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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C324/2006

In the matter between:

FOOD AND ALLIED WORKERS UNION	First Applicant
FAIZEL MARTIN	Second Applicant

and

THE COLD CHAIN	Respondent

J U D G M E N T

NEL AJ:

[1] In this matter the second applicant, Mr Faizel Martin ("Martin" or "the employee") seeks relief against the respondent ("the employer") for what the employee alleges was an automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act ("the LRA").

[2] It was common cause between the parties that Martin was dismissed solely as a result of his refusal to relinquish his position as a shop steward when he was offered a higher

grade position as an alternative to being retrenched.

[3] It was contended that the employer's demand that Martin resign as a shop steward and his subsequent dismissal contravened the provisions of section 187(1)(f) of the LRA, as read with sections 4 and 5 thereof. It was in particular alleged that the employer discriminated against Martin on the grounds of his union affiliation and his participation in lawful trade union activities. It was accordingly contended that there was no fair reason for Martin's dismissal, whether as part of a retrenchment exercise or otherwise.

Factual background

[4] Martin had been employed by the respondent since 1995. At the time of his dismissal he was a shop steward of the first respondent ("FAWU") and also its regional treasurer, a non-remunerative position.

[5] Prior to the events giving rise to his dismissal, Martin was employed in a Grade 13 position on the employer's organisational structure. The employer employs the Peromnes Grading System pursuant to which managerial employees are graded from 1-12, while other employees are graded 13-18. A recognition agreement between FAWU and the respondent defined the bargaining unit as being Grades 13-18. It would appear that a distinguishing feature of employees occupying Grades 1-12 was that these employees performed some supervisory or managerial functions within the employer

company.

[6] In February 2006, the employer gave formal notice to FAWU in terms of section 189(3) of the LRA proposing a restructuring of the workplace. On 30 March 2006, Martin was formally advised by the employer that his position had become redundant and that he could apply for alternative positions. The next day Martin was given one week by his employer to advise it of his decision with regard to the vacant positions which had been offered to him. On 4 April 2006, FAWU wrote to the employer indicating that Martin would be interested in either the administration clerk or transport clerk position.

[7] A meeting was held between FAWU, Martin and the employer on 10 April 2006. At this meeting, Martin was expressly made aware of the condition attaching to acceptance by him of the transport clerk position namely that as the position was a Grade 12 position, he would have to relinquish his position as a shop steward.

[8] On 24 April 2004, FAWU on behalf of Martin, advised that Martin accepted the position of transport clerk. Although the employer had earlier made it a condition that acceptance of the position as transport clerk would require that Martin should relinquish his shop steward position, the letter of acceptance of 24 April 2006 did not deal with this condition. On 26 April 2006, the employer directed a letter to Martin to which it attached a copy of the job description for the

transport clerk position, requesting that Martin should sign it, indicating acceptance of the responsibilities outlined therein. The letter further stated that:

> "Also discussed with you at our meeting on 10 April 2006, was the fact that the Grade of the transport clerk position, being a Grade 12, falls outside the bargaining unit. In compliance with the FAWU constitution and the company/union relationship agreement, you will accordingly be required to step down from your duties as senior shop steward for the Cape Town distribution centre and you will be required to relinquish your FAWU office-bearer duties and responsibilities, immediately upon assuming your new responsibilities with effect from 1 May 2006".

[9] This letter, at the end thereof, required that Martin should sign it to indicate acceptance of all the terms and conditions as stated in the letter.

[10] On 28 April 2006, although Martin was willing to sign the written transport clerk description, he refused to sign this letter of appointment which contained the condition that he should step down from his duties as senior shop steward and to relinquish his FAWU office-bearer duties and responsibilities.

[11] Martin accordingly commenced his duties in the transport clerk position on 2 May 2006, but refused to relinquish his

union positions. A meeting was held on the same day between Martin and the employer at which the employer repeated its demand. Martin continued to refuse to relinquish the positions. That very same day, 2 May 2006, the employer gave Martin a final retrenchment notice advising him that, as a result of his failure to accept the position of transport clerk with the conditions attached by the employer, the company was left with no alternative other than to proceed with Martin's retrenchment. His retrenchment was to take effect on 1 May 2006.

[12] In terms of this notification, in addition to his *pro rata* bonus from 1 January to 31 May 2006, his notice of one month's salary and his leave pay, Martin was paid severance pay equal to one week's salary for every completed year of service. His 11 years of service resulted in a severance payment of 11 weeks' remuneration equal to an amount of R10 350. The total payment to Martin amounted to R21 590,62.

[13] Under these circumstances, I find that it is clear that the employer offered Martin an alternative position to retrenchment, which position Martin was prepared to accept. The employer, however, made acceptance of the position offered conditional on Martin stepping down from his duties as senior shop steward for the Cape Town distribution centre and requiring that he should relinquish his FAWU office-bearer duties and responsibilities the moment he assumed his new responsibilities with effect from 1 May 2006.

[14] It is equally clear that when Martin refused to give effect to these conditions, he was retrenched. The crisp issue which calls to be determined is accordingly whether it was lawful and/or fair for the employer to impose these conditions, it being clear that, but for Martin's refusal to relinquish his shop steward and FAWU office-bearer duties and responsibilities, he would have been retained by the employer in the transport clerk position.

The law

[15] Section 23(2) of the Constitution provides that every worker has the right to form and join a trade union and to participate in the activities and programs of that trade union. Clearly, to perform the duties of a shop steward and to be an office-bearer of a trade union are such activities. This right is couched in clear and unambiguous terms and may only be limited by a law of general application as set out in section 36 of the Constitution.

[16] As the LRA was promulgated with a view to give effect to these stated section 23 constitutional rights, section 4(2) of the LRA stipulates that every employee has the right to join a trade union, subject to the constitution of that trade union. It further stipulates that every member of a trade union has the right, also subject to the constitution of that trade union, to participate in its lawful activities. Likewise this section of the LRA gives trade union members a right to stand for election

and to be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office of that trade union.

[17] Section 5(1) of the LRA in turn provides that "no person may discriminate against an employee for exercising any rights conferred by this Act".

[18] Section 5(3) of the LRA provides that no person may advantage an employee in exchange for that person not exercising any right conferred by the LRA.

[19] Section 5(2)(a)(i) and (ii) also prohibits an employer from requiring an employee not to be or become a member of a trade union. Section 5(2)(c)(i) and (iii) precludes an employer from acting to the detriment of an employee "because of past, present or anticipated...membership of a trade union" or participation in its activities.

[20] There is no doubt that the rights contained in section 4(2) of the LRA are exactly the rights which may be exercised by an employee without fear of being discriminated against by reason of the employee so exercising his or her rights, or being advantaged in exchange for not exercising any right confirmed by the LRA.

[21] Mr Whyte, on behalf of the applicants, referred me to IMATU & Others v Rustenburg Transitional Council [1999] 12 BLLR 129C (LC), a judgment in which Brassey AJ at length

considered similar issues to those to be determined by me. In that matter the Rustenburg Transitional Council ("the Council") gave three reasons for adopting the stance that a certain level of senior managerial employees could not be allowed to serve in executive positions of the trade union. They were that those officials would have access to confidential information; that they were required to initiate or conduct disciplinary hearings against employees; and thirdly that these employees may, by reason of their membership of the union executive, find themselves in the position in which they were unable or unwilling to fulfil essential tasks required of them.

[22] Brassey AJ, having considered sections 4 and 5 of the LRA, (at paragraph [15], page 1305) had the following to say about the argument presented to him that the legislature could never have intended to bring senior managers within the ambit of the protections given by sections 4 and 5 of the LRA:

> "I cannot agree. Bound by a Constitution that confers organisational rights on workers without limitation, the legislature might well have decided that no such limitations should be embodied in the protections conferred by the Act. There is nothing untoward, still less absurd, in giving senior management the right to participate in trade union activities: white collar unions have long been recognised as legitimate and there is no reason to believe the legislature intended to curb their scope or activities. The implication of limitations and conditions into statutory provisions is not likely to be undertaken and, even if one were persuaded that they might be legitimate here, it would be all but impossible to decide where the legislature implicitly intended the line to be drawn. I consider that the sections must be read as they stand".

[23] Brassey AJ continued (at paragraph [17] page 1306) to say that:

> "..... The protections conferred by the organisational rights clauses give employees, whatever their status, the absolute right to join trade unions and take part in their activities. By so doing, they legitimise acts that might otherwise constitute a breach of the employee's duty of fidelity, prohibit victimisation and outlaw rules of the sort that the respondent laid down in the present case. Beyond that, they do nothing to exempt employees from their duties under the contract. The employee must still do the work for which he is engaged and observe the secondary duties by which he is bound under the contract. If he does not, he can be disciplined for misconduct or laid off for incapacity".

[24] I can see no reason why, or basis on which I should deviate from Brassey AJ's conclusions. I am in fact in full agreement with the expressed conclusions as to the protections conferred on employees by the organisational rights clauses.

[25] I have not been referred to any contrary view to that expressed by Brassey AJ in the Rustenburg Transitional Council matter (supra). In fact it appears to have been fully endorsed by labour law commentators. In this regard see Grogan: "Double Cross Manager's right to hold union office" Employment Law. (Vol. 15) November 1999 No. 6 pages 4 - 9; PAK Le Roux in "Trade Union rights for Senior employees." Contemporary Labour Law (Vol.9) No.6 January 2000 pages 58 - 60; and Carl Mischke: "Shop stewards: their rights and obligations" Contemporary Labour Law (Vol.12) No.1 August 2002 pages 1 - 7.

[26] Mr Wagener, contended on behalf of the respondent, that the matter before me was distinguishable from the Rustenburg Transitional Council decision (*supra*). He contended that it was distinguishable because therein the Court was dealing with the invalidity of a general resolution and it was not considering the peculiar status of a shop steward. I am, however, not persuaded that the matter before me is distinguishable for these reasons, or at all. It is clear that, just as this Court is required to herein consider the application of section 23 of the Constitution and sections 4 and 5 of the LRA, that was what Brassey AJ considered. His conclusions, as indicated, were that the protections conferred by the organisational rights clauses gave employees, whatever their status, the absolute right to join trade unions and take part in their activities. As I have stated, I am in complete agreement that the protections conferred by sections 4 and 5 of the LRA are absolute.

[27] Mr Wagener further argued that in terms of the ordinary rules of offer and acceptance, it had been clearly demonstrated that Martin had agreed to the condition attaching to his appointment as a transport clerk namely that he would resign as a shop steward. If I understood his argument correctly, it would appear that he contended that a binding contract had come into effect to which Martin was bound. The effect thereof was that, on him accepting the appointment as transport clerk, he had to comply with the condition preceding such appointment, namely that he had to resign as a shop

steward and relinquish his FAWU office-bearer duties. For this reason, so Mr Wagener argued, it could not be said that, under these circumstances, the employer had discriminated against Martin by reason of his union activities when it terminated his employment when he refused to comply with the terms of this agreement.

[28] Even if I were to assume that such a "contract" or agreement had been reached, and that Martin, as Mr Wagener contended, acted in breach of his "contractual" terms (by refusing to resign as a shop steward and to relinquish his union office-bearer duties and responsibilities), I believe that Martin was entitled to do so. This would be so as I believe, in light of my conclusion that the organisational rights afforded Martin in terms of sections 4 and 5 of the LRA are absolute, that such a contractual term would have been unlawful on the basis of it being contrary to public policy. In any event, on the evidence adduced before me, I am unpersuaded that a binding contract, as contended on behalf of the employer, had come into existence between the employer and Martin.

[29] I have also considered the propositions contained in the employer's letter addressed to Martin that the FAWU constitution required that a shop steward and office-bearer should resign if he or she fell outside the bargaining unit. This contention is, in my view, not at all supported by FAWU's constitution. In terms of the FAWU constitution, it is apparent that an employee's position, *vis à vis* the bargaining unit of an employer, is totally irrelevant.

[30] The further contention by the employer was that the recognition agreement between FAWU and the employer required that a shop steward should resign once he or she was employed outside of the bargaining unit as defined by the agreement. Again I could find no support for such contention in the agreement itself. The fact that the scope of the agreement may be limited to employees employed in Grades 13-18 does not, in my view, prohibit an employee in Grade 12 from becoming, or remaining, a shop steward or a union office-bearer.

[31] The further argument was raised by the employer that Martin could not be allowed to be a shop steward as he would have been required to be at his workstation the whole time. This proposition of the employer was seemingly based on the fact that it contended that Martin had spent an extraordinary amount of time performing his shop steward duties and that in his more senior position that would no longer have been possible. The recognition agreement between the employer and FAWU allowed that shop stewards may take a maximum of 13 days off. Mr Whyte submitted in this regard that as Martin, on assuming his Grade 12 position, would fall outside the ambit of the relationship agreement, the employer would have been entitled to have limited the time taken off by Martin. Or it could even have granted him no time off at all in terms of the provisions of section 15 of the LRA. I would imagine that if the employer wanted to grant Martin no time off in terms of the provisions of section 15 of the LRA, then it

would have had to argue, and if necessary persuade the CCMA, which would have jurisdiction in respect of section 15 rights, that it was not reasonable to give Martin any leave during working hours for the purpose of performing the functions of an office-bearer of the representative trade union.

[32] I am of the view that as employees have an absolute right to be a trade union member and participate in its lawful activities irrespective of their seniority, that it will in the first instance be unlawful for an employer to deny an employee promotion into those senior ranks unless he refuses to relinquish his shop steward and/or office-bearer duties and responsibilities. Secondly, if any employee for that matter fails to perform his duties as an employee in any respect whatsoever, he needs to be dealt with in terms of the clear and accepted principles applying to employees who fail to perform.

[33] In this regard the employer complained that Martin would not be able to perform his duties to investigate, report and initiate charges against co-employees properly. It was counter-argued that this was in any event a general duty resting on all employees and that if Martin failed to fulfil this duty, he could be disciplined. Martin also testified before me that he would have been able to perform the duties to investigate, report, and if necessary, to initiate charges against co-employees. He said that FAWU members would have accepted this. Mr Whyte argued that on the other hand, if the FAWU membership or FAWU itself became unhappy with the manner in which Martin was investigating, reporting or initiating

charges against co-employees, they could simply vote Martin out of office.

[34] It is apparent that what was required to happen was that both the employer as well as the employee would have been required to regulate matters in terms of how Martin conducted himself. If he failed to perform his employee duties in any respect because of attending to his union duties, he could have been disciplined by his employer. I am in agreement with the proposition by Mr Whyte that if Martin, after being promoted to the more senior position, was experienced by his fellow union member employees as not attending to his union responsibilities with the same diligence as he did before, they may have voted him out of office.

[35] I also need to consider the allegation by the employer that there was a practice at the employer that any employee shop steward or office-bearer would resign that position if promoted out of the bargaining unit. There certainly was no agreement in writing or evidence of one verbally entered into between FAWU and Martin on the one hand, and the employer. Nor was there evidence that FAWU and Martin had accepted this alleged practice. I am of the view that the fact that other employees might have chosen to resign from their positions in the union, once they were promoted, did not preclude Martin from exercising the rights conferred on him by sections 4 and 5 of the LRA.

[36] I am accordingly satisfied that the employer breached Martin's

rights in terms of sections 4 and 5 of the LRA and that it acted unlawfully in demanding of Martin that he abandon his rights to participate in lawful union activities. As the dismissal of Martin was solely premised on compliance with the unlawful demand I am also satisfied that the dismissal was unlawful and unfair and that it discriminated against Martin on the grounds of his union affiliation. Accordingly Martin's dismissal was automatically unfair and in breach of section 187(1)(f) of the LRA.

Relief

[37] Martin does not seek reinstatement but seeks compensation in terms of section 194(3) of the LRA. It was contended on behalf of Martin that in the exercise of my discretion the just and equitable compensation that I should award to Martin will be 24 months' remuneration.

[38] Martin's evidence was that he had remained unemployed and that he had to subsist off his UIF payments. He did, however, also indicate that his decision not to seek reinstatement was purely based on personal grounds. No serious effort was made by Martin to blame the employer for this decision of his not to seek reinstatement. The employer likewise did not adduce any evidence that it did not want to reinstate Martin.

[39] In considering the appropriate sanction herein I am of the view that Martin was entitled to receive his notice, leave and bonus pay. His retrenchment compensation, in my view, really

constitutes payment, or a reward, for his years of service. Wherever he may now be employed, he will have to start at zero in respect of his years of service. He has, however, in effect been paid at least the obligatory minimum of one week's remuneration for every year of service.

[40] But for the applicant's personal reasons, which incidentally he did not disclose what they are, there can be little doubt that I would have ordered Martin's retrospective reinstatement, effective to 1 June 2006, which was the date that his dismissal took effect. It was argued by Mr Whyte that, particularly in a case of an automatically unfair dismissal, compensation ought to extend, where appropriate, beyond mere patrimonial loss.

[41] As I am of the view that I am empowered, in terms of section 193(3) of the LRA, to make an order of reinstatement as well as one of compensation, the question is, would I have ordered compensation in addition to reinstating Martin. I am aware that, where appropriate, compensation may go beyond mere patrimonial loss suffered by the unfairly dismissed employee. However, had Martin herein sought reinstatement, I believe it would have been just and equitable to put him in the position he would have been in had he not been unfairly dismissed by reinstating him with retrospective effect to 1 June 2006. In respect of the question whether, in addition to reinstatement, I would have ordered compensation. I would not have done so. I would have considered the ongoing relationship between the parties as a very relevant and important reason why not to

order compensation in addition to the employer already having had to pay the remuneration to Martin in respect of his retrospective reinstatement without having had the benefit of Martin's services. I have also considered Martin's evidence that it was the principle that counted herein, and not the money. He also confirmed that he had not seriously pursued alternative employment. Taking all these factors into consideration, I would not have considered it just and equitable, in addition to retrospective reinstatement, to order the employer to pay Martin any additional compensation.

[42] Martin elected not to take the Court into his confidence and disclose what exactly the personal reasons were why he did not want to be reinstated. As I have said, he certainly placed no blame for this decision of his at the door of his erstwhile employer. Whilst the Court respects this personal attitude of the employee, I do not believe that the employer should therefore be penalised to a greater extent than what would have been the case had I ordered Martin's retrospective reinstatement to 1 June 2006. Under all these circumstances, I believe that it is just and equitable that I order that the respondent should pay Martin the equivalent of nine months' compensation. The salary, which Martin would have earned as transport clerk, was R4 600 per month. This is the position he would have been appointed to had he not been automatically unfairly dismissed by the respondent. This is accordingly the remuneration that I order should be the basis to calculate the nine months' remuneration, which I intend ordering the respondent to pay the second applicant. No reason exists why

costs should not follow the result.

[43] Accordingly, the order that I make herein is the following:

1. The second applicant's dismissal is found to have been automatically unfair.
2. The respondent is ordered to pay the second applicant the amount of R41 400 being the equivalent of nine months' remuneration at R4 600 per month.
3. The respondent is ordered to pay the applicants' costs of suit.

Deon Nel

Acting Judge of the Labour Court

DATE OF HEARING: 15-17 November 2006

DATE OF JUDGMENT: _____

Appearances:

For the applicants: Mr J Whyte of Cheadle Thompson, Haysom.

For the respondent: Mr M Wagener of Bowman Gilfillan

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