THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: CA10/2024

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD	**Appellant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER SARAH CHRISTIE N.O	**Second Respondent**
KEVIN JACOBS	**Third Respondent**

Heard: **15 May 2025**
Delivered: **19 June 2025**
Coram: **Savage JA, Musi and Waglay AJJA**

Summary: **Remedy in terms of section 193(1) and (2) of the Labour Relations Act – dismissal substantively unfair – objective facts showed that the circumstances surrounding dismissal such that a continued employment relationship would be intolerable – appeal succeeds – order of Labour Court set aside – substituted with order dismissing review application**

JUDGMENT

SAVAGE, JA

Introduction

[1] This appeal is concerned with the issue of remedy in terms of section 193(1) and (2) of the Labour Relations Act[1] (LRA) following an employee's dismissal, having been found substantively unfair.

[2] Section 193(2) provides that where a dismissal is found to be unfair:

> '(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –
>
> (a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

Background

[3] The third respondent, Mr Kevin Jacobs (the respondent), was employed by the appellant, Golden Arrow Bus Services (Pty) Ltd, the largest public transport operator in the Cape Metropolitan area, as its support services manager. He was responsible for the rollout of the appellant's new automated fare collection or smartcard bus ticketing system. Although the smartcard rollout was scheduled for 15 October 2018, the respondent took annual leave from 11 October 2018 to 18 October 2018. His leave was approved after he assured the appellant that the rollout

[1] Act 66 of 1995, as amended.

was on track. However, on the day of the rollout, no system was in place to sell the smartcards, there was a card shortage, and 18 000 smartcards were missing.

[4] On his return from leave on 18 October 2018, a meeting was called with the respondent to discuss the problems which had emerged with the rollout, including the 18 000 missing smartcards. At the meeting, the respondent indicated that he did not trust anyone, which included his direct line manager, who was also the General Manager, and the in-house legal advisor, and he refused to co-operate with the investigation into the missing cards. As a result of his conduct, he was charged with gross negligence, dishonesty and bringing the company's name into disrepute. Following a disciplinary hearing, he was dismissed from his employment on 13 March 2019.

[5] Aggrieved with his dismissal, the respondent referred a dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was not settled at conciliation. At arbitration, his dismissal was found to be unfair and, despite seeking reinstatement, he was awarded 12 months' compensation. The respondent thereafter sought the review of the arbitration award in the Labour Court. On review, the Labour Court set aside the compensation award and ordered the respondent's retrospective reinstatement. It is against that order that the appellant, with the leave of the Labour Court, now appeals.

Arbitration award

[6] The commissioner found at arbitration that, although he had been negligent in his conduct, the dismissal of the respondent was substantively unfair. When he went on leave on 11 October 2018, '*he knew there were likely to be problems*' because if not, he would not have had to be on call during his leave. His negligence was evident from his failure to migrate his own Excel spreadsheet to the appellant's database, or provide the degree of monitoring, internal audit and oversight required before and during the rollout. This caused the unavailability of smartcards on 15 October 2018. At the meeting held with him on his return from leave on 18 October 2018, it was found to have been incumbent on the respondent as a senior manager to offer to assist the appellant and to do so immediately. Instead, the respondent

shifted the burden of accountability to a junior person and told the General Manager and legal advisor that he could not trust them, that he would not provide any information and suggested that senior management was against him. The commissioner found that –

> '(t)his was unwise. If a serious problem is identified it is an inherent aspect of managerial responsibility to assist in the resolution of the problem. His failure to cooperate made it necessary for the GM and in due course the CEO to launch an investigation and to put contingent measures in place: the recall and reallocation of Smart cards.'

[7] Given his lack of cooperation with senior management at the meeting, the commissioner found that it is more likely than not that the respondent would have been uncooperative in any investigation and may have undermined it.

[8] At arbitration, the respondent claimed that senior management had destroyed evidence that would have assisted him in his defence, that the appellant was biased against him and that he had been set up by them to fail. This was found by the commissioner not to be supported by any credible evidence, more so in circumstances that the respondent and the General Manager had known each other for many years and were good friends. It was found that there was '*no motive for anyone to set him up to fail'*. The respondent instead had deliberately failed to accept the responsibilities that came with his contract of employment, with no evidence to show that his approach to his obligations would change.

[9] In addition, almost a year was found to have elapsed since his dismissal and:

> 'Mr Jacobs is a senior person; the relationship between him, the operations manager, the IT department, the General Manager and the CEO has broken down… Although the applicant says that reinstatement would be tolerable, I think there has been too much relationship damage as a result of [his] initial failure to cooperate and find solutions.'

[10] In spite of the respondent's 26 years of service and his personal circumstances, neither reinstatement nor re-employment was found to be

appropriate. As a result, the commissioner awarded the respondent the maximum compensation of 12 months but refused reinstatement.

Judgment of the Labour Court

[11] Aggrieved with the outcome at arbitration and seeking reinstatement, the respondent sought the review of the arbitration award by the Labour Court. The Labour Court found that no clear and convincing reasons rooted in solid evidence were advanced to deny reinstatement, nor did evidence surrounding the dismissal indicate that reinstatement was intolerable.

[12] It was noted that the commissioner had found the dismissal of the respondent to be unfair but relied on four reasons to justify the finding that a continued employment relationship would be intolerable. These were: (i) that the respondent was a senior employee; (ii) that the relationship between the respondent, the operations manager and the IT department had broken down following the respondent's failure to co-operate on his return from leave with the investigation into what went wrong; (iii) that the matter had taken over a year to be heard; and (iv) that reinstatement would be unlikely to succeed.

[13] The Labour Court found that it was illogical for the commissioner to rely on the respondent's seniority and his attitude to the investigation to deprive him of reinstatement when the existence of these factors did not make a continued employment relationship intolerable. In addition, the length of time taken to resolve the matter at arbitration was found not to constitute a basis on which to find reinstatement intolerable. The Court rejected as circular reasoning the commissioner's finding that reinstatement was unlikely to succeed because it was unlikely to succeed.

[14] For these reasons, it was found that to deny the respondent the primary remedy of reinstatement when his dismissal was substantively unfair was a decision which fell to be reviewed and set aside, given that the reasons for it were not those of a reasonable decision-maker. The award of the commissioner denying the respondent reinstatement was set aside and substituted with an order reinstating him

retrospectively into his position with effect from the date of his dismissal on the same terms and conditions. Two months' remuneration was ordered to be excluded from the calculation of backpay, given delays in the prosecution of the review application.

On appeal

[15] On appeal, the appellant seeks that the order of retrospective reinstatement be set aside. The appellant contends that, given the seriousness of the accusations made by the respondent against senior management, it is difficult to see how any semblance of trust or the prospect of mutual future co-operation could survive. This was because the relationship was beyond 'strained', 'fraught' or 'sour' as in *Booi v Amathole District Municipality and Others*[2] *(Booi),* but manifestly intolerable, and the Labour Court failed to engage with this in its judgment. The commissioner's finding that reinstatement was intolerable was made on a proper consideration of the circumstances and what constituted an appropriate operational response to a senior manager's expressed distrust in his line manager and other members of management and his refusal to assist constructively in solving the problem identified. The commissioner exercised the discretion vested in her in relation to remedy judicially, and there was no basis on which to interfere with her award on review. For these reasons, the appellant sought that the appeal succeed.

[16] The respondent opposed the appeal, accepting that the power to grant a remedy in section 193 is by its nature discretionary and that such discretion must be exercised judicially. The overriding consideration in the enquiry is the underlying notion of fairness between the parties, assessed objectively on the facts of the case, bearing in mind that the core value of the LRA is security of employment. Once the commissioner determined that the respondent's dismissal was substantively unfair, it was contended that factors related to misconduct should not be considered as valid grounds on which to determine intolerability. This was so in that if the respondent's seniority and conduct did not warrant dismissal, these factors could not subsequently be used to justify denying him reinstatement. In addition, the year-long delay in resolving the matter did not justify denying reinstatement. The Labour Court, it was

[2] (2022) 43 ILJ 91 (CC).

submitted, correctly rejected this reasoning, noting that delays are common in CCMA processes and do not provide a valid basis for denying reinstatement, nor did the delay feature in the evidence as a factor that made reinstatement impracticable. It followed that delay was no bar on the facts of this matter to reinstatement. The award of the commissioner was unreasonable since the respondent's dismissal had been found substantively unfair and the evidence did not show that the trust relationship had broken down. For these reasons, the respondent sought that the appeal be dismissed.

Evaluation

[17] Reinstatement is the primary remedy in cases of unfair dismissal.[3] In considering which of the remedies in section 193(1) is appropriate,[4] regard must be had to section 193(2)[5] which requires that:

> '[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in s 193(2)(*a*) - (*d*) exist, in which case compensation may be ordered depending on the nature of the dismissal.'[6]

[18] Even where misconduct has not been proven, the court or a commissioner must consider what constitutes appropriate relief and determine whether any of the non-reinstatable conditions set out in section 193(2) exist.[7] In doing so, it must take into account any relevant factor which it considers relevant.[8]

---

[3] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC) *(Equity Aviation)* at para 33.

[4] Section 193(1) states:

'If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.'

[5] *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016) 37 ILJ 313 (CC) (*Toyota*) at para 135.

[6] *Equity Aviation* id fn 3 at para 33.

[7] See: *Booi* id fn 2 at paras 36 -37.

[8] *Mediterranean Textile Mill (Pty) Ltd v SACTWU and Others* [2012] 2 BLLR 142 (LAC) at para 30, confirmed in *Booysen v Safety and Security Sectoral Bargaining Council and Others* (2021) 42 ILJ 1192 (LAC) at paras 16 - 17.

[19] In *Booi*[9], it was stated that:

> 'The language, context and purpose of s 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in s 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal.[10] And, my approach to s 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.'[11]

[20] It was recognised in *Booi* that the evidentiary burden to establish intolerability is heightened where the dismissed employee has been exonerated of all charges in that, as a general proposition, to punish employees '*with unemployment, even if this is accompanied with some compensation, without finding them guilty of any wrongdoing is grossly unfair*'.[12] It noted that guidance should be sought from *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*[13], in which it was stated that:

> 'If [the conduct] did not justify dismissal I find it difficult to understand why, at the same time, it could nevertheless provide a ground to prevent reinstatement.'[14]

[21] This led the Court in *Booi* to make it clear that:

---

[9] *Supra* at footnote 2.
[10] *Equity Aviation* id fn 3 at para 36.
[11] *Booi* id fn 2 at para 40 with reference to *National Transport Movement and Others v Passenger Rail Agency of SA Ltd* (2018) 39 ILJ 560 (LAC) (*National Transport Movement*) and *Jabari v Telkom SA (Pty) Ltd* (2006) 27 ILJ 1854 (LC) (*Jabari*).
[12] *Booi* id fn 2 at para 42 with reference to *Amalgamated Pharmaceuticals Ltd v Grobler N.O. and others* (2004) 25 ILJ 523 (LC) at para 13.
[13] (2010) 31 ILJ 273 (CC) (*Billiton*) at para 29.
[14] Ibid at para 29.

> 'It should take more to meet the high threshold of intolerability than for the employer to simply reproduce, verbatim, the same evidence which has been rejected as insufficient to justify dismissal.'[15]

[22] Where a commissioner, in terms of section 193(2), has considered all the evidence and found that intolerability has or has not been established, and made a decision whether or not to grant the primary remedy of reinstatement, the commissioner's decision should not readily be interfered with by a review court.

[23] This is so since the Labour Court is not entitled to set aside the decision of the commissioner simply because it would, on the facts of the matter, have come to a different conclusion. It may interfere on review with the decision taken only when it appears that the commissioner had not exercised their discretion judicially, has been influenced by wrong principles or a misdirection on the facts, or that they had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[16]

[24] The discretion exercised by the commissioner in relation to the issue of remedy under section 193(2) is one in a wide sense, requiring that regard is to be had to all the relevant circumstances.[17] It remains a value judgment subject to review by the Labour Court, with the weight to be attached to particular factors, or how a particular factor affects the eventual determination of the issue, being a matter for the commissioner to decide in good faith, reasonably and rationally.[18] The task of a review court in such circumstances is to determine whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach, on the well-known test set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[19]

---

[15] *Booi* id fn 2 at para 42.
[16] See National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and others 2000 (1) BCLR 39 (CC) at para 11 in the context of a postponement application.
[17] *National Union of Metalworkers of South Africa obo Motloung and others v Polyoak Packaging (Pty) Ltd and others* [2025] 3 BLLR 227 (LAC) at para 50.
[18] See: *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at paras 18 and 20 in a different but related context.
[19] (2007) 28 ILJ 2405 (CC) at para 110.

[25] An enquiry into whether there has been a breakdown of the employment relationship is an objective one and is not to turn on subjective and possibly irrational views of the employer.[20] Intolerability in the working relationship is not to be confused with mere 'incompatibility' between the parties.[21] Weighty reasons, accompanied by tangible evidence, must be produced to show that intolerability exists.[22] It has previously been found that, where unwarranted and unfounded,[23] or serious and scandalous[24] allegations have been made by an employee against management, despite no finding of misconduct, a continued working relationship is intolerable. An acrimonious approach to review proceedings in *First National Bank - A Division of FirstRand Bank Ltd v Language and Others,*[25] in which the employee alleged that the employer had falsified documents, stolen money, been unscrupulous and lacked *bona fides*, has similarly been found to make reinstatement inappropriate.

[26] *In casu*, the commissioner found that while the dismissal of the respondent was substantively unfair, he had failed to ensure that proper internal audit and oversight procedures were in place before he went on leave, which indicated negligence. When confronted with his conduct, he sought to shift the burden of accountability to a junior employee. At the meeting called to discuss the issues which had arisen, the respondent indicated that he did not trust anyone, which included the General Manager and the appellant's legal advisor, and he expressly refused to co-operate with the investigation into the missing cards. At arbitration, the respondent claimed that senior management had destroyed evidence that would have assisted him in his defence, that the appellant was biased against him and that he had been set up by them to fail.

[27] The commissioner found that, on the objective facts, the respondent refused to take responsibility for the problems which had emerged with the rollout when he was responsible as a senior manager for the process. He sought to blame others for

---

[20] *Concorde Plastics (Pty) Ltd v NUMSA and Others* 1997 (11) BCLR 1624 (LAC) (*Concorde Plastics*) at 1648A-C.
[21] *Booi* id fn 2 at para 41.
[22] *National Transport Movement* id fn 11. See too *Jabari* Id fn 11.
[23] *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] 2 BLLR 130 (LAC) at para 68.
[24] *Dunwell Property Services CC v Sibande and Others* (2011) 32 ILJ 2652 (LAC) at paras 32 -34.
[25] (2013) 34 ILJ 3103 (LAC) at paras 27 -31.

the problem, claimed he did not trust his senior colleagues, including the General Manager who was his good friend, refused to assist in solving the problem, snubbed the invitation to help solve it and made serious and unfounded accusations against senior management in relation to the issues raised with him and his case at arbitration. In this context, the commissioner's finding that the respondent lacked insight into his behaviour can hardly be found to be unreasonable. This, when the respondent's allegations were found not to be supported by any credible evidence and with it having been found that there was '*no motive for anyone to set him up to fail'*. Despite his seniority, the respondent refused to cooperate or accept the responsibilities which came with his role, with his unfounded accusations of bad faith on the part of his colleagues not supported by the facts. The commissioner's finding that it was more likely than not that he would have been uncooperative in any future investigation and that, in fact, he '*may have undermined it*' was therefore a reasonable conclusion to reach on the material before her.

[28] It followed that on the undisputed facts before the commissioner, there existed '*weighty reasons, accompanied by tangible evidence, to show intolerability*' of as required by the Court in *Booi*. The objective facts cumulatively considered met the high threshold of compelling evidence required, and the decision taken by the commissioner not to reinstate the respondent was not one that a reasonable decision-maker could not have made. The finding that the circumstances surrounding the dismissal were such that the continued employment of the respondent would be intolerable was one that fell within the bounds of reasonableness required. This was so given the respondent's own conduct in the circumstances surrounding his dismissal and the reasonableness of the appellant's operational reaction to his conduct.

[29] As has been emphasised, a court reviewing an award to refuse reinstatement on the basis of intolerability does not itself conduct the intolerability enquiry afresh. Instead, it assesses whether the enquiry conducted by the commissioner in the exercise of their discretion in relation to remedy resulted in a decision which could not have been reached by a reasonable decision maker conducting that enquiry.[26]

[26] *Booi* id fn 2 at para 44.

[30] The Labour Court was not entitled, on review, to interfere with the commissioner's decision unless this was warranted. On the facts of this case, it was not since the commissioner had reasonably and rationally exercised her discretion in relation to remedy and there was no basis on which to interfere with it. It was not illogical for the commissioner to find reinstatement intolerable and unlikely to succeed given the respondent's seniority and his attitude to the investigation. On the material before the commissioner, the decision reached fell within the ambit of reasonableness required.

[31] It follows for these reasons that the appeal must succeed, and the orders of the Labour Court set aside and substituted with an order that the review application is dismissed. Having regard to considerations of law and fairness, a costs order is not warranted in this matter.

[32] For these reasons, the following order is made:

Order

1. The appeal succeeds with no order as to costs.
2. The orders of the Labour Court are set aside and substituted as follows:

'1. The review application is dismissed with no order as to costs.'

SAVAGE JA

Musi and Waglay AJJA agree.

APPEARANCES:

FOR THE APPELLANTS: G Leslie SC

Instructed by Macgregor Stanford Kruger Inc

FOR THE THIRD RESPONDENT: R Parker, Parker Attorneys