

SOUTH AFRICA / JUDGMENT

Pinn v CCI Call Centre (Pty) Ltd and Others (D201/2020) [2024] ZALCD 1; [2024] 4 BLLR 422 (LC); (2024) 45 ILJ 1058 (LC) (16 January 2024) [2024] ZALCD 1

COURT
Labour Court Durban

BEFORE
Tshangana

CASE / FILE NUMBER
D201/2020

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FLYNOTES:

LABOUR – Dismissal – Reinstatement –
Employee
used vulgar language towards senior – Commissioner finding
dismissal substantively unfair but not ordering
reinstatement
because of view that relationship had broken down completely –
Disciplinary process causes awkwardness
between employee and
superior – Does not on own amount to irretrievable breakdown
of relationship – Senior was
willing to work with employee
and try to mend relationship – Review successful and order
amended such that applicant
be reinstated retrospectively to date
of dismissal without any loss of benefits – Labour Relations
Act 66 of 1995, 193(2)(b).
IN THE LABOUR COURT OF
SOUTH AFRICA, DURBAN
Reportable/Not
Reportable
CASE NUMBER: D201/2020
In
the matter between: -
DALE
KEELEY PINN
Applicant
and
CCI
CALL CENTRE (PTY) LTD

First Respondent
THE
COMMISSION FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second Respondent
CHARLES
OAKES N.O.
Third Respondent

Heard: 06 December 2023

Delivered: 16 January 2024
(This judgement was
handed down electronically by emailing a copy to the parties. The 16
January is deemed to be the date of delivery
of this judgement)

Summary: The Commissioner found that the
dismissal of the Applicant was unfair and ordered one month's
compensation instead of reinstatement.
In this application the
Applicant seeks an order reviewing and setting aside certain portions
of the award, and an order substituting
the one month's
compensation with reinstatement or just and equitable compensation
the court deems fit.
When dismissal is found
to be unfair and the exceptions listed in section 193 (2) (a) to (d)
do not exist, the Labour Court or Arbitrator are enjoined by section
193 (2) to either reinstate or re -employ the dismissed employee. The
Court or the Arbitrator has no discretion. Irretrievable
or
intolerable employment relationship in terms of section 193 (2) (b)
is an objective test not just a mere allegation, there must be
substantive facts to that effect.

Held: The exceptions in 193 (2) (a) to (d)
do not exist in this matter therefore, the Applicant must be
reinstated.

JUDGMENT

TSHANGANA, AJ

INTRODUCTION

- [1] In this matter the Commissioner, found that the Applicant's dismissal was substantively unfair however, he did not order that the First Respondent must reinstate the Applicant. In this regard he state that "It would not be prudent to reinstate the Applicant. The relationship between the Applicant and his senior; Mr. Bridgmohan has broken down completely. They cannot work together".
- [2] Consequently, the Commissioner awarded the Applicant one month's compensation.
- [3] The applicant has filed this application under the provisions of section 145 of the Labour Relations Act 66 of 1995 ("LRA"). In terms of which he seeks the following

orders:

- (a) that a portion of the arbitration award dated 24 February 2020, handed down by the Third Respondent under the auspices of the Second Respondent be review , set aside and substituted with an award that the First Respondent be ordered to reinstate the Applicant Retrospective to the date of dismissal without any loss of remuneration and benefits or retrospective to any day or earlier than the date of dismissal, alternatively, the First Respondent be ordered to pay compensation to the Applicant equivalent to twelve months remuneration or any just and equitable compensation as this Honourable Court may deem fit.
- (b) that the First Respondent pays the costs hereof, together with an order for costs against the Second and Third Respondents in the event of their unsuccessful opposition hereto.

Grounds for review

- [4] The grounds for review are listed in paragraphs 19 and 20 of the Founding Affidavit and they are the following:
- (a) The Third Respondent committed gross irregularity and exceeded his powers as a commissioner by failing to order the First Respondent to reinstate the Applicant in circumstances where he was statutorily enjoined to do so.
- (b) The Third Respondent committed gross irregularity by finding that the relationship between the Applicant and Bridgmohan had completely broken down in circumstances where the evidence properly before him did not support such a finding. In this regard the Third Respondent ignored or disregarded the evidence that was properly before him which showed that working relationship between the Applicant and the First Respondent was not completely broken down and could be restored upon reinstatement.
- (c) Further, the Third Respondent committed gross irregularity by exercising his discretion improperly, capriciously, or without reason when it came to determining just and equitable compensation for substantively unfair dismissal.

- (d) Further, the Third Respondent misconceived the nature of the inquiry he had to undergo in (1) determining the inappropriateness of reinstatement after finding that dismissal was substantively unfair, and in (2) determining just and equitable compensation for substantively unfair dismissal.
- (e) Based on all the material before the Third Respondent no reasonable commissioner could have arrived at the findings and conclusion the Third Respondent arrived at in his arbitration award.
- [5] The First Respondent denied that there are any grounds to review and set aside the arbitration award. Furthermore, in the opposing affidavit the First Respondent sought to bring a counter – review, to review the finding that the dismissal was unfair. However, there was no Notice of Motion for that counter – review application and the provisions of Rule 7A were not followed, therefore, the counter – review application was not properly before court. Consequently, this court only dealt with the main application for review on the basis that the Commissioner had found that the dismissal was (“substantively”) unfair.

Section 193 of the LRA, Remedies for unfair dismissal and unfair labour practice

- [6] Once the Arbitrator finds that the dismissal was unfair, the provisions of section 193 of the LRA, are applicable.
- [7] In terms of section 193 (1) the Labour Court or an 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...
 - (c) Order the employer to compensate the Employee.
- [8] Section 193 (2) provides that the Labour Court or 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 that 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

- [9] In contrast to subsection (1), where the term "may" is utilized, subsection (2) employs the term "must," indicating a mandatory and non-discretionary requirement. Consequently, a presiding officer, whether acting as a Judge or an Arbitrator, is obligated to order the reinstatement or re-employment of the employee upon determining that the dismissal was substantively unfair. This directive stands unless one or more of the grounds outlined in 193(2)(a) to (d) is present.
- [10] In this matter the Commissioner found that the dismissal was substantively unfair however, he did not order that the First Respondent must reinstate the Applicant. In this regard he state that "It would not be prudent to reinstate the Applicant. The relationship between he Applicant and his senior; Mr. Bridgmohan has broken down completely. They cannot work together".
- [11] As a result, the Commissioner awarded the Applicant one month's compensation.

Issue to be determined by this court: Do the exceptions listed in section 193 (2)

- (a) to (d) exists in this matter to justify failure to reinstate or to re-employer the Applicant?

[12] Section 193 (2) is peremptory and in the absence of the grounds listed in 193

- (2) (a) to (d) the Judge or Arbitrator has no discretion and they must order reinstatement or re-employment. In *Kraukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153, the Labour Appeal Court as per Zondo JP held:

"[114] None of the situation set out in section 193 (2) (a) to (d) exists in this matter. That being the case this court is enjoined by section 193 (2) to grant the appellant an order of reinstatement. In this regard it is important to emphasize that the language of s 193 (2) is such that, if none of the situations set out in paras (a) – (d), exists, the Labour Court and, therefore, this court, or an arbitrator, has no discretion whether or not to grant reinstatement. In the words of s 193 (2) the Labour Court or the arbitrator "must require the employer to reinstate or re – employ the employee" whose dismissal has been found to have been unfair. That embraces both dismissals which have been found to be automatically unfair and those which have been found to be, shall I say, ordinary unfair. Ordinary unfair dismissal in this context does not include those which have been found to be unfair solely because the employer did not follow a fair procedure because those fall under the exception in para (d). It refers to those dismissals which are not automatically unfair but nevertheless lack a fair reason."

- [13] The Constitutional Court in the case of *Booi v Amathole District Municipality and others* [2022] 1 BLLR 1 (CC) further confirmed that reinstatement is the primary remedy for unfair dismissal. In a unanimous decision written by Kamphophe ADCJ, the Constitutional Court held:

"[38] It is plain from this Court's jurisprudence that where a dismissal has been found to be substantively unfair, "reinstatement

is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or reemploy the

employee unless one or more of the circumstances specified in section 193 (2) (a) to (d) exists, in which case compensation may be ordered depending on the nature of the dismissal”.

[14] In this matter paragraph 96 of the award the Commissioner stated the following:

“96. In the present matter I have considered among other factors, the length of service of the employee, the harm or potential harm that could have arisen out of his actions and most importantly in this case the circumstances of the occurrence of the misconduct and believe that dismissal was harsh. In this regard I have considered the circumstances around his job description. However, I believe that it would not be prudent to reinstate the Applicant. The relationship between the Applicant and his senior Mr. Bridgmohan has broken down completely. They cannot work together. It is for this reason that I believe that it would be just and equitable to award the Applicant one months compensation. The Applicant earned R75 666.00 per month”.

[15] Paragraph 96 referred to above, gives reasons for the Commissioner to award compensation instead of reinstatement. Therefore, the Commissioner was of the view that “it would not be prudent to reinstate the Applicant. The relationship between the Applicant and his senior Mr. Bridgmohan has broken down completely”. If the Commissioner’s is correct that the relationship has completely broken down that would fall under 193 (2) (b).

[16] The irretrievable breakdown of employment relationship is not just a mere say -so, evidence and the facts must demonstrate that there has been irretrievable breakdown of the employer and employee relationship. The mere fact that the disciplinary process caused awkwardness between the employee and superior, on its own does not amount to irretrievable breakdown of employer - employee relationship. By its nature, disciplinary hearing causes discomfort, friction or awkwardness between the employee and his superior or those who testify against him or her. But that on its own does not amount to irretrievable breakdown of employment relationship. However, the court may infer irretrievable breakdown of relationship from the hostile manner and attitude demonstrated by the parties during the disciplinary hearing or arbitration.

[17] The breakdown of employer - employee relationship requires an objective test that demonstrates that the employer - employee relationship would be intolerable and cannot be retrieved. The Labour Appeal Court (LAC) held in (para 31), *Dunwell Properties Service CC v Sibande* [2011] 32 ILJ 2652 (LAC) that:

“[31] In order to determine whether or not an unfairly dismissed employee should be reinstated as contemplated in s 193 (2) of the LRA, the overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than legal onus, and that “fairness” ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment”

[18] Both the Employer and Employee representatives were pressed to address the Court on the facts regarding the irretrievable breakdown of the employment relationship as that is going to be one of the main considerations as to whether or not the exceptions in 193 (2) (a) to

(d) exists in this matter.

Employer's submissions re: irretrievable breakdown of employer - employee relationship

- [19] The Heads of Argument of the Employer, dealt with the breakdown of trust and employment relationship, and this was supplemented by oral presentations by its representative, Mr. Berry. The Employer's case regarding the breakdown of employer – employee relationship and trust was mainly based on the fact that the Applicant had used vulgar language on Bridgmohan, apologized and repeated the swearing again. The Employer's case was that the Applicant was not bona fide or honest when apologizing as he repeated the offensive language again.
- [20] In addition to the aforementioned points, the representative of the First Respondent argued that the mere statement by Mr. Bridgmohan expressing no personal grudges against the Applicant should not be confused with the breakdown of the employment relationship. The representative emphasized that, despite the absence of personal animosity from Mr. Bridgmohan, the Employer perceived the employment relationship as irretrievably broken. Furthermore, the representative contended that the opinions of other junior employees, who might still be willing to work with the Applicant, should not be considered. According to the representative, the Employer firmly believed that the employment relationship had completely broken down.
- [21] It is also worth noting that the First Respondent attempted a counter-review application to review and set aside the finding that the dismissal was unfair. However, this application was deemed improper as it lacked a Notice of Motion and failed to comply with the provisions of Rule 7A. The First Respondent's representative acknowledged the deficiency in the counter-review application and conceded that it could not be entertained by the court.
- [22] One of the points that the Employer considered as reason to say the employment relationship had completely broken down was the communication between the Employer representatives and the Applicant's erstwhile attorney Mr. Mgaga when the parties were discussing settlement.
- [22] During the arbitration Mr. Mbanjwa for the Employer raised the point, however, Mr. Mgaga for the Applicant objected and stated that, that concession was made during settlement discussions and cannot be relied on in the arbitration proceedings. That is found in the transcript from page 185 to 187 and the Commissioner made a ruling that the discussion was without prejudice.
- [23] Hence, it would be deemed a significant irregularity for the arbitrator to take into account a "without prejudice" discussion that had been previously ruled as inadmissible. Using such a discussion as a basis to assert that the employment relationship has entirely broken down would be considered a serious departure from proper procedure.

Employee's submissions re: irretrievable breakdown for employer – employee relationship

- [24] The Applicant contended that the Commissioner misinterpreted Bridgmohan's testimony. Specifically, the Applicant argued that Bridgmohan stated during the hearing that if the Applicant had apologized at the meeting on 04 February 2019, he would have forgiven him. The Applicant referred to the record to substantiate that he did, indeed, apologize. However, the First Respondent countered this by highlighting that, despite the initial apology, the Applicant later reverted to using vulgar language and displayed disrespectful behavior.
- [25] In addition to the above the Applicant's representative Mr. Mhlanga referred to the transcript in page 200 and in this regard, he stated that in his evidence in chief Bridgmohan did not say that the employer – employee relationship has irretrievably broken down and cannot be restored.
- [26] The Applicant's representative further referred to the transcript in page 393 line 9 wherein Bridgmohan stated "yes we try to mend" and Magaga asked "mend" and the response was "... and try to move forward".
- [27] The question that was asked above was in the event that the Applicant was found not guilty would he (Bridgmohan) be able to work with him and his response was that they would try to mend the relationship and try to move forward.
- [28] The Commissioner has found that the dismissal was unfair, therefore, based on the evidence of Bridgmohan, the parties can try to mend their relationship.
- [29] The Applicant further opposed the use of a without prejudice communication to support an impression that the relationship had irretrievably broken down. In pages 181 to 189 of the transcript this issue was dealt with. The Commissioner made a ruling that the communication was without prejudice. Therefore, it would be a gross irregularity for him to rely on the evidence that was ruled to be a without prejudice communication.

Breach of Trust and Intolerable continuation of employment relationship

- [30] One of the factors that this Court had to consider is whether or not there has been a breach of trust and that the continuation of the employment relationship has become intolerable. The Commissioner found that the dismissal was unfair but failed to order reinstatement as he was of the view that it was not prudent to order reinstatement because the employment relationship has completely broken down. The facts presented in the preceding paragraphs demonstrate that this viewpoint was not substantiated by the information before him.
- [31] It is interesting to note that an article published by Speculum Juris, authored by C. Okpaluba (LLB, LLM (London), PhD (West Indies)), a Research Fellow at the University of the Free State, and T.C. Maloka (BA, LLB, LLM (UCT), LLD (UFH)), an Associate Professor at the University of Limpopo, delves into the topic of "The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in Modern Law of Unfair Dismissal." This article provides in-depth exploration and valuable insights for understanding and addressing issues related to the breakdown of trust in the context of reinstatement within the framework of contemporary unfair dismissal laws.

[32] The above article dissects breakdown of trust and intolerability with reference to the Constitutional Court cases, firstly *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC), the principle established in *Masetlha's* case (*supra*) is that the remedy of reinstatement cannot be ordered where trust relationship

has broken down irretrievably.

[33] The above article further dissects the case of *Moyane v President of the Republic of South Africa* 2019 (1) All SA 718 (G) . In this case after the release of the interim report by former Judge Nugent as commissioned by the President, Mr. Moyane had openly and at various occasions attacked the integrity of the President to such an extent that it would be obvious to any reasonable observer that that nothing like a trust relationship would have remained between the two. The breach of trust had openly broken down completely and reinstatement was not ordered in the interim application.

[34] In the case of *Department of Finance and Economic Development, Gauteng v Mosome* 2014 ZALAC 46 (19 September 2014), an employee was charged with insubordinate behavior towards her supervisor by using unacceptable language that demonstrated disrespect by saying to her supervisor that she must be stupid, she must stop calling her at home (when she was contacted while she was supposed to be on duty), also telling her supervisor that she does not deserve the post she holds. The arbitrator found that her dismissal was substantively unfair but would not order reinstatement because the employment relationship between her and the employer had

irretrievably broken down with no prospects of reconciliation. The arbitrator, therefore awarded seven month's pay as compensation.

[35] The Labour Court set aside the award, remitted the matter to allow further evidence as to why the dismissed employee should or should not be reinstated in accordance with section 193 (2) of the LRA. The second arbitrator appreciated that the only issue before her was to determine whether the employee after having been found in insubordination by the first arbitrator was unfairly dismissed or whether she ought to have been reinstated or re-employed in terms of section 193 (2) of the LRA. Further the second arbitrator appreciated that in terms of section 193 (2) (b) of LRA, an exception to the primary remedy of reinstatement or re-employment in the case of dismissal provided, where pursuant to section 193 (2) (b) "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable". Having applied her mind to the totality of the evidence , the second arbitrator found that the appellant had conclusively established that employment relationship between the parties had irretrievably broken down to such an extent that the employment relationship could not be resuscitated hence a continued employment relationship would be intolerable.

[36] The LAC upheld the second arbitrator's finding that the derogatory, insulting, contemptuous and disrespectful conduct on the part of the employee towards supervisor struck the core of employment relationship such that reinstatement of the first respondent would be

intolerable because the employment relationship had irretrievably broken down, not only with her supervisor but also Head of Department. Since the employee's insubordination "affected the heart of the employment relationship" the second arbitrator rationally and properly exercised her discretion under 193 (2) not to reinstate but to compensate the employee"

Application of the law to the facts

- [37] In this matter this Court has to decide whether or not certain portions of the award and order of Commissioner stand to be reviewed, set aside and substituted.
- [38] In this regard the main question is whether or not one or more of the exceptions contained in s193 (2) (a) to (d) exists to deviate from reinstating the Applicant.
- [39] The submission made by the Employer in relation to the irretrievable breakdown of employer – employee relationship and trust have been dealt with above, and I find that the employer failed to provide cogent reasons and evidence to support that the employer employee relationship has irretrievably broken down. The evidence demonstrated that the immediate manager Bridgmohan was open to mend the relationship and move forward in the event that the Applicant is successful.
- [40] Furthermore, the Employer cannot rely on a without prejudice communication to say the relationship has completely broken down. When considering the breakdown of relationship, the most important consideration is the immediate superior's attitude and the employees who in the course of their work interact with the Applicant. In this case the Applicant reports to Bridgmohan who is the companies Chief Financial Officer and he indicated that he would be amenable to mend relationship and move forward (work with the Applicant). Furthermore, the evidence of Shanaaz Mahabir is also important as she interacts with the Applicant in the course of her duties.
- [41] This Court has to consider the totality of the evidence and based on the documents and evidence before this Court it is apposite to note that one of the factors that counts against the Employer in this matter is that the Employer is not coming with clean hands as the genesis of the problem is the failure to provide a Job Description with clear roles and responsibilities. Had there been a proper Job Description, KPI and performance evaluation process most of the issues that led to the dispute could have been avoided.
- [42] The facts of this matter are distinguishable from the Department of Finance and Economic Development, Gauteng v Mosome ("Mosome's case") referred to above. In Mosome's case the disrespectful language used against the superior clearly demonstrated lack of respect for the superior. The Employee said the superior did not deserve the position she held, stop calling me at home (whilst the person was supposed to be on duty). That does not respect the office. In this case one must consider the contexts of the outbursts, the words "shit", the Applicant testified they came out of out of frustration. The words you are a liar have a basis laid in that the Applicant says he believed that his motivation was required by and sent to the Director,

Chana.

- [43] However, the most important consideration is that Bridgmohan and Mahabir who directly work with Applicant testified that they could still work with him. In the contrary in Mosome's case the relationship was found to have broken with the supervisor and the Head of Department.
- [44] The Applicant presented substantive facts with proof from the record and transcripts that the evidence before the Commissioner did not support the findings that the relationship had completely broken down.
- [45] In view of the lapse of time from the date of dismissal, this court has also considered the exceptions in s193
- (2) (c), "whether it is reasonably practicable for the employer to reinstate or re-employ the employee". It is trite that the period lapsed from the date of dismissal to the date of judgment on its own is not a bar to reinstatement. The circumstances must show that it is not feasible to reinstate, for example, the company is under liquidation, the position no longer exists.
- [46] The inconvenience that will be caused by reinstatement does not qualify as an exception under s193 (2) (c).
- [47] Based on the Constitutional Court and Labour Appeal Court judgments referred to above, and the doctrine of stare decisis, in the absence of the exceptions listed in section 193 (2) (a) to (d) this court or the arbitrator has no discretion but to reinstate the Applicant.

Relief Sought

- [48] The Applicant seeks an order reinstating him retrospectively, alternatively a just and equitable compensation.
- [49] The Applicant's legal representative submitted that the Applicant has not been employed since his dismissal therefore, he still wants reinstatement. The ethos of the LRA is to save jobs and in the circumstances, unless one or more of the exceptions in s193 (2) (a) to (d) exist, this court is enjoined to reinstate the Applicant.
- [50] The Commissioner found that dismissal was harsh but strangely still dismissed the Applicant and granted one month salary as compensation. One month compensation induces a sense of shock and is unjustifiable under the circumstances.
- [51] Where a dismissal is substantively unfair that means there was not justifiable reason to dismiss the employee, therefore, the person must be put back to the position they would have been but for the unfair dismissal.
- [52] The grounds listed in section 193 (2) (a) to (d) do not exist in this matter therefore, reinstatement as primary remedy must be applied.

Order

- [53] Application for review is successful and paragraphs 96 and 100 of the arbitration award under reference number KNDB2286 – 19 dated 25 February 2020 are hereby reviewed and set aside.
- [52] Paragraph 100 is substituted with an order, that the Applicant be reinstated retrospectively to the date of dismissal without any loss of benefits and the First Respondent be allowed to deduct the one-month compensation, if already paid.
- [53] That the First Respondent pays the Applicant all monies due to him in terms of the above paragraph within 30 days of service of this order.

Costs

- [54] Each party to pay its own costs.

S. TSHANGANA,

(Acting Judge of the Labour Court)

Appearances:

For the Applicant

MHLANGA INCORPORATED

Per: Mr. Mhlanga

For First Respondent

GUARDIAN EMPLOYERS' ORGANISATION

Per: Mr. D. Q. Berry

Date of Hearing: 06 December 2023

Date of Judgement 15 January 2024

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