IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C15/17

In the matter between

UNTU OBO SCHRENK	**Applicant**
and	
EMMA LEVY N.O.	**First Respondent**
TRANSNET BARGAINING COUNCIL	**Second Respondent**
TRANSNET PORT TERMINALS	**Third Respondent**

Heard: 29 November 2018
Delivered: 23 April 2019

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award issued by the first respondent (the Arbitrator).

[2] The applicant employee (Schrenk) was employed by the third respondent for a period of 34 years. At the time of his dismissal in September 2016, he was a Technical supervisor. Schrenk was dismissed after allegations that he made racist remarks to a fellow employee.

[3] It was submitted on behalf of Schrenk that the award is not one of a reasonable decision-maker. The primary basis for this argument is that although the arbitrator found the dismissal to have been substantially unfair, she simply awarded Schrenk one month's compensation[1] to him without the remedy of reinstatement.

[4] The Arbitrator summarised the background to the dismissal as follows:

> "The Applicant was dismissed for allegedly making racist remarks against an employee on 16 September 2016. A dispute was referred to the Transnet Bargaining Council on the Applicant's behalf by his trade union (UNTU) on 24 September 2016 challenging the fairness of the dismissal and seeking his reinstatement with the company.
>
> Prior to his dismissal, the Applicant was suspended on full pay (on 24 August 2016) pending a disciplinary hearing to investigate the allegations stated above. The suspension followed a formal grievance hearing by the company (18 August 2016) after a grievance was submitted by an employee (on 16 August 2016).
>
> On 1 September 2016, the applicant was notified to attend a disciplinary hearing (on 14 September) to consider allegations of Racism and Degrading Remarks: **"That on Tuesday 16 August at approximately 10am at your office after enquiry was made by Mr Z Ntsiko and Ms Lengisi regarding their migration, you in your capacity as Technical Supervisor commented by allegedly**

[1] This was awarded as one month's gross salary

saying the following to Mr Ntsiko : 'You just want money, money, money, you're just like a baboon' knowing that such utterences are not tolerated at Transnet."

The Applicant denied the allegation stated above and averred that he had used an Afrikaans idiom ("**die bobbejaan die bult gaan haal – n moesilkheid tegemoet loop; joe vreeslik kwel oor lest wat nog glad nie eens gebeur het nie**") Meaning do not look for trouble when it is not there. He stated that the idiom had been misunderstood by both the employees on 16 August 2016.

It was noted that the Applicant had been issued with a Final Written Warning (valid from 10 November 2015 – 10 November 2016) for serious misconduct in relation to safety instructions to employees. It was further noted that this warning expired the day before the arbitration on 11 November 2016."

[5] From the record of the arbitration, the final written warning dealt with "gross unsafe instructions and actions" given to his artisans. The charges for which Schrenk received the penalty were as follows:

"Gross unsafe instructions and actions:

(a) That on 11 August 2015 you in your capacity as Technical Supervisor instructed Ms Warrenay Menas, an apprentice, to use the air grinder disk and put it in the electric grinder knowing that it is unsafe to do so.
(b) That on the 13th August 2015 at Workshop 17 you gave Conrad Makhaliva, the artisan, an instruction to weld a nut onto the shaft and to turn the eyebolt into it knowing that it's not standard procedure to do so.
(c) That on the 14th August 2015 you in your capacity as Technical Suprevisor instructed the two apprentices in your department to lift up the gear of the tippler drum gearbox in order to install the cones of the bearing, know that they can injure their fingers, continuing even after you were informed by the trade hand, Mr Kosie Truter, that it is unsafe for them to work like that."

[6] Shrenk was also charged for 'Insolence' in the same hearing as follows:

"a) improper conduct that you in your capacity as Technical Supervisor used obscene language towards Mr Kosie Truter which is a trade hand under your supervision regarding your artisan, Conrad Makhaliva, who is also reporting to you. The instance in question was when referring to Conrad as a 'vaak seun en p*es' knowing that such behaviour is unacceptable especially if you being in a senior position.

b) improper conduct that you in your capacity as Technical Supervisor used obscene language towards Mr Kosie Truter who is a trade hand under your supervision regarding Kenneth Miggel, saying the following : "He gaan Workshop toe (Kennith) kom na Charl dan gaan Plaai kom vir 3 maande. Naaie die ek hou nie van hom nie, he was n Trade Hand gewees nou is hy n Ambagsman in my oe sal he altyd n Trade Hand bly."

[7] There is no counter-application to review the Award in this matter. Thus, the Court must consider whether reinstatement should have been the appropriate remedy in this matter, rather than the one month's compensation awarded. The reasons for the remedy awarded are set out in the following paragraphs of the Award:

"Relief

75. In the absence of sufficient material evidence of overt racism and degrading remarks to a subordinate, I am obliged under the circumstances to find the dismissal substantively unfair in terms of section 188(1)(a)(i) of the LRA. However, I am of the view that the use of an Afrikaans idiom by the Applicant with reference to baboons was highly inappropriate under the circumstances and certainly unworthy conduct of a trained supervisor.

76. Turning to the appropriate remedy, I am persuaded that there is sufficient material evidence to show that the Applicant had not changed his punative and dehumanising approach to staff discipline despite his final written warning and training. In the light of his disrespectful treatment of his staff and persistent complaints against him, I am persuaded that it is not reasonably practicable

under the circumstances for the employer to reinstate or re-employ the employee in terms of section 193(2) (c) of the LRA.

77. Due to the Applicant's 34 years of service and that it is the first time he had been charged with racism and degrading remarks to staff, I am of the view that it is just and equitable under the circumstances for him to be paid compensation equivalent to one month's salary. It is noted that the Applicant would have accepted an early retirement package to resolve the matter prior to arbitration. However, this was not agreed to by the company."

[8] The founding affidavit in this review submits that: "The reasons advanced why proper and compelling circumstances exist for Schrenk not to be reinstated, are not sufficient in the circumstances to justify the determination that Schrenk should not have been reinstated." This is in essence the basis for the review.

[9] The Arbitrator took into account the evidence at arbitration relating to Schrenk's relationship with his subordinates in making the decision that reinstatement was not reasonably practicable. That evidence traversed the need for him to be trained to deal with his subordinates after grievances raised by his team in 2014, and a group training session from the Employees Assistance programme conducted to restore the relations between Schrenk and his team. He received training on people's management and stress management in 2015. The charges previously brought against him, referred to above, including those that reflected that Schrenk referred to his subordinates in derogatory, crude and insulting terms were handed in during the arbitration without objection from Schrenk or his representative.

[10] In these circumstances, the issue of whether reinstatement was reasonably practicable needs consideration. I note from the record of the arbitration, Schrenk was asked by his representative about reinstatement. The question and answer are as follows:

"MR WEWERS: If the opportunity comes your way to be reinstated would you like to go back to the team as a Supervisor or what would you prefer to do?

APPLICANT: At the moment I feel very betrayed. I do not what to say."

[11] In **National Commissioner of the SA Police Service & another v Myers**[2] , the LAC reiterated the meaning of 'reinstatement' as articulated by the Constitutional Court in **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others**[3], i.e. 'to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions'. The Court stated that: "Equity Aviation established the principle that where an employee is reinstated by the employer, he or she resumes employment on the same terms and conditions that prevailed at the time of the dismissal of the employee. This means that the employer does not conclude a new contract when reinstating a dismissed employee. It merely restores the employment relationship to what it was before the dismissal."[4]

[12] It is the Court's view that given the evidence before the Arbitrator relating to the relationship between Schrenck and his team, as well as the statement of Schrenk himself referred to above, the decision that reinstatement into his job of Technical Supervisor was not reasonably practicable, is not susceptible to review. However, it is necessary to decide whether the compensation awarded should stand unchanged.

[13] In **SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others**[5] the Constitutional Court had this to say:

"To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA. Zondo JP outlined the applicable factors in these terms:

"There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It

[2] (2018) 39 ILJ 1965 (LAC)
[3] Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others 2009 (1) SA 390 (CC)
[4] At paragraph 52
[5] (2017) 38 ILJ 97 (CC) at para 50

would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

. . .

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.

(c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been

sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes."

[14] In this matter the dismissal of the applicant employee was found to be substantively unfair, but procedurally fair. The Arbitrators finding that he was not guilty of the charge for which he was dismissed has not been challenged. However, the Arbitrator did voice her view that by using the idiom that he did, his conduct was highly unworthy and inappropriate. The impact of such conduct on the employer in view of its obligations to uphold the prescripts of employment law'and the Constitution, must be taken into account. In addition, the very long service of Schrenk must be duly considered. In the Court's view, the award of one month's compensation cannot be considered as a judicious exercise of discretion. An award of six months compensation is appropriate in all the circumstances.

[15] Neither party can be said to have been entirely successful in this application and taking into account that Schrenk is represented by his union, I am not going to make a costs order in this matter. I make the following order:

Order

1. The decision of the Arbitrator under case number TCR010508 as to the quantum to be awarded to Mr Audri Schrenk for substantively unfair dismissal is reviewed and set aside.
2. Paragraphs 81 and 82 of the Award are substituted as followed:
   2.1 The Third Respondent is ordered to pay the Applicant monetary compensation equivalent to six month's pay at his gross salary at the time of his dismissal.
   2.2 The payment shall be made to the Applicant in full within one calendar month of this order.

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H RABKIN-NAICKER

Judge of the Labour Court of South Africa

Appearances

For the Applicant: W. Hutchinson instructed by Fluxman's Incorporated

For the Third Respondent: C.Tsegarie instructed by Webber Wentzel