IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NUMBER: J1758/05

In the matter between:

COMMUNICATION WORKERS UION (CWU)	**First Applicant**
Z DLADLAMA & 6 OTHERS	**Second to Seventh Applicants**
and	
TELKOM SA LIMITED	**First Respondent**
E TLHOLHALEMAJE	**Second Respondent**
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	**Third Respondent**

JUDGEMENT

BASSON, J

(1) This is an unopposed review application in terms of section 145 of the Labour Relations Act 66 of 1995 (hereinafter referred to as “the LRA”) to review and set aside the arbitration award made by the Second Respondent (hereinafter referred to as “the Commissioner”) under case number GA38480-02. This review is confined to the order made by the Commissioner to the effect that it was not appropriate, equitable or reasonable to reinstate the Second to Seventh Applicants (hereinafter referred to collectively and “the Individual Applicants”) and that only a nominal amount in compensation be paid to the Individual Applicants as a remedy. On behalf of the Individual Applicants it was submitted that the award should be corrected and that the individual applicants should be reinstated with full retrospective effect or, alternatively, on whatever basis this Court deems just and equitable. It was submitted that the award falls to be reviewed on the basis that the Commissioner had failed to properly apply his mind to the facts before him and the applicable legal principles, and that he had arrived at a conclusion in respect of the remedy which is not rationally justifiable. It was further argued that the Commissioner had exceeded his powers and committed a gross error of law when he exercised the discretion not to reinstate the Individual Applicants and only to award them one month’s compensation.

(2) The Individual Applicants were employed as call centre agents. Save for one employee (a one Mr. Raphoko) who pleaded guilty to the charges, all the Individual Applicants have been dismissed following individual disciplinary hearings into allegations that they had committed misconduct by misusing the First Respondent's lines. (I will hereinafter refer to the First Respondent as "Telkom").

(3) The dispute was subsequently referred to arbitration. The Commissioner, although finding on the evidence that the Individual Applicants were guilty as charged, was of the view that the sanction of dismissal was not appropriate in the circumstances and concluded that the dismissals were *substantively* unfair. In respect of the Third and Fifth Applicants (Mr. Ntenteni and Mr. Mphonyo), the dismissals were also found to be *procedurally* unfair.

(4) In coming to a finding *vis à vis* sanction, the Commissioner took into account that, although there had been misuse of company property, there was no evidence that the Individual Applicants had been persistent offenders. I interpose here to point out that Telkom's disciplinary code makes specific provision for repeated misconduct under category B. An employee who is found guilty of a category B offence may receive a final warning or even face dismissal. However, the Individual Applicants in this case have been charged under Part

A.7 of the Disciplinary Code which envisages less harsh sanctions as a method of corrective discipline. The Commissioner concluded that it was therefore, in light of the disciplinary code, not appropriate to dismiss the Individual Applicants for a first offence. As already pointed out, had the Individual Applicants been charged under Category B7, dismissal would have been appropriate. The Commissioner therefore concluded as follows:

> *"I am satisfied that the circumstances of these cases dictate and call for an interference with the sanction of dismissals as it was excessive and not justifiable when regard is had to the infractions in question and the provisions of the respondent's own disciplinary code. There was nothing that prevented the chairperson from considering a sanction of final written warning, as was the case with the 8th applicant."*

The Commissioner also found that Telkom treated employees inconsistently when applying discipline:

> *"I am of the view that in the light of the conclusions reached above that the sanctions of dismissal were inappropriate given the nature of the charges and what the Disciplinary Code provided for, the fact that some of the employees were*

treated leniently can only add credence to that view, and to this end, I have reason to believe that there was some substance in the applicant's complaint."

(5) It was correctly argued on behalf of the Individual Applicants that once the Commissioner had found that the sanction of dismissal was inappropriate, the Commissioner was then obliged to consider the reinstatement of the Individual Applicants. More in particular, the Commissioner was obliged to consider and apply *section 193(2)* of the LRA which clearly states that an arbitrator *must* require the employer to reinstate or re-employ an employee *unless* one of four factors are present. These four exception are

(i) that the employee does not wish to be reinstated;
(ii) the circumstances are such that a continued employment relationship would be intolerable;
(iii) it is not reasonably practicable for the employer to reinstate; and
(iv) the dismissal was only procedurally unfair.

I am in agreement with the submission that none of these factors were considered by the Commissioner in arriving at the conclusion that reinstatement was inappropriate. It should also be pointed out that section 193(2) does not allow the arbitrator to apply a general

discretion based on equity. It appears that the legislature has intended to impose fairly strict guidelines pertaining to when an arbitrator could consider the reinstatement of an employee. In fact one may go as far as to state that the legislature has ousted the discretionary power of the arbitrator and replaced it with a statutory rule that reinstatement is the primary remedy subject only to the exceptions laid down by section 193(2) of the LRA.

(6) Furthermore, the evidentiary burden rests on an employer (Telkom) to demonstrate that reinstatement is not appropriate. I will return to this aspect herein below. Suffice to point out at this stage that the only evidence that was led in favour of a sanction of dismissal was the following:

(i) that the disciplinary code required a dismissal;
(ii) the Individual Applicants were aware of the rule;
(iii) Telkom had suffered financial loss; and
(iv) genuine customers had been inconvenienced.

In this regard I am also in agreement with the submission that these factors are irrelevant in exercising the discretion in terms of section 193(2) of the LRA and that the Commissioner's reliance on these factors therefore constitutes a reviewable irregularity. No evidence was

led to the effect that there had been an *irretrievable breakdown* in the trust relationship or that it would *not be practical* for Telkom to reinstate the Individual Applicants. The fact that there was a *delay of time* should also not, in principle, deny and employee from obtaining the primary remedy of reinstatement in the absence of special considerations to the effect that it would be impractical to order reinstatement.

(7) It further appears from the award that the Commissioner had premised his finding that the dismissal was inappropriate on the construction that the disciplinary code of Telkom required a *progressive approach* to discipline. In my view it simply does not make sense to find on the one hand, that dismissal is inappropriate in light of the fact that the disciplinary code requires progressive discipline and then to deny, on the other hand, an employee the primary remedy of reinstatement especially in the absence of any evidence that reinstatement would not be appropriate for one or more of the reasons set in section 193(2) of the LRA.

(8) I am therefore in light of the aforegoing of the view that the finding by the Commissioner in respect of reinstatement stands to be reviewed and set aside on the basis that it is not rational and on the basis that

the Commissioner had taken into account irrelevant considerations in arriving at this decision not to reinstate.

AWARD OF COMPENSATION

(9) I now turn to the decision by the Commissioner to award one month's compensation to each of the Individual Applicants as opposed to an order for reinstatement.

(10) In coming to a conclusion to award compensation in the amount of one month only (and not to order reinstatement), the Commissioner took into account the following four factors:

(i) the Individual Applicant had approached the arbitration proceedings in a vexation manner by suppressing or denying evidence which clearly implicated them in the transgression in question. In this regard the Commissioner was of the view that their actions bordered "on the vexatious".

(ii) the Individual Applicants had made false denials;

(iii) the Individual Applicants were unrepentant; and

(iv) the dismissals had taken place in November and December 2002 and January 2003 thus predating the outcome by approximately two and a half years.

(11) In terms of *section 194(1*) of the LRA, an arbitrator has a broad discretion to award compensation up to a maximum of 12 months based on considerations of justice and equity. I am, however, in agreement with the submission that the Commissioner committed a reviewable irregularity by relying on the four factors listed in the preceding paragraph for the following reasons:

(i) Firstly, the conduct of the Individual Applicants during the arbitration proceedings is irrelevant to a proper determination of compensation and could only have served as a factor in respect of costs. See *Flex-O-Thene Plastics (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 1028 (LAC)

(ii) Secondly, the fact that the Individual applicants had made false denials during their evidence is likewise irrelevant to a proper determination of compensation and could only have impacted on the finding as to whether or not the Individual Applicants were entitled to a finding of substantive (and procedural unfairness).

(iii) Thirdly, the fact that the Individual Applicants were unrepentant during the arbitration proceedings is likewise irrelevant in light of the fact that the Individual Applicants have denied the misconduct in question.

(12) In light of the aforegoing I am of the view that the finding by the Commissioner in respect of the amount of compensation also stands to be reviewed and set aside.

APPROPRIATE AWARD

(13) The only remaining question to be decided is what an appropriate remedy would be in the circumstances. On behalf of the Individual Applicants it was submitted that it would be appropriate for this Court to substitute its own finding for that of the Commissioner on the question of reinstatement and/or the appropriate quantum of compensation. It was submitted that the arbitration ran for a period of twelve days over a period of a year and that it would not be in the interests of the parties for the process to be repeated. It was further submitted that the Court is in a position to apply the same considerations as set out in section 193(2) (in respect of reinstatement) and section 194 (in respect of compensation). It was also argued that it is necessary to bring the matter to finality in light of the fact that the Individual Applicants have been dismissed approximately four and a half years ago. I am in agreement that it would not be fair under the circumstances to remit the matter back to the Third Respondent (hereinafter referred to as “the CCMA”) for

these reasons and that this court is in a good position to make the decision itself. See *Consol Ltd t/a Consol Glass v Ker NO &* Others [2002] 4 BLLR 367 (LC).

APPROPRIATE AWARD

(14) I will now proceed to consider what an appropriate award in the present circumstances would be, and, more specifically, whether it would be appropriate to award reinstatement. I am in agreement with the submission that only two of the exceptions listed in section 193(2) of the LRA are relevant in the present case in exercising the discretion whether reinstatement is the appropriate sanction: Firstly, the feasibility of an ongoing relationship and secondly, the physical ability of Telkom to reinstate. I am also in agreement that the evidentiary burden rests on Telkom (as the employer) to demonstrate that reinstatement is not appropriate. See in this regard *Manyaka v Van de Wetering Engineering (Pty) Ltd* [1997] 11 BLLR 1458 (LC). In the absence of any evidence to demonstrate an irretrievable breakdown in the trust relationship *or* that reinstatement was not physically feasible, there appears to be no reason why an order of reinstatement should not be made. I can also find no reason not to reinstate the Individual Applicants retrospectively. I am, however, mindful of the decision of the Labour Appeal Court in *CWIU & Others v Latax Surgical Products*

(Pty) Ltd [2006] 2 BLLR 142 (LAC) where it was held that retrospective reinstatement will be limited to 12 months remuneration.

(15) In the event the following order is made:

1. The arbitration award issued by the Second Respondent on 17 June 2005 is reviewed and set aside but only in respect of the findings on reinstatement and compensation.
2. The award by the Second Respondent is substituted with an order that the Individual Applicants are reinstated retrospectively into their previous employment with the First Respondent.
3. The Individual Applicants must report for duty no later than 17 September 2007 failing which the reinstatement order will lapse.
4. The First Respondent is ordered to pay the Individual Applicants back-pay in the amount equivalent to 12 months' remuneration.
5. There is no order as to costs.

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BASSON, J

FOR THE APPLICANTS:

CR DANIELS: CHEADLE THOMPSON & HAYSON INC