

166336

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J247/99

In the matter between:

TRUDY NGALEKA

Appli
cant

And

**SCAROB MARKETING t/a FRIENDLY GROCER
BANBURY CROSS**

Resp
onde
nt

JUDGMENT

STELZNER AJ

1. This matter came before me as a result of an allegation made by applicant that her dismissal by respondent was automatically unfair. She alleged in her statement of claim that respondent's reason for dismissal was based on an infringement of her fundamental rights to join a trade union and was motivated by her role in having recruited other employees to become members of the trade union. She alleged further that there was no substantive reason for the dismissal in that there was no gross misconduct by applicant as contemplated by the provisions of Schedule 8 of the Labour Relations Act, No 66 of 1995 ("the

Act"). Respondent, on the other hand, alleged that applicant had correctly been found guilty of serious misconduct for which dismissal was the appropriate penalty. The parties filed a pre-trial minute in which it was recorded that the issue of procedural fairness was not in dispute.

2. In the circumstances I am called on to decide whether or not applicant was properly found guilty of serious misconduct and whether, if so, the penalty of dismissal was fair. Secondly, I am called upon to decide whether the dismissal of applicant amounted to an automatically unfair dismissal.

3. Applicant was employed by respondent on 10 November 1997 in the position of supervisor on the floor. She was dismissed on 4 August 1998 following upon a disciplinary hearing held on 3 August 1998. At the time of her dismissal she was earning R1750-00 per month. At the disciplinary hearing applicant was found guilty of improper and contemptuous conduct and being absent from work without authorisation. The penalty of dismissal was only imposed in respect of the first charge, namely, improper and contemptuous conduct. A final written warning was imposed in terms of the second charge. The background to and facts leading up to the dismissal are summarised hereunder based on the evidence which was placed before me.

4. Respondent carries on business in the retail trade as a supermarket and commenced business towards the end of November 1997. It was common cause that the respondent relied on the services of a labour consultant to assist it in regard to most matters pertaining to industrial relations and the employment of staff. Both Herman Breedt and Peter de Leeuw, (hereinafter referred to as “Breedt” and “Leeuw” respectively), of the firm of labour consultants assisted respondent from time to time.

5. The three members of the close corporation which carries on the business are John Rosser, Gary Carlton and Clive Rautenbach, (hereinafter referred to as “Rosser”, “Carlton” and “Rautenbach” respectively). Rosser and Carlton are active in the running of the business, while Rautenbach is a “silent partner”.

6. Rosser testified that he was advised by the labour consultants that employment contracts and a Code of Conduct ought to be put in place. These documents were not ready at the time that the business commenced its operation. Breedt confirmed that he prepared the documents for respondent but that the documents prepared by him were drafts, first to be commented on by the employer so that appropriate changes could be made to suit the requirements of the business. Thereafter his recommendation to

the employer was that the documents be put forward for discussion with either the union, if a union existed, or with the employees themselves. At the time there was no union at the workplace and sometime in March 1998, draft contracts and a draft Code of Conduct were handed out to all staff members for comment. The Code of Conduct formed part of the documents handed to me in evidence but I did not have sight of the draft contracts.

7. It was common cause, however, that the draft contracts handed to employees contained a three month probation clause. Rosser explained in his testimony that these were included because it was intended that the contracts, once finalised, would be used for all future employees. The documents were not presented to employees for their signature but for their comments.

8. It was also common cause that applicant immediately reacted to the inclusion of the probation clause on the basis that it would be unfair to expect existing employees to sign a contract containing a probation clause, when they had already been in the employ of the respondent for some time. Rosser testified, however, that employees were advised at the time that the probation clause was not applicable to existing employees. This

was apparently conveyed to the staff by de Leeuw when he attended at respondent's premises to discuss the draft documents which had been handed to the employees the day before. Applicant, however, it appears, attributed a sinister motive to respondent by virtue of the inclusion of a probationary clause in the draft contract. Nevertheless, she also agreed when giving evidence that the contracts were not put into effect but that de Leeuw had undertaken to revert in due course with revised contracts.

9. As a result of her concerns arising from the introduction of employment contracts at the workplace, applicant testified that she thought that the employees needed some form of representation. If respondent was going to be represented by labour consultants, in her view, the employees needed a union. Accordingly, she approached Mr Sebola, of the Security, Retail, Transport and Allied Workers Union of South Africa (hereinafter referred to as "the union"), and actively began recruiting union members at the workplace. It was also not in dispute that a number of respondent's employees joined the union as a result of applicant's initiative. On or about 24 April 1998 the union wrote to respondent supplying membership forms and requesting the implementation of stop order facilities. Applicant testified that shortly before that Rosser approached her with a request for a

list of union members. She perceived this as an attempt by him to access the names of the new recruits so that he could victimise them, as she put it. She refused to supply the list and told Rosser to contact the union in that regard. Rosser testified that he wanted the list of names as part of the process of verification of union representivity and certainly not because he wished to victimise union members. Applicant clearly had nothing more than a suspicion, unsubstantiated by any facts.

10. At more or less the same time an incident occurred in which applicant accidentally caught sight of the salaries of certain other employees at the workplace while meeting with one of the human resources personnel in the office. The person concerned had left her computer screen on, thus affording applicant sight of the information. Applicant's evidence to the effect that she did not deliberately gain access to the computer in order to have sight of this information was never placed in dispute by respondent and I accept that the information came to her attention accidentally. Nevertheless, having come into possession of this information accidentally, applicant proceeded to divulge the information which she had seen to, on her own version, at least one co-employee, being her roommate, one Joyce. Respondent's version was that she divulged the information to a large number of employees at the workplace,

indeed, that the information spread more or less throughout the workplace. Two other employees of respondent gave evidence during the proceedings, namely Candy Khaselele and Allan Sibande (hereinafter referred to as “Khaselele” and “Sibande” respectively). Both Khaselele and Sibande confirmed that the information had become generally known amongst employees at the workplace and that they, personally, had been given the information by applicant. The information concerned the exact salary details of the manager of the butcher department, one Jose, and the blockman in the butcher department, one Jack. Applicant was aggrieved when this information came to her attention as both Jack and Jose were earning more than what she earned whereas she perceived that as the supervisor on the floor she should at least have been earning more than Jack, the blockman.

11. It was further not in dispute that respondent had consistently advised all employees that salaries were to be regarded as confidential and should not be discussed or disclosed amongst each other. Indeed, applicant herself agreed under cross-examination that the fact that she was not happy with her salary and would have been happy to share information about her salary with her colleagues did not detract from the principle that salaries were confidential.

12. As a result of this incident there was unhappiness on the shop floor and Rosser testified that both Jack and Jose complained to him that the entire workforce appeared to know exactly what they earned. In consequence thereon, respondent convened a disciplinary hearing at which applicant was charged with "improper conduct relating to disclosure of salaries to co-employees". She was found guilty and a penalty of a final written warning was imposed. Applicant appealed against this decision, the issue was reconsidered on appeal and the decision and penalty were upheld. De Leeuw chaired the initial hearing and Breedts chaired the appeal. Thereafter applicant referred a dispute under Part B of Schedule 7 of the Act to the CCMA. A conciliation hearing was scheduled in respect of this dispute for 26 June 1998 and it was common cause that no one from respondent attended the conciliation meeting. Rosser testified to the effect that he had never seen the notice to attend a conciliation meeting. He accepted that the notice could well have been telefaxed to respondent's premises but that at the time a new secretary had been employed and administration was in a state of confusion. Furthermore, the fax machine was in a back office where the printouts were collected in a large box and thus even had the notification been faxed it might well have not come to his attention. Although this does not appear to be an

issue of decisive relevance in the matter it was also noteworthy that applicant's representative was unable to supply the court with proof, in the form of a telefax transmission slip or otherwise, to the effect that the notification had indeed been sent to respondent.

13. In the meantime, however, applicant testified that she was asked by Rosser to remain behind after work on 19 June 1998 for the purposes of a meeting with himself and Rautenbach. Rosser testified to the effect that the purpose of the meeting was a further attempt to counsel applicant on her unacceptable behaviour and conduct at the workplace both towards management and co-employees. Rosser testified that applicant had an attitude problem and tended to be aggressive and confrontational and to regularly pick fights with other employees on the shop floor. He testified that he had counselled her verbally in this regard on numerous previous occasions. The purpose of calling Rautenbach in to the meeting was in the hope that the introduction of a third party who was not involved in the daily running of the business would introduce an element of objectivity and neutrality. Applicant had always been a good worker, he testified, and he was hoping that a good working relationship could be restored as a result of this initiative.

14. Applicant, however, placed an entirely different light on the meeting of 19 June 1998. She testified that she had been approached by Rosser and advised that his partner, Rautenbach, wanted a meeting with her that evening. When the meeting commenced Rosser asked her how many children she had and when she responded that she was the mother of two, he said that she must think about her children's future and what she wanted. He stated further, according to applicant, that he could not afford to have the union or the CCMA running his business. He then proposed giving her an increment in her salary provided that she was prepared to forget about the union and drop her case with the CCMA. When she advised Rosser that she was not prepared to do this and that she was simply exercising her rights, she testified that Rosser told her that she could have some time to reconsider her position.

15. Following on from that incident applicant testified that when she returned from attending at the CCMA on 26 June 1998, Rosser called her in and asked her where she had been. When she told him that she had been at the CCMA he immediately responded to the effect that he had decided to demote her because she had, as she put it, "stabbed him in the back". She testified further that she asked Rosser to put this in writing and that she subsequently received the letter dated 1 July 1998 which

forms part of the bundles which were placed before me.

16. It is common cause that applicant was demoted from the position of supervisor to that of merchandiser (or shelf packer) and, further, that this was without loss of salary. What was not common cause, however, was the context in which this demotion took place. Applicant would have it that the demotion occurred as a result of her refusal to drop her case against respondent with the CCMA and testified further that Rosser told her that she would get her old position back if she gave up her union activities. Rosser, however, testified that he did not speak with applicant at all on 26 June 1998 when she came back from the CCMA. He could not recall the exact date on which he had advised her of her demotion but said it would at most have been a day or two before handing her the written demotion letter of 1 July 1998. Furthermore, he testified that the decision to demote applicant came about after numerous counselling sessions (including the one of 19 June 1998) had failed to improve her behaviour and attitude. The letter read as follows:

"It is the decision of management to demote you from Floor Supervisor to Merchandiser on the grounds that the relationship between yourself and Management has become untenable and is affecting the performance of staff and undermining the authority

of Management.

Your constant rebuttal of management discipline has not been an example of your peers and subordinates.

Counselling has been done on numerous occasions regarding your objection to Management decisions.

Management respects your position as Shop Steward and the role that this position places upon you; however, we feel that you are unable to separate the two functions, (i.e. one as role model Floor Supervisor and the other as fair representative of the Labour Union and Staff).

A letter written by yourself on behalf of some of the staff members indicates your racial bias and your underhandedness as some signatories admitted that they were not privy to the contents, which is an indictment on your ability to handle staff issues with fairness and transparency.

This demotion will not mean a reduction in your salary however we wish to stress that there is opportunity to redeem your status as Floor Supervisor and this will be based entirely on your attitude in the future and periodic reviews of your position.

We trust you view this matter with concern and that you will

endeavour to improve the relationship between yourself and Management."

17. Rosser testified that applicant was demoted without loss of salary and that the door was specifically left open for her to become a supervisor again in the event of her attitude and behaviour improving. He also denied categorically that the demotion had anything whatsoever to do with her referral of a dispute to the CCMA or her union activities.

18. The incident which finally resulted in applicant's dismissal took place on 30 July 1998. Applicant was in the store shortly before opening time, being 8am. It does not appear to have been in dispute that Rosser walked past applicant on two occasions during that period of time. Nor was it in dispute that applicant did not greet Rosser on either of these occasions. Rosser's version was that she appeared to be deliberately ignoring him which led him to believe that there was some problem. In any event, it was not in dispute that after the second occasion on which applicant failed to greet him, Rosser called applicant to come with him to his office which is situated at the front of the shop near the tills. The office is a small enclosed area with a door but is glass from about shoulder height upwards so that the person in the office can see out into the shop.

Furthermore, the top of the office is not enclosed so any loud noise from within the office can be heard within the shop.

19. Once both Rosser and applicant were in the office the applicant's version and the respondent's version differ as to what took place. Applicant testified that Rosser immediately asked her who she thought she was not to be greeting him. Her response was: "Oh John, I'm not in the mood for this", meaning that she did not want to get into an argument with him. Applicant testified that Rosser's response was "who do you fucking think you are", that he grabbed her and shoved her hard against the door. He then forcibly removed her from the office and refused her attempts to come back in to discuss the issue with him. Rosser's version was that he asked applicant to come into the office and to close the door whereafter he asked her what was the matter because he had noticed that she was not greeting him. In response, stated Rosser, "applicant went berserk". She started screaming and shaking her finger in his face and asked him who he was to question her attitude. He asked her to stop because he was concerned that other people in the store would hear the argument. (On the evidence I am satisfied that the store was already open at the time and that there would have been at least some customers in the store at the time.) He told her that if she did not stop he would ask her to leave. She did

not react and he therefore opened the door in order to insist on her leaving. In doing, because of the confined space in the office he had to squeeze past her and this would have resulted in him coming into bodily contact with her. He denied, however, grabbing her or shoving her. When he opened the door, he said, the staff were gathered around to see what was going on and he, being quite shocked at what had happened, did not know quite what to do. He closed the door and went back into the office in order to contemplate how he should react further. Before anything further could happen, however, applicant flung the door open again shouting "do you think I am your fucking slave, fuck you John". Once again, Rosser testified that he was at a loss for words or as to how he ought to react. He therefore simply closed the door and telephoned his labour consultant for advice.

20. The labour consultant, after listening to his description of what had happened, advised him to suspend applicant with immediate effect on full pay pending the holding of a disciplinary hearing. While he was discussing the matter with his labour consultant he observed applicant from the office walk to Jose and then leave the store. It transpired that applicant had sought permission from Jose to leave the store for five minutes to clear her head. Not long afterwards she returned to the store but then approximately 20 minutes later walked out again and was absent

for some time, in the region of three-quarters of an hour. Rosser testified that Jose informed him that applicant had requested permission to leave the store the first time but not the second time, hence the addition of a third charge to the disciplinary notice regarding being absent without permission.

21. Rosser's version of the incident was corroborated in all material respects by the evidence of Khaselele and Sibande. Although they could not testify as to each and every aspect of what happened, the issues on which they did testify, accorded with the testimony of Rosser. For instance, they both heard applicant's voice being raised and her shouting at Rosser but did not hear shouting from Rosser. The words themselves as used by applicant were also confirmed. Sibande, in particular made a very good impression as a witness, responding well under cross-examination and making concessions when called for. I have little hesitation in accepting the veracity of his evidence in its entirety.

22. It was common cause that applicant was then suspended by way of a letter dated 30 July 1998 and that she then received a notice to attend a disciplinary hearing concerning the following allegations:-

- 22.1 Gross insubordination;
- 22.2 Unauthorised absenteeism;
- 22.3 Improper/contemptuous conduct.

There was some dispute in regard to the date of the notice to attend a disciplinary hearing. It was common cause that the applicant was handed the notice after the incident of 30 July 1998 and that the disciplinary hearing subsequently took place on 3 August 1998. However, the notice to attend a disciplinary hearing was dated 27 July 1998. Applicant sought to infer from the aforesaid date that respondent had planned the incident which ultimately resulted in her dismissal. She argued that it was clear that the notice had been prepared on 27 July 1998 and that Rosser had thereafter orchestrated the incident which led to her being charged and then dismissed. Rosser's explanation, corroborated by the testimony of Breedt, was that he sought advice from his labour consultants in regard to the wording of the notice and that, indeed, the notice was prepared by the consultants after the conversation with Breedt following shortly after the incident of 30 July 1998. Breedt testified that in such situations he made use of pro forma notices which were already on his computer, making the necessary changes required by the

facts and circumstances. It quite frequently happened, he said, that a detail such as the date in the heading was not changed. Therefore, he said, the fact that the notice was dated 27 July 1998 was most likely because he had used as a precedent a document which was prepared on that date and had omitted to alter the date before faxing same through to his client.

23. While applicant was initially charged with the three separate allegations set out above, de Leeuw, who chaired the hearing, determined that the allegations of gross insubordination and improper/contemptuous conduct in fact amounted to the same thing based on the evidence and therefore found applicant guilty of improper/contemptuous conduct, for which the penalty of dismissal was imposed. In regard to the unauthorised absence from the workplace a penalty of a final written warning was imposed, in line with the provisions of the Code of Conduct. In his finding he made reference to the fact that applicant already had a final written warning for improper conduct arising out of the disclosure of salaries issue. Applicant's representative sought to argue that the decision to combine the charges of gross insubordination and improper/contemptuous conduct was a further attempt by respondent to mastermind applicant's

dismissal. He argued that if applicant had been found guilty of gross insubordination instead of improper conduct then the appropriate penalty would have been a final written warning rather than dismissal. By terming her conduct improper conduct and by relying on the previous final written warning for improper conduct, respondent was able to achieve her dismissal.

24. Subsequent to her dismissal applicant laid a charge of assault against Rosser with the South African Police. Rosser testified that he was visited by the police who took his statement and spoke to other employees at the workplace. He followed up on the issue and was subsequently advised that the charges had been dropped due to insufficient evidence. It cannot be said that the mere fact that applicant saw fit to lay such a charge takes her case any further, where the charge appears to have been without substance on the evidence before me and was similarly regarded by the SAP after investigation. It is also significant that no mention of the alleged assault is made in applicant's statement of case.

25. Applicant also raised certain other issues/incidences in support of her allegation that she was being subjected to victimisation by respondent. For instance, she said that when

she came to work for respondent she was provided with accommodation behind the store in a flat owned by Rautenbach. However, at the time when she was busy with her CCMA application and after she had recruited union members, she was told to vacate the premises on short notice. Rosser's evidence on this issue was that applicant had originally come to Johannesburg and found accommodation of her own but had then been evicted from that accommodation. In an effort to help her he had arranged accommodation at short notice for her in Rautenbach's flat. The reason for her being required to vacate the flat was that the unit had been sold and had nothing to do with her union activities or exercising her rights to complain to the CCMA. Furthermore, he testified that the arrangement in terms of which she was renting Rautenbach's flat was never intended to be a permanent one. There appears to be no reason to disbelieve Rosser's evidence on this point when I am inclined to accept his evidence in general.

26. Applicant alluded further to respondent's refusal, as she put it, to grant her a loan to pay the deposit on her accommodation subsequent to her being required to leave Rautenbach's flat. She testified that she had had to obtain a loan

from her sister's employer. Rosser's evidence in this regard was that applicant had come to him with a cheque in the sum of R3500,00 which had been made out incorrectly, apparently by her sister's employer, in respect of the deposit for her accommodation. The sister's employer was out of the country at the time and she was unable to have the cheque corrected. Under the circumstances Rosser testified that he agreed to advance her the money until such time as the cheque could be altered as required. Had Rosser been intent upon victimising applicant, as alleged by her, he would as likely as not have refused to assist her on this occasion. He was clearly under no obligation to do so. If anything, therefore, Rosser's actions on this occasion tend to support respondent's rather than applicant's case.

27. I turn then to deal with the applicable legal principles. In terms of s187(1) of the Act a dismissal is automatically unfair if an employer, in dismissing the employee, acts contrary to section 5 of the Act. In terms of s 5(1) of the Act employees are afforded protection against discrimination for exercising any right conferred by the Act. This general protection is amplified in s 5(2) to encompass, *inter alia*, a specific prohibition against

prejudicing an employee because of past, present or anticipated membership of a trade union, participation in forming a trade union or in the lawful activities of a trade union, exercising any right conferred by the Act or participation in any proceedings in terms of the Act.

28. Section 10 of the Act deals with the question of the burden of proof and states as follows:

"In any proceedings –

a party who alleges that a right or protection conferred by the Chapter has been infringed must prove the facts of the conduct; and

the party who engaged in that conduct must then prove that the conduct did not infringe any provision of the Chapter."

In this matter, therefore, applicant bears the onus suggested by s 10(a) and respondent that suggested by s 10(b).

29. In regard to the allegations made under the various provisions of section 10, it was submitted by Mr Sebola, who appeared for the applicant, that I ought to draw an inference

from the sequence and timing of the various factual events which occurred, as set out in some detail above. His argument was that the fact that disciplinary steps followed upon applicant's activities in recruiting union members and her referral of a dispute to the CCMA was in itself sufficient to establish the factual basis for a claim based on victimisation under section 5 and thus also the claim based on an automatically unfair dismissal.

30. In the alternative, he argued that applicant's refusal was unfair in the sense contemplated by section 188 of the Act in that, specifically, the requirements of item 2(1) read with item 3(1) of Schedule 8 to the Act had not been met. In short, he argued that the offence for which applicant was dismissed was not sufficiently serious to warrant dismissal.

31. Ms De Jongh, who appeared for respondent, argued that respondent had put up a rational explanation for the various steps it had taken against applicant, including her ultimate dismissal.

32. In applicant's statement of case as well as her evidence she attempted to link the final written warning she received in

respect of the salaries incident to the fact that she was victimised because of her attempt to introduce the union to the workplace. The respondent's case was, however, that the issue of salaries was a confidential one and was at all times treated as such. The rule in this regard was stressed by the employer to all employees, including the applicant. This the applicant admitted. However, despite the rule, applicant discussed the salaries of co-employees, Jack and Jose, with other staff, even on her own version at least with her room-mate. Jose and Jack were unhappy and complained to Rosser who decided (with the assistance of his labour consultants) to convene a disciplinary enquiry. At the enquiry applicant was found guilty of improper conduct and was issued with a final written warning in terms of the respondent's Code of Conduct.

33. Applicant further alleges that she was prejudiced by respondent in that she was demoted as a result of her referral of a dispute to the CCMA. Respondent's case in this regard is that applicant was counselled verbally over a period of time and on numerous occasions in respect of her improper and confrontational behaviour in the workplace towards both management and fellow staff members. The demotion,

confirmed by way of a letter dated 1 July 1998, was a further attempt to correct this behaviour, without loss of pay. The decision to demote her was reached after a counselling session held prior to the issuing of the letter. Applicant conceded during cross-examination that she indeed had several meetings with management where her behaviour was addressed but she perceived these meetings as victimisation.

34. Finally applicant claimed that her dismissal was pre-planned by respondent. She relied in this regard on the fact that the date of the disciplinary enquiry notice was 27 July 1998 when the incident in respect of which she was disciplined only took place on 30 July 1998. It was submitted that respondent adequately explained that the incorrect date was as a result of a bona fide error. If respondent had seriously pre-planned applicant's dismissal in the fashion suggested by her it would have made a concerted effort to cover its tracks and would hardly have let slip a mistake in regard to the date of the letter. The version contended for by applicant is thus improbable in the extreme.

35. As regards the incident of 30 July 1998, on applicant's own version there was an incident which preceded her dismissal.

The contradictory versions have already been set out in detail above. Not a single witness was called by applicant to verify her version, where both the other shop steward at the time and fellow union-members ought, on her version, to have been able to corroborate what she says took place.

36. There was every reason to believe the version put up by respondent on the facts, both in regard to the incident of 30 July and those that took place prior thereto. There was thus nothing sinister or suspicious in regard to the sequence of events. Apart from the far-fetched nature of some of the averments made by applicant in her evidence, she failed to call any witnesses to corroborate her version even in circumstances where it was clear that such witnesses ought to have been or were available. On her own version, Eddie, the other shop steward at the time, was in regular contact with her. Furthermore, in response to bold allegations made by applicant in the witness box respondent issued an open invitation to make available to applicant as witnesses any union members currently employed by respondent. Applicant and her representative failed to take up this invitation.

37. As a result, it was submitted, and I accept, that

applicant has failed to discharge the onus which rested upon her to prove the facts of the alleged infringement or prejudice. She thus failed to make out a case for relief based on an automatically unfair dismissal.

38. In regard to the alternative claim based on an “ordinary” unfair dismissal, Ms De Jongh submitted that I did not have jurisdiction to entertain the claim because applicant came to court on the basis of a claim based on an automatically unfair dismissal. On this aspect I am satisfied that applicant pleaded the issues sufficiently widely to encompass the alternative cause of action and that I can thus entertain the alternative cause of action. Furthermore, it appears appropriate that being seized with the matter, I deal also with the alternative cause of action even though on its own it would be a matter falling within the jurisdiction of the CCMA.

39. Ms De Jongh submitted in the alternative and in any event, however, that even on a consideration of the principles applicable to an “ordinary unfair dismissal”, where respondent bears the onus of proving that the dismissal was fair (it being common cause that applicant was dismissed), that onus had been discharged on the facts. I have already accepted

respondent's version of the events which led to applicant's dismissal. The question that remains, therefore, is whether or not the penalty of dismissal was appropriate in the circumstances. Here Ms De Jongh submitted that I should not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly or unreasonably in imposing the sanction. I was referred to the decision of the Labour Appeal Court in *Nampak Corrugated Wadeville v Khoza* (1999) 29 ILJ 578 (LAC).

"There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld ad fair; even though some other employer may not have dismissed him."

40. I do not think that respondent's decision in this case can be said to be unreasonable. Rosser's evidence was that his authority had been challenged and that he had been treated with disrespect in front of a number of other employees. Applicant had previously challenged management's authority (on occasions

where it was felt that counselling was the preferred response in an attempt to correct her behaviour) and had received a final written warning for improper conduct in regard to the disclosure of salaries incident. Although not by any means identical I am satisfied that both incidents demonstrated in different ways a challenge to the authority and instructions of management. Even if I am wrong in regarding the incidents as sufficiently similar then I am nevertheless satisfied that in regard to the incident of 30 July 1999 alone applicant's conduct was sufficiently serious to warrant dismissal. Certainly respondent's decision in that regard cannot be regarded as falling outside the band of reasonable responses. Applicant treated her employer with a complete disregard for mutual respect. The Code of Good Practice (Schedule 8 to the Act) recognises the need for mutual respect in the employment context in Item 1(3) thereof:

"The key principle in the Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of the business."

(See also *Lefifi v SA Breweries* (1999) 20 ILJ 1327 (CCMA) at 1328D-F).

41. In my view respondent was justified in dismissing applicant because her conduct was such that she was jeopardising the efficient operation of the business and respondent had made efforts to correct her behaviour, to no avail. The incident of 30 July 1999 may be said to be the straw that broke the proverbial camel's back. The conduct was nevertheless so gross on that occasion that it probably justified dismissal without reference to any previous misconduct. It was also clear from the wording of the Code of Conduct that the penalties suggested therein were in the nature of guidelines rather than immutable prescriptions. A penalty of dismissal in the circumstances of this case, even had the offence been regarded as one of gross insubordination, would thus not constitute an unacceptable departure from the provisions of the Code. I thus find nothing improper, unfair or prejudicial to applicant in the respondent having treated the offence in the manner in which it did.

42. On the issue of costs, Mr Sebola submitted that even if I were to find against applicant I should make no order as to costs as she is still unemployed and was represented at court by the union. Ms De Jongh, on the other hand, submitted that if an

innocent employer is dragged into court proceedings to defend itself it should not be out of pocket as to costs, especially where the allegations against which it was required to defend itself were allegations of victimisation and where not only was she unable to substantiate those allegations but applicant was in the end found to have been guilty of serious misconduct.

43. Ordinarily this court is reluctant to make costs orders where applicants come to court with genuine disputes. This court does not want to inhibit those kinds of disputes from being properly aired and resolved. In this matter, however, I have come to my decision on the basis that applicant's version has been rejected. She was not honest with the court in all respects. This is not a matter where applicant has lost simply because she was wrongly advised on the law. In all likelihood she was advised to proceed on the basis of her false version of what happened. In the circumstances I believe that it would accord with the requirements of law and fairness if some form of costs award were made in respondent's favour. Applicant is, however, unemployed and ought not to be penalised unduly with a costs order that is too onerous.

44. In the result I make the following order:

44.1 The dismissal of the applicant was both procedurally and substantively fair.

44.2 The application is dismissed with costs, such costs to be taxed on the lowest scale applicable in the Magistrate's Court.

S STELZNER

ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 2 - 5 August 1999

DATE OF JUDGMENT: 23 August 1999

APPEARANCE FOR APPLICANT: Mr S Sebola

OF: Security, Retail, Transport &
Allied Workers Union of
South Africa

APPEARANCE FOR
RESPONDENT: Ms M M De Jongh

INSTRUCTED BY: