certificates of competency;

2. To the extent that it may be necessary to gain experience at sea on commercial vessels of companies other than Portnet, Portnet shall advise such companies of the fact that the affected-Employee is on an official Portnet training programme and Portnet shall provide such

support necessary to enable the affected-Employee to secure placement on the said commercial vessel;

3. Should the aforesaid result in any absence on leave, Portnet shall pay such Employee his full remuneration and benefits during the period of absence of leave, provided that in the event of the Employee receiving any remuneration or benefits from another source in relation to the Employee's duties on such commercial vessel, then that amount shall be taken into account to the benefit of Portnet;

4. To the extent that an Employee has to attend to academical studies on a full-time basis for purposes of obtaining the STCW endorsement, Portnet shall grant such Employee absence of leave on full remuneration and with retention of benefits, for the prescribed period in which such course can be completed in the normal course of events;

5. Any absence on leave granted to an Employee in terms of 3 and 4 above, shall result in such Employee being obliged to work for Portnet for a period equal to three times the period of absence on leave, failing which the Employee shall pay to Portnet such pro-rata portion of the expenses incurred by Portnet as represented by the period the Employee failed to render services;

6. The affected-Employees shall be permitted to attend such further studies and/or experience at sea on a staggered basis within five (5) years from the date of this award;

7. For purposes of 6 above, the parties shall agree on criteria to determine a schedule reflecting which Employees will be granted leave first, failing such agreement, Employees will be scheduled on the basis of the results of the Port Operations Certificate exams with those Employees who scored the highest marks being placed first on the schedule'

8. Should Portnet succeed in compiling a programme on the basis of the affected Employees receiving recognition for previous sea time acquired or courses completed, or should Portnet succeed in compiling a programme which will ensure that the Employees qualify for a STCW endorsement on an expedited basis, then such programme shall get preference over this award;

9. Nothing in this award prohibits the parties on reaching agreement on ways and means acceptable to both parties, in attaining an STCW endorsement."

15. It is the review and setting aside of that Award that the Applicant pursues in

these proceedings. It seeks the following additional relief:

"2. Substituting the award made by the Second Respondent with an order that the First Respondent had no jurisdiction to arbitrate the dispute, alternatively;
3. substituting the award made by the Second Respondent with an order that there was no factual or legal basis for concluding that an unfair labour practice had been committed;
4. Making such order as the Court deems appropriate for the further conduct of proceedings, if any, including an order that the dispute should be referred to a Senior Commissioner of the First Respondent for a re-hearing."

16. The grounds of review which the Applicant submits are that the Second Respondent "committed a gross irregularity and/or alternatively, committed misconduct and/or alternatively exceeded his powers." The first element of alleged irregularity addressed, is the contention that the First Respondent, the CCMA, lacked jurisdiction to be seized of the matter and that the Second Respondent was therefore not entitled to arbitrate the dispute, with the result that his award "is accordingly a nullity and should be set aside." This, the Applicant submits, is because the Second Respondent concludes on the one hand, that the provision of STCW training was a condition of employment which, without consultation or negotiation, was unilaterally amended by the Applicant to the prejudice of the Respondents, but then proceeds to classify the dispute as one relating to training. A dispute relating to the unilateral change of terms and conditions of service, the Applicant contends, is one of mutual interest which is not arbitrable by the CCMA.

17. In ordering that training be provided moreover, with paid leave to the Respondents for that purpose, the Second Respondent, it is submitted, exceeded his powers. The manner in which that training must be provided "must be looked for in the contract and no provision is made therein in that regard." Nor, says the Applicant, was any evidence adduced on that issue in the arbitration.

18. In essence, the Applicant submits, both the grievance and the Award necessitate the diversion of resources and funds from the Applicant for the benefit of the Respondents, with no guaranteed return on that investment. The procurement by the Respondents of that form of benefit and the circumstances in and conditions upon which it is obtained, are economic issues properly left to collective bargaining and the power play involved in that concept. They are issues of mutual interest, rather than right and as such, are not arbitrable under the provisions of Schedule 7 or otherwise.

19. Support for that contention is sought in

Hospersa & another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC) at 107 D.

"The provisions of Schedule 7 Item 2(1)(b) were not meant to allow arbitrators to adjudicate upon collective bargaining disputes. This much has been expressly recognised by the Labour Appeal Court in Hospersa & Another v Northern Cape Provincial Administration (2000) 21 ILJ 1066 LAC where the Court at 107 D says as follows:

'A dispute of interest should be dealt with in terns of the collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated in terms of Item 2(1) (b) read with Item 3(4)(b) under the pretext that it is a dispute of right. To To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself (see by way of example *Public Servants Association & Others v Department of Correctional Services 1998 19 ILJ 1665 CCMA at 166 9CE and 167 4DE.* If individuals can properly secure orders that have the effect of determining the evaluation of different interests on the merits thereof, then the distinction between dispute of interests and

dispute of right would be distorted .....' "

Recognising however that the provisions of Schedule 7 Item 2(1)(b) of the Act classify as unfair labour practices -

"the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee,"

disputes relating to which are arbitrable in terms of Item 3(4)(b), the Applicant argues that not all training disputes are disputes of right. It points to the legislated functions of bargaining and statutory councils whose functions, inter alia, are to "promote and establish education and training schemes." (Sections 28 (f) and 43 (b)). Section 84(1)(i) moreover, designates for consultation with workplace forums, in the absence of collective agreements dealing with the subject, matters relating, inter alia, to education and training.

21. In that context, it is submitted, training disputes are matters of mutual interest. That is how the instant dispute should have been classified by the Second Respondent and in determining that he had jurisdiction to arbitrate it, he was manifestly wrong.

22. The irregularity committed by the Second Respondent is further compounded, the Applicant alleges, by his unequivocal conclusion that the Applicant's conduct constituted a unilateral change in the terms and conditions of employment of the Respondents. Section 64 of the Act regulates the right to strike and recourse to lock-outs. Inherent in these concepts are contests of power emanating from interest disputes and sub-section (4) makes express reference in that context to disputes relating to unilateral changes to terms and conditions of employment, which must, of necessity, be classified as disputes of interest, precluding arbitration in the CCMA. That they were manifestly in that position, was acknowledged by the Respondents in their written closing submissions to the Second Respondent, thus -

Recognition should be given to MITUSA for not invoking Section 64(4) of the Labour Relations Act and excercising our right to embark on a

protected strike.

23. In determining that he had jurisdiction to deal with the matter, the Second Respondent was undeterred by these arguments. He was, as I have said, left in no doubt that Portnet's actions, "amounted to a change in conditions of service", a dispute relating to which, if unresolved by conciliation in the CCMA, cannot be arbitrated but must be "resolved through power play." Schedule 7 to the Act moreover, he emphasised, "confers limited jurisdiction on the CCMA to interfere in certain employment matters and cannot be interpreted as conferring a general unfair labour practice or equity based jurisdiction on the CCMA." Support for that conclusion is found by the Second Respondent in the comments by Thompson in

Cheadle *et al*, Current Labour Law 1999, page 51 (footnote)

"It is submitted that the remedy is not intended for deciding 'quantum-type' issues but for combating unfair conduct associated with demotions etc, such as inconsistency, arbitrariness, and a lack of due process ..... Where restructuring involves changes to terms and conditions of employment ..... fairness generally does not come directly into the picture."

24. Significantly, in my view, and on the strength of the authorities referred to by him, the Second Respondent then says this:

"In the present matter I have already concluded that STCW training or equivalent training was a term of contract by means of the express agreement between the parties at the interviews, together with the importation of Marine Circular 10 of 1997's provisions into the employment contract. It follows that Portnet was not entitled to vary these provisions without the consent of Mitusa or the affected employees. What was required was 'consent'. This implies that Portnet had to, in order to have effected the change in respect of the qualification requirements, negotiate with the affected employees as opposed to mere consultation."

25. Having then reviewed certain facts which indicated in his view a failure by Portnet to "engage in proper negotiations" and concluding, once again, that "Portnet effected a substantive amendment to contracts of employment without having followed a proper process" the Second Respondent continues thus -

"However, what is the true nature of the dispute? If it is in fact a dispute relating to the unilateral change in conditions of employment, the provisions of Schedule 7 to the LRA do not confer jurisdiction to arbitrate the matter. I will only be clothed with jurisdiction should the matter in fact be capable of resorting under Item 2(1)(b) of Schedule 7. This is what Mitusa claimed and it was not challenged by the employer. However, even in the absence of a party questioning the CCMA jurisdiction, I still have to determine this issue. Although the dispute could also be categorised as a dispute pertaining to the unilateral change in conditions of service, there can be no doubt that the dispute is primarily one relating to training. Having regard to the comments of Thompson referred to above, I also do not believe that the issue in respect of STCW training can be said to fall within the category "quantum-type" disputes. As such the dispute is arbitrable under the provisions of Schedule 7."

26. I have difficulty with that conclusion. The Applicant, whilst endeavouring to rationalise the economic and practical motivation for Portnet having done so, does not seem to me to mount a serious substantive challenge to the submission by the Third and Further Respondents, and the emphatic finding by the Second Respondent, that its actions constituted a unilateral change to the terms and conditions of the individual Respondents' employment. What would otherwise be the Second Respondent's acknowledged lack of jurisdiction to arbitrate a dispute arising therefrom and which, he reiterates, is a matter for resolution by "power play", is then, so to speak, side-stepped and not, to all intents and purposes, revisited by him. Jurisdictional comfort is quite simply

sourced by him in his conclusion, stated to be open to no doubt, "that the dispute is primarily one relating to training" and, *a fortiori* arbitrable in terms of the provisions of Schedule 7 Item 2(1)(b).

27. The Second Respondent's confidence in that conclusion is however, in my view, misplaced. For Portnet's conduct to constitute an unfair labour practice relating to the "training of an employee" as envisaged in Item 2(1)(b) of Schedule 7, it must embody characteristics directly associated therewith, such as referred to by Thompson (*supra*) by way of example - inconsistency, arbitrariness and a lack of due process.

28. Disputes in that context would not relate to matters of mutual interest but rather to the unfair infringement of the rights of employees in the context of probation, job performance and so forth, linked to the right not to be unfairly dismissed as generally provided for in Schedule 8 to
the Act. As such, the arbitration jurisdiction of the First Respondent in relation thereto is clearly defined.

29. The individual Respondents' case before the Second Respondent was premised on no such allegations or submissions. The essence of the Second Respondent's determination, on the comprehensive evidence presented to him, was that the dispute was one "primarily relating to training" and which had arisen out of a change to terms and conditions of employment effected unilaterally and not through the collective bargaining process, constituted by discussions between Portnet, Mitusa and the affected employees, which had been their original source. The change in question, he determined, had been implemented "without the consent of Mitusa or the affected employees", a consent which, by implication, should have been sought and obtained through the same bargaining process.

30. The Applicant, as emphasised by Adv Grogan representing the Respondents, seeks the review of the Second Respondent's award as allegedly defective in terms of Section 145(2)(a)(ii) and (iii) of the Act. There is no basis, in my

opinion, for the Second Repondent's conclusion that, on the evidence presented to him, Portnet's conduct constituted an unfair labour practice arbitrable in terms of Schedule 7. That being the case, the dispute could not be the subject of arbitration under the Act. In purporting to determine a dispute in the absence of statutory jurisdiction to have done so, a Commissioner will manifestly have exceeded his powers. For the cumulative reasons which I have stated, I find that to have been the case in the present instance.

31. Having reached that conclusion, it is unnecessary for me to deal with the remaining grounds of review submitted by the Applicant and the order which I therefore make is the following:

31.1 The Arbitration Award by the Second Respondent dated 4 July 2000 in CCMA Case No EC16971 is reviewed and set aside.

31.2 The Third, Fourth and Further Respondents, jointly and severally are to pay the Applicant's costs.

Acting Judge of the Labour Court

26 March 2001

Representation:

For the Applicant: Adv. F A Boda
Instructed by Maserumule Inc

For the Respondents: Adv J G Grogan
Instructed by Oosthuizen & Associates