

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: CA9/1999

In the matter between:

CAPE TOWN CITY COUNCIL Appellant

and

THEMBILA MARK MASITHO & OTHERS Respondents

JUDGMENT

NUGENT, AJA:

The respondents in this appeal were dismissed from their employment as ambulance personnel. They applied to the Labour Court for relief, alleging that their dismissal was unfair. The Labour Court (per Mlambo J) upheld their claim, and ordered that they be reinstated, but with a final warning effective from the date of the order. The appellant now appeals against that decision.

The appellant has a number of ambulance stations situated at various

places within the Cape Town metropolitan area. The eight respondents, and a certain Mr. Nongqokwana, were all employed by the appellant as ambulance personnel, at the Khayelitsha sector station. It is not disputed that the duties of ambulance personnel were not confined to responding to calls emanating from the particular area in which they were stationed. They were obliged to respond to all instructions from the ambulance control centre, even if this required them to travel outside their particular sector.

On the evening of 22 January 1997 the respondents, and Mr Nongqokwana, commenced their shift at 19h00. At the time their shift commenced, there was confusion at the ambulance control centre, apparently because of a shortage of ambulances, which had the result that the ambulance personnel at Khayelitsha were called upon to respond to calls outside their sector. This gave rise to considerable unhappiness amongst the personnel, and they, gathered in the kitchen at the sector to express their concern. It is not necessary for purposes of this appeal to dwell upon the cause of their concern, for whatever it was, they were not entitled to respond to it by abandoning their shift, which is what occurred.

A certain Mr Pietersen, who was in charge of the Mitchells Plain sector station, was requested by one of his superiors to go to the Khayelitsha station, and attempt to resolve the matter. On his arrival, he found the respondents gathered in the kitchen, threatening to abandon their shift. Mr Pietersen cautioned them against doing so, pointing out that other mechanisms were available to them to resolve their grievance, and that they would be putting lives at risk if they left the station. Unable to persuade them, he then left. Shortly thereafter, the respondents, and Mr Nongqokwana, then abandoned their shift. The person who was in charge of the Khayelitsha station at the time was a certain Mr Mkhubeleki. When it became apparent to him that the respondents intended abandoning their shift, he completed "sick leave" forms in respect of each of them. Why he did so is not entirely clear, for it is quite apparent that there were no grounds for any of them to take sick leave.

Disciplinary proceedings were then commenced by the appellant against the respondents and Mr Nongqokwana. Although not framed in precisely those terms, essentially, it was alleged against all of them that they had abandoned their duties without permission. For reasons which are not apparent from the record, separate hearings were held in respect of the respondents on the one hand, and Mr Nongqokwana on the other.

The hearing in relation to Mr Nongqokwana took place on 7 February 1997, and was chaired by a certain Mr Slater. According to the record of the disciplinary hearing, Mr Nongqokwana said that he was not guilty of the

charge, but nevertheless acknowledge that he had indeed abandoned his shift, and said that although he “was not intimidated in any way” he had “decided to go home with the others in view of the violent history of this particular group.” The chairman of the disciplinary hearing found that he was guilty of “absconding from work after deciding that an instruction given by the Control Room Officer was not to your liking”, and he was given a warning. His reasons for reaching that conclusion were recorded as follows:

“This was due to the fact that the Initiator did not submit any aggravating circumstances, that the Defendant although on overtime shift, still did not have the right to terminate his duties and go home at will. Furthermore he had choices at that time and instead of going home could have asked either Mr Mkhubukeli, or Mr Pietersen who had come through from Mitchells plain to bring him to the Station to complete his shift in terms of the Standing Orders.”

The disciplinary hearing in respect of the respondents took place over a period of eight days between April and June 1997. The chairman of the hearing on this occasion was a certain Mr Pillay. The respondents said they were not guilty of the charge, and said that they had all shared in a meal on the evening in question, which had made them all ill, and that is why they had gone off on sick leave after the shift commenced. Quite clearly that explanation was false. They were all found guilty of absconding from their duties, and were dismissed.

At the trial of the matter in the Labour Court, none of the respondents gave evidence, and the untruthful account which they had given at the disciplinary hearing was not repeated. Mr Nongqokwana gave evidence, in which he stated that the words attributed to him in the record of his disciplinary hearing, to the effect that he had left in view of the “violent history” of the respondents were not correct. He said that he had been “afraid of the situation” but nobody had intimidated him. Precisely what it was in the “situation” that had made him afraid was not explained in the evidence, and nor is there anything in the evidence to suggest that he had any reason to be afraid.

The learned judge in the court a quo found, correctly, that there had been no justification for the personnel to have abandoned their shift, and that their conduct in doing so was irresponsible. However, the learned judge

went on to find that the sanction that had been imposed upon the respondents was unfair, bearing in mind that ambulance personnel at the Mitchells Plain station had previously been had been given a final warning for similar conduct, and Mr Nongqokwana had also not been dismissed. In that respect the learned judge said the following:

“I cannot however ignore the fact that employers are entitled to set their own standards as regards discipline and punishment. It is not for this court to second guess the standards set by employers for their employees. In this case the (appellant’s) standard for a similar transgression is a final written warning. Were it not for this situation this court would have no hesitation in confirming the dismissals of the (respondents). The punishment meted out to Nongqokwana is also relevant. There is no basis for the differentiation in punishment because he was as guilty as the others who were dismissed. Under the circumstances the dismissal of the applicants was not fair. In view of the fact that Nongqokwana, who was as guilty as the applicants, is still in employment as well as the fact that the Mitchells Plain employees were also not dismissed means that in all fairness the applicants must be reinstated with a final written warning which was imposed on the Mitchells plain employees.”

The reference to the Mitchells Plain employees was a reference to certain ambulance personnel at that station who had abandoned their shift on the pretext of being ill, and had been given a final warning after a disciplinary hearing that took place during March 1997.

Fairness generally requires that like cases should be dealt with alike. As pointed out by Brassey, albeit in a different context, in ‘The Dismissal of Strikers’ (1990) 11 ILJ 213 at 229:

“The parity principle, a basic tenet of fairness, requires that like cases should be treated alike: if two employees are caught committing much the same wrong, one should not be disciplined if the other goes free; nor, if their personal circumstances are much the same, should one be more severely punished than the other.”

Similarly in *The Post Office v Fennel* 1981 IRLR 221 at 223, the following was said, which was cited with approval in *Henred Freuhauf Trailers (Pty) Ltd v National Union of Metalworkers of SA & Others* (1992) 13 ILJ 593 (LAC) at 600:

“It seems to me the expression equity as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an industrial tribunal is entitled to say, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.”

There may be valid grounds in a particular case to distinguish one employee from another, albeit that they have engaged in the same conduct, on the basis of their respective records, or on the basis of other material factors (see, for example, *National Union of Mineworkers & Others v Amcoal Collieries & Industrial Operations Ltd* (1992) 13 ILJ 1449 (LAC) at 1453B; *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddie's Mine* (1993) 14 ILJ 341 (LAC) at 357J; le Roux & Van Niekerk: SA Law of Unfair Dismissal 110-111) but in the absence of material distinguishing features equity would generally demand parity of treatment.

In SACCAWU & Others v Irvin & Johnson (1999) 8 BLLR 741 (LAC) at 751

B this court reiterated that consistency is an element of disciplinary fairness, and that it “is really the perception of bias inherent in selective discipline which makes it unfair”, but went on to observe that the flexibility which is inherent in the exercise of discretion will inevitably create the potential for some inconsistency. I am not at all sure that disciplinary decisions involve the exercise of a discretion, but even if that is so, fairness would seem to me to generally require any such discretion to be exercised consistently. While it is true that an employer cannot be expected to continue repeating a wrong decision in obedience to a principle of consistency (751D), in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.

In the present case, Mr Arendse SC, who appeared for the appellant, submitted that the position of the respondents was distinguishable from the employees at Mitchells Plain, and from Mr Nongqokwana.

The features that were relied upon to distinguish the Mitchells plain employees do not seem to me to be material. In that case, too, the ambulance personnel were found to have abandoned their shift without justification, and in that respect they were no different to the respondents in this case.

But that apart, in my view the evidence does not reveal any material distinction between the respondents and Mr Nongqokwana, who was equally culpable for abandoning his shift in precisely the same circumstances. The suggestion that he had somehow distanced himself from the conduct of the respondents is, in my view, not borne out by the evidence. While it is true that he was not present with the respondents at the time that they first met in the kitchen, that was merely coincidental. He was present when Mr Pietersen urged the personnel not to abandon their shift; left with the others; and had as little justification for doing so as the respondents did. It was also submitted that Mr Nongqokwana was distinguishable from the rest because he did not advance a false explanation for his conduct at his disciplinary hearing. While it is true that Mr Nongqokwana did not advance the false excuse that he had been ill, in my view that is not a material distinction. While there might indeed be circumstances in which the conduct of an employee at a disciplinary hearing will itself be relevant to whether the employment relationship can be expected to continue, I do not think they apply in the present case, and that was in any even not a consideration that was taken into account in the appellant's decision to dismiss the respondents. They were dismissed solely because of the gravity of their transgression, which applied equally to Mr Nongqokwana (and to the employees at Mitchells Plain).

In my view the learned judge in the court a quo cannot be faulted for finding that it was unfair to dismiss the respondents, when neither Mr Nongqokwana, nor the employees at Mitchells Plain, were dismissed for precisely the same conduct. I hasten to add that the fact that consistency is called for from the appellant does not mean that, having adopted one course in the past, it is forever bound to adhere to it. The value of consistency is that employees are entitled to expect that like cases will be dealt with alike, but they can have no complaint if they are told clearly in advance that a former practice will no longer be adhered to. I agree with the learned judge in the court a quo that the conduct of the respondents in the present case was most irresponsible, but if it is to warrant instant dismissal, employees ought to be made clearly aware of that fact.

In the circumstances, I can see no reason to interfere with the decision of the court a quo, and the appeal ought to be dismissed. No order for costs was made in the court a quo, but as far as the appeal is concerned, I can see no reason why the costs should not follow the result.

The appeal is dismissed with costs.

R.W. NUGENT
ACTING JUDGE OF APPEAL

R.M.M. ZONDO
JUDGE PRESIDENT

JUDGE OF APPEAL

C.R. NICHOLSON

For the Appellant: Adv. Nongqokwana. Arendse SC
 Instructed by
Mallinicks Inc, Cape Town.

For the Respondent: Adv.
 Instructed by
Hofmeyr Herbststein Gihwala & Cluver Inc

Cape Town

Date of Hearing:

Date of Judgment: 28 June 2000