reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Case No. P428/09

In the matter between:

EQUITY AVIATION SERVICES (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

M NDUZULWANA N O Second Respondent

SATAWU OBO J MASIBA Third Respondent

JUDGMENT

GUSH, J.

1. The Applicant in this matter had dismissed the 3rd Respondent for misconduct in November 2004. The 3rd Respondent who was employed at the Applicants office at the East London Airport was accused of having retrieved from an aeroplane a document which

had been sent to him in the hold of the aeroplane by a colleague employed at the Port Elizabeth Airport. In July 2005 the dismissal was found to be unfair by an arbitrator appointed by the 1st Respondent in the absence of the Applicant. In July 2005 the Applicant applied to the 1st Respondent for the award to be rescinded, which application was unsuccessful. The Applicant then applied to review the default award in November 2005 which application was eventually heard and granted in February 2008. The arbitration was finally enrolled for arbitration before the 2nd Respondent in March 2009.

2. At the conclusion of the final Arbitration of this matter on the 24th March 2009, some 4 years and 4 months later, the Applicant conceded in its closing argument that that the 3rd Respondent's dismissal in November 2004 had been "substantively unfair". In making this concession the Applicant admitted that it was common practice in the East London office to send and receive cargo in the manner in which the 3rd Respondent had.

3. The Applicant however sought to persuade the 2nd Respondent that despite the 3rd Respondent's plea that he be re-instated, that it was not reasonably practicable for the Applicant to re-instate him, (as provided for in s193(2)(c) of the Labour Relations Act 66 of 1995 (LRA), and that he should be awarded at best no more than the equivalent of 12 months salary as compensation.

4. The 2nd Respondent was not persuaded by the Applicant that it was "not reasonably practicable" for the 3rd Respondent to be re-instated and ordered that the Applicant re-instate him retrospectively from the date of his dismissal being the 16 November 2004. The 2nd Respondent however did not award the 3rd Respondent back pay for the entire period since his dismissal but only for 38 months of the elapsed 52 months. The Applicant was in addition ordered to pay the "costs of the suit on a party and party scale".

5. The Applicant in this application seeks to review that part of the award ordering reinstatement and costs and that it is substituted with a finding that the 3rd Respondents re-instatement is "not reasonably practicable" and awarding him the equivalent of 12 months salary as compensation.

6. The background to the 3rd Respondent's dismissal is that he had been employed by the Applicant in 1994 as a baggage coordinator and was stationed in East London. At the time the Applicant provided ground support services to inter alia the East London and Port Elizabeth Airports and the airlines using those airports.

7. In May 2004 an employee of the Applicant, Mr M H Piko (Piko), who was employed as an aircraft coordinator who was stationed at the Port Elizabeth Airport sent an envelope containing the Applicant's employment equity plan to his colleague, the 3rd Respondent, in the "Skylink" compartment of an Airlink aircraft. The 3rd Respondent was seen by the pilot in East London removing the envelope from the compartment. The pilot reported the incident as he was not aware of any prior arrangement for the envelope to be so conveyed.

8. Piko was charged with misconduct in that he had dispatched the document without obtaining authorisation and completing a waybill and 3rd Respondent was charged with misconduct in that he had collected the envelope from the compartment in East London.

9. In November 2004, following a disciplinary enquiry, both 3rd Respondent and Piko were dismissed and both of them referred disputes to the 1st Respondent claiming that their dismissals were unfair.

10. On the 15th March 2005 Piko's dispute was arbitrated. The arbitrator held that he had been unfairly dismissed for the following reasons:

10.1 Up until the 14th January 2004 it had been common and accepted practice for employees to dispatch cargo and documents in the skycheck compartment;

10.2 On the 14th January however a rule had been implemented requiring employees to seek authorisation and complete a waybill before sending cargo or mail in the skycheck compartment of airlines using the airports and a notice to this effect had been placed on the notice board;

10.3 At the time however the employees of the Applicant had been on strike and had only returned to work on the 15th April 2004. The Applicant was unable to confirm that the notice was still on the notice boards when the employees returned to work;

10.4 Piko had not in any way concealed or tried to conceal the fact that he was sending the document;

10.5 As a result, in the face of Piko's evidence that he was unaware of the new practice, that the notice was no longer displayed on the notice board on his return, and that he would have complied had he seen it, the Arbitrator concluded that the Applicant had not established that Piko was aware of the change in the practice and the rule requiring authorisation and a waybill before sending the envelope.

11. The Arbitrator reinstated Piko.

12. The Applicant did not seek to review this award and complied therewith by reinstating Piko on the 4 April 2005 as ordered.

13. The 3rd Respondents matter came before an arbitrator appointed by the 1st Respondent on the 5th July 2005. The arbitrator having satisfied himself that the Applicant had received proper notice dealt with the matter in the absence of the Applicant.

14. The 3rd Respondent gave evidence at the arbitration and, as had Piko, challenged the existence of the rule. He also testified that he had been given permission by his foreman to collect the document from the airplane's skycheck compartment.

15. The Arbitrator accepted the 3rd Respondent's evidence, concluded that his dismissal was unfair and ordered that he be reinstated and be compensated for the 8 months that had elapsed since his dismissal.

16. The arbitrator's award was faxed to and received by the Applicant on the 8th July 2005. The Applicant filed an application for the rescission of the award on the 22nd July 2005, on the grounds that although the notice of set down had been faxed to the Applicant's correct fax number the Applicant's Human

Resources and Industrial Relations Officer for the George, Port Elizabeth and East London regions had not received it hence his failure to appear. The 3rd Respondent did not oppose this application.

17. On the 26th September 2005 a commissioner of the 1st Respondent refused the Application.

18. On the 16th November 2005 the Applicant applied to this court to review the arbitration award and the ruling refusing its application for the rescission of the award. This application too was not opposed.

19. Inexplicably, the review application was only heard on the 7th February 2008 and granted and the matter was referred back to the 1st Respondent to be heard afresh by an arbitrator appointed by the 1st Respondent. The Applicant offered no explanation why it had taken more than two years for the review to be finalised nor did it set out what steps it had taken to expedite the hearing, given that it was an unopposed review.

20. The arbitration was finally enrolled and heard by the 2nd Respondent on the 14th April 2009. At the Arbitration the Applicant called one witness, the Applicant's national human

resources manager. The 3rd Respondent gave evidence and called a union official as a witness.

21. In its closing submissions dated the 24th March 2009 the Applicant conceded that its dismissal of the 3rd Respondent in 2004 had been "substantively unfair". It made this concession, ostensibly for the following reason:

"During the arbitration proceedings it was established that although the [3rd Respondent's] *conduct was irregular, that it was common practice in the* [Applicant's] *East London offices at the time that employees sent and received cargo."*[1]

It is noteworthy that in Piko's arbitration (which had taken place on the 15th March 2005, prior to the first arbitration of the 3rd Respondent's dispute), that this was one of the primary reasons why his dismissal was found to be unfair.

22. The Applicant knew what the outcome of the Piko arbitration was at the time they received default award in favour of the 3rd Respondent and the reasons for such award. In addition the 3rd Respondent had given evidence at the first arbitration that he had obtained permission from his foreman, an employee of the Applicant, Mr Spilsbury, before collecting the document from the aircraft. He repeated this evidence at the second arbitration. The Applicant did not challenge his evidence that he had been given permission to collect the document when cross examining the 3rd Respondent.

[1] Applicant's closing argument at the Arbitration.

23. At the conclusion of the arbitration the 2nd Respondent made the following award:

> *"1. The dismissal of Khayalethu Joseph Masiba by Equity Aviation Services (Pty) Ltd is unfair.*
>
> *2. Equity Aviation Services (Pty) Ltd must reinstate Khayalethu Joseph Masiba retrospectively from the date of dismissal being 16 November 2004 on the same or similar terms and conditions of employment that governed his employment relationship with his employer prior to his dismissal.*
>
> *3. Notwithstanding the order of retrospective reinstatement in paragraph 2 above; Equity Aviation Services (Pty) Ltd is ordered to pay Khayalethu Joseph Masiba R19299,00 being lost wages for a period of 38 months he was unemployed less lawful deductions.*
>
> *4. Mr Khayalethu Joseph Masiba must report for duty within 7 days from the date of receiving this award.*
>
> *5. The amount of R192249,00 less lawful deductions must be paid to Mr Khayalethu Joseph Masiba within 14 days from the date of (sic) Equity Aviation Services (Pty) Ltd has become aware of the award.*
>
> *6. Equity Aviation Services (Pty) Ltd is ordered to pay the costs of the suit on a party-to-party scale in accordance with the tariff contemplated in CCMA Rule 39"*[2]

[2] Arbitration award.

24. The record of the arbitration reveals that in her opening address the Applicant's representative was alert to the consequences of the 3rd Respondent's dismissal being found to have been unfair in the light of his claim for reinstatement and suggested that an appropriate award would be compensation of 12 months remuneration. At the arbitration the Applicant lead evidence that on the 29th February 2008 the Applicants contract at the airports in South Africa had come to an end and that the company was in the process of winding down its operations. The Applicants witness confirmed however that it still had employees who were involved in this process. The manager at East London Airport for example had been retained for a period to look after the assets of the company at that site. Notwithstanding that the majority of the erstwhile employees had applied for and obtained employment with the new contractors, the Applicant had retrenched approximately 300 of its employees. The Applicant's witness conceded that the 3rd Respondent would have been entitled to have been retrenched had he not been dismissed.

25. The Applicant in its closing submissions argued that "it would not be fair" to the Applicant to order reinstatement.

26. The second Respondent concluded that the Applicant had *"failed to prove that reinstatement of the employee is reasonably impracticable"* and held *"I am of the view that it is just and equitable in the circumstances to order the employer to reinstate*

the employee retrospectively from the 16th November on terms similar to those that governed his employment prior to his dismissal."[3]

27. The provisions of s193(2) are clear. In matters where a dismissal is found to have been unfair, the Labour Court or the arbitrator is obliged to order that the employer reinstate the employee unless: the employee does not wish to be reinstated; where a continued employment relationship would be intolerable; if the dismissal is unfair only because the employer did not follow a fair procedure; or "*it is not reasonably practicable for the employer to reinstate or re-employ the employee*". [4]

28. Whilst the Applicant endeavoured to couch its application as a review of the 2nd Respondent's award that it reinstate the 3rd Respondent, both the founding affidavit and the heads of argument suggest that the Applicants case is more akin to an appeal against the finding by the 2nd Respondent that the Applicant had not proved it was "*reasonably practicable for the employer to reinstate or re-employ the employee".*

29. Apart from the suggestion in the founding affidavit that the decision of the 2nd Respondent was reviewable on the grounds

[3] Arbitration award.
[4] (s193(2)(c)).

that "*his decision ... is not one which a reasonable decision maker could reach"*[5] the Applicant's concern is focussed on the 2nd Respondent's comments regarding the delays.

30. In its heads of argument the Applicant suggests the 2nd Respondent was punishing the Applicant in ordering reinstatement. I do not agree. What the Applicant regards as punishment is no more than consequence flowing from the substantial delay in the matter being finalised. As has been by this court held on numerous occasions the intention behind the dispute resolution processes provided for in the Labour Relations Act is to resolve disputes expeditiously. In this matter the excessive delay in finalising the matter must of necessity be a factor which the 2nd Respondent was obliged to take into account in coming to an equitable finding particularly its impact on the relief the 3rd Respondent was entitled to in the circumstances.

31. The 2nd Respondent deals extensively with the delays in considering whether such delays had rendered reinstatement not reasonably practicable. The quantum of the back pay, which the Applicant referred to as "exorbitant" was also simply a consequence of the length of time it took for the matter to be finalised. Other than the suggestion that the Applicant was merely exercising its rights, there was no explanation offered why it had taken over two years to finalise the review.

[5] Founding affidavit

32. To fairly determine the issue the 2nd Respondent was obliged to consider the impact a compensation order as opposed to reinstatement would have on the 3rd Respondent. This 2nd Respondent did and found that if he ordered compensation which was limited o twelve months remuneration, the effect would be to benefit the Applicant to the detriment of the 3rd Respondent and that that result would not be fair to the 3rd Respondent.

33. In particular the Applicant's concern is focussed on the 2nd Respondents comments that firstly the delay was largely created by the Applicant and secondly that whether the delay and the long passage of time taken in finalising the matter could be regarded rendering reinstatement not practicable.

34. Despite the Applicant's protestations that the delay was caused by it merely exercising its rights in seeking to rescind and review the original award, it offered no explanation why, given the specific circumstances of the matter and in particular the Applicants response to the Piko award, it found it necessary to do so. The Applicant accepted the award reinstating Piko on the grounds that he had been unfairly dismissed. Piko had dispatched the cargo the 3rd Respondent was accused of receiving. The Applicant persisted in its opposition to the 3rd Respondent's claim right up until its closing argument at the conclusion of the

arbitration. Specifically it offered no cogent explanation why (having conceded that it had unfairly dismissed Piko) it waited some four years before conceding that the same unfairness attached to its dismissal of the 3rd Respondent. There can be no doubt that the Applicant was at all times aware of the award in the Piko matter and its direct link to the 3rd Respondents dispute.

35. Bearing in mind the obligation on the 2nd Respondent to reinstate the 3rd Respondent, save as provided for in s193(2)(a) to (d), in order for an him to invoke the provisions of s193(2)(c) of the LRA the 2nd Respondent had to be satisfied that the Applicant had established that it was reasonably impracticable to reinstate the unfairly dismissed employee.

36. It is not sufficient for it simply to be inconvenient for the employer to reinstate. Reasonably impracticable must mean more than inconvenient, troublesome or uncomfortable. The term "*practicable*" is defined as "*able to be put into practice; able to be effected, accomplished or done; feasible*".[6] Clearly the 2nd Respondent was not persuaded by the evidence adduced by the Applicant that it was not able to or that it was not feasible to reinstate the 3rd Respondent.

[6] The New Shorter Oxford English Dictionary

37. To successfully review that decision the Applicant is obliged to establish that the decision was one

> *"that a reasonable decision maker could [*not*] arrive at considering the material placed before him"*[7].

In this matter the arbitrator has expressly considered the evidence lead by and the submissions made on behalf of an employer and concluded that the employer has not established that reinstatement was reasonably impracticable.

38. It is clear from the 2nd Respondent's award that he considered the material placed before him, specifically the Applicant's own evidence and correctly weighed up the circumstances of both the Applicant and the 3rd Respondent. The 2nd Respondent weighed up the evidence of the Applicant against the impact an order not reinstating the 3rd Respondent would have on him. The 2nd Respondent and concluded that it could not be said that simply for the reason that the Applicant had lost its contract reinstatement was impracticable.

39. The question then that must be answered is whether the 2nd Respondent's finding that the Applicant had not established that reinstatement was reasonably impracticable and his order that the Applicant reinstate the 3rd Respondent to reinstate is a decision that *"that a reasonable decision maker could [*not*] arrive at."* It is not an appeal against his finding.

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[7] EDCON LTD v PILLEMER N O & OTHERS [2010] 1 BLLR 1 (SCA) page 9.

40. It is an established principle that reinstatement is the primary remedy for employees who have been unfairly dismissed. The intention behind the obligation on an arbitrator to reinstate (save in the specific circumstances enumerated in s193(2)(a)(b)(c) and (d)) is to place the employee in the position he would have been had he not been unfairly dismissed.[8]

41. The rationale behind the remedy of reinstatement was set out in NUMSA v HENDRED FREUHOF TRAILERS as follows:

> *Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the status quo ante. It follows that it is incumbent on the court when deciding what remedy is appropriate to consider whether in the light of all the proved circumstances there is reason to refuse reinstatement.*[9]

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[8] NATIONAL UNION OF METALWORKERS OF SA & OTHERS v EDELWEISS GLASS & ALUMINIUM (PTY) LTD (2010) 31 ILJ 139 (LC); BILLITON ALUMINIUM SA LTD t/a HILLSIDE ALUMINIUM v KHANYILE & OTHERS (2010) 31 ILJ 273 (CC); EQUITY AVIATION SERVICES (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2008) 29 ILJ 2507 (CC)

[9] NATIONAL UNION OF METALWORKERS & OTHERS v HENRED FRUEHAUF TRAILERS (PTY) LTD (1994) 15 ILJ 1257 (A) (1994) at 1263 C-D.

42. Bearing in mind that the intention of reinstatement is to "redress the wrong" suffered by the employee, considering whether or not it is "reasonably practicable" to reinstate cannot be fairly be determined without also considering the wronged employees circumstances and weighing them up against the submissions made by the employer.

43. Given the undue length of time between the dismissal and the eventual concession by the Applicant that it had unfairly dismissed the 3rd Respondent the 2nd Respondent was obliged to take into account the position the 3rd Respondent would have been in but for his unfair dismissal.

44. The Applicant argued that as its circumstances had changed reinstatement was not reasonably practicable. Reinstate is defined as to *"bring or put back a person into a former position or condition"*[10]. With regard to the 3rd Respondents situation the only way open for the 2nd Respondent to achieve this was to order reinstatement. That being so the 2nd Respondent was required to consider whether the Applicants changed circumstances rendered reinstatement not reasonably practicable. The record clearly shows that the Applicant was able to reinstate the 3rd Respondent within the context of its changed circumstances.

[10] The New Shorter Oxford English Dictionary

45. The Applicant suggested that the 3rd Respondent's insistence on reinstatement was not bona fide in that he was aware that his job no longer existed and that it was simply a "*mechanism for obtaining a bigger payout*"[11]. This suggestion totally ignores the consequences suffered by the 3rd Respondent as a result of his unfair dismissal. Given that the legislative intention behind the provisions of s193(2) is to redress the wrong suffered by the unfairly dismissed employees, in so far as it is reasonably practicable to do so, the 2nd Respondent's order of reinstatement achieves this aim despite the fact that the Applicant may retrench the 3rd Respondent.

46. In summary therefore the 2nd Respondent having considered the evidence of and submissions made by the Applicant concluded that the Applicant had "*failed to prove that reinstatement of* [3rd Respondent] *is reasonably impracticable"*. I am not satisfied that this decision is reviewable. The Applicant has not established that this was a decision *"that a reasonable decision maker could [*not have] *arrived at."* [12]

47. The Applicant also sought to review the 2nd Respondents order that it pay the costs of the arbitration on the grounds that it was unreasonable to order the Applicant to pay costs as the delay was

[11] Applicants heads of Argument
[12] EDCON LTD v PILLEMER N O & OTHERS supra

caused simply by the Applicant exercising its rights. I have dealt with this argument in considering the review of the reinstatement order. In the absence of any explanation as to why it was necessary in all the circumstances to pursue such rights and in the light of my finding that the decision of the 2nd Respondent to order reinstatement is not reviewable I am not persuaded that the 2nd Respondents costs order is reviewable.

48. In the circumstances I make the following order:

48.1 The Applicants application is dismissed;

48.2 The Applicant is ordered to pay the Respondents costs.

Gush J

Date of Hearing: 28 July 2010

Date of Judgment: 21 September 2010.

Appearances:

For the Applicant: Gavin Stansfield of Cliffe Dekker Hofmeyr Inc.

For the Respondent: Advocate Wade instructed by Gray Modliar Attorneys.