RE-INSTATEMENT OR RE-EMPLOYMENT AFTER UNFAIR DISMISSAL:

AFGEN (PTY) LTD V ZIQUBU (JA34/18) [2019] ZALAC 40 (13 JUNE 2019)

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The primary remedy in instances of dismissals found to be substantively unfair is the re-instatement or re-employment of an employee, especially when such relief is sought by the aggrieved employee(s). However, must the employer still re-instate or re-employee an employee if the employment relationship has broken down irreparably and to such an extent that a continued employment relationship in all practicality is impossible?

This question was addressed by the Labour Appeal Court (LAC) in the matter of *Afgen (Pty) Ltd v Ziqubu (JA34/18) [2018] ZALAC 40* (hereinafter referred to as '*Afgen*').

It was held by the Commission for Conciliation Mediation and Arbitration (CCMA), that although the primary remedy for dismissal found to be substantively unfair is re-instatement or re-employment, as per the provisions of Section 193 of the Labour Relations Act, Act 66 (LRA), the employment relationship has broken down to such an extent that re-instatement or re-employment is not possible. The Commissioner therefore awarded the employee 3 months compensation.

The Labour Court however, on review, disagreed with the finding of the CCMA and ordered that the employee be re-instated and paid 24 months compensation in consequence to the dismissal of the employee being substantively unfair.

On appeal, the Labour Appeal Court overturned the Labour Court's judgment and ordered that the employee should not be re-instated but only be paid 12 month's compensation in accordance with the provisions of Section 194 of the LRA.

By handing down this judgment, the Labour Appeal Court gave effect to the provisions of Section 193(2) of the LRA and found that extraordinary circumstances existed in this matter, which made the continuation of an employment relationship intolerable. In this regard, the Court held that the conduct of an employee plays a crucial part and therefore took into account evidence such as the break down of trust between the employee and the supervisor, the conduct of the employer, insubordinate and disrespectful behaviour towards the supervisor. It was based on these factors and clear evidence that the Labour Appeal Court found that the continuation of an employment relationship, especially between the employee and her direct superior, is impossible and that it is therefore not practicable for the employee to be re-instated or re-employed.

In the matter of *Autozone v Dispute resolution Centre of the Motor Industry and others*[1] the LAC that the evidence on a whole established on probabilities that the employee deliberately and falsely misrepresented the amount to be paid to casual workers and that the conduct displayed a stratagem of dishonesty. The LAC found that it can be accepted that the employer probably will lose trust in the employee by reason of the misconduct alone, which rendered the continued relationship intolerable or unfeasible. Dishonest conduct and deceitfulness pose an operational difficulty which will place the employer in a hard-pressed place to trust such an employee.

This highlights the current legal position that there must be evidence that the relationship between the employer and the employee had broken down. Two comments need to be made in this respect: firstly, an employer is not obliged to lead evidence to satisfy a commissioner that the relationship has indeed broken down, the facts should speak for themselves. See for instance the matter of *Impala Platinum Ltd v Jansen and Others*[2] in this regard; or if the employer specifically seeks dismissal on the basis of a breakdown in the relationship as was the case in *Edcon Limited v Pillemer NO and Others*[3], where the charge against the employee was that her action had destroyed the employer/employee relationship, then it must lead evidence to prove the breakdown; secondly, even if evidence is led of a breakdown in the relationship, it is the commissioner who must determine whether dismissal in the circumstances of the matter before him is the appropriate sanction as a number of factors may play a role in coming to this conclusion and the same factors may apply differently to different category of employees.

In this regard, in the matter of *Glencore Holdings (Pty) Ltd and Another v Gagi Joseph Sibeko and Others (Glencore*[4]*)*, the Court also accepted that functional relationship between an employee and his superior may play a part in determining whether abominable behaviour displayed by an employee against his superior was an obstacle to the continued employment relationship. Even extreme inappropriate behaviour may in an exceptional case not lead to a dismissal, for instance if there is no proximity between the employee and the supervisor who was undermined.

Of importance to employers is the fact that the evidence of the breakdown must exist or the evidence of the conduct must be of such a nature that the Commissioner or a Court could find that the facts in itself show a breakdown in the relationship.

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[1][1] [2019] ZALAC 46; [2019] 6 BLLR 551 (LAC); 2019 40 ILJ 1501; MM Khambule v NUM and others JA89/17, delivered on 24 July 2019

[2] [2017] 4 BLLR 325 (LAC)

[3] [2010] 1 BLLR 1 SCA

[4] [2018]1 BLLR 1 (LAC)