REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 63/2011

In the matter between:

SACTWU **First applicant**

J WILLIAMS **Second applicant**

B JOSEPH & 34 OTHERS **Third and further applicants**

and

BERG RIVER TEXTILES,

A DIVISION OF

SEARDEL GROUP TRADING (PTY) LTD **Respondent**

Heard: **24 – 26 October 2011**

Delivered: **4 November 2011**

Summary: Dismissal – participation in unprotected strike (35 union members); automatically unfair dismissal on grounds of religion (one employee).

JUDGMENT

STEENKAMP J

Introduction

[1] The 36 individual applicants are members of the South African Clothing and Textile Workers' Union (SACTWU), the first applicant. They were dismissed for being absent without leave after having participated in a series of unprotected work stoppages. The question to be considered is whether their dismissal was fair. But there is a further element particular to the second applicant, Mr Johannes Williams. That is that he refused to work on Sundays and that, he claims, is the only – or at least the primary – cause for his dismissal. He claims, therefore that his dismissal was automatically unfair in terms of s 187(1) (f) of the Labour Relations Act[1], as the reason for the dismissal was discrimination on the grounds of his religious beliefs.

Background facts

[2] The employees, all members of SACTWU, were employed by the respondent, Berg River Textiles, which is a division of Seardel Group Trading (Pty) Ltd. It operates a textile factory in Paarl. SACTWU has a closed shop agreement with the respondent company.[2]

[3] Due to a down-turn in trade, the respondent approached the exemption committee of the National Textile Bargaining Council for a ruling or recommendation as to whether it could be exempted from the 7.5% general wage increase for the 2009 bargaining year. The exemption committee recommended that the implementation of the increase could be postponed until 31 October 2009 and that the parties (namely SACTWU and the respondent) should endeavour to re-negotiate shift patterns in order to reduce costs.

[1] Act 66 of 1995 ("the LRA").

[2] The irony has not escaped anyone in court that SACTWU's investment arm is one of the main shareholders in Seardel. The chairman of the holding company is Johnny Copelyn, one-time General Secretary of SACTWU. But none of this impacts on the facts of the case or the legal principles to be considered.

[4] Negotiations ensued and on 11 November 2009 the parties entered into a collective agreement that altered the shift patterns at the respondent. It is common cause that the agreement constituted a binding collective agreement as contemplated by the LRA. Although SACTWU – represented by its organiser, Bonita Loubser, and shopsteward Anwa Meniers – had agreed to it, it is common cause that the new shift system was less advantageous to its employees for the following reasons:

4.1 Excessive overtime that had hitherto been worked during the week was reduced substantially.

4.2 Saturdays were remunerated at normal time rather than 1.5 times the hourly rate.

4.3 Sundays were remunerated at 1.5 times rather than 2x.

4.4 Meal breaks were less favourably remunerated.

4.5 Weekend work would be compulsory rather than voluntary.

[5] There was thus unhappiness amongst some employees both insofar as their reduced take home pay was concerned as well the manner in which their working hours were being prescribed.

[6] Due to necessary changes in the respondent's time recording systems, the respondent only made initial attempts to implement the new shifts in March 2010. These attempts were met with resistance by some employees, prompting the respondent to fly in its Group Human Resources Director (Mr Amon Ntuli) from KwaZulu-Natal to address the workers. Ntuli – who had served as the National President of SACTWU for more than 20 years -- perceived that they were unhappy.

[7] The implementation was again postponed on Ntuli's advice due to the number of public holidays in April, with the result that the first phase of the implementation only occurred on 3 May 2010. The implementation was met with sporadic instances of non-compliance, but went largely unchallenged.

[8] On 8 June 2010, the second phase was given notice that implementation would commence on 14 June 2010. The individual applicants were affected by this implementation.

The first work stoppage

[9] On Tuesday, 15 June 2010, Williams (the second applicant) sought to register his protest against the new system by reporting for duty under the old system. The reason for his conduct was to register his protest against the new system as it required him to work on a Sunday which was contrary to his religious beliefs. This resulted in him being escorted off the premises. He lodged a grievance about the new shift system compelling him to work on Sundays.

[10] The balance of the employees engaged in a two hour work stoppage in support of WIlliams. The respondent made contact with SACTWU's new regional organiser for the Boland, Gerrit Willemse, and asked him to come to the premises and to address his members. The stoppage ended after Willemse spoke to the workers and encouraged them to return to work. Only 16 of the 36 applicants participated in this stoppage. The respondent issued each of them with a written warning. It is common cause that this constituted an unprotected strike as the applicants had not followed the prescribed procedure set out in s 64 of the LRA. The warning letter, that was given to each employee individually, read in part:

> "The purpose of this notice is to warn you that if you engage in an illegal work stoppage again, or if you are absent from your work station without permission, further serious disciplinary action will be taken against you which may result in your immediate dismissal."

[11] On the same date, the respondent published a notice advising the employees against such action in the future. This notice read in part:

> "The purpose of this notice is to warn all employees that if you engage in an illegal work stoppage again, or if you are absent from your work station without permission, further serious disciplinary action will be taken against you which may result in your immediate, summary dismissal.
>
> We urge you to follow the appropriate procedures available to you, and carefully think about your actions and the consequences thereof."

[12] Following the work stoppage of 15 June 2010, Willemse (the SACTWU regional organiser) undertook to engage with the workers, particularly Williams, with a view to regularising the situation. For this reason,

Williams's grievance (regarding Sunday work) was put on hold. He worked the new shifts from that point on, but was granted an interim indulgence in respect of the following Sunday (20 June 2010). He made no commitments however to work the Sunday shifts in the future.

The second work stoppage

[13] On Saturday 19 June 2010 the applicants (excluding Williams) engaged in a work stoppage by leaving early on the Saturday morning shift and failing to report at all for the Saturday afternoon shift.

[14] No further warnings were issued nor was any other disciplinary action taken against those employees. However, a few days later the respondent "drew a line in the sand", as Mr *Whyte*, for the applicants, put it.

[15] On Thursday 24 June 2010 the respondent published an ultimatum requiring the employees to comply with the new shifts from Monday 28 June 2010. It was however contended by the respondent that this did not grant the employees the right to act with impunity prior to that date. The ultimatum stated unequivocally[3]:

"**<u>This is the ultimatum:</u> If you do not work on your required shift from the start of your first shift on Monday 28 June 2010 and continue to do so, you will be dismissed immediately. Any work stoppages, which is an unprotected stoppage, will be dealt with in the same manner.**

If you are dismissed, you will lose your job and your family will lose all your benefits.

We urge you to consider the aforesaid in the most serious light and return to work immediately."

The third work stoppage

[16] On Saturday 26 June 2010 the applicants again engaged in an unprotected work stoppage by leaving early from the Saturday morning shift and not arriving at all for the Saturday afternoon shift. Williams was

[3] Bold and underlining as in the original.

not involved in this conduct. The respondent did not issue any warnings or take disciplinary action against the employees at this stage.

[17] On 29 June and 2 July 2010, SACTWU's regional organiser (Willemse) drafted two memoranda on a SACTWU letterhead which were posted at the respondent's premises. The union called on its members to work the new shifts. The first memorandum further stated:

> "We humbly request that all employees affected by the New Shift Agreement, that you adhere and comply with this Agreement and the Ultimatum.
>
> Should workers refuse to comply with the above, they stand the risk to be dismissed by the company.
>
> ....
>
> We once again request your co-operation in this regard."

[18] In the second memorandum, SACTWU repeated the request to its members to work the new shift hours and reiterated:

> "Should anyone refuse, please note that you open yourself to be disciplined, which could cause your termination of service."

The fourth work stoppage

[19] Despite the ultimatum and these repeated requests from the employer and their own trade union, on Saturday 3 July 2010 the applicants again engaged in the same form of unprotected work stoppage as they had on the previous two Saturdays. No attempt was made on that day (or on the previous Saturdays for that matter) to contact Willemse and seek his intervention in the stoppage. Williams worked his normal Saturday shift.

[20] Sunday 4 July 2010 was the first Sunday on which Williams was required to work. He failed to report for duty.

Disciplinary action

[21] On Monday 5 July 2010 the individual applicants were suspended. Willemse was called in and met with Laubscher (respondent's CEO). Willemse proposed that he try to persuade each employee to sign an individual commitment to work the new shift system. This proposal never

came to fruition and none of the individual applicants testified that they did, or indeed were willing to, sign such an undertaking.

[22] Disciplinary hearings commenced on an individual basis on 8 July 2010. The third and further applicants all pleaded guilty to the charges put to them and were dismissed.

[23] Williams pleaded not guilty on the basis that he was entitled, by virtue of his right to freedom of religion, to refuse to work on the Sunday. He was nevertheless found guilty and also dismissed.

Was the dismissal of applicants 3-36 fair?

[24] It is trite law that participation in an unprotected strike is to be seen simply as an incidence of misconduct which must be judged on the basis of how serious that misconduct is[4].

[25] The relevant considerations are set out in section 6 of the Code of Good Practice to the LRA. The factors to be considered are:

25.1 the seriousness of the contravention of the LRA;

25.2 attempts made to comply with the LRA; and

25.3 the conduct of the employer.

[26] The "seriousness of the contravention" ground would include factors such as the duration of the strike, attempts made by the union and employer respectively to resolve the dispute as well as the extent of the disruption to the business of the employer.

[27] As with any dismissal for misconduct, the court ultimately needs to determine whether the relationship has irretrievably broken down and whether a less severe form of discipline ought to have been utilized by the employer, dismissal being the ultimate and most severe sanction available. At the same time, the court will take into account that the LRA prescribes a relatively simple procedure to render strike action protected;

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[4] See: *Food & Allied Workers' Union & others v Earlybird Farm (Pty)* Ltd (2003) 24 *ILJ* 543 (LC) at 548F – 549A*; Machabakwa & others v Pletonic* CC [1996] 9 BLLR 1143 (IC) at 1151J – 1152J*; PACT v PPWAWU* (1994) 15 *ILJ* 65 (A) at 75C – E.

the failure of a trade union and its members to make use of this procedure removes the protection with which they could have clothed themselves and opens them up to the sanction of dismissal, especially if the employer had issued an ultimatum making the consequences of their actions clear..

[28] Ultimately, dismissal must be proportionate to the misconduct in question[5].

The Seriousness of the Contravention

[29] The individual applicants made no attempt to comply with the provisions of the LRA and they repeated their misconduct on three occasions after the 15 June 2010. What is more, the individual applicants blatantly disregarded not only the provisions of a collective agreement to which they – through their trade union – was a party, but even two memoranda issued by that same trade union calling upon them to cease their misconduct. SACTWU acted in a responsible manner, having entered into the collective agreement. Its members did not.

[30] Mr *Whyte* pointed out that there was no evidence to suggest that the misconduct was in and of itself particularly serious or lead to any sustained losses on the part of the respondent. Allied to this, he argued, is that the respondent itself does not appear to have considered the initial stoppages as particularly serious as no action was taken following the stoppages of 19 and 26 June 2010. But had the respondent dismissed the employees after one of the earlier work stoppages, he would no doubt have argued that it was premature. The misconduct was particularly serious in that it was repeated; it was a contravention of the LRA; it disregarded earlier warnings and an unequivocal ultimatum; and, perhaps most alarmingly, it disregarded a collective agreement and repeated exhortations by the employees' own collective bargaining agent.

[5] *Hendor Steel Supplies v NUMSA & others* (2009) 30 *ILJ* 2376 (LAC)

The Conduct of the Employer

[31] It is understandable that the new shift system could cause unhappiness amongst the employees. But the trade union representing those employees entered into a collective agreement setting out the terms of that shift system. The respondent's uncontested evidence was that the agreement went through at least five drafts; that the former SACTWU regional organiser, Meniers, reported back to his members on each draft; that he also reported back to the general secretary, Wayne van der Rheede before it was signed off on behalf of SACTWU; and that its national organiser, Bonita Loubser, signed the agreement on behalf of SACTWU.

[32] Mr *Whyte* pointed out that, in *SACWU v Unitrans Supply Chain Solutions (Pty) Ltd*[6] a business had been transferred as a going concern in terms of section 197(2) of the LRA. The employees refused to 'recognise' the new employer and withheld their services. The Court concluded that this conduct was unlawful and unjustified, but nonetheless found that the dismissal of the employees was unfair as the breakdown had been caused by the failure by the employers to communicate adequately with the union and employees. The court also criticized the haste with which the (new) employer acted in dismissing the employees. But in the present case, the respondent bent over backwards by failing to take any disciplinary action until the misconduct had been repeated four times; and far from failing to communicate with the employees and their trade union, the respondent negotiated with and ultimately struck a collective agreement with SACTWU – one that its own members then disregarded.

[6] (2009) 30 *ILJ* 2469 (LC).

Circumstances of the Employees

[33] No evidence has been tendered to suggest that the employees have relevant disciplinary records or that they had been involved in similar misconduct prior to the implementation of the new shift system. The misconduct which took place on 19 and 26une, and 3 July 2010 might be akin to one incident of misconduct for the purposes of disciplinary action as no progressive steps of discipline had been taken between those dates thereby putting the employees to terms. Nevertheless, they do constitute repeated acts of similar misconduct over those three discrete days.

[34] Mr Waldek, who chaired the disciplinary hearings, did testify, though, that the events of 15 June 2010 (and hence the serious written warning issued in respect of that work stoppage) were not relevant to the outcome.

[35] Many of the employees had lengthy service; but this is a double-edged sword. Experienced unionised employees should also have been well aware of the potential consequences of repeated unprotected strike action in defiance of their own collective agreement.

Less Restrictive Means

[36] The applicants submitted that the dispute would have been resolved had the respondent adopted the solution proposed by Willemse or had it imposed a clear final written warning at the conclusion of the disciplinary hearing. I do not agree. Even though the work stoppages were not violent, it is difficult to fathom a more reprehensible form of unprotected strike action than one where the workers disregard the very outcome of collective bargaining through their representative trade union. One is left wondering what more an employer in these circumstances could have done before eventually issuing an ultimatum and acting in accordance with it.

[37] The sanction of dismissal with regard to the third and further applicants – all of whom conceded their misconduct and noted that they were guilty of

the misconduct in question -- was fair and proportionate to the misconduct in question.

The case of Williams: discrimination and automatically unfair dismissal

[38] A few weeks before this matter was heard, the Labour Appeal Court handed down judgment in *The Department of Correctional Services & another v POPCRU & others*[7] . In the light of the very succinct and useful summary of legal principles set out in that case, the requirements for a successful workplace based religious discrimination claim can be summarised as follows:

38.1 An ostensibly neutral workplace rule or policy which is applied to all employees may be discriminatory if it offends against an individual employee's religious convictions. This approach differs from that expressed in *FAWU v Rainbow Chicken Farms*[8] where Revelas J found that it was required that there be some form of differentiation between employees[9].

38.2 It is "incumbent on the [employees] to show that the [employer] through their enforcement of the prohibition on the wearing of dreadlocks interfered with their participation in or practice of their religion or culture"[10].

38.3 The principle involved must be a central tenet of that religion[11].

38.4 The employer must, of course, be aware of the employee's religious convictions[12], although the employees do not necessarily have to assert their rights[13].

[7] CA 6/2010, 27 September 2011 [per Murphy AJA, Waglay DJP and Davis JA concurring).

[8] (2000) 21 *ILJ* 615 (LC).

[9] See also *Dlamini & others v Green Four Security* (2006) 27 *ILJ* 2098 (LC).

[10] *POPCRU* at para 24 citing *MEC for Education, Kwazulu-Natal & others v Pillay* 2008 (1) SA 474 (CC) at para 46.

[11] See *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) and *Dlamini & others v Green Four Security* (2006) 27 *ILJ* 2098 (LC) at paras 14 – 18.

[12] See *Lewis v Media24 Ltd* (2010) 31 *ILJ* 2416 (LC).

[13] *POPCRU* at para 27.

38.5 Once an employee demonstrates that his or her employer has *prima facie* discriminated against him or her, the employer must establish either that the rule is an inherent requirement for the job or that the discrimination was fair under the circumstances[14].

38.6 In particular, the employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions[15]. Ultimately the principle of proportionality must be applied. Thus an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business.

38.7 The employer's motive and intention are not relevant to the enquiry and it is thus not relevant whether the employer acted with benign motives[16].

Legal principles applied to Williams

[39] It is clear that the application of the new shift system (which constituted a workplace rule) ran contrary to Williams's religious beliefs. He testified passionately that he became a reborn Christian 20 years ago; that it is so central to his belief system that he is a lay preacher in his church, the Apostolic Faith Mission; and that the Sunday work prohibition is a central tenet of those beliefs and is considered of utmost importance to him.

[40] Whilst it is clear that the workplace rule applied equally to all and that there was no differentiation between employees, the test is now whether the workplace rule discriminated against the beliefs of any single employee, irrespective of how neutral the rule was. The point is simply this: Williams was the only employee who chose to register a complaint premised on his religious beliefs.

[41] It is clear that the respondent's management knew of Williams's religious convictions and had known for some time. More particularly, the

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[14] *Harksen v Lane NO* 1998 (4) SA 1 (CC) at para 53.

[15] *FAWU* at para 33; *Dlamini* at para 13; *Lewis* at para 128; *POPCRU* at paras 43 – 45; *Pillay* at 73.

[16] *POPCRU* at para 35, citing *James v Eastleigh Borough Council* [1990] 2 AC 751 and *Nagarajan v London Regional Transport* [2000] 1 AC 501.

respondent knew that the Sunday work prohibition was a central tenet of his beliefs – so much so that he had in the past turned down promotions and lucrative overtime work in order to go to church, preach and not work on Sundays.

[42] Whilst it is no longer a requirement that the employee assert his rights, it is clear that Williams did so by refusing to work the Sunday shift and in attempting to "work to rule" on 15 June 2010. He also lodged a grievance and instructed his union representative to deal with his dispute.

[43] It is thus clear that Williams established a *prima facie* case of discrimination against his religious beliefs. If upheld, that discrimination, which resulted in Williams's dismissal, would constitute an automatically unfair dismissal for the purposes of the LRA. It would also follow that in as much as compliance was an instruction, it was neither lawful nor reasonable.

[44] The respondent argued that the rule was an inherent requirement of the job and that it had no means of accommodating the second applicant and his beliefs. Once they had forged a collective agreement, it was to be applied across the board with no differentiation between employees.

[45] The applicants do not dispute that the respondent had valid economic reasons for restructuring the shift patterns or that it was in some way barred from implementing those patterns generally. What was submitted is that there is no good reason why Williams, as an individual, could not have been accommodated within what is a relatively large business.

[46] The respondent was obliged to conduct this enquiry at the point of the disciplinary hearing as this was the stage where it was required to determine whether Williams had a valid reason for refusing to obey a workplace rule. On the assumption that he could be accommodated, the respondent was required to find that he was not guilty of unprotected strike action or the refusal to carry out a lawful instruction – the instruction itself being discriminatory.

[47] It would of course have been preferable had the respondent simply elected not to prosecute second applicant to begin with. Whilst there was no grievance process "alive" in a technical sense while the union

representative was trying to resolve Williams' concerns, it would have been clear to the respondent that he was not going to comply with the Sunday work demand. It was thus inevitable that his dispute had to be resolved one way or the other.

[48] Against the clear guidelines formulated by the Labour Appeal Court in *POPCRU,* the failure by the respondent to accommodate Williams by removing his obligation to work on Sundays and dismissing him as a consequence thereof rendered his dismissal automatically unfair.

Conclusion

[49] The dismissal of Williams was automatically unfair. The real or proximate cause for his dismissal was his religious beliefs; had he been willing to work on Sundays, he would not have been dismissed. The respondent did not make any effort, or at least not a sufficient effort, to accommodate him by exploring alternatives to Sunday work for him.

[50] Williams sought reinstatement. He was by all accounts an excellent worker with 26 years' clean service. Ever since his conversion, he has had a very good relationship with the respondent. There can be no bar to his reinstatement, which is the primary remedy prescribed by s 193(2) of the LRA. The respondent also had the foresight to appoint replacement employees on a fixed term basis only pending the finalisation of this dispute. It will therefore not be difficult from an operational point of view to reinstate Williams.

[51] The dismissal of the third and further applicants was fair. They did not object to the procedure and all pleaded guilty. The only question before this court was whether the sanction was too harsh. Given the background outlined above and the repeated efforts by the respondent and SACTWU to persuade the individual applicants to adhere to the collective agreement, it was not.

Costs

[52] Both parties have been partly successful; SACTWU insofar as it represents Williams, and the respondent with regard to the remaining

applicants. It would be very difficult, if not impossible, to apportion the costs of the trial between the parties. SACTWU was not to blame for its members' conduct; on the contrary, it acted in an exemplary and responsible manner in its efforts to save its members' jobs. The respondent also acted, on the whole, in a mature and responsible way in attempting to resolve the issues around shift work with the union, entering into a collective agreement, and resorting to dismissal only after repeated misconduct by the employees. The union and the respondent also have an ongoing relationship. This is a case where, in law and fairness, neither party should be held liable for the other's costs.

Ruling

[53] The dismissal of the second applicant, Johannes Williams, was substantively unfair. The respondent is ordered to reinstate him retrospectively into the same position that he occupied prior to his dismissal; provided that he may not be compelled to work on Sundays.

[54] The dismissal of the third and further applicants was fair.

[55] There is no order as to costs.

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A J Steenkamp

Judge

APPEARANCES

APPLICANTS: J Whyte of Cheadle Thompson & Haysom.

RESPONDENT: F Cronjé.