

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case Number: JA13/98

In the matter between:

ROSCO MOULDINGS (PTY) LTD

First Appellant

VOLANTE

Second

Appellant

and

NUMSA

First Respondent

AND OTHERS

Second and Further

Respondents

JUDGMENT

NGCOBO AJP

1]On 29 September 1995 the appellant companies, Rosco Mouldings (Pty) Ltd and Volante, dismissed a number of their employees, second and further respondents (the employees), for participating in a go-slow. Volante is joint venture between a company called Euro-Plastifoam and Rosco Moulding (Pty) Ltd. The appellants manufacture mainly motor vehicle parts primarily for Honda, Nissan and Mercedes Benz. All the dismissed employees were members of NUMSA, the first respondent, the recognised collective bargaining representative of the employees of the

appellants. Consequent upon their dismissal, the employees brought two separate applications in terms of section 46(9) of the Labour Relations Act, 28 of 1956, as amended,(the Act) against each appellant. The two applications were subsequently consolidated. After hearing evidence, the industrial court found that the dismissal of the employees constituted an unfair labour practice and ordered the reinstatement of the employees.

2]The present appeal is against both the determination and the order made by the industrial court.

3]Broadly speaking, the appeal raises three issues:

- (a) The correctness of the finding that the dismissal of the employees constituted an unfair labour practice;
- (b) the appropriateness of the relief awarded; and
- (c) the correctness of the order joining certain twenty employees who were not on the original list of dismissed employees when the dispute was referred to the industrial council.

4]The background facts against which these issues must be determined are not in dispute.

5]The appellants and NUMSA had been engaged in wage negotiations. These negotiations commenced in April 1995. NUMSA demanded a wage increase of 15% plus “an improvement factor” of 5% across the board. The appellants offered a 8% increase, which was to be the last and final wage offer by the appellants. By early August 1995 the negotiations had reached a deadlock. The National Industrial Council for the Motor Industry was unable to resolve the dispute. NUMSA gave notice to conduct a strike to ballot amongst its members. In the meantime, some of the employees accepted the appellants’ wage offer of 8% increase. At Euro-Plastifoam, the majority of employees accepted the offer.

6]On a Friday, 22 September, the employees of the appellants took a decision to embark on a go-slow. The go-slow commenced during the week of 26 September and continued

until 29 September, when the employees were dismissed. According to appellants' witnesses, all the employees participated in the go-slow. Memoranda and ultimatums urging the employees to resume their normal duties went unheeded.

7]The appellants assumed that those employees who had not accepted the wage offer were the ones who had participated in the go-slow. The rationale for this assumption was that these employees were the only employees who still had a dispute with the appellants. Accordingly, the appellants took a decision to dismiss all those employees who had not accepted the wage offer.

8]The dismissed employees included Messrs Christopher Kanyane, Solomon Morobane and Banks Mashale who were absent from work either owing to illness or on sick leave during the period of the go-slow.

9]In the course of his argument, Mr Woudstra, who appeared on behalf of the appellants, very fairly and properly conceded that there was no basis for the dismissal of the employees who were absent from work. The dismissal of Kanyane, Morobane and Mashale was indeed substantively unfair and it constituted an unfair labour practice.

10]As for the remaining employees, the central issue for determination is whether the decision by the appellants to dismiss only those employees who had not accepted the wage offer was fair and reasonable.

11]A convenient starting point is the parity principle. This principle is a basic tenant of fairness. It requires that like cases should be treated alike. *National Union of Metal Workers of South Africa v Henred Fruehauf Trailers* 1995 (4) SA 456 (A) at 463 G-J; *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545 H. However, this is not an inflexible principle which is to be applied in all cases. There may be cases where the dictates of fairness and justice may require the principle to yield to some other considerations. The circumstances of each case have to be considered and evaluated. Generally speaking, the criterion used to differentiate must be fair and reasonable.

12]The appellants had little doubt that the workforce was engaged in the go-slow. According to the witnesses of the appellants the entire workforce was engaged in the go-slow. Yet only second and further employees were dismissed. The only basis upon which these employees were selected for dismissal was because they had not accepted the appellants' wage offer. On behalf of the appellants, it was submitted that the criterion applied by the appellants was fair and reasonable in the circumstances of this case.

13]For the submission that the criterion applied by the appellants was fair and reasonable, Mr Woudstra relied upon circumstantial evidence, which, he submitted, pointed out the dismissed employees as being the only ones who participated in the go-slow. The circumstantial evidence relied upon was, inter alia, the fact that: the employees who accepted the offer declared that they were not in dispute with the appellants; that the employees at Euro-Plastifoam, where a majority of employees accepted the wage offer, did not participate in the go-slow; and that work returned to normal after the dismissal of the employees. He submitted that the only inference that can be drawn from this circumstantial evidence is that those employees who did not accept the offer were the only ones who participated in the go-slow. They had the motive to do so, he argued.

14]The foundation of this argument is the assumption that the employees who accepted the wage offer did not participate in the go-slow. Mr Woudstra's argument must stand or fall by the distinction made by the appellants. If there was no basis for the distinction, the criterion applied by the appellants cannot be said to be fair and reasonable. Indeed, Mr Woudstra accepted that this was so.

15]The fallacy of the appellants' argument is that it overlooks the direct evidence of the appellants' managers who testified that on their observation the entire workforce was engaged in the go-slow. They further testified that no employee approached them with a complaint that he/she wanted to work but was prevented from doing so by the go-slow. Indeed, in the light of this evidence, Mr Woudstra was constrained to

concede that the workforce was engaged in the go-slow. He submitted nevertheless that if the employees who had accepted the wage offer were seen not to be working, this was not because they were engaged in the go-slow. The difficulty with this submission is that no employee disassociated himself/herself from the go-slow. In addition, on Friday 22 September a decision was taken that the workforce would embark on a go-slow.

16]In the light of the direct evidence of participation of the workforce in the go-slow, the inference contended for by Mr Woudstra cannot stand.

17]It was further submitted that in order to find that the employees who had accepted the offer had participated in the go-slow, they would have to be disbelieved when they declared, when accepting the offer, that they were not in dispute with the appellants. That does not necessarily follow. The employees were dismissed not because they were in dispute with the appellants, but because they had participated in the go-slow. Once the evidence establishes that the entire workforce participated in the go-slow, the declaration by them that they were not in dispute with the appellants, ceases to be an important consideration. This also applies to the other circumstantial evidence relied upon by Mr Woudstra.

18]In any event, the inference contended for by Mr Woudstra is not the most plausible inference. The fact that these employees accepted the wage offer does not necessarily mean that they were happy with the increase they had received, let alone the fact that they did not participate in the go-slow. Indeed, it is not inconceivable that some of the employees who had accepted the wage offer were nevertheless unhappy with the increase as they had not received the increase they had initially demanded. These employees would have had a reason to participate in the go-slow in the hope that they might receive a better increase than they had accepted. Another important factor to bear in mind is the fact that the appellants' production line is organised in such a manner that retardation of work at one point on the production line would affect the volume of work that was available for employees further down the production line. It is, therefore, not inconceivable that some of the dismissed employees found

themselves either not working or working at a slower pace because they did not have enough work coming through to them.

19]Where a group of employees participate in the same form of misconduct and it is virtually impossible to say who of the employees were not engaged in such misconduct, it is patently unfair to arbitrarily select, for dismissal, a small group of employees. In the light of the direct evidence that the entire workforce was engaged in the go-slow, there was no basis for treating differently the employees who had accepted the wage offer from those who did not. The criterion applied by the appellants in selecting the employees for dismissal was, in my view, arbitrary and patently unfair. The arbitrariness and the patent unfairness of this selection criterion is amply demonstrated by the dismissal of three employees who were absent during the period of the go-slow. The appellants assumed that they had participated in the go-slow because they had not accepted the wage offer. Yet It could hardly be suggested that these employees participated in the go-slow.

20]Apart from the foregoing the dismissed employees were never warned that they were considered responsible for the go-slow because they had not accepted the wage offer and that the future of their employment was in jeopardy for that reason. Mr Woudstra submitted that it was not necessary for the appellants to warn the employees beforehand of the criterion that would be used in selecting the employees to be dismissed. This is so, he submitted, because all the employees knew that they would be dismissed for participating in the go-slow. That may be true though, what the dismissed employees did not know, but what they were entitled to know prior to their dismissal, was that their failure to accept the wage offer would be used against them. To be fair, an ultimatum must inform the employee, inter alia, why his/her employment is in jeopardy and what remedial action such an employee is required to take to avoid dismissal. The ultimatums issued by the appellants failed to do this. In addition, twenty seven employees who were working the night shift were not even aware of the final two ultimatums as these were issued after the night shift had left work and they were only due to resume their duties on Monday 2 October 1995.

21]In all the circumstances, I conclude that the dismissal of the employees was substantively unfair.

22]Then there is the question of remedy.

23]In awarding relief, the industrial court differentiated between the three absentees and the twenty seven night shift employees who did not receive the final two ultimatums on the one hand, and the remaining employees on the other hand. While there is basis for treating the three absentees differently from the other dismissed employees, there is no basis for differentiating between those who received the ultimatums and those who did not, where the dismissal of both groups was substantively unfair. Once it is accepted that dismissals were substantively unfair and that both those groups of employees participated in the go-slow, the receipt of the ultimatums ceases to be an important consideration for purposes of the relief.

24]Apart from the foregoing, the orders for reinstatement made by the Court a quo fell foul of the provisions of section 49(3)(b) and (c) read with section 46(9)(c) of the Act, which limits retrospective relief of reinstatement to a maximum period of six months. ***Cremerk a division of Triple P- Chemical Ventures (Pty) Ltd v South Africa Chemical Workers Union and Others (1994) 15 ILJ 289 (LAC) at 294E - 295A; Trident Steel (Pty) Ltd v John NO and Others (1987) 8 ILJ 27 WLD at 38J - 39A.*** The order made by the Court a quo went beyond the six months period.

25]The industrial court committed a misdirection in these two respects. This court is, therefore, entitled to consider the question of relief afresh.

26]Fairness and justice require that employees who are dismissed unfairly be reinstated unless, having regard to all the circumstances, there is reason to

refuse reinstatement. ***National Union of Metal Workers of South Africa v Henred Fruehauf Trailers*, supra at 462J-463A.** A go-slow has been described as a most insidious form of industrial action, rightly so. Nor can it be gainsaid that the conduct of the employees was reprehensible. The sabotage which followed was the most deplorable conduct on the part of the employees. However, there are other considerations. The dismissed employees were not alone in their conduct. The employees were part of a workforce all whom had participated in the go-slow. They were the only ones who were dismissed. Others whose conduct was equally reprehensible, were left undisturbed. The only thing that set them apart was the fact that they did not accept the wage offer.

27]In these circumstances a denial of reinstatement would not be in accordance with fairness and justice. However, this court cannot turn a blind eye to the conduct of the employees. Their conduct was reprehensible. This is a factor which must be taken into consideration when determining whether reinstatement should operate retrospectively. The three absentees, must of course be treated differently from the other employees. They did not participate in the go-slow. The others participated in the go-slow. Fairness requires that the three absentees should be reinstated retrospectively. The remaining employees do not deserve that relief - it is sufficient if they are reinstated as from the date of the order of the industrial court.

28]Finally, the appellants objected to the joining of certain twenty employees on the grounds that: (a) these employees did not appear on the list of employees when the dispute was submitted the industrial council; (b) no formal application was made to join them as applicants; and (c) there is no evidence that six of these employees were employees of the appellants and that they were dismissed on 29 September.

29]Mr Woudstra conceded that, in view of the affidavits filed by the employees, including

the six employees complained of, confirming that they were further applicants and that they were dismissed by the appellants on 29 September, he could no longer persist with the last mentioned ground of objection.

30]The basic submission by the appellants in regard to the employees who were joined is that the industrial court had no jurisdiction in respect of the employees sought to be joined as they were not parties to the dispute that was referred to the industrial council.

31]The referral of a dispute to the industrial council is governed by section 27 A(1)(a) of the Act. What that section requires is that a matter giving rise to the dispute shall be referred to the industrial council. The matter that gave rise to the dispute here was the dismissal, on 29 September, of the employees who were members of NUMSA. It is that dispute which was referred to the industrial council. When NUMSA referred the dispute to the industrial council, it did so in its own name and on behalf of its members. That the referral was accompanied by a list of employees, does not detract from the fact that NUMSA referred the dispute on behalf of its members who were dismissed by the appellants. To now say that the referral was limited to those employees whose names appeared on the original list, seems to me to be a highly artificial and unacceptably narrow view, in the circumstances. There was, in my view, substantial compliance with section 27 A(1)(a) of the Act.

32]In these circumstances, there can be no legitimate objection to joining the twenty employees as further applicants. In the result, the industrial court had jurisdiction in respect of these employees and they were properly joined as further applicants in the court below.

33]Fairness requires that no order as to the costs of the appeal should be made. I did not understand Mr Van Der Riet, who appeared on behalf of the respondents, to contend otherwise.

34]In the event, I make the following order:

(a) The appeal succeeds to the extent that the order of the industrial court is set

aside and there is substituted the following order:

“1. The dismissal of the applicants by the respondents on 29 September 1995 was unfair and it constituted an unfair labour practice.

2. The respondents are ordered to reinstate:

2.1 Messrs Christopher Kanyane, Solomon Morobane and Banks Mashale, retrospectively, for a period of six months from 6 February 1998; and

2.2 the remaining applicants with effect from 6 February 1998,

in their employ on the same terms and conditions which applied to them prior to their dismissal.

3. The applicants are ordered to report for work at their respective places of employment no later than 08h00 on Monday, 8 March 1999.

4. Any applicant who fails to comply with the order in paragraph 3 above shall forfeit the right to reinstatement.

5. There is no order for costs.”

(b) No order as to the costs of appeal is made.

Ngcobo AJP

I agree,

Froneman DJP

Date of hearing	:	5 February 1999
Date of judgment	:	18 February 1999
For the Appellant	:	H Van R Woudstra SC
Instructed by	:	Riaan Du Plessis Inc
For the Respondent	:	Adv J G Van Der Riet
Instructed by	:	Cheadle Thompson & Haysom