



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 587/14

In the matter between:

KM PHORA

First Applicant

DM TLADI

Second Applicant

and

MEC: DEPARTMENT OF HEALTH: GAUTENG

Respondent

Heard: 11 June 2018

Delivered: 12 October 2018

Summary: Dismissal for participating in an unprotected strike – inconsistent application of discipline.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] In these proceedings the first and second applicants (Messrs Phora and Tladi) are challenging their dismissal for participating in an unprotected strike and related acts of misconduct. They seek an order of reinstatement.
- [2] The issues for determination are as follows:
- 2.1 Whether the dismissal of the applicants was substantively and procedurally fair;
 - 2.2 Whether the respondent was consistent in issuing a sanction of dismissal in respect of participating in an unprotected strike;
 - 2.3 Whether the respondent complied with the Labour Relations Act¹ (LRA) Schedule 8 Code of Good Practice: Dismissal when it summarily dismissed the applicants.

Background

- [3] The applicants were employed by the Department of Health: Gauteng (the department) which is headed by the respondent as the political head. They were stationed at Masakhane Laundry and Cook Freeze (Masakhane) in Pretoria.
- [4] On 5 August 2014, a group of about 84 employees embarked on an unprotected strike. The strike was triggered by the outcome of the investigation on allegations that some employees were involved in nepotism and selling of posts when recruiting new employees. It was reported to the grievant employees who called themselves 'the concerned Workers Group' that their allegation could not be proven as none of the implicated employees were found to have committed the alleged transgressions.

¹ Act 66 of 1995 as amended.

[5] The department issued an ultimatum dated 8 August 2014. It was followed by a lockout invoked on 11 August 2014 and, *inter alia*, suspending all the talks with employee leaders at Masakhane. On 17 August 2014, the department and relevant trade unions (HOSPERSA, PSA, NUPSAW and NEHAWU) representing the striking employees concluded a settlement agreement. In terms of the settlement agreement, all the striking employees, save for the applicants, were to receive final written warnings for participating in an unprotected strike and resume work on 22 August 2014.

[6] Clause 7 of the settlement agreement specifically states that 'the two summarily dismissed employees [the applicants] will not be allowed to enter the premises to resume duties; they must follow due process. They remain dismissed.'

[7] The applicants were summarily dismissed on 8 August 2014 but only became aware of their dismissal on 19 September 2014 as the letters of dismissal were sent via registered post.

[8] Mr Phora was dismissed for the following charges:

8.1 Blowing a whistle and thereby inciting staff to leave their workplaces and for preventing other workers to do their work, thereby preventing hospitals to render requisite health care; and

8.2 Participating in an unlawful strike and further ignoring the ultimatum to return to work.

[9] Mr Tladi, on the other hand, was dismissed for the following charges:

9.1 Intimidating workers to leave work and go on a strike;

9.1 Switching off the iron machine, preventing other workers from doing their work, and preventing hospitals to render requisite health care; and

9.3 Participating in an unlawful strike and further ignoring the ultimatum to return to work.

Legal principles and application

- [10] Section 65(1)(d)(i) of the LRA limits a right to strike by proscribing persons engaged in an essential service from taking part in a strike. Section 213 of the LRA defines essential service as 'a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population'.
- [11] The Essential Service Committee designated the services rendered by different units of the hospital essential services.² The services declared essential included services in support of emergency health services and the provision thereof to the community or part thereof, nursing, medical and premedical. The designated support services include catering, medical records, porter, reception, laundry and waste removal. Even though the general laundry service is not designated as essential, it is not disputed that its disruption would ordinarily affect the provision of health care services by hospitals.

Inconsistency

- [12] The department clearly chose to enter into negotiations with the trade unions instead of charging the striking employees, save for the applicants. The deal that was struck with the unions representing the other striking employees ignored the fact that the strike at Masakhane interrupted provision of essential services by hospitals. The other striking employees were allowed to resume their duties with final written warnings.
- [13] It is trite that the employees participating in an unprotected strike should be treated the same when it comes to discipline and sanction. I am, however,

² Notice 1216 published in the Government Gazette 188276 dated 12 September 1997.

not oblivious to the authorities that state that consistency is an element of disciplinary fairness and is not a rule unto itself.³

- [14] In the present case, the applicants were already dismissed when the negotiations that led to the lenient sanction for participating in an unprotected strike took place. However, there is no reason provided for not extending the indulgence to the applicants, especially since their dismissal was not preceded by disciplinary hearings. In my view, therefore, the decision to isolate and dismiss the applicants for participating in an unprotected strike was capricious and therefore unfair.
- [15] In respect of allegations misconduct, Mr Phora denied that he had blown the whistle or incited other staff members to join the unprotected strike on 5 August 2014. He testified that it was practice at Masakhane to blow the whistle when calling the employees to meetings. He was a shop-steward at that time and the purpose of the meeting was to give the employees feedback on the allegations of nepotism and selling of jobs. It was the employees, in their own volition, who had refused to go back to work, demanding a written response to their grievances. He was surprised he had been issued with a final written warning before.
- [16] The department's witness, Mr Mboyane, testified that he saw Mr Phora blowing a whistle, calling other employees to a meeting. He however conceded in cross examination that blowing a whistle only called employees to a meeting. He also conceded that there were other employees on final written warning that benefited from the negotiated deal by escaping dismissal.
- [17] With regard to Mr Tladi, he conceded that he did switch the ironing machine off as it was malfunctioning and he did so as instructed by his supervisor, Mr Lethole. He, however, denied that he intimidated and prevented the other employees from working. He also conceded that his pension fund withdrawal

³ See *SACCAWU and Others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; see also H Cheadle *at al, Strikes and the Law*, LexisNexis (2017) at pages 210 to 211; .

was classified as retirement and he did so as he needed money to pay off his house.

[18] Mr Tladi's evidence was, to a great extent, unchallenged. Mr Mboyane conceded that he could not say much about what happened at section B Factory as he was the Manager for Section A. However, he was adamant that Mr Tladi was a senior supervisor at the receiving unit and had nothing to do with the ironing unit.

[19] The Department bears the onus to show that the applicants are guilty of transgressions that are a misconduct in terms of its policies. No evidence was, however, led in this regard. To me, the blowing of the whistle and switching off of the ironing machines could not have instigated the strike. The applicants' evidence that the decision to embark on a strike was taken by the group of employees during the meeting on 5 August 2014 in protest of the outcome of their grievance was never challenged. Also, there is no iota of evidence to prove that the other striking employees had been coercion by the applicants to participate in an unprotected strike.

[20] It is common cause that the applicants' dismissal was not preceded by disciplinary hearings. There is no explanation given for the respondent's failure to hold disciplinary hearings nor can it be inferred from the circumstances of this case. Nothing turns on Mr Tladi's subsequent withdrawal from the pension fund that was labelled as a retirement. It does not change the fact that he was dismissed nor does it affect reinstatement as a form of relief.

Relief

[21] The applicants seek the primary remedy of reinstatement. In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁴ the Constitutional Court reaffirmed reinstatement as 'the primary statutory remedy in unfair dismissal disputes...aimed at placing an

⁴ [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para 36.

employee in the position he or she would have been but for the unfair dismissal... by restoring the employment contract...The extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.'

- [22] There is no evidence that militates against reinstating the applicants. In deciding the date from which their reinstatement would run, I have considered the fact that four years have passed since the dismissal of the applicants. The delay is considerably attributed to the department as it relentlessly defended the dismissal on the charge of participating in an unprotected strike despite having issued the other striking employees with final written warnings. As a result, the bargaining council ruled that it has no jurisdiction to deal with the matter. Accordingly, I deem it just and equitable to order the applicants' reinstatement with a backdated period of 24 months.

Conclusion

- [23] In all the circumstances, I am convinced that the dismissal of the applicants was procedurally and substantively unfair. They stand to be reinstated with a backdated period of 24 months. Put differently, the applicants' date of reinstatement is 10 October 2016 with full back payment.

- [24] To the extent that I proceeded to deal with the allegations of misconduct committed during the unprotected strike, which must ordinarily be adjudicated by the bargaining council, I do so in terms of section 158(2)(b) of the LRA and, given the history of this matter, it is also expedient.⁵

Costs

- [25] Costs do not necessarily follow the result in this Court. However, the respondent was evidently ill-advised in defending this lawsuit.

⁵ *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) at paras 18 and 19.

[26] In the circumstances, I make the following order:

Order

1. The dismissal of Messrs Phora and Tladi is substantively and procedurally unfair.
2. Messrs Phora and Tladi are reinstated with a 24 months back payment from the date of this order.
3. The respondent is ordered to pay the applicants costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

P Govender

Instructed by: Macgregor Erasmus Attorneys

For the respondent: Advocate: X Matyolo

Instructed by: Msikinya Attorneys

LABOUR COURT