

IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Port Elizabeth)

Delete whichever is not
applicable:

Reportable : yes / no

Of interest to other

Judges: yes / no

Revised

14 April 1999

Signature

Case No:

P139/97

In the matter between :

RS

First Applicant

Second to Further Applicants

and

MALCOMESS TOYOTA, A DIVISION OF MALBAK

Respondent

R E A S O N S F O R J U D G M E N T

REVELAS J:

[1] The second to further applicants ("the individual applicants" or "employees"), all members of the first applicant ("the union"), were dismissed by the respondent on 18 September 1997 for their participation in an unprotected strike. The employees challenged the fairness of their dismissal and referred the ensuing dispute to the relevant bargaining council for conciliation. The dispute remained unresolved on 7 October 1997 and the matter was then referred to the Labour Court for adjudication, in terms of section 191 (5) (b) (iii) of the Labour Relations Act, No 66 of 1995 ("the Act", or "the current Act").

[2] The applicants' case is that the employees in question, participated in unprotected strike action on Tuesday, 16 September 1997 as from 15h00 onwards, and that they resumed their duties the following day, 17 September 1997. According to their pleadings, no strike action was embarked upon by the employees on 17th September, but according to the evidence of one of the shop stewards, Mr Lele, the industrial action continued on the 17th September 1997, but only as from 15h00, and not since the morning, as the respondent would have it.

[3] The applicants' case is further that the contravention of the Act by the individual applicants was not of a serious nature and that the strike was in response to unjustified conduct by the respondent.

[4] They allege that they have been misled by the respondent's promise that they would receive an interim increase and that the prospect of such increase was linked to an unreasonable demand by the employer.

[5] They contend that their sole "demand" throughout the strike had been to discuss the matter with Mr Robertson, and that when he finally appeared, it was only to dismiss them before the ultimatum had expired.

[6] The applicants aver that the respondent acted precipitately and prematurely in dismissing the employees prior to the expiry of the ultimatum, which required them to return to work by no later than 07h30 on 18 September 1997.

[7] Their case is also that the respondent failed to afford the applicants a fair hearing prior to their dismissal.

[8] The applicants seek reinstatement and costs.

[9] According to the applicants' pleadings the only ultimatum which they had received from the respondent, was an ultimatum which had been pinned to the notice board late on the afternoon of 17 September 1997, after all the employees had already left. They allege that the majority of them, only learnt of the contents of the ultimatum when they arrived to resume their duties on the morning of 18 September 1997. Amongst themselves, they discussed the ultimatum and resolved that they would not participate in any further unprotected industrial action.

[10] As they were preparing to resume their duties, which was at about 07h20 on the morning of 18 September 1997, Mr Heuer, the respondent's divisional manager, approached them and enquired whether they (the employees) were going to work. They indicated to him that they were getting dressed and that about 07h25, (five minutes later), Mr Heuer returned with Mr Robertson, the managing director of the respondent, who informed them that they were dismissed.

[11] It was also the applicants' case that Mr Lumkhile Vena employed by the respondent as the cleaner, was absent and on sick leave on 15, 16 and 17 September 1997 and did not participate in the industrial action. Yet, he was dismissed for participating in the unprotected strike action.

[12] On 19 August 1997, Mr Robertson, the managing director, of the respondent, was approached by two shop stewards, Ms Pango and Mr Lele, who enquired about the increases that had always been granted in the past on

1 September. It is common cause between the parties that the respondent did not negotiate increases and terms and conditions of employment with its employees, as this process was conducted at central level through a national bargaining forum, by the representatives of both parties.

[13] The applicants contend that on the meeting of 19 August 1997, Mr Robertson promised the employees that an increase of 8,5% would be implemented. Mr Robertson did not deny that the possibility had been mooted at the meeting of 19 August 1997, but stated that it was "unlikely" since the respondent was bound by the outcome of central bargaining. He never agreed to the increase in any event. According to Mr Robertson, he informed the employees of the bargaining council regime under which the respondent fell. It was also not disputed that this regime had been in place for at least 10 years and that the respondent had never negotiated wages directly with the individual employees or with their representative trade union. This was confirmed by both Mr Robertson and Mr Lele, the shop steward.

[14] The applicants allege that Mr Heuer, on 8 September 1997, and on some occasions thereafter, promised the employees that they would receive an 8.5% increase with effect from 1 September 1997.

[15] It is common cause that Mr Robertson wanted the employees to sign an undertaking, which was distributed to the employees, and dated 20 August 1997 which reads as follows:

"I..., [the names of individual employees were inserted here] hereby pledge my ongoing attendance at work and will not involve myself in any stay away, strike or industrial action. In return I wish to qualify myself for one or several of the perks, such as: housing loan assistance, school bursaries for my children, Christmas salary advances, financial assistance upon the death of a family member; all of which are available at the sole discretion of the Managing Director.

Signed:..."

[16] According to the evidence of Mr Lele, the shop steward, the employees were informed by Mr Robertson that they would only become entitled to the 8.5% increase if they signed the aforesaid document. Mr Lele testified that the employees also understood from Mr Robertson that they would have to resign from their union, in addition to signing the document, to earn the 8.5% increase. This is denied by the respondent. According to Mr Lele, the employees decided not to sign the document because they weren't prepared to resign from the union.

[17] The respondent's case is, that the employees embarked on an unprotected strike from 16 September 1997 since 15h00, and continued with their unprotected strike until the morning of 18 September 1997 at 07h50, when they were dismissed.

[18] According to the respondent, the employees who were on strike were all issued with ultimatums at 10h00, on 17 September which required them to return to work at 07h30 the following day, 18 September. Although the employees refused to physically accept the ultimata, the contents thereof were explained to them and translated to them.

[19] The respondent's case is further, that an ultimatum was pinned to the notice board at the respondent's premises, on the afternoon of 17 September and was brought to the attention of Mr Lele, who confirmed that the ultimatum was pointed out to him by Mr Heuer.

[20] The respondents version of the events of the 18th of September is that, a few minutes after Mr Heuer arrived at the change room to enquire from them what they were doing, he was met with the reply that the employees still needed to discuss the matter. Mr Heuer testified that he then gave them five minutes which then became ten minutes to have a discussion, and when he went back to the change room, the employees told him that they needed more time to talk. He then told them that they had enough time and "that's it". Mr Heuer then appraised Mr Robertson who had arrived in the

meantime, of the situation. Mr Robertson testified that he then proceeded to the change room where he (Mr Robertson) upon enquiry, from the employees, was met with silence.

[21] The respondent argued that it complied with the Act, more particularly section 68(5) thereof, and with the Code of Good Practice in schedule 8 of the Act ("the Code"), as the employees knew that their strike action was unprotected, that their demand was unreasonable, and that the respondent could not grant an interim increases prior to the conclusion of centralised bargaining. The respondent contends that it also complied with the Code in that it endeavoured to contact the union to intervene and that it gave the employees a clear and unambiguous ultimatum to return to work.

[22] According to the respondent, it had also, through labour consultants, approached Mr Goni, the local organiser of the union, to intervene in the matter, but that the latter had indicated that the union could not bring its members to their senses and they would still continue with their strike.

[23] The following facts were common cause in this matter:

[24] The respondent is Malcomess Body Works, a division of Unitrans Limited, and at the time the dispute arose it was a division of Malbak Consumer Products (Pty)Ltd. The local Malcomess division comprises four outlets, one of them being the "Body Shop" where *inter alia*, panelbeating, repairing and painting of vehicles are done. The nineteen dismissed employees worked here.

[25] On 15 September 1997, the employees informed Mr Heuer, that they would be embarking upon a strike the following day, 16 September 1997.

[26] On 16 September 1997, at approximately 15h00, the employees embarked upon unprotected strike action which was not preceded by any attempt at conciliation. No dispute had been referred to the relevant bargaining council. Mr Heuer, did not indicate the consequence of non-compliance or stipulate a deadline for their

return, but it was not disputed that he informed the employees that their intended actions would be illegal.

[27] On the applicants own case, they again embarked upon industrial action during the course of the afternoon of 17 September 1997, at about 15h00. Of course, whether or not they were on strike during the earlier part of 17 September 1997 is in dispute.

[28] On the unchallenged evidence of Mr Robertson, Mr Goldberg of Global Consulting Trust, (the respondent's labour consultants) and Ms Beckmann, (Mr Robertson's secretary), the labour consultants sent a letter to the respondent company advising it of the cause of action it should adopt at 09h00 on 17 September 1997. Copies of the correspondence were exhibits at the hearing.

[29] It was not disputed that at approximately 10h00 on the same day, (17 September) Ms Beckmann faxed a letter to the union enclosing a copy of the ultimatum, urging the union to intervene and protect the "job security" of the employees.

[30] The undisputed evidence of Mr Goldberg and Mr Robertson was that at about 12h00 or lunch time on 17 September, Mr Goldberg reported to Mr Robertson that he had spoken to Mr Goni, the union organizer, who had indicated to him that he was unable to assist, as the employees were not prepared to follow his advice, which was that they should return to work. Exactly what was discussed between Mr Goldberg and Mr Goni, and at what time on 17 September they spoke, is in dispute.

[31] The following facts are in dispute:

- (1) Whether or not Mr Robertson and Mr Heuer promised an increase of 8.5% to the employees if the employees signed the undertaking;
- (2) Whether or not the employees worked on 17 September 1997;
- (3) Whether or not the respondent issued ultimata at approximately 10h00 on 17 September 1997;
- (4) Whether or not Mr Lumkhile Vena was at work on 17 September 1997;
- (5) The content and time of day of the discussions between Mr Goldberg and Mr Goni;

(6) Whether or not Mr Robertson terminated the employment contracts of the employees on 18 September 1997 prior to the expiry of the stipulated deadline being 07h30;

(7) The extent to which, if at all, the individual applicants rendered themselves guilty of intimidation and other forms of misconduct on the days following their dismissal.

[32] THE CIRCUMSTANCES WHICH GAVE RISE TO THE STRIKE
According to the employees, the alleged breach of the undertaking to grant an 8.5% increase and the alleged conditions attached thereto (the undertaking) effective from 1 September 1997, was a source of concern, frustration and provocation to the employees, which culminated in them downing their tools.

[33] If the respondent reneged on its promise, this in my opinion, was of such a serious nature, that one would have expected the union to take up the issue with the respondent, or at least, that the applicants would have pleaded the circumstances of the breach more specifically.

[34] On the applicants' own version, the issue arose at least ten days prior to the unprotected strike action.

If regard is had to the undertaking, which was allegedly a prerequisite to the increase, the dispute arose on 20 August 1997, which is more than twenty days before the unprotected strike action.

[35] The undertaking itself, makes no reference to terms and conditions of employment, or an increase or the fact that the employees should resign from the union. In this regard I cannot except Mr Lele's evidence that Mr Robertson had requested the employees to resign from the union, or that the signing of the undertaking, was a prerequisite to an 8.5% increase.

[36] It is unlikely that the respondent, knowing that any increase negotiated at national level would have, as a matter of law, have to be added to any "interim increase", would make a promise to give an interim increase in the first place. There was also no suggestion that the respondent was under pressure to implement increases prior to the conclusion of the national negotiations.

[37] Even if I were to accept that Mr Robertson attempted to persuade employees not to strike by proposing financial incentives, I cannot, due to the time period between this letter and the actual strike action, come to the conclusion that this was the reason why the employees went on strike. If the undertaking was linked to an increase, there is surely no indication of that in the document itself. It is also difficult to understand why the respondent would wish to incur the financial obligations as alleged by the applicants, before further financial obligations would be imposed on it as a consequence of the national negotiations. In this regard, I agree with counsel on behalf of the respondent, that this proposition is contrary to the inherent probabilities.

[38] What was put to the respondent's witnesses during the course of cross-examination was that the promise of an 8.5% increase (which was not pleaded), was made conditional upon the employees signing the undertaking. The undertaking in the document says nothing of the kind. It is also unlikely, in my view, that the union would not have immediately taken up the about a

document, attempting to get employees to sign away their right to strike and a condition of resignation from the union, as a prerequisite to an increase.

[39] Even if the question of the 8.5% was discussed on 19 August 1997, I am unable to accept, on the probabilities and evidence, that Mr Robertson had agreed thereto.

[40] It was put to Mr Heuer that on 15 September 1997, Mr Lele specifically proposed to him, that the respondent offer an 8.5% interim increase which could then be adjusted dependant on outcome of the national negotiations. However, when Mr Lele was questioned about whether he had made any specific proposals on the day in question, he replied that he had merely made enquiries regarding the timing of the increase, in other words, when they were to be implemented.

[41] Mr Lele also made no reference to any meeting which took place on 8 September 1997 with Mr Heuer, even though it was put to both Mr Robertson and Mr Heuer that Mr Heuer had made a specific promise to Mr Lele on 8 September 1997.

[42] In all the circumstances I have to accept that the undertaking which the respondent wanted the employees to sign, had nothing to do with wages but was related to benefits and that there was nothing sinister about the undertaking and, if there was, this should have been pleaded.

[43] I consequently reject the version of the employees, regarding an increase which was promised to them.

[44] The demand of the employees throughout was that the employees wanted to speak to Mr Robertson, who did not want to adhere to this demand.

[45] The probabilities rather indicate that the employees had become accustomed to an increase on 1 September each year, and when this did not happen in 1997 they were disappointed and upset and embarked upon an unprotected strike, because, as Mr Lele put it, they wanted to give Mr Robertson "a fright".

[46] THE DURATION OF THE STRIKE AND THE ULTIMATA

If I accept the applicants' version that they did in fact work on 17 September 1997, I have to accept that Mr Mollendauer (not a member of management), Mr Wright (the foreman at the Body Shop) and Mr Heuer, all conspired to lie to Mr Robertson, and fabricate evidence that all the employees were on strike on 17 September. This I find most improbable. There was no reason why the employees should have returned to work. None of their demands had been met. In fact, they were informed by Mr Heuer that Mr Robertson would not come to see them and that the subject of increases had been closed, as it had been discussed previously.

[47] I found nothing about the demeanour of the respondent's witnesses, or their evidence, which could suggest to me that they were lying about the fact that the employees did not work on 17 September. In addition, Mr Lele stated that on the 17th the employees resumed their strike at 15h00, a further important fact which was, surprisingly, not pleaded. This contradiction, in addition to the aforesaid improbabilities persuaded me to reject the version that the applicants worked on 17 September.

[48] The further question which now has to be decided is whether the applicants' version regarding the issuing of the ultimata is true or false.

[49] If the only ultimatum issued was the one which was pinned on the notice board late in the afternoon of 17 September, then as the applicants contend, the question arises why the respondent would have personalised the ultimata if it had no intention of handing them to the respective individuals.

[50] The applicants' case as pleaded, is that the majority of the employees only learnt of the contents of the aforesaid ultimatum when they arrived for work on 18 September 1997 (Pleadings bundle: paragraph 6.4 at page 3.4).

[51] The pre-trial conference minute dated 11 November 1998, specifically records the following exchange:

"the respondent's representative enquired from the applicants' representative as to which of the second and further applicants alleged that they only found out about the ultimatum on 18 September 1997. The applicants' representative advised that all of the second and further applicants, only Kelvin Lele (the thirteenth applicant) found out about the ultimatum on 17 September 1997. The balance of the second and further applicants only learnt of the ultimatum on 18 September 1998."

[52] Mr Lele's gave evidence to the effect that he informed at least **nine** of the employees of the ultimatum on the afternoon of 17 September 1997 and that he had told them to report for duty the following day.

[53] Mr Mollendauer, Mr Wright and Mr Heuer testified as to how they attempted to serve the ultimata and how the contents thereof were explained to the employees.

[54] The above two versions are mutually exclusive. In the circumstances, and for the same reasons and considerations which are applicable to the question of

whether the employees went to work or not, I accept the respondent's version that the ultimata were issued to the employees personally, who refused to accept them.

[55] MR VENA'S PRESENCE

The next question which I had to decide was whether Mr Vena was at the respondent's premises on 17 September 1997.

[56] It is common cause that Mr Vena was absent on 15 and 16 September 1997 and he produced a medical certificate which reflected that he suffered from bronchial pneumonia and an inflamed thyroid.

[57] It is clear from the certificate that Mr Vena was not required to be off sick on 17 September 1997 and that he could return to work. Mr Vena said that on this particular day he was so sick and he vomited blood and therefore he could not go to work, but felt better the next day since he was taking medication and returned to work only on 18 September to be dismissed.

[58] On both the testimonies of Mr Wright and Mr Heuer, whom I have found to be credible witnesses in this matter, Mr Vena was amongst the striking employees on 17 September, when the ultimata were issued to them. Mr Heuer said that he pointed out to Mr Wright that Mr Vena was present. This he had done because Mr Vena had been absent the previous two days and, as he was a cleaner, his presence was noted. I have no reason not to believe these two witnesses. They couldn't have a motive to lie about Mr Vena.

[59] Mr Vena, on the other hand, did not obtain a doctor's certificate in respect of 17 September 1997 so as to ensure that he received payment or that he was excused for his absence.

[60] I find that Mr Vena's version is improbable and in the circumstances I find that he was present on 17 September 1997 and therefore the same considerations regarding the participation in unprotected strike

action should apply to him, as in the case of the other employees.

[61] THE UNION'S FAILURE TO INTERVENE

The next factual question which I had to decide was the nature of the discussions between Mr Goldberg and Mr Goni, and when, on 17 September 1997, these discussions took place.

[62] According to Mr Goldberg, he phoned Mr Goni at approximately midday on 17 September, and enquired from him whether he could intervene and salvage the situation of the striking employees at the respondent's premises.

[63] Mr Goni, according to Mr Goldberg, was appraised of the fact that the employees were on an unprotected strike and that an ultimatum had been issued calling for their return to work.

[64] Mr Goldberg said that Mr Goni informed him that he had already communicated with the employees in an endeavour to secure their compliance with their ultimatum. He was, however, unsuccessful in his endeavour as the employees were not prepared to listen to him or to act on his advice.

[65] On the other hand, Mr Goni had a very different account of events. In the first place, he denied that he ever received the fax requesting his intervention, to which a copy of the ultimatum was attached. He said he only received this at a later stage, apparently after the dismissal. However, Mrs Beckman (Mr Robertson's secretary), testified that she faxed this herself to the union's offices.

[66] Mr Goni stated that he had been out of his offices, prior to receiving a call about the strike, after working hours, from Mr Goldbergon 17 September. He testified that when he spoke to Mr Goldberg, after hours, stage he knew nothing about the strike and

informed Mr Goldberg that the union would require an "extension". Mr Goldberg, according to Mr Goni, then said that he would discuss the matter with the respondent and revert to Mr Goni.

[67] It is common cause that the letter requesting the union's intervention was faxed to the union's head office at 10h00 on 17 September 1997. It is not disputed that Mr Robertson visited Mr Goldberg's offices at approximately noon or lunch time on 17 September, and that the respondent's attorney of record, Mr Kirschmann was also present. It is not disputed that Mr Goldberg then contacted Mr Goni in Mr Robertson's presence, and reported *later* that Mr Goni despite his best efforts, could not take the matter any further.

[68] Counsel on behalf of the respondent raised the question as to why Mr Goldberg would report on a conversation which, on the applicants' version, had not yet occurred.

[69] Mr Goni agreed with the proposition put to him that, when important and urgent documents are faxed to the offices of the union, the union's administration personnel or some other responsible official would be present to deal with such matters. If Mr Goni was not in his office, it is highly unlikely, in my view, that a responsible union official, upon reading the contents of the letter and the ultimatum, would not make any contact with the respondent. It was a very serious matter, where 19 employees stood to be dismissed at 7h30 the next day.

[70] It also remains unexplained to what time Mr Goni wanted an extension. On his own version, he was at the time completely unaware as to when the ultimatum was due to expire. I also gained the impression that Mr Goni's memory in respect of some incidents was particularly detailed, whereas he was not able to recall other events, which is more consistent with the memory of someone recalling events which took place almost two years ago.

[71] In my view, Mr Goldberg's version is more credible

than that of Mr Goni and also more consistent with the inherent probabilities and undisputed facts which were evidence before me.

[72] THE TIME OF DISMISSAL

I now turn to the question of whether or not the respondent, having imposed its own deadline (07H30), elected to ignore that deadline and terminate the contracts of employment of the employees in question, prior to 07h30.

[73] Mr Robertson stated that he had arrived 15 or 20 minutes after the ultimatum had expired on 18 September 1997, to "allow the employees to change their minds". The respondent argued that this seemed strange if Mr Robertson was serious about the terms of the ultimatum. Mr Robertson also told the court that he met Mr Heuer and Mr Wright on arrival, who informed him that the employees had been given "five minutes" to discuss the matter. When he went to the change room and asked them whether they intended working, he was met with silence, where after he dismissed the employees.

[74] On Mr Heuer's version the five minutes given to the employees expired at 07h40 and when the employees indicated that they wanted more time, Mr Heuer, according to his evidence, informed them that had enough time and "that's it". According to the evidence of Mr Robertson and Mr Heuer the services of the employees were terminated at 07h50. With regard to the timing of the dismissal, the applicant's counsel put forward the following propositions in relation to the testimony of these events.

(1) Mr Wright's version of the timing of events, is that all the events occurred about ten minutes later than on the version of Mr Heuer, except for the actual timing of the dismissal, which was on both versions at 07h50, and this discrepancy was important.

(2) Mr Heuer's evidence was that the bell that rings

to signal the start of the work day actually rings at 07h20, ten minutes before the actual starting. It was argued, that it made no sense that this would be the time that Mr Heuer would go the workers and give them five minutes.

- (3) It was also argued that it made no sense that Mr Robertson, aware of the deadline and serious about it, arrived at work prior to its expiry. Therefore the possibility that the events described by the applicants, actually occurred before 07h30, cannot be rejected.

[75] On the applicants' version the employees were ready to work prior to 07h30 but were fired. I respectfully agree with counsel on behalf of the respondent that this proposition is inconsistent with the respondent's efforts to engage the applicants to get to work the previous day.

[76] On the version of the employees, they only became aware of the ultimatum on the morning of 18 September 1997. In those circumstances it is hardly likely that the employees arrived at work shortly before 07h25, read and discussed the ultimatum and thereafter resolved to return to work, despite the situation that none of their demands were met.

[77] On their own version, the respondent had not done anything which would have mollified their attitude. They had been on strike for at least two hours on 16 September and on 17 September 1997 and their union could not persuade them to return to work. There is no rational explanation why they would in these circumstances, decide collectively, to return to work. After all, Mr Robertson had not come to see them and the question of the increase had not yet been resolved at that stage.

[78] The case advanced by the applicants, in this regard is, that the only intervention came when Mr Robertson terminated their services prior to 07h30. In other words, there had been no meeting with Mr Wright and Mr Heuer. Consequently, what needed to be explained is that according to the applicants' pleadings, Mr Heuer had arrived and asked them at about 07h20 whether they were going to work and they replied that they were getting dressed. It further needs to be explained why Mr Lele testified that Mr Heuer (and not Mr Robertson) had approached the employees, prior to Mr Robertson and enquired as to their intentions for the day and terminated their contracts of employment. It was put to Mr Heuer and Mr Wright that Mr Robertson prematurely terminated the services of the applicants. It was therefore surprising when Mr Lele testified that it was Mr Heuer, and not Mr Robertson, who terminated their contracts of employment. These contradictions cast serious doubts on the credibility of the applicants' version regarding the events in question.

[79] Considering the inexplicable inconsistencies and the inherent improbability that the respondent would wish to terminate the employees' services prior to the expiry of the ultimatum, I have to accept the respondent's version in this regard. I have also considered the overall credibility of the applicants on other disputes of fact in deciding this question.

[80] INTIMIDATION

The Act provides that if a dismissal is found to be unfair the court must order reinstatement or re-employment unless the exception provided for in section 193(2) of the Act is to apply. The basis on which the respondent seeks to resist reinstatement, apart from alleging that the dismissal was fair, is by relying on alleged misconduct on the part of some of the applicants after their dismissal. In my

opinion, the respondent has failed to prove that the applicants were collectively guilty of any misconduct as that there was simply not enough evidence to support such a finding. None of the persons who were intimidated testified or made any attempt to give some form of evidence. An onus rests on the respondent to show that the relationship between itself and its former employees had deteriorated to such an extent by virtue of their conduct.

[81] It was the unchallenged evidence of Mr Mollendauer, who understands Xhosa and translated the ultimatums to the employees, that he heard the 9th and 14th applicants threatening one of the employees, that if he returned to work he would be killed. This evidence does not prove a common cause amongst all nineteen of the dismissed employees, and only relates to two of them. However, I do not find it necessary to decide the question whether the relationship between the respondent and the two employees has broken down to the extent that they may not be reinstated.

[82] THE FAIRNESS OF THE DISMISSAL

The respondent is obliged to show that it had a fair reason to dismiss these employees in the circumstances, and it follows that the events which occurred just prior to the dismissal of the employees, need to be scrutinised carefully.

[83] Having found that the applicants engaged in an unprotected strike on 16 and 17 September 1997, I consequently have to consider the strike in its full context, with all its distinct features.

[84] The applicants argue that the respondent had conducted itself "by the book" until the point, just minutes before the dismissal. According to the applicants, the respondent had issued a model ultimatum, specified the time to return to work in clear and unambiguous language, and specified the consequences of not complying. Yet, according to the applicants' submissions, "the book" was departed from on the expiry of the ultimatum.

[85] The applicants counsel argued that on the respondent's version, the deadline stipulated in the ultimatum, was never expressly or tacitly renewed. Mr Heuer's cryptic "*that's it*", did not renew the deadline, nor did Mr Robertson when he appeared to ask the applicants about their intentions and dismissed them because they had not resumed work by 07h30.

[86] My attention was also drawn to the fact that the employees weren't hardened trouble makers but were regarded as valuable workers who had not been on strike before, and that many of them had rendered years of valuable service.

[87] It was argued on behalf of the applicant that Mr Robertson appears to have resolved, not to act in terms of the deadline, before he even set out for the Body Shop on the morning of 18 September. It was submitted that the very least Mr Robertson could have done, and should have done, was to advise the employees that the extended deadline was to end at 08h00 and he could have waited until then.

[88] It was further submitted that once an employer decides to wave the enforcement of a deadline set in the ultimatum, it is bound to issue a clear, new ultimatum, which was never done.

[89] It was further submitted by counsel for the applicants that the employees were caught by surprise when Mr Robertson came in and dismissed them, and that

their silence in fact was indicative of confusion and uncertainty rather than a sullen defiance as Mr Robertson apparently understood it.

[90] Of great importance when considering the arguments put forward by counsel on behalf of the applicant in the above regard, is that these arguments are based on the **respondent's** version of events and was not on the case pleaded by the applicants.

[91] According to the employees, they were dismissed prior to the expiry of the ultimatum. They did not say that they were confused at 07h25. They also did not tender their services on the morning of 18 September 1997 at 07h30 or before, when they had been on strike for part of a day and a whole day. They also did not admit that they were on strike on the 17th. Had they been honest and advanced their case along the lines now argued, namely that they seriously needed more time to reflect on their actions of the previous day, and the day before, this may have cast a different light on matters. However, they chose to deny being on strike on 17 September.

[92] In the case of *National Union of Mineworkers v Black Mountain Development Company (Pty) Ltd* [1997] 4 BLLR 355 (A), it was held that striking as such, did not amount to misconduct and there was accordingly an important distinction between dismissal for misconduct and dismissal in consequence of strike action. It was held further, that it would follow that considerations relevant to dismissals for **misconduct** (my emphasis) are not necessarily relevant to dismissals for **participation in strikes** (my emphasis) and that it was undoubtedly so, that in a sense the dismissal of striking workers could be said to be a last resort (at 364I to 365B).

[93] The aforesaid decision was handed down in terms of the Labour Relations Act, No 28 of 1956 ("the former Act").

[94] The current Labour Relations Act specifically makes provision for the proposition that participation in a strike that does not comply with the provisions of

the Act, may constitute a fair reason for dismissal. Section 68(5) of current Act provides that in determining whether or not the dismissal is fair, the Code of Good Practice Dismissal in Schedule 8 ("the Code") must be taken into account. The relevant provision of the Code is item 6 of Schedule 8 which defines participation in a strike that does not comply with the provisions of chapter 4, of the Act, as "misconduct".

[95] This is a departure from the principles which were often applied under the former Act. According to item 6 of the Code of the current Act, the substantive fairness of such a dismissal must be determined in the light of the facts of the case, including-

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

[96] The Code further provides that 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.

[97] 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.

[98] The employees should be allowed sufficient time to reflect on the ultimatum and to respond to it whether by complying with it or rejecting it.

[99] If the employer cannot reasonably expected it to

extend these steps to the employees in question the employer may dispense with them.

[100]All the aforesaid requirements were followed by the respondent.

[101]The provisions of the Code that relate to dismissals for other misconduct, are dealt with separately in item 7 of the Code, which in my view, indicates that different principles apply to these two types of dismissals.

[102]The right to strike is protected by the Constitution and the current Act. Employees who participate in a protected strike are therefore protected from dismissal. This right to strike and the protection from dismissal is earned, by following the correct procedures. It is a right which is relatively easy to earn. In the current matter, no attempt was made by the employees in question to follow the procedures set down in the Act.

[103]It is also very difficult to understand upon a reading of the applicants' case, what their dispute with the respondent was really all about.

[104]I have already found that it appears to be that the employees were disappointed because they did not receive their increases on 1 September 1997. This was not the fault of respondent. To punish the respondent or to "give Mr Robertson a fright" by embarking on unprotected strike action, in my opinion, amounts to unreasonable behaviour on the part of the employees.

[105]There was no unjustified conduct, on the part of the respondent. On 16 September 1997, Mr Robertson was out of East London and therefore it was not possible for him to speak to the employees. He had explained to the employees before, at a meeting, that the parties were bound by the central bargaining process in respect of increases. Employees should not be entitled to obtain the presence of their employer by embarking on unprotected strike action.

[106]The employees continued with their strike action

17 September 1997. They received ultimatums at 10h00 in the morning and did not at any stage, on that day or thereafter, tender their services.

[107]The non-compliance with an ultimatum to return to work under the current labour dispensation, is to be viewed in a more serious light than was the case under the former labour dispensation. The protection against dismissal following participation in unprotected strike action is now limited. This limitation is demonstrated by the introduction of the Code into the Act, which classifies this type of conduct as "misconduct".

[108]The employees in question did have enough time to reflect upon their actions. They were given 22 hours to rectify the situation caused by them and did not do so.

[109]On the evidence which I have accepted, the respondent had, as it was required to do, by the Code of Good Practice, contacted the union and requested the union to intervene. A union official then informed the respondent that the employees did not heed the union's advice, to return to work. Their inflexible attitude therefore was not based on a reasonable demand, or the unjustified conduct of their employer.

[110]Considering these factors, it cannot be argued that there was a duty on Mr Robertson to extend the deadline set out in the ultimatum, as argued by the applicants. The fact that some minutes had elapsed since the deadline, in these circumstances, creates no necessity to hand down any further ultimata in writing. The employees did not tender their services and there was no indication that they were going to do so.

[111]The aggravating feature of the misconduct in this case was the unreasonableness of the conduct and the demand of the employees. The enquiry is not whether one or other cause may have been more preferable, or more successfully employed to end the strike, or whether Mr Robertson should have endured the strike for longer. He followed the Code. The employees ignored the Act. The enquiry is whether in all the circumstances, having accepted that the employees are guilty of misconduct,

the dismissal can be said to have been for an unfair reason. In my opinion, the dismissal was for a fair reason.

[112]The Act was contravened by the employees. It cannot be argued that this contravention was not serious. The employees were on strike for a whole day and part of a day. They had made no attempts to comply with the Act and I have already found that their strike was not in response to unjustified conduct by the respondent, but rather the result of an unjustified and unreasonable attitude on their part.

[113]Confusion, uncertainty and surprise are not good reasons to embark on industrial action. Disputes which lead to such a state of affairs should be identified and referred to conciliation. There is no reason why this course was not followed in this matter.

[114]It is highly significant that, immediately after their dismissal, there was no attempt to tell their employer that there had been confusion and frustration and that they immediately tender their services.

[115]Not once did the employees tender their services.
PROCEDURAL FAIRNESS

[116]The respondent's position is that there was no legal obligation on it to give hearings of any kind to the employees after their dismissal.

[117]In the normal course, hearings should be held to establish whether there was misconduct and whether or not dismissal is in fact necessary, in cases where misconduct is alleged.

[118]It was argued that if participation in a strike is misconduct, it must follow that the requirements for dismissals for misconduct should be followed. I respectfully disagree with the aforesaid. Hearings are held prior to dismissal, to enable the employee to understand the charges levelled against him or her, be given an opportunity to state their case and to give all concerned an opportunity to evaluate the facts and

circumstances surrounding the subject matter of the enquiry.

[119]In a strike situation, particularly an unprotected strike, where employees are warned of dismissal in an ultimatum, it would hardly make sense to conduct a hearing just before the dismissal is imposed. Apart from the fact that it promises to be very impractical to have hearings during an unprotected strike about participation in the strike itself, a requirement for disciplinary hearings to be held prior to taking action during an unprotected strike, would also mean that the employer's endeavours to bring an end to unprotected action, is seriously hampered.

[120]A requirement to have hearings *after* the dismissal had already taken place, would be, in my opinion, tantamount to the employer second guessing its own decision. Such a process could not serve in any meaningful way to resolve the issues at hand.

[121]A reasonable step to take, for example, would be for the employer to invite all dismissed employees to show, if able to do so, that there was a good reason for their participation in unprotected industrial action eg, that they were intimidated. In this particular case, none of the employees put forward a case that they would have provided such an explanation, had they been given an opportunity to do so in some form of an enquiry or an appeal. This was not the case pleaded by them and since the Act does not require the employer to follow this course or hold any hearing for dismissals following participation in unprotected strikes, there is no reason to find that the dismissal was procedurally unfair, simply because no such process had been followed. In any event, the facts of this matter, do not suggest that there was an obligation on the respondent to take such a course.

[122]I do not agree, that all the principles applicable to dismissal for misconduct as set out in the Code, should be followed in the case of dismissal for participation in unprotected action. The legislator has deemed it fit to deal with these matters separately.

[123]Item 6 of the Code is clearly an attempt to codify the law as it pertains to substantive and procedural requirements pertaining to the unprotected strike situation. In *Cheadle et al: Current Labour Law 1997 at page 97 et seq* it is stated that pre-dismissal hearings do not generally have to be observed in respect of strikers who have been given an ultimatum.

[124]In the circumstances I find that the employees were dismissed for a fair reason and that their dismissal was not only substantively fair but also procedurally fair and the application should fail.

[125]There is no reason why costs should not follow the result in this matter.

[126]Consequently, the application was dismissed with costs.

E REVELAS

For the applicants: Advocate J G Grogan

ruacted by : PRETORIUS HERBERT & BARNES

For the respondent: Advocate R B Wade

ruacted by : LINDE, DORRINGTON & KIRCHMANN INC

This judgement is also available on the Internet at website:

<http://www.law.wits.ac.za/labourcrt>

