



**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

Not reportable

CASE NO: JR 2475/09

In the matter between:

**NATIONAL UNION OF
METALWORKERS OF SOUTH
AFRICA (NUMSA) (on behalf of its
members listed in Schedule One
hereto and cited as The Second To
Further Applicants)**

First Applicant

**JOHANNES MOHLALA AND 32
OTHERS**

**Second to Further
Applicants**

and

TIMKEN SA (PTY) LTD

Respondent

Delivered: 29 July 2015

Summary: (Alleged unfair dismissal for participating in an unprotected strike – no justification for not following grievance procedures or LRA – strike unnecessarily prolonged in any event – employer taking adequate steps in the circumstances to involve the union – strikers unresponsive to ultimatums and appeals by union officials – selection of strikers for dismissal fair – waiver of right to dismiss not established)

JUDGMENT

LAGRANGE, J

Background

[1] This matter concerns the fairness of the dismissal of 33 employees of the respondent on 19 March 2009 who had participated in an unprotected strike in which approximately 80 employees were involved. As the unprotected status of the strike is common cause, the issue is whether the strikers were unfairly dismissed for participating in it. They maintain they were not fairly dismissed for one or more of the following reasons:

- 1.1 The company had not handled their alleged grievances reasonably and had provoked the strike.
- 1.2 The employer failed to take reasonable steps to defuse a volatile situation.
- 1.3 The employer had failed to contact the union officials at the earliest opportunity.
- 1.4 The various ultimatums had not been properly communicated to the strikers.
- 1.5 The employer had waived its right to dismiss employees on 26 February 2009.
- 1.6 To the extent that the employer could rely on the previous disciplinary records of striking employees when deciding on a sanction, whether those records were valid, correct and fair. This complaint concerns whether the prior warnings, which appeared on the employees' records, had been issued to them individually and whether the employer had previously said it would not take any disciplinary action over industrial action which arose in February and March 2008. The employer dismissed all those strikers whom it claimed had previous written warnings for their involvement in an unprotected industrial action during the previous 12 months.

[2] Much of the factual narrative is common cause, as set out below:

- 2.1 The dispute over the dismissals was unresolved by 13 July 2009 and the referral to this Court was filed five days late. The applicants applied for condonation for the late referral of the dispute which was not opposed.
- 2.2 The strike involving 83 employees began at approximately 10H30 on 25 February 2009. Whether the strike was spontaneous or not is a matter of dispute.
- 2.3 No prior notice of the strike was given to the employer.
- 2.4 In the interaction between the parties during the strike it was clear that the strikers demanded that the employer should attend to their alleged grievances.
- 2.5 On the same morning that the strike commenced, at either 11H15 or 11H55, according to the respective version of the applicants and the respondent, the respondent issued its first ultimatum to the strikers to return to work by 12H 25. On either version of the timing of the ultimatum, the strike continued. The ultimatum, on which the time was recorded as 11:15, read:

“You are hereby informed that you are engaged in unprotected industrial action in that you have not followed the procedures laid down by the Labour Relations Act.

You have already been given a verbal ultimatum to return to work, but you have chosen to ignore this.

You are hereby advised you are to return to work by:

12:25

The company reserved [sic] the right to take disciplinary action against you. Should you fail or refuse to return to work by the above time, then such disciplinary action could result in your dismissal.

Further take note that the principle of no work, no pay will apply in the interim.”

(Uppercase font ignored)

- 2.6 A fax transmission slip indicates that the first ultimatum was conveyed to them to the union at 11:54 the same morning under cover of a letter which read:

“SUBJECT: ILLEGAL STRIKE: TIMKEN SA

Tshepo,

Please be advised that NUMSA members have been on strike since 10:30.

An ultimatum to return to work by 12:25 was issued to the NUMSA shop stewards.

Please find attached a copy of the above ultimatum.

Regards,...”

- 2.7 Later, at 13H25 the employer issued a second ultimatum virtually identical to the first requiring employees to return to work by 14H25. That ultimatum, bearing 13:25 as the time of issue, read:

“You are hereby informed that you are engaged in unprotected industrial action in that you have not followed the procedures laid down by the Labour Relations Act.

You have already been given a written ultimatum to return to work, but you have chosen to ignore this.

You are hereby advised you are to return to work by:

14:25

The company reserved [sic] the right to take disciplinary action against you. Should you fail or refuse to return to work by the above time, then such disciplinary action could result in your dismissal.

Further take note that the principle of no work, no pay will apply in the interim.”

(Uppercase font ignored)

A copy of this ultimatum was apparently transmitted to the union by fax at 13:13 under cover of a letter advising the union that it had been issued.

- 2.8 A final ultimatum dated 26 February 2009, stipulating the time of issue as 08:00, stated:

“You are hereby informed that you are engaged in unprotected industrial action in that you have not followed the procedures laid down by the Labour Relations Act.

You have already been given two written ultimatums to return to work, but you have chosen to ignore this.

You are hereby advised you are to return to work by:

10:00

The company reserved [sic] the right to take disciplinary action against you. Should you fail or refuse to return to work by the above time, then such disciplinary action could result in your dismissal.

Further take note that the principle of no work, no pay will apply in the interim.”

(Uppercase font ignored).

A copy of this ultimatum was sent to the union at 12:51 under cover of a letter which is set out below at paragraph 2.10.

- 2.9 The strikers did not return to work in accordance with the ultimatum, but the applicants claim not to have been aware of the existence of the ultimatums.

- 2.10 During the morning of 26 February, union officials had been in attendance at the premises. In the afternoon, at 12H51, the employer sent a letter to the

union asking it to intervene to secure the return of the workforce and at the same time issued a notice of a disciplinary enquiry due to take place on 2 March 2009. The letter was addressed to Lephoto and the body of the letter reads:

“SUBJECT: ILLEGAL STRIKE: TIMKEN SA

Thsepo,

Please be advised that NUMSA members have continued their illegal strike action, after the final ultimatum was issued by Mrs Nel earlier today requesting that they return to work by 10:00.

We, therefore appeal to you to urge your members to return to work and advise them of the risk to their employment should they continue on this course of unprotected action.”

2.10.1 A few minutes later, another letter bearing the same heading contained this content:

“Please be advised that a disciplinary hearing in respect of various NUMSA members, in respect of the illegal strike action, has been scheduled for 11:30 on Monday, 2009-03-02.

You are kindly invited to represent your members. Non-attendance will result in the hearing proceeding and no postponement of the hearing will be allowed.”

2.11 The applicants base their claim that the employer waived its right to dismiss them for striking because when the employer sent the letter to the union asking it to appeal to members to return to work despite the expiry of the final ultimatum it effectively waived reliance on the final ultimatum.

2.12 On the morning of Friday, 27 February 2009 the striking workers returned to work.

2.13 The disciplinary enquiry did convene on 2 March 2009 and continued on 4 March 2009.

2.14 A meeting between management, the union, shop stewards and the union's legal representative took place on 18 March 2009. There is a dispute as to whether the Court can have regard to what was discussed at that meeting because the applicants contend that it concerned off the record settlement discussions held without prejudice.

2.15 On 19 March 2009, the respondent dismissed employees who had been involved in similar misconduct in the previous 12 months and issued final written warnings to the remaining employees who had participated in the strike.

2.16 On 18 March 2009, an appeal hearing in which the employees were represented by the union was held but the appeal was unsuccessful.

The evidence

- [3] Oral evidence for the respondent was given by the current manager, Mr K J Holloway ('Holloway'), who was plant manager at the time of the strike. Mr J A Kunene ('Kunene') and Mr E Diraditsele ('Diraditsele'), who were both NUMSA shop stewards at the time gave evidence for the applicants. An affidavit of Mr Pillay ('Pillay'), the former manager, was admitted as evidence with the agreement of the applicants, but without conceding the correctness of its contents. The affidavit dealt with a very limited issue and is discussed in the analysis below. There was also limited video footage viewed in the course of the evidence concerning some of the events during the strike.
- [4] The firm operated a three shift system of eight hours each shift, with the bulk of the workforce engaged on the day shifts. The shift times were 06:00 to 14:00; 14:00 to 20:00, and 20:00 to 06:00.
- [5] Holloway described relations between the union, which represented approximately 90% of the workforce, and the company as 'generally good'. There were regular engagements between management and shop stewards in monthly meetings at

plant level. Relations between the union and the firm were regulated by a recognition agreement which provided for monthly shop steward and management meetings. The agreement also made provision for an extension of the duration of ordinary monthly meetings and for the calling of extraordinary or urgent meetings by agreement between the parties if required. The union and the company had also concluded a detailed grievance procedure which permitted employees to escalate grievances to the level of a meeting with the general manager within 10 working days.

- [6] Hollaway's earliest recollection of the strike was that it started at about 10:30 on 25 February 2009 when workers gathered between the administration and manufacturing plant buildings and were stamping on the steel grating in front of the administration building. He and Mrs Nel, the HR manager, met the strikers. The strikers were 'very angry' and were accusing Mrs Nel of not doing her job and demanded a meeting there and then. Hollaway told them that they would address the issues in an orderly fashion and they should return to their workstations that they remained implacable and proceeded to the area in front of the canteen which was the designated area for industrial action. Diraditsele agreed that there had been an incident involving two of the strikers during the interaction in the corridor but apart from this, the strike had proceeded peacefully.
- [7] Hollaway confirmed that the first ultimatum had been issued by the company but could not personally confirm that it had been given to the strikers. In the written representations made by Mr T Nel, the HR Manager ('Nel') to the disciplinary enquiry, on which the applicants placed great reliance when cross-examining Hollaway, Nel recorded in relation to the first ultimatum:

"I immediately typed up and ultimatum, instructing the workers to return to work by 12H25. The shop stewards asked if I could just give them the opportunity to address the workforce themselves, before I issued the ultimatum. I said they could do that with pleasure. I instructed to shop stewards to address the workers and explained that we were busy

discussing the issues at hand and that the strike was unlawful and unprotected. I said that the shop stewards need to explain that there are a number of employees previous warnings on the files, for this selfsame thing and that such behaviour could lead to disciplinary action.”

Hollaway agreed that at this stage Nel had not mentioned the prospect of dismissal as such. Hollaway's understanding was that the ultimatum had been given to the shop stewards, but he agreed that it appeared that the shop stewards had asked Nel not to issue the ultimatum until they had addressed the strikers. It was common cause that the first ultimatum had been sent to the union just before 12:00 that day. Kunene claimed that Nel had agreed to their request to hold back the ultimatum and they had gone to address workers to persuade them to return to work, but the workers rejected their efforts because they were so angry by that stage. They insisted that Nel should address them in the canteen and when they reported this to Nel, she reiterated that she had no time to meet with them. At that stage most of the strikers had gathered in the passage near the pavement block and he maintained that they were peaceful. Kunene distanced himself from the pleaded case by the applicants where it was stated that the ultimatum was issued at about 11h15 because he had never seen the document again after they had asked Nel to hold off issuing it.

- [8] Hollaway confirmed some of the events described in a document used by Nel in presenting the company's account of the strike at the disciplinary enquiry where she gave evidence. In particular, Hollaway confirmed contacting Nel at 12:42 to arrange a meeting with shop stewards who demanded to meet with her. Kunene said that they had approached Hollaway because they could not get Nel's attention so they had gone to him to convene a meeting.
- [9] The meeting took place just after 07:30 on the morning of 26 February and was attended by four shop stewards, including a local union organiser, Mr T Lephoto ('Lephoto').
- [10] Hollaway also confirmed receiving a handwritten notice dated 26/02/2009 on that day, which contained a list of approximately 16 grievances grouped under the

headings of 'Transparency', 'Prestige guys working with components', 'SEIFSA rate vs Timken Rate' and 'Discrimination' with most of the grievances grouped under the last heading.

[11] With reference to the way these grievances were reformulated in the applicant's statement of case, Hollaway responded in detail to each allegation. In answer to the claim that there was discrimination when it came to promotions, Hollaway referred to the company's record of promotions since 2007 which showed that 19/33 persons promoted in the period came from historically disadvantaged groups the vast majority of whom were black Africans and no grievances were lodged over any of the promotions nor were any specific cases raised in shop steward meetings. Kunene identified the key issue in the grievances as being the alleged failure not to promote black employees supposedly because of their limited education and said that the information provided was not known to him at the time of the strike and that they might have understood the situation better if they had it at the time. However, he could not explain how the workers could not have been aware that half the workers promoted were black. He also could not explain why no grievance had been filed by anyone about this issue if workers were so aggrieved about it, nor why a dispute had not been declared. Diraditsele also could not dispute the information but said that even if they had been wrong about the promotions, management had never given them the information, though he could not dispute that they had never really asked for it. They had not ever lodged a grievance over the issue because they did not "deem it necessary". Diraditsele also could not recall anyone having complained to the shop stewards about discrimination, nor could he remember it being raised with NUMSA. He too suggested that the reason for the strike had been Nel's alleged remark.

[12] When asked about the handwritten list of demands dated 26 February, Diraditsele could not say who had drafted it. Initially he also had no explanation why the alleged offensive remark of Nel had not been mentioned even though this was supposedly the central issue in the strike. He then sought to suggest that it was 'spread' over some of the other items mentioned in the list of demands, but was compelled to concede that nowhere was the offensive statement referred to in the

demands. He then said that if management had provided clarity on all the issues listed and addressed them, workers would have returned to work. He further agreed that on the morning of 26 February when management agreed to engage on the issues, the demand had been met but could not explain why workers stayed out on strike. When confronted with this line of questioning, Diraditsele again reverted to the stance that the core issue in the strike was that Nel should address the strikers. When they met with management on the morning of 26 February it did not though occur to him that they should tell Hollaway that it would have gone a long way to settling the strike if Nel had spoken to the workers, because he thought Hollaway knew by then. He said it could not be raised when they met Hollaway and Nel around 12H00 in the corridor between the buildings on 25 February. He could not say why it had not been raised with Hollaway in the meeting in his office shortly thereafter as the key to ending the strike, or at any time thereafter until the commencement of the trial.

[13] The applicants claim that the firm had two ratings systems for determining remuneration for the same work and that the basis for the differentiation was on racial lines. Hollaway had agreed that there was a dual wage structure but this was because since 2006 new employees had been paid on the wage scales determined in the bargaining Council, whereas longer serving employees were retained on the previous scales. Eventually all employees would be working at bargaining Council rates. This had been raised previously as an issue but no dispute had been declared over it. Kunene conceded that there was no racial character to this differentiation and could not explain why the union had made this claim. He maintained that it was one of the issues leading to the strike but not the big issue.

[14] The complaint relating to limited duration contracts concerned the non-renewal of approximately 10 employees on such contracts of who were members of the union. It was also contended that there was a tendency to keep extending the limited duration contracts of black employees whereas white employees were made permanent on the expiry of their contracts. Hollaway conceded that it was true that 10 of the union's members did not have their contracts renewed and that

contracts had been extended but not to the extent alleged by the applicants. Kunene confirmed that this too was an issue, but not one that led to the strike. A further complaint was that there was a practice of white workers who had previously resigned but not Black former employees. Hollaway denied that there was any policy in this regard and that if there had been a need to employ machine operatives the company would have done so. No specific complaint of such disparate treatment was raised with the company. Kunene was unable to identify any of those who had been supposedly unfairly treated in this way. He thought the white employee who had been re-employed was Mr I McDonald, a manager from another facility ('McDonald'). McDonald who had been re-engaged by Timken before 2000, but he himself had only joined Timken in January 2003. As with other issues, Kunene was reluctant to say that this was anything more than an issue the workers had and not the issue which led to the strike. He would not comment when he was asked how any of the above issues could have justified unprotected action.

[15] A further complaint concerned a perception that psychometric testing was used to prefer white employees for promotion as opposed to black employees. Hollaway disputed this contention and said that the test were aptitude tests designed to test abilities of a candidate against the skills required for the job they were applying for and was not racially biased. As in the case of the other complaints no referral of any dispute had been made and Kunene could not explain why this was not done despite it being a long standing issue. The only rationale offered by Kunene was that the workers had a belief that management would resolve it. He was even reluctant to say that management's alleged failure to resolve the issue was one of the issues that prompted the strike.

[16] One specific complaint raised was that the firm had upgraded the position of a white handyman based on an increase in his responsibilities without a commensurate adjustment made in respect of his black assistant. Hollaway's explanation for this was that the handyman had been given additional responsibilities as the site caretaker in addition to his duties as a handyman. No grievance had been lodged on this issue either. Kunene also expressed the view

that workers would not have gone on strike over an issue dating from 2007, which is when the handyman was promoted. By way of explaining the delay, Kunene suggested that it was possible that workers only learnt of the assistant's situation in 2009, but conceded that the assistant would have known about the issue in 2007.

- [17] Lastly, it was alleged that there was a complaint about study loans not been provided to black employees. Hollaway confirmed that the company did provide study loans provided these related to the job the employee performed and it was possible that some had been declined on this basis. As with other complaints, Kunene could not recall any specific individuals who had been denied loans nor could he substantiate the allegation of racial bias in the provision of such loans.
- [18] Hollaway agreed under cross-examination that the relationship between employees and Nel was more strained than his relationship with employees and that Nel was aware that there were issues which needed to be addressed. He stressed though that an agreement had been reached on dates for discussions. He also agreed that two previous shop steward meetings had been boycotted by shop stewards but according to his understanding the reason for the boycott was that they did not accept the chairmanship of a third party who had been called into chair the meetings not because the shop stewards were unhappy with Nel. Kunene claimed that meetings had been boycotted in February 2009 because most of the issues raised in monthly meetings were not attended to and the boycott was a 'cry for help'. This reason had not been expressly put to Hollaway during his cross-examination, and under cross-examination when Kunene was confronted with the minutes of the 6 February 2009 he could not explain why the minuted reason given for boycotting the meeting was because they objected to a third party chairing the meeting and not because management was not addressing their issues. Likewise, he could not offer an explanation why the boycott of monthly meetings because management was allegedly not dealing with issues would not been mentioned in the statement of claim. He conceded that the union ought to have been told if things had deteriorated so much that meetings were not taking place.

- [19] On 17 and February 2009 a handwritten request was directed to Nel by shop stewards for a meeting to discuss: “(i) practice of employment and (ii) disclosure of information.” Kunene agreed that it was not entirely clear what issues would be discussed and agreed that Nel had agreed to the meeting despite shop stewards walking out of the previous monthly meeting.
- [20] The meeting had started on 24 February but could not conclude and continued the following day. Kunene thought that the issues which had been discussed on the first day concerned promotion and as far as he recalled that they had finished discussing this item. Between the two meetings they reported back to workers about what Nel had allegedly said black workers had not been able to be promoted because they were uneducated. Kunene said that it was when the meeting resumed the following morning at 10 H30 that workers went on strike. He claimed that the shop stewards had tried to persuade workers that they would raise their complaint with management, but the workers insisted that Nel must speak to them herself and explain her alleged comments. He insisted that Nel could still have addressed workers during the lunchtime if she had gone to the canteen at 10H20 after they had reported to her what the workers were saying. Diraditsele corroborated the solution in broad terms. When asked why the shop stewards did not suggest that Nel should go with them to the canteen to address workers instead of continuing with the scheduled meeting with the shop stewards at 10H30, Kunene said that they did not think about it and did not talk about that. He agreed that it could be correct as reflected in Nel’s representations to the disciplinary enquiry that McDonald had entered the meeting at about 11H00 to announce that the workers were striking. Kunene said that between 10H20 and 11H00 they were trying to persuade her to go to address the workers but they thought that the workers were back at work.
- [21] Kunene agreed that after McDonald entered the meeting, Nel started to type the ultimatum and they continued to engage her to go and speak to the workers. They persuaded her not to issue the ultimatum and went to speak to the workers themselves but the workers were very angry and would not go back to work, demanding that Nel must come and address them. Diraditsele corroborated the

shop stewards attempts to persuade workers to return to work and that Nel typed the ultimatum though he never read it. He said that they tried to urge them to return to work because they were on an unprotected strike.

[22] Thereafter the shop stewards phoned the local union organiser Lephoko, and informed him that workers were on strike. He arrived that afternoon and tried to persuade workers to return to work. When cross-examining Holloway, it had been suggested that a union organiser had come to the premises, but it was never specifically mentioned that he had arrived in the afternoon of 25 February. According to Kunene, the strikers were still angry and wanted to see Nel before they would be prepared to go back to work. During the course of his testimony in chief, Diraditsele mentioned that Lephoto had attempted to persuade workers to return to work at 10H00 on 26 February and at 15H00. He agreed that he had assisted Lephoto in speaking to the strikers on the first occasion, which was after the meeting in which management and the union had agreed that the grievances would be discussed on 3 and 4 March. He could not say why the workers would not return to work after they spoke to them about the agreement, except to state that they were still angry.

[23] In his evidence in chief, Kunene claimed that it was at the meeting with shop stewards on 25 February that the issue arose when Nel said that blacks were uneducated and could not be promoted. The shop stewards had gone back to the workers at 10 H00 and reported on what Nel had said, to which they responded she should be called to explain to them what she meant in the canteen. They returned to Nel and reported the workers' demand during the lunchtime and she responded that she did not have time to go to the workers. It was then that McDonald came into the meeting and advised that a strike was in progress. The shop stewards had not been aware that workers had not returned to work. In relation to the alleged immediate provocation in which Nel was said to have told shop stewards at the meeting she held with them on the morning of 25 February 2009 that black people were not educated and could not get promoted, Holloway could not say what Nel had said in the meeting nor could he comment on the suggestion that the strike had only started after shop stewards had reported back

to employees during the morning lunch break what she had allegedly said. However when he had interacted with shop stewards immediately after the strike had commenced and in the meeting he held with them on 26 February her alleged statements were not mentioned then, nor on any subsequent occasion. Kunene could not say why the shop stewards had not asked Hollaway to get Nel to speak to the workers for a few minutes, but he conceded that if they had done so that might have brought the strike to an end.

- [24] Hollaway did not agree with the suggestion that if Nel had gone to speak directly with the workers as demanded by the shop stewards that would have helped. He disagreed that it would have been appropriate for her to address the whole workforce because it was not in keeping with the agreed procedures and would not have been a normal method of interaction for the HR manager. He would not agree that if she had gone to address the workers the strike would not have occurred because it had already started while she was in a meeting with shop stewards. He also did not agree that it was inappropriate for Nel to issue an ultimatum rather than going to address the strikers directly as they demanded. It was suggested in cross-examination that the strikers felt they had no option but to down tools in order to get management's attention as evidenced by the representations made by Nel to the disciplinary enquiry in which she recorded this being expressed by workers when she and Hollaway went to speak to the strikers after the first ultimatum had been given to shop stewards. Hollaway agreed that the strikers had been angry and felt that they were not getting proper attention from Nel but insisted that they told them that they would make an arrangement to discuss issues and a commitment was made to meet with shop stewards for this purpose but the strikers should have returned to work. In Nel's representations, which the applicants relied on heavily for their cross examination of Hollaway, she recorded that Hollaway had explained to them that their grievances would be put on the table and addressed but this would take time and could not be resolved in a day but the workers were 'insulted' that management was not willing to stop everything to sit down with them until the matter was resolved. Kunene testified under cross examination that Hollaway's commitment to meet to resolve the issues

was not enough unless Nel spoke to the workers. When it was further suggested to Hollaway that Nel did not adopt a constructive approach in the circumstances, Hollaway responded that he did not think a constructive discussion was possible in the circumstances. He had assured strikers that the company would address the issues but they could not deal with an angry crowd.

[25] In Nel's representations it was recorded that after she and Hollaway had interacted with the strikers, they asked to be given time to discuss the matter and she left to attend the next meeting. When she was called by Hollaway at 12:42 and was told that shop stewards demanded to meet with her she said she would meet them early the following day at 07:30. The afternoon shift which reported for work had then joined the strikers. Hollaway could not comment on Nel's availability or whether her conduct in not making herself available that afternoon was irresponsible and it was the sole reason for the escalation of matters. On the other hand, Kunene could not explain why, when shop stewards approached Hollaway for a meeting, they did not tell him that a meeting between them and the company could not resolve things unless Nel went to address the workers.

[26] Some video footage was shown of a man and a woman approaching a group of approximately 10 workers gathered at the entrance of a building. Hollaway identified them as Mrs Nel and McDonald. The pair can be seen stopping in front of the workers seated in the entrance of the building and after a while giving some papers to a couple of them in the course of a discussion, which they start to move off towards another group of more lively strikers chanting and dancing about 5 m away, but on their way stopped by one of the employees they had previously given a paper to and some discussion ensues between the three of them. The employee then leaves them and moves off towards the group of toyi-toying workers, whom he joins as they move in a circular motion on a round paved area. The two managers appear intent on moving closer to the group at about the same time that the tempo of the chanting and dancing starts to rise and become more audible. They soon come to a standstill at a couple of metres from where the crowd is toyi-toying in a circle. A couple of demonstrators brandishing large cardboard placards individually approach them and brandish the placards at them defiantly. Shortly

after this, the managers turned around and walk in the direction of the building from which the video footage appears to be taken. Hollaway accepted that perhaps the conduct of strikers seen in the footage was not intimidating but he still felt it was disrespectful and aggressive. Hollaway agreed that two individuals who had been identified for their verbally abusive conduct towards Nel when she and McDonald first engaged with the group of strikers earlier in the morning had not been dismissed, because workers had been selected for dismissal on the basis of the prior warnings.

[27] As far as Hollaway could recollect the footage was taken some time after 13:00 on 25 February 2009 after lunch. However it had been pleaded by the company that shop stewards were supposed to report to the HR Department to collect the ultimatum but refused to do so. In fact a handwritten note appears on a copy of the second ultimatum stating that:

“Eddie, NUMSA shop steward, did not arrive at my office when paged or called on his cell.”

Diraditsele said that he would not have heard himself being paged as he was outside but could not comment on being notified by cellphone. Kunene testified that the reason he could not respond to any requests on that day was because he was not present on the second day of the strike as he had taken his child to the doctor. However, the ultimatum referred to was issued on the previous day and it was never suggested to Hollaway that Diraditsele did not respond to being paged because he was not at the workplace.

The applicants’ version was that the video could only have been taken of the issuing of the final ultimatum on the morning of 26 February. However Hollaway was emphatic that the final ultimatum had been issued during the meeting with the shop stewards and the union organiser on the morning of 26 February 2009. Hollaway was a little bit equivocal about whether he had witnessed what was depicted on the video or that his recollection of the event was based entirely on the video. His explanation for an inscription on the video indicating the date of 26 February 2009 and a time of 07H26 was that this was the time that the video had

been transcribed from the camera format to an MPG format. In explaining the discrepancy between Nel's account of the issuing of the second ultimatum contained in the representations she made at the disciplinary enquiry which clearly stated that the shop stewards had not come to the office to collect the ultimatum, Hollaway said he did not think it was inconsistent that she might have made an attempt to give the ultimatum to the remaining shop stewards by paging them. Kunene did not testify about the video footage as such, but Diraditsele in his evidence in chief said he was certain that it was around midday on 26 February. Although the timing of the second ultimatum fitted the time management alleged the video was taken, Diraditsele said the video was taken the following day. He could not explain why the video would reflect a time of creation that was before lunchtime on 26 February which is when the final ultimatum was issued. To confuse matters further, Diraditsele said he was one of those who were shown on the video being handed the ultimatum. He never got a chance to speak to workers who had continued singing and dancing until the organiser came later that afternoon at around 15H00. He said that workers did not want to listen to him and would not give him an opportunity to address them.

[28] It was also suggested to Hollaway that the final ultimatum had not actually been issued because an agreement had been reached in the meeting, but he denied this because shop stewards had to report back to members on the firm's commitment which was limited to a commitment to resolve the issues and to meet on the agreed dates. It was not a resolution of the issues *per se* which allegedly gave rise to the strike and the workers were still on strike. Hollaway agreed that a union official had attempted to persuade strikers to return to work on the morning of the following day, 26 February 2009.

[29] At 15H08 that same day, after the final ultimatum and notice of the disciplinary enquiry had been issued (according to the respondent) , Nel recorded that the union had requested a meeting with her that she was in a telephone consultation and could only meet with them afterwards at 17:00 or the following morning at 08:00. Hollaway could only surmise that the telephone conference had been with the firm's management in the USA because it was not uncommon to communicate

with them at that time and such telecoms could be lengthy. He would not be drawn on whether she should have prioritised resolving the strike.

[30] At the morning meeting of 26 March, which was minuted, agreement was reached that issues would be discussed on 3 and 4 March on agreed times. The main issue raised in the meeting concerned employees on limited duration contracts many of whom had allegedly failed psychometric tests, which the workers believed were racially discriminatory in nature and should be re-evaluated. The minute records that the final ultimatum was issued during that meeting at 08:45 for the workforce to return to work by 10:00. Hollaway claimed that it had been agreed the ultimatum would be read to strikers. He therefore expected that following the lunch break at 10:00 to 10:30 that workers would return to work but they did not. It was put to him in cross-examination that, properly interpreted, the final ultimatum meant that the company was conveying that it had reserve the right to take disciplinary action but would only dismiss strikers if they failed to comply with the ultimatum. Hollaway's response was that the company had no desire to dismiss anyone and was willing to work through the grievances but the situation changed when they failed to comply with it. The letter sent to the union the same day urging it to persuade them to return to work or risk their jobs was similar. D

[31] Diraditsele's recollection of the issuing of the final ultimatum was somewhat muddled and he appeared to have confused the meeting when it was handed to the shop stewards and the organiser with the first meeting between the shop stewards and Nel when they had asked her to hold back on issuing the first ultimatum. Mr B Mkhawana ('Mkhawana') said that even though the letter had been sent to the local organiser, he understood that it was conveying that members might be dismissed and that opportunity presented itself to persuade them to return to work so they would not be. On the basis of the letter he persuaded them to return. As far as he could recall he got the letter in the afternoon and went to Timken sometime after 14h00 that afternoon. He also saw the other letter announcing the disciplinary enquiries before he went to the company. He understood the letter only to be expressing an initial intention to embark on disciplinary enquiries because he received that letter before he saw the

letter calling on the union to intervene, but his view was no different after learning of the correct sequence of letters. After he addressed the strikers and they agreed to go back to work and it was agreed that work would only commence the following day and the afternoon and evening shifts would not resume work until 27 February as well. The reason for this decision was that all workers would lose the same amount of pay and it was a question of solidarity.

[32] Mkhawana said that the alleged waiver of the right to take disciplinary action had not been raised during the appeal against the dismissals on 3 April 2009 because he was not present. He could not offer an explanation why his name would have been specifically referred to in the handwritten minutes of that meeting as arriving late during the proceedings. He claimed he had not raised this before the appeal hearing because he was not in the legal unit of the union and eventually explained the union's failure to take up this point at the appeal proceedings as an oversight.

[33] Hollaway agreed that no time limit was given to the union in the letter to persuade workers to return to work by a particular time and that the following day, after a regional official addressed the strikers they did return to work. It was put to Hollaway that the letter had achieved its purpose and accordingly the company had waived its right to dismiss the employees. Hollaway did not respond to this. However, it was never suggested at the disciplinary hearing or indeed at the meeting with the union to discuss the recommended sanction on 18 March 2009 that the union was of the view that the company had waived its right to dismiss strikers on the basis that they had returned to work on 27 February 2009. Kunene said he understood that when the strikers returned to work that day that the issue regarding the grievances had been resolved because dates have been set for meetings and that the issue of disciplinary action was also resolved on the basis that if workers return to work no disciplinary action would be taken. Diraditsele said that the regional organiser succeeded in persuading workers to return to work because he read the ultimatum which said if they returned to work there would be no disciplinary action and he told them he would engage with the company on their grievances. Mkhawana gave a cryptic explanation why the supposed to

promise not to take disciplinary action had not been raised at the meeting on 18 March 2009, which he had attended. He said that being arrogant at that point when they had their backs to the wall would not have helped and he saw his role as pleading with the company not to dismiss the strikers. In that meeting he believed he was arguing from a perspective of fairness and not from a legal point of view. He conceded that the union was seeking a sanction short of dismissal at that meeting.

[34] Hollaway testified that this led the company to issue a letter sent to the union at 12:51. He denied that the company intended to convey that if they heeded the letter, the strikers would not have been disciplined, but agreed that if workers had returned to work immediately the employer might have viewed the matter differently. The letter announcing the disciplinary enquiries were sent a few minutes later because at that point there was no indication that employees were going to return to work. Diraditsele testified that when the organiser addressed workers that afternoon at about 15H00 he had told them to return to work and if they did there would be no disciplinary action taken against them, but if they did not there would be. As he understood it, it was agreed they would return to work and the other issues would be dealt with the following day because of the 'promise' made by management. He also struggled to explain why this promise was not raised at any stage afterwards if indeed it had been made and given that it was so fundamental, but he still insisted that workers would not have gone back to work if it had not been made.

[35] Hollaway also gave evidence that the company lost two days production amounting to approximately 400 units of output valued at 1 million Rand, to which had to be added the cost of overtime to recover the lost production and the reputational damage occasioned by letting the customers down.

[36] After the disciplinary enquiry, the chairperson recommended the dismissal of all employees who had participated in the strike, but a meeting was held on 18 March 2009 between the parties at which NUMSA appealed to the firm not to dismiss all the strikers. The applicant objected to the introduction of the minute of this meeting

on the basis that it constituted a privileged document recording without prejudice discussions in the course of a settlement. Hollaway nevertheless explained that the company had gone through a lengthy exercise with its local and international team and have considered dismissing all of the strikers, issuing them with a final written warning or dismissing those with previous final written warnings for industrial action. If they had proceeded to dismiss all strikers would have brought operations to a standstill as to between 3 to 6 months to train operators and the company could not afford to do that. On the other hand there was a history of work stoppages and it was necessary to take action.

[37] The first previous written warning which existed related to respect of an unlawful gathering on 17 March 2008. Another warning taken into account was issued in respect of a similar gathering on 18 March. In both instances it was alleged that 18 employees had refused to return to work despite being instructed more than once to do so. The third warning which existed against the records of 29 employees concerned their alleged participation in an unlawful strike on 15 May 2008. Hollaway agreed that not all those dismissed had final written warnings but they all had at least two written warnings for participating in this type of misconduct.

[38] Hollaway also accepted that it was not sufficient to send a letter to the trade union and conceded that individual warnings had only been issued in one department and he could not say that each employee was aware of the warning issued on 25 March 2008. He also agreed that in order to challenge the warning as employees were invited to do, they needed to be aware of the warning in the first place. He was unable to say if either the first or second warnings were received, nor could he say who had written an inscription dated 17 May 2008 appearing on one of the warning forms issued for the unprotected strike action on 15 May 2008 which stated:

“Advised not to sign by union members pending final negotiations”

[39] There was also evidence of a letter from the company sent to NUMSA on 22 May 2008 in which the company conveyed its decision to issue a written warning to all employees who had participated in the strike on 15 May 2008 despite the union’s

request that no warnings should be issued. Hollaway could not say categorically that the warnings had been issued or if there had been incidents where workers had refused to accept the warnings. However, he found it was an unbelievable suggestion that the firm had prepared written warnings for each individual striker and had placed them in their personnel files but never issued any. On the other hand, Kunene testified that workers had not been aware of the warnings allegedly issued in March and May 2008 because they had not been given to them. Later, he agreed that when he had joined the strike on 25 February he had known he had a warning at that stage. Diraditsele claimed that the warnings in March and May 2008 had not been received. He disputed the averments in the affidavit of Pillay that he would never have said there would be no disciplinary action at the time. According to Diraditsele, the issue was resolved quickly and Pillay had said he would not take disciplinary action against anybody. There was evidence that three employees in the heat treatment department had signed for written warnings. Diraditsele suggested that they had probably signed under duress but he could only speculate why they had been issued and signed for warnings if an undertaking had been given as he claimed that none would be issued. As far as he was aware shop stewards ought to have been present when any warnings were issued, even though the disciplinary procedure did not require that. One of the employees in the heat treatment department, Mr L Nkosi, testified that they had been called in individually by their supervisor to his office had told them that everyone who was in the canteen must sign for a warning.

- [40] Diraditsele agreed that the union had been involved in discussions with management about the sanction that would be imposed for the unprotected strike action in May 2008, but he could not say if management had communicated that it was going to issue warnings. He also could not say why there was no response from NUMSA to the letter announcing the company's intention to issue the warnings and he remembered the local union organiser reporting back that there would be no warnings issued. Diraditsele also claimed not to be aware of the letter sent by Timken to the union on 22 May 2015, which confirms its intention to issue

written warnings to all employees involved in the 15 May 2008 stoppage, despite the union's representations made at a meeting the previous day.

[41] Hollaway's interpretation of the table summarising the warnings issued was that where it stated 'final written warning' that was a reference to the second written warning. When the question of an appropriate sanction was discussed with the head office management, the selection of candidates for dismissal was based on whether they had a second written warning which was treated as a final written warning. The intention of the firm was not to make an example of those dismissed but it had faced a number of incidents of this kind and had to take a stand on the matter. He denied the accusation that poor HR management was to blame because there were procedures which could have been followed. Even though Nel had not contacted the union before issuing an ultimatum there was interaction with the union, though he could not deny that it was the workers who had summonsed the trade union organiser to the plant on 26 March 2009. He also testified that at no stage had any requests being made by the union for Nel's removal.

[42] Towards the end of his cross-examination, Kunene agreed that it was not reasonable for the workers to have continued striking for two days over a demand that the HR manager should speak to them. He also conceded that there were procedures which were not followed but they were not in a position to control the strike.

Evaluation

[43] Section 68(5) of the Labour Relations Act, 66 of 1995, ('the LRA') states:

"(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account."

[44] The Code of Good Good Practice: Dismissal says the following about unprotected strikes:

“6. Dismissals and industrial action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

- (a) the seriousness of the contravention of this Act;*
- (b) attempts made to comply with this Act; and*
- (c) whether or not the strike was in response to unjustified conduct by the employer.*

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

The seriousness of the contravention of the Act and whether the strike was provoked by unjustified conduct by the employer

[45] It is common cause that the strike which endured for the best part of two days was unprotected. Not only was no dispute referred for conciliation prior to the strike commencing, but it also took place without any prior warning. Leaving aside for the moment the alleged derogatory remarks of Nel as a cause of the strike, the other causes all related to complaints having a common element of alleged racial discrimination at their core. None of these issues have even been articulated as a grievance at the time the strike took place. At best, a few of them, like the complaint about a discriminatory promotion policy were the subject matter of

discussions between management and shop stewards at the time of the strike. The handwritten list of complaints only surfaced on the second day of the strike. On the face of it, the lawful process for pursuing most of those complaints if they could not be resolved in the course of discussions between management and shop stewards, or if they could not be resolved after invoking the grievance procedure, would have been to refer a claim of unfair discrimination under section 6 of the Employment Equity Act, 55 of 1998, ('the Equity Act') to conciliation and ultimately adjudication. It is possible that if some of the issues have been reframed in the form of proposals, such as a demand relating to psychometric testing, they might conceivably have provided the basis for pursuing a dispute of interest which could have led to a protected strike action.

[46] However, even allowing for the latter possibility, no effort was made by the workers or shop stewards to even initiate the in-house dispute resolution mechanisms which had been negotiated on their behalf, let alone to escalate matters using the processes provided by the LRA. An alternative explanation for the strike was the alleged provocative remarks made by Nel to the effect that black workers were not educated and therefore could not be promoted. The difficulty with this explanation is that it does not gel with the absence of this being expressly articulated at any time when the issue was supposedly a burning one. It also did not find expression in the handwritten list of issues, nor in the identification of issues that would be discussed between management and the union after the strike. Diraditsele could not provide a satisfactory explanation why this supposedly central issue was not raised at the time.

[47] It may be that Nel might not have had the necessary experience or expertise to address the issues with the shop stewards on her own, but the contention that the strike was primarily sparked by her alleged remark and that this was a key issue in resolving the strike and the obvious explanation for the strikers anger does not find support in the evidence. In particular, it is a mystery why Holloway was never advised that Nel needed to address the strikers to explain or apologise for her comment and why it was never even a demand that she must apologise and retract such remark in order for workers to return to work. Holloway met strikers on

the morning of 25 February and was not challenged when he testified that they had only accused Nel of not doing her job, but without any mention of the alleged offensive remark. Kunene also did not explain why, when the strike commenced, the shop stewards did not tell Nel that she needed to go and address the workers. If indeed that was the burning issue, why did they focus on persuading her not to issue an ultimatum and offer to address workers themselves?

[48] In assessing the evidence it seems more probable that the alleged provocation by Nel was added as a reason for the strike in order to try and justify the fact that it took place without warning and because it was difficult to provide a legitimate explanation for a two-day strike at a time when the grievance procedure had not even been invoked in respect of one of the issues about which the workers were unhappy. I am satisfied that management did not commit unjustified conduct which provoked the strike.

[49] The respondent's evidence of economic loss suffered as a result of the strike was not disputed. The impact was material. A further consideration is that, even if there had been some ground of understandable aggravation which sparked the strike and even if Nel had been reluctant to meet shop stewards again during the afternoon of 25 February, there was no real justification for the strike continuing beyond the morning of 26 February when management agreed to engage with the union on the issues articulated in the handwritten note.

[50] In light of the above I am satisfied that the unprotected strike lacked redeeming justification and in any event was unnecessarily prolonged.

Efforts made to comply with the Act by the strikers and the company's response to the strike

[51] It has already be mentioned that no effort was made to invoke the agreed dispute resolution procedures and no attempt was made to direct the dispute to the channels provided by the LRA. A related question is whether the workers responded to efforts to correct their unprocedural action by returning to work. Quite apart from the issue of the ultimatums, it is apparent even on the evidence of the

applicants that the shop stewards and the local organiser did attempt on more than one occasion on 25 and the morning of 26 February to persuade workers to return to work. These pleas fell on deaf ears. It took two days for the workers to return to work so that matters could be discussed in the appropriate forum while work continued as normal. On the face of it, no blame can be attached to the conduct of the shop stewards or the organiser if strikers were not receptive to their attempts.

[52] The company's first response to the situation was for Nel to issue an ultimatum. On balance, it seems most probable that she did so by conveying the ultimatum to the shop stewards in the expectation that they would relay it to the strikers. It may be so that shop stewards persuaded her not to issue the ultimatum directly to the workers on the basis that they would speak to them, but it seems unlikely that they could have gone back to the workforce without an understanding that the workers were expected to return to work by 12:25. It is only reasonable that the respondent could have expected them to convey that message and that Nel believed they would do this as evidenced by the covering letter to the union in which it was mentioned that the ultimatum had been issued to the shop stewards. Although the company did not expressly call upon the union to intervene, it timeously advised it of the situation and that it had issued the first ultimatum. The first ultimatum also warned of disciplinary action. Accordingly, the union was apprised early on of the unfolding situation and that management expected a return to work.

[53] The evidence of the video footage seems more consistent overall with it being a video of the second ultimatum being issued by Nel and McDonald after shop-stewards failed to respond to being paged and called to collect the video. The timing recorded on the video footage is not consistent with either the second ultimatum or the final ultimatum. Moreover, on the version that the respondent's representative, *Mr Niehaus*, the final ultimatum never issued because agreement was reached on how the complaints would be addressed. So, it was not the applicants' version that the final ultimatum was issued to anyone. It seems most likely that the company had tried to convey the ultimatums through the shop stewards and that when no shop stewards responded to the call to come to the

office to receive the second ultimatum, Nel and McDonald took the step of approaching them directly.

- [54] On the morning of 26 February, the company met not only with shop stewards, but also the local organiser. It is unlikely, given the advanced state of the strike that no effort would have been made to convey the ultimatum particularly as the threat of dismissal was now being mentioned. There was evidence of the organiser unsuccessfully persuading workers to return to work that morning, but it was only after the regional organiser addressed them in the afternoon that they agreed to return to work and then only on the following morning. If the ultimatum was not issued, oddly the union did not dispute it at the time. It is evident the workers were not listening to their own organiser or shop stewards even after agreement was reached on how their complaints would be dealt with. The only person they eventually listened to was the regional organiser. Even then, they were only prepared to start work the following day solely to ensure that all workers bore the loss of pay occasioned by the strike equally, thereby costing the respondent another lost shift. The fact that the respondent only appealed to the union in writing after the final ultimatum was ignored was not evidence that it had not sought the union's intervention previously: it had already reached an agreement in a meeting attended by a union official and the official had addressed workers. The union had been advised the previous day of the situation and was clearly aware of it. The union was already involved and dealing with management, so it ought hardly to have been necessary on the afternoon of 26 to bring the matter to its attention and request its further assistance especially when the basis for dealing with worker's complaints had been agreed to. If anything, it was for the union to report back on whether workers had accepted that their issues would be dealt with and would now return to work. Instead the respondent had to take the initiative of contacting the union again. The company might have been more insistent in pressing the union to make a greater effort to resolve the situation, but it cannot be said that it simply let matters drift. When workers did not respond reasonably to the company's undertakings to deal with their complaints, or to the final ultimatum, it did contact the union again. In circumstances where the union has already

apprised itself of the situation and has been directly involved in efforts to resolve matters but the situation has not been normalise, the company is not obliged to repeatedly ask it for further assistance. The company took reasonable steps to alert the union and engaged with it. The strikers were reluctant to respond positively to steps taken by management to address their issues or to respond to exhortations of their own organiser to return to work and, when they eventually decided to do so, did so on terms solely convenient to their own concerns about sharing the strike burden between themselves.

Did the company waive the right to take disciplinary action including dismissal?

[55] Firstly, both the second and final ultimatums clearly intimated that disciplinary action which could include dismissal was a real possibility outcome if they were not heeded. Secondly, the letter to the union calling upon it to appeal to members to return to work and advise them of the risk to their employment if they continued with their action did not necessarily mean that their employment was not already at risk as a result of ignoring the previous ultimatums. It could be interpreted as simply reiterating the earlier warnings that their failure to heed the ultimatums was jeopardising their employment. It was certainly not an undertaking in the form that was given in ***Administrator, Orange Free State & others v Mokopanele & another***¹, in which the employer had unambiguously told striking workers that “unless” they returned the following day they would face dismissal, but then proceeded to dismiss them a few weeks later. Even if the letter to the union might conceivably have been interpreted as an unequivocal revocation of the threats in the second and final ultimatums, it was followed almost immediately by the letter announcing the intention of the respondent to take disciplinary action. No reasonable person having read those two letters issued almost simultaneously could have confidently assumed the letter announcing disciplinary action was not seriously intended. Not only is evidence lacking of an unambiguous election by the respondent to waive its right to rely on the earlier threats of disciplinary action, but it is unlikely it was ever seriously understood by the union organiser who

¹ (1990) 11 ILJ 963 (A)

persuaded workers to return to work that way. If that had been his understanding and if the strikers had acted in accordance with an understanding that they were effectively indemnified from dismissal by the letter to the union, notwithstanding the virtually contemporaneous one announcing disciplinary hearings, then it is inexplicable that this was never vocally raised in either the disciplinary enquiries, the meeting with the union to discuss the recommended sanction of dismissal or in the appeal against the dismissal. This also means that it is improbable that it was the alleged inducement of no disciplinary action which led to the return to work and on which the workers relied. In my view it is more probable it was the expression of the respondent's resolve to proceed with disciplinary action which focussed the strikers' minds. Consequently, I do not think the applicants succeeded in establishing a waiver of the right to dismiss the strikers on the part of the respondent.

Was it fair to dismiss strikers on the basis of their disciplinary history in relation to unprotected strike action

[56] Firstly, it must be emphasised that this was not a strike action in response to provocation or because normal channels of processing complaints were blocked. Even if that had been so, there was no justification of any kind for prolonging the strike a further day once specific commitments were made to address the issues identified. It was a gratuitous infliction of further economic harm on the employer without any attempt to follow the correct procedures. This is not just a lapse in formalising industrial action. The law permits workers to inflict economic damage on an employer, but provided they have given it a reasonable opportunity to evaluate their crystallised demands, engage with them in an effort to resolve it, and to contemplate their willingness to suffer such harm. An unprotected strike that could not be foreseen is like a boxer punching his opponent before the fight has begun. In the circumstances, the employer would have been entitled in my view to dismiss all the strikers for participation in the two day strike. However, it decided, mainly for pragmatic reasons to dismiss those it considered had prior warnings. It

is debatable whether the warnings for the three separate incidents of unprotected strike action in 2008 were issued to individual workers. There was no dispute the warnings were in their files. There was also evidence in relation to the May 2008 strike that there was no appeal or objection raised by the union on behalf of members when the respondent announced its intention to issue all participants in that strike with written warnings despite the union's appeal to it not to. The evidence suggests that these warnings were the subject matter of collective discussions between the union and the respondent and that the decision to impose warnings was one that would have been conveyed to the union. It seems somewhat unlikely that if Pillay had agreed not to take disciplinary action against strikers the warnings would be in the individual applicants' files.

- [57] It does seem likely that individual warnings were not physically issued to most of the applicants and there might have been cases where an individual would have appealed on grounds which would have distinguished their conduct from others, for example if they were absent from work on account of illness rather than participation in a strike. The union contested that the warnings should not have been taken into account because they had not been formally issued to each individual and therefore they had not had the opportunity to appeal against them, but advanced no reasons why the warnings would most probably have been overturned for substantive reasons in the event of a right of appeal being exercised. No evidence was advanced that any of the individual applicants whose record was taken into account had not participated in unprotected strike action on those previous occasions. The net effect of the respondent's actions in deciding to dismiss the individual applicants rather than all the participants in the February 2009 strike was that it only dismissed persons with a previous history of participation in unprotected strike action within a twelve month period prior to that strike. Given that it would have been entitled to dismiss them even on the basis of the February 2009 strike, I do not think that dismissing those who had previously participated in at least two other instances of unprotected strike action, and issuing final warnings to others, was unfair.

Costs

[58] The union and the respondent appear to have a mainly constructive and ongoing relationship and I do not think the union was vexatious in challenging its members' dismissal notwithstanding the merits. In the circumstances, a cost order would not be appropriate in my view.

Order

[59] The applicants' late referral of the dispute is condoned.

[60] The second to further applicants' dismissal for participation in unprotected strike action was not unfair.



R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicants: M Niehaus of Minnaar Niehaus Attorneys

For the Respondent: C Orr

Instructed by: Bowman Gillfillan Inc.

LABOUR COURT