PART II 990 R.

CASE NO. NHN 11/2/1124

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

SITTING AT DURBAN

In the matter between:

CHRISTIAN ZULU Applicant

and

EMPANGENI TRANSPORT LIMITED Respondent

CONSTITUTION OF THE COURT:

Presiding Officer:

Mr A de Kock Member

ON BEHALF OF:

Applicant:

Mr R M M Zondo
Instructed by:
S S Mathe & Company
Durban

Respondent:

Mr R D Haslop
Instructed by:
Deneys Reitz
Durban

DATE AND PLACE OF PROCEEDINGS:

24th & 25th August 1989 Durban

J U D G M E N T

PRESIDENT: The respondent dismissed the applicant on the 14th of August 1987. The applicant contended that that dismissal was unfair. The dispute was referred to this Court for determination in terms of section 46(9) of the Labour Relations Act 28 of 1956 (The Act). The Court determined that the dismissal did constitute an unfair labour practice and granted orders in terms of which the respondent was ordered to pay the applicant compensation in the sum of R15,000, the respondent was ordered to reinstate the applicant in its employ with effect from the 4th of September 1989 and the applicant was ordered to submit himself for further induction and retraining. These are the reasons for the orders granted.

The respondent operates a fleet of passenger buses in Northern Natal, including country areas, concentrating on areas surrounding Empangeni. The applicant was a bus driver who had been engaged in December 1985. The only infractions recorded against the applicant related to two incidents of negligent driving in January 1987, neither of which was of a serious degree or had any serious consequences. Applicant was warned that he should exercise caution when driving on wet roads but no disciplinary points were allocated for either of the offences. They were regarded as less than minor offences.

The applicant led no evidence. The matter must therefore be decided on the evidence led on behalf of the respondent, which evidence includes the records of the

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disciplinary enquiry and subsequent appeals.

The applicant, on the 24th of July 1987 at 4.42 in the morning, was driving his bus, in which there were passengers, along a country road. The dirt road was damp but not excessively wet, slippery or muddy. The applicant approached a bend in the road. Flood water had run across the road in the bend. The road there was extremely wet, muddy and very slippery for a distance which was not precisely established but must have been 50 metres or more. The company's speed limit on that road for its buses was 60kms per hour. Tachograph evidence showed that the bus had been travelling at 88km per hour but had slowed down to 81kms over a period of nine seconds and then to 60kms over a period of a further five seconds. At that speed the drive wheels became locked in a skid and the speed dropped instantly to 0kms per hour. The bus went into skid, left the road and landed on its side in a ditch. The cost of the repair of the bus was at least R11,000. Some passengers were also injured.

The applicant, after returning to work, was not allowed to continue driving and was charged in terms of the disciplinary code with, "Major accident: travelling too fast for road conditions, plus minus 85kms per hour". He was found guilty. The applicant appealed. The appeal wad heard by Mr Howarth on 31st August 1987 and the applicant was dismissed. The applicant appealed to the Managing Director, Mr M S Forder, who reviewed the decision but on 17th December 1987, upheld the dismissal. Mr Forder held a special appeal in the form of a full re-hearing on the 1st and 10th of February 1988. The

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managing director upheld the decision to dismiss the applicant. The disciplinary code and procedure makes provision for:

(a) part I offences for which three penalty points are awarded;

(b) part II offences for which four or six penalty points are awarded;

(c) part III offences for which ten penalty points are awarded and justify summary dismissal even for a first offence.

Employees may be dismissed if they have accumulated ten or more penalty points.

Offences related to the driving of vehicles are listed in the list of offences as:

1. Part II - Serious offences (4 points for each offence).
   (a) 13.2.3 Minor accidents to blame
   (b) 13.2.5 Driving offence
2. Part III - Offences warranting immediate dismissal
   (a) 13.4.11 Major accident to blame
   (b) 13.4.23 Driving offences resulting in endorsement of licence.

An accident was regarded by the company as a major accident if it caused monetary damage of more than R2,000 or any person, whether inside or outside the bus, was injured. The degree of blameworthiness of the employee driver of the company vehicle played no role whatsoever in determining whether the accident was major or minor. The company's code therefore provides that an employee may be dismissed if he is involved in a collision in

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which damage exceeds R2.000 or persons are injured, if he was in any way to blame for the collision regardless of the extent of his blameworthiness. It is manifestly unfair to couple the right to dismiss to the consequences of faulty driving and not to the degree of fault. Human beings are by nature fallible. To dismiss a driver for a momentary lapse of concentration which results in extensive damage but retain in employ a driver who is reckless but through luck causes minimal damage is indefensible. The appropriate sanction cannot, like a prize in a lottery, be made dependent on the element of chance. The bus may not have overturned if there had been no ditch. The applicant may then have been guilty of a "minor accident to blame". It is not necessary to canvass all the evidence relating to the initial disciplinary enquiry conducted by Mr C Boucher, the corrective behaviour counsellor. The decision reached by Mr Boucher and the manner in which the enquiry was conducted was unfair for the following reasons:

1. Mr Boucher's approach was that it was up to the person charged to prove that he is not guilty of the offence.

2. He did not consider separately the finding of guilty and the sanction to be imposed. In his statement which formed part of the first appeal hearing he states:

> "When I concluded my decision which was to dismiss Mr Zulu, Mr Mkhize questioned my knowledge of tachographs."

When cross-examined in Court on the opportunity he

/had given

had given to the applicant and his representative to make representations regarding the appropriate sanction his replies on several occasions related to the finding in relation to guilt and not the sanction. I am satisfied that he never gave the applicant or his representative any opportunity to address him in regard to what would be an appropriate sanction. This Court has repeatedly stated that the sanction must be considered separately and that the employee must have an opportunity to make representations regarding sanction. C/f Chemical Workers Industrial Union v A.E.C.I. (1988) ILJ 1046

3. He found that the applicant was to blame for the collision without knowing all relevant facts. His enquiry was in that respect superficial. He did not know that the road, although damp, was not dangerous prior to the muddy patch in the bend. He based his decision on a finding that the applicant had been driving at approximately 85kms per hour when in fact at the moment the bus started skidding the speed was 60kms per hour. The tachograph evidence submitted to the Court shows that that particular bus had, on the four days preceding the day of the accident on a regular basis, exceeded the 60kms hour speed limit. He was not aware of that fact, nor did he investigate whether other drivers adhered to the speed limit laid down.

4. He did not consider any penalty other than dismissal. He thought that the fact that he had

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cautioned the applicant in January for minor offences showed that no further rehabilitation was possible and he therefore gave no thought to retraining through the company's internal training procedures. he conceded in evidence that retraining could have assisted.

5. He did not take the applicant's length of service into account in his decision that dismissal is appropriate. He conceded that if that aspect had been brought to his attention it may well have influenced him.

6. He found that the applicant was to blame for the accident. He, however, did not consider whether the degree of fault was such that dismissal was appropriate regardless of the consequences of the driver's negligence. The disciplinary code did not require him to do so. I accept that he realized that he had a discretion not to dismiss. He did not exercise that discretion properly.

The Court must decide on the fairness of the applicant's dismissal by reference to the standards set by the employer provided those standards conform to the yardsticks of commercial rationality (The New Labour Law - Brassey et al p 75). I cannot, from the available evidence, establish what standard of driving respondent set for its bus drivers. An employer is, however, entitled to expect from the driver of a passenger bus, the degree of skill and care commensurate with potential consequences of negligent driving. The nature of the occupation requires a high degree of professional skill.

One failure to perform in accordance with the required standard may be enough to justify dismissal.

/Taylor

(Taylor v Alidair Ltd (1978) IRLR 82). That will, however, only rarely be justified. (Harvey on Industrial Relations paragraph 671 and Labour Law Briefs Vol I No 1 at page 6).

The person who decides on the sanction to be imposed should consider the four recognised aims of disciplinary sanction namely; rehabilitation, deterrence, prevention and retribution. The disciplinary tribunal must impose a balanced sanction taking into account the disciplinary infraction, the interest of the employee, the employer and other employees. The interest of the employer and other employees include the maintenance of discipline and adherence to standards in the workplace.

This Court will not interfere with the disciplinary tribunals decision in regard to sanction if that decision falls within the range of responses to be expected from a fair employer provided, however, that that tribunal has given proper consideration to all relevant factors. Mr Boucher failed to do so with the result that the Court is free to reconsider that aspect.

The applicant was not guilty of any deliberate act other than exceeding the respondent's speed limit. That in itself does not justify dismissal, either generally or in terms of respondent's disciplinary code. Mr Boucher found that he was negligent ("at fault" for a major accident). I need not decide whether that finding is correct. I am prepared to assume that the applicant was negligent. Mr Forder, in his evidence, stated that a damp dirt road is no more unsafe than (but may be safer than) a dry road as the surface is not as loose. Mr

Grobler did not find the road dangerous. There was no evidence that a speed of 88 k.p.h. was dangerously fast. The applicant did slow down as he approached the bend. He did not brake sharply. He was travelling at 60 k.p.h. as he entered the wet patch in the bend. He misjudged the situation. The accident was due to an error of judgment, and not driving, which shows such a disregard for the safety of his passengers, that it would be against the employers interest to entrust the safety of others to him. Rehabilitation should have been considered but was not. The deterrent approach serves little purpose where the offence involves negligence. Prevention would be appropriate only if the manner in which the applicant drove was such that one could conclude that he cannot be rehabilitated and that considerations of safety require that he be prevented from repeating the infraction. That would also deter others from driving in the wrong manner. Prevention is in casu inappropriate. His driving history also does not show a propensity for dangerous driving. I, for the aforegoing reasons, came to the conclusion that Mr Boucher's decision to dismiss the applicant was substantively and procedurally unfair.

The special appeal, conducted by Mr Forder, the then general manager, was a full re-hearing. It was contended that that re-hearing was procedurally fair in all respects and that the facts heard by him justified his conclusion that the applicant was to blame for the accident and that dismissal was the appropriate sanction. It was contended that that re-trial cured any possible

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procedural defects. I, for two reasons, do not agree with that contention.

There are three major factors which render the enquiry conducted by him unfair in itself.

(a) He did not give the applicant or his representative any opportunity to address him in regard to sanction.

(b) Mr Forder stated in his summary of findings that no extenuating circumstances could be found. He, however, used the expression 'extenuating circumstances' not in its ordinary meaning as matters relevant to sanction but as a reference to facts which could indicate that the driver was not to blame for the accident. Mr Forder did not apply his mind to extenuating circumstances in its ordinary meaning. He conceded that he did not take the applicant's length of service into account as it was in his opinion irrelevant. The fact that the applicant had driven dirt roads daily for a lengthy period without any serious incident is obviously relevant.

(c) There is nothing in his summary of findings which indicates that he properly considered whether the degree of negligence was such that the company could no longer entrust the safety of passengers to the applicant. His evidence-in-chief that the applicant was in his opinion so negligent in handling the bus that it did not justify reinstatement is immaterial. What is material is the opinion he then formed, not that which he has now formed.

/An appeal

An appeal in the form of a re-trial can in any event not cure an injustice at the first hearing. It can at most serve to rectify minor deficiencies in procedure which do not lead to any injustice. The deficiencies in the first disciplinary hearing in casu were such that they led to grave injustice of a degree which could not be cured by a re-hearing. There are statements in Makhathini & Another v Uniply (Pty) Limited (1985) 6 ILJ 315 and National Union of Mineworkers & Another v Zinc Corporation of S A (1987) 8 ILJ 499 that a subsequent re-hearing will cure procedural deficiencies in the disciplinary enquiry. Those judgments are not reasoned judgments. The members concerned quote no authority for their conclusion. This aspect is discussed by Edwin Cameron in his articles on 'The Right to a Hearing Before Dismissal', part 1, in the 1986 'Industrial Law Journal' at pages 214-5 and in part 2 in the 1988 'Industrial Law Journal' at pages 159 and 160. Mr Cameron is of the opinion that both the Zinc Corporation and Uniply decisions are wrong. I agree with that decision. In casu the respondent's disciplinary code makes provision for a right of appeal. The appeal is separately significant and separately important. The person chairing the appeal hearing should objectively reconsider the decision arrived at after a properly conducted disciplinary hearing. Once the appeal takes the place of the disciplinary enquiry the employee is denied his right of appeal. He is furthermore placed in the position that at the appeal he bears the burden of displacing an adverse decision which for lack of natural justice ought never to have been reached. In Turner v

Jockey Club of South Africa 1974 (3) SA at 658 Botha J A approved of the following statement :

> "A failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

Edwin Cameron, in my opinion, correctly states that those considerations apply with greater force in the employment situation where it may be difficult, on a simple human level, for higher levels of management sitting in an appeal to detach themselves from the problems which may be caused by overruling a subordinate colleague. Any finding that the re-hearing cures prior procedural lapses would in casu make a mockery of justice. Mr Forder reviewed the initial enquiry and appeal. He upheld the decision to dismiss the applicant. He was therefore re-considering his own decision. Justice must be seen to be done. The decision in NUMSA v Hall Longmore & Company, unreported case NH 11/2/1257 - GF 725, supports the conclusion to which I have come although in that case the Court was concerned with the question whether a hearing after dismissal can cure the failure to hold a hearing prior to dismissal.

The respondent's decision, at all levels of the disciplinary process, that the applicant must be dismissed is unfair and constitutes an unfair labour practice.

I took into account the following considerations in deciding on the remedy to be granted to the applicant. The records of the disciplinary enquiries and appeals, as also the evidence led in this Court, satisfied me that

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applicant's lack of careful driving which caused the bus to slide off the road was not such that it could be regarded as reckless or establishing that he lacked proper consideration for the safety of his passengers. The evidence established that his immediate superiors would have no difficulty in resuming a satisfactory employer/employee relationship with the applicant. The applicant has sought employment with employers in the Empangeni and surrounding areas who would need the services of a heavy duty or bus driver but could find no such employment. He did find temporary employment with Cargo Carriers as from the 27th of May 1989. He is married and has four children to support and assists in the support of his mother. It was decided in Black Allied Workers Union v Edward Hotel (1989) ILJ 375 at 375 and 376 that information regarding an applicant's efforts to find employment and his income after dismissal may be placed before the Court in any appropriate manner. It was in casu done from the bar. That evidence was not challenged or denied. The Court could, if it had been challenged, have ordered applicant to submit to cross-examination on that limited aspect. I therefore accepted that statement from the bar. Reinstatement in employment coupled with adequate compensation would therefore be the appropriate remedy.

It has been said, in other decisions of this Court, that reinstatement may not be the appropriate remedy where a considerable period of time has elapsed from date of discharge to the date the Court determines the dispute. There is, however, no such rule or principle.

/Each

Each case must be decided on its own merits. Reluctance to reinstate after a long lapse of time is appropriate where large numbers of employees are involved and reinstatement would cause much disruption of respondent's business and much distress to those employed in the positions previously occupied by the applicants (Steel Engineering & Allied Workers Union of S A v Trident Steel (Pty) Limited (1986) 7 ILJ 418). The Court must exercise its discretion after taking into account fairness towards both the applicant and the respondent. The Court is in casu concerned with the reinstatement of a single applicant. One additional employee, if it causes any disruption of respondent's business, would cause only temporary disruption as there is a natural attrition in the number of employees.

The applicant was dismissed in August 1987 and the matter was only heard in August 1989. The lapse of two years was not due to any fault or neglect on the part of the applicant. Applicant applied for the establishment of a Conciliation Board on the 21st of December 1987. He did not sign the application with his ordinary signature but wrote out his full name where provision is made for a signature. This was done in the office of and in the presence of his attorney. The respondent advised the Department of Manpower that there was a difference between the signature on the section 35 application and the applicant's normal signature. This appears from the letter from the Department of Manpower returning the application to applicant's attorneys in which they state:

"Applicant's signature differs from that on

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forms submitted to this office regarding the company's internal disciplinary procedure."

The Department was advised of the correct position. The Department, possibly due to confusion, delayed any decision. On the 19th of April 1989 the applicant's attorneys advised the Minister that if a Conciliation Board was not appointed they would approach the Supreme Court for an appropriate mandamus. The Minister appointed the Conciliation Board on the 5th of May 1989. The matter was referred to this Court in June and heard in August. The delay was triggered by the respondent's advice to the Department that there is a difference between the signatures on the application form and their internal disciplinary forms. The C.B. application was lodged by reputable attorneys and applicant's address was given as c/o the attorneys. The respondent did not contact those attorneys prior to querying the signatures. It would, under those circumstances, be unfair to penalize the applicant for a delay not due to any fault in his part. The delay was triggered by the respondent and there is nothing unfair in determining that they bear the loss. I in arriving at the amount of compensation took into account the interim earnings of the applicant as also his right to unemployment insurance benefits, although not on a basis of set off. Intervening earnings are counter-balanced by the hardship suffered by applicant and his family following on his dismissal.

I ordered payment of compensation and prospective reinstatement as the Court may reinstate retrospectively for a maximum period of 6 months. The Court is not limited to compensation covering loss for a maximum period of 6 months. The Court may order both reinstatement and compensation. The word "or" may mean "and/or" (Claassen - Dictionary of Legal Words and Phrases and the cases cited by him). The legislature did not when the Act was amended in 1988 intend to limit the relief the Court may grant.

The word "or" in the context in which it is used in section 46(9)(c) means "and/or". The Court may order both reinstatement and compensation and any other order it considers reasonable. (The New Labour Relations Act by Cameron, Cheadle and Thompson at 62 and 63). The Court in casu also ordered retraining to counteract the two years loss of experience.

SIGNED AND DATED AT DURBAN THIS 14th DAY OF SEPTEMBER 1989.

ARTHUR DE KOCK
MEMBER: INDUSTRIAL COURT