THE LABOUR COURT OF SOUTH AFRICA REPORTABLE

HELD AT JOHANNESBURG

CASE NO: J1946/2000

In the matter between:

NATIONWIDE AIRLINES (PTY) LTD	**Applicant**
and	
COMMISSIONER AR MUDAU	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
ALPA-SA obo M WRIGHLEY	**Third Respondent**
MICHAEL WRIGHLEY	**Fourth Respondent**

JUDGMENT

MASERUMULE AJ:

1. The Applicant seeks an order in terms of section 145 of the Labour Relations Act, 66 of 1995, ("the Act"), reviewing and setting aside an arbitration award made by the first respondent, in terms of which he found the dismissal of the fourth respondent to have been procedurally unfair and awarded him compensation in the amount of R120 000.00.

2. The facts that were placed before the first respondent are as follows:

2.1 The fourth respondent was employed by the applicant as a flight engineer in 1997;

2.2 The fourth respondent was, on at least two occasions, warned that his performance was not satisfactory;

2.3 From 23-26 May 1999, fourth respondent was sent to the United

Kingdom for a simulator instruction. A simulator is a device which resembles an aircraft cockpit and can be programmed to replicate various flying conditions and manoeuvres. The pilots and flight engineer team up as the flight deck crew and are taken through a number of simulated flying emergency situations to test their ability to react swiftly and in a correct fashion to such situations, given each crew member's tasks and responsibilities in the cockpit. A simulator instructor, who remains present on the flight deck during the session, makes written assessments of the individual crew member's performance;

2.4 Following his return from the simulator's session and on 7 June 1999, the fourth respondent was told to attend a meeting on 8 June 1999. He was not told what the purpose of the meeting was nor was he informed that he could bring a representative.

2.5 The meeting on 8 June 199 was attended by applicant's Chief Pilot, Captain Willemse, Captain Isherwood, the B727 Fleet Captain and L Bradley, the Human Resources Manager;

2.6 The fourth respondent was informed that according to a report prepared by the simulator instructor, he had performed poorly during the simulator session held in May 1999 and he was asked to explain his shortcomings as recorded in the report.

The fourth respondent had not previously been shown or provided with a copy of the report;

2.7 At the conclusion of the meeting, the fourth respondent was told that the management representatives would deliberate on the matter;

2.8 On 10 June 1999, the fourth respondent was handed a letter in which he was advised that his services with the applicant were being terminated with immediate effect due to his poor work performance;

2.9 Around 25 May 1999, the fourth respondent was told that there was a clerical position available in flight operations and he was asked to try it out for a few days. He did so but when he was told that the position paid R4500.00 per month, being almost a third of the R12 500.00 that he previously earned as a flight engineer, he turned down the offer. The latter is disputed by the applicant.

3. Following the referral of first respondent's alleged unfair dismissal dispute to the CCMA, and at the arbitration hearing held on 11 May 2000, the applicant applied for a postponement to enable it to call Mr. Bradley, its ex-Human Resources Manager, who was not in attendance at the hearing. Bradley's

evidence would have been to refute fourth respondent's allegation that he had met with the former and was told that his salary would be R4500.00. The first respondent turned down the application for a postponement and as a result, Bradley did not testify.

4. The first respondent does not in his award deal with the application for a postponement and the reasons for refusing to grant the application. There is no reference in the record of the arbitration hearing to the application for a postponement either. The record is also incomplete in that there is no indication in the court file that the CCMA filed a Rule 7A notice and the documents used at the arbitration hearing. Only the transcribed record of the evidence is in the court file. I am therefore, unable to determine whether the first respondent filed an explanatory affidavit in which he addressed the issue about his refusal to postpone the arbitration hearing. This is an extremely unsatisfactory state of affairs as the court depends on the record to make an appropriate evaluation of decisions by CCMA commissioners.

5. The applicant attacks the award on a number of grounds and I

deal with each of these grounds below.

Refusal to grant a postponement

6. The applicant states in its founding affidavit that a postponement was necessary to hear the evidence of Bradley regarding the clerical position offered to the fourth respondent and whether or not the fourth respondent had given reasons for allegedly rejecting the position. This evidence would have been relevant in determining whether or not the fourth applicant had absconded or was dismissed.

7. According to the affidavits, the first respondent refused a postponement because the arbitration hearing would be delayed by a couple of months. The applicant claims that it could not have anticipated that Bradley would be required as a witness as it could not have known in advance that the fourth respondent would allege that he had met with Bradley and discussed the clerical position with him.

8. Notwithstanding the deficiencies in the record, it appears to me that this first ground of review must fail. A letter attached to the third and fourth respondents' answering affidavit specifically refers to a meeting between Bradley and the fourth respondent that took place on 8 July 1999 and at which the fourth

respondent gave reasons why the clerical position was unacceptable to him. The applicant was thus aware all along of what fourth respondent's version was with regard to the alleged meeting and ought to have consulted with Bradley earlier and arrange for his availability on the day of the arbitration hearing. The first respondent cannot be faulted for refusing to grant the applicant a postponement and this ground of review must accordingly fail.

9. The alternative position was offered to the fourth respondent more than two weeks after he was dismissed and not as an alternative to his dismissal. The offer for the position was not coupled with a withdrawal of fourth respondent's dismissal. Refusing to take up this position would not change the fact that he had been dismissed from his position as a flight engineer and Bradley's evidence would not in any way have changed this outcome. In any event, given fourth respondent's reason for rejecting the clerical position, and assuming in favour of the applicant for this purpose that the job was offered as an alternative to dismissal, such rejection would have been entirely reasonable and would not have amounted to a "fresh" dismissal. Bradley's evidence, therefore, would not have changed this outcome. In the result, the first respondent correctly refused to grant the applicant a postponement and a review of his award on this ground must fail.

Fourth respondent's alleged desertion

10. The second ground for review is that the fourth respondent had absconded and was not dismissed. I have already indicated, in dealing with first respondent's refusal to postpone the arbitration proceedings, that the applicant's argument that the fourth respondent had absconded and was not dismissed cannot be sustained.

11. The fourth respondent was given a letter in which it was unequivocally stated that his services were being terminated for poor work performance. The offer to the fourth respondent to work as a clerk in flight operations was made some weeks after his dismissal and there is no evidence that it was coupled with an offer of reinstatement, albeit to a different position from the one which the fourth respondent occupied at the time of his dismissal.

12. In addition, one would have expected the applicant to take issue with fourth respondent's referral of his dismissal dispute to the CCMA on the basis that it was premature. This is because the fourth respondent referred the dispute to the CCMA before he took up and later rejected the offer to try the clerical position. No such challenge was mounted.

13. First respondent's conclusion that the fourth respondent was indeed dismissed, cannot be faulted. The second ground for review must accordingly fail as well.

Fourth respondent's dismissal was not procedurally unfair

14. The third ground of review relates to first respondent's conclusion that the fourth respondent's dismissal was procedurally unfair. Applicant's attack on this conclusion can be summarized as follows: the fourth respondent was called to a meeting on 8 June 1999 and was told that he had performed poorly on the simulator. He was given an opportunity during this meeting to make representations about his performance and was thereafter dismissed. The applicant was thus given a fair hearing and his dismissal was thus procedurally fair.

15. The submission is startling, to say the least.

16. The applicant knew, when it summoned the fourth respondent to the meeting, that the intention was to discuss his performance on the simulator and the intention to terminate his services in the event that his explanation were not to be accepted. Yet the applicant does not convey this information to the fourth respondent when it informed him of the meting on 7

June 1999. The applicant was literally ambushed;

17. Secondly, the applicant was in possession of the report prepared by the simulator instructor before 8 June 1999. The fourth respondent was not given a copy of the report before the meeting to enable him to prepare to deal with its contents. He was shown the report in the meeting and was there and then asked to respond to the content thereof, which was critical of his performance. No reason has been given why he was not given a copy of the report beforehand to enable him to prepare his response to its criticism of his performance on the simulator.

18. Thirdly, given that the applicant knew what the purpose of the meeting was, it was obliged but failed to warn the fourth respondent that he would be expected to give reasons at that meeting why he should not be dismissed. In fact, even at the meeting itself, the fourth respondent was not told that the deliberations of the management's representatives were about his possible dismissal. He only learnt that this was the case when he received his letter of termination.

19. Fourthly, the fourth respondent was entitled to be assisted by his union representative. He could not be because he 8was not told what the purpose of the meeting was. The applicant has not suggested that it was unaware of fourth respondent's union

membership. Even if that were the case, he would still have been entitled to assistance by a fellow employee. No reason has been advanced why he was not accorded this basic right.

20. In *JDG Trading (Pty) Limited t/a Price and Pride v Brundson* (2000) 21 ILJ 501 (LAC), Zondo AJP,(as he then was) writing for the majority of the court, observed as follows:

" [61] *Some argument was advanced by the appellant's counsel that the respondent was employed as a senior manager and that he knew what his shortcomings were. That an employee is a senior manager does not, in my view, give the employer licence to dispense with the observance of the audi alteram partem rule. Such an employee is also entitled to the observance of the audi alteram partem rule. What may be relaxed in the case of a senior manger may be the form which the observance of the rule may take….*

[62] *The opportunity which is given to a senior employee must still meet at least two basic requirements of the audi alteram partem rule, namely, he must be given notice of the contemplated action and a proper opportunity to be heard. The reference to 'notice of the contemplated action' necessarily implies that the action has not been decided upon finally as yet but it is one*

which may or may not be taken depending on the representations which the affected person may give. In these case the opportunity to be heard which the appellant purported to give to the respondent did not meet any of these two basic requirements…"

21. The above quotation may well have been written for this case. Although the judgment dealt with an appeal from the Industrial Court, and therefore, the repealed 1956 Labour Relations Act, the principles stated therein are of equal application to a dismissal for incapacity under the 1995 LRA. In fact, in the light of the constitutional right to fair labour practices and the right not to be unfairly dismissed as prescribed in the Act, the principles set out by the Labour Appeal Court apply with even more force.

22. The fourth respondent was not informed of the action contemplated against him prior to the meeting of 8 June or even at that meeting. He was not given an opportunity to influence the decision to dismiss him. There was, in *casu,* a complete failure to observe the *audi alteram partem* rule.

23. The fact that the fourth respondent was a flight engineer of a passenger aircraft does not mean that he was not entitled to a proper observance of the *audi alteram partem rule*. He was

grounded before the meeting of 8 June 1999 and there is therefore, no reason why he was not informed of the purpose of the meeting and given an opportunity to make representations as to why he should not be dismissed.

24. The applicant attacks the first respondent's conclusions on the basis that he confused issues related to substantive fairness with those related to procedural fairness. In his award, first respondent concluded that:

24.1 The fourth respondent was a good in theory but not a good performer;

24.2 The fourth respondent dismissed procedurally fairly;

24.3 The fourth respondent should have been offered training and given a reasonable chance to improve and the applicant failed to do so;

24.4 The fourth respondent was not given a chance to present his side of the matter;

24.5 The applicant may have had a good reason to dismiss, however, things did (not) go well procedurally;

24.6 The fourth respondent was dismissed unfairly with regards to procedure.

25. Undoubtedly, reference to failure to provide the fourth respondent with training and an opportunity to improve suggests that the first respondent was critical of the substantive fairness of the dismissal. It is not entirely clear whether the reference to the fourth respondent not being given a chance to present his side of the story (or the matter as the first respondent would have it), refers to his poor performance or why he should not be dismissed.

26. These deficiencies notwithstanding, I am not persuaded that they are of such a nature as to render the award reviewable. The summary of the findings as outlined and the conclusion arrived at by the first respondent indicates that he considered procedural fairness to have been applicant's shortcoming in respect of fourth respondent's dismissal. His reference to the fourth respondent being good in theory but not a good performer and that the applicant may have had a good reason to dismiss the fourth respondent clearly shows that he considered the dismissal to have been substantively fair. His statements that things did not go well procedurally and that the applicant was dismissed unfairly with regards to procedure puts the issue beyond doubt as to what his conclusion is with regard

to the reason for unfairness.

27. Does the fact that first respondent's brief reasons seem to confuse substantive fairness with procedural fairness taint the award to an extent where it should be set aside? I do not believe so. His conclusion is entirely justifiable, having regard to the evidentiary material before him, see *Federated Timbers (Pty Ltd v Lallie NO & Others* (1999) 20 ILJ 348 (LC).

28. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 ILJ 1603 (LAC) at 1636H-I, Zondo JP stated as follows:

> [101] In my view it is within the contemplation of the dispute- resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view the first respondent's award cannot be said to be unjustifiable when regard is had to all the circumstances this case and the material that was before him."

29. The above remarks are of equal application to the award made by the first respondent.

30. The applicant has not suggested that the compensation

awarded to the fourth respondent is not justified.

31. The third and fourth respondents had brought an application to make the arbitration award an order of court in terms of section 158(1)(c) of the Act.

32. In the result, the application for the review of first respondent's award is dismissed and the award issued by the first respondent is made an order of court. The applicant is ordered to pay third and fourth respondents' costs in respect of both applications.

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MASERUMULE AJ

On behalf of the Applicant: Adv A Landman, instructed by Golding Venniker Attorneys

On behalf of Third and Fourth Respondents: Adv NH Maenetje, instructed by Cheadle Thompson & Haysom Inc.

Date of hearing: 8 August 2002

Date of judgment: 4 Novemebr 2002.