CASE NO: 722/92, 16/93, 121/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

PERFORMING ARTS COUNCIL OF THE TRANSVAAL APPELLANT

AND

PAPER PRINTING WOOD AND

ALLIED WORKERS UNION 1ST RESPONDENT

ENOCK MAWASHA AND OTHERS 2ND & FURTHER RESPONDENTS

CORAM: CORBETT CJ, VAN HEERDEN, GOLDSTONE JJA NICHOLAS et KRIEGLER AJJA

DATE HEARD: 15 NOVEMBER 1993

DATE DELIVERED: 1 DECEMBER 1993

JUDGMENT

GOLDSTONE JA:

The first respondent is the Paper Printing Wood and Allied Workers Union of South Africa ("the trade union"). It is duly registered as a trade union in terms of the relevant provisions of the Labour Relations Act 28 of 1956 ("the Act"). Together with some of its members individually ("the employees") it brought unfair labour proceedings in terms of s 46(9) of the Act against the respondent, the Performing Arts Council of the Transvaal ("PACT"). The proceedings arose out of the dismissal of the employees consequent upon a strike at the State Theatre in Pretoria on 25 September 1990. The industrial court made the following determination:

"1 The dismissal of the individual applicants on 25 September 1990 by the respondent was unfair and constitutes an unfair labour practice.

2. The said applicants are reinstated in the employ of the respondent on terms and conditions no less favourable to them than those which governed their employment prior to their dismissal. Their reinstatement with back-pay is made retrospective for six months reckoned from the date of this order.

3. The respondent shall fully restore to each of the said applicants all the rights and benefits, including pension benefits, which he or she enjoyed on 25 September 1990.

4. The parties shall, within 21 days of the date of this order, draw up an agreed schedule of the amount due to each applicant in terms of para 2 of this order, and such schedule shall be deemed to form part of this determination. The amount due to each applicant shall be paid

over to him or her by not later than 31 October 1991.

5. The court makes no order as to costs."

The judgment of the industrial court is reported at (1992) 13 ILJ 189 (IC).

PACT appealed in terms of s 17 (21A)(a) of the Act to the Labour Appeal Court (Transvaal Division) against the determination of the industrial court. The appeal was argued before Van Zyl J and assessors. The Court dismissed the appeal. No order as to costs was made. The judgment is reported at (1992) 13 ILJ 1439(LAC). An application for leave to appeal to this Court was dismissed. In consequence of a petition to the Chief Justice, in terms of s 17C(l)(b) of the Act, leave to appeal was granted and it was ordered that the costs of the application were to be reserved for decision by this Court.

5 Before considering the grounds of appeal advanced in this Court, it will be convenient to set out the findings of fact of the Labour Appeal Court and the basis upon which it decided that the dismissal of the employees constituted an unfair labour practice.

The first contact between the trade union and PACT was on 27 February 1990 when the former sent a letter by telefax to PACT proposing a meeting to introduce itself as the representative of the majority of PACT's employees. As such it claimed to be entitled to recognition by PACT.

The first meeting between PACT and the trade union was held on 5 April 1990. PACT was represented, inter alios, by its deputy general director, Mr L Bezuidenhout. The trade union, represented by Mr P Motau, claimed to have recruited 280 of PACT's employees. Notwithstanding that they constituted less than half of PACT's work force, it was agreed that the stop-order

forms which had been obtained by the trade union would be submitted to PACT for verification. Thereafter, said Bezuidenhout, PACT would be willing to negotiate with the trade union. He requested the trade union to make available certain documentation including its constitution and certificate of registration.

In a letter dated 18 May 1990 the trade union informed PACT that the requested documentation had been furnished and suggested that a further meeting be held on 30 May 1990. However, on the date proposed PACT addressed a letter to the trade union stating that it represented less than 50% of PACT'S employees and requesting it to explain the basis on which it sought recognition.

On 8 June 1990 a second meeting was held. PACT was represented by Bezuidenhout and Mr A Oosthuizen, a representative of the employers' organisation of which PACT was a member. The trade union was represented by

Motau and a number of shop stewards. Oosthuizen stated that PACT was not entitled to grant the trade union stop-order facilities without an exemption from the industrial council. Motau stated that the trade union would apply to the industrial council for such exemption. There was also some dispute concerning the authenticity of certain of the signatures on the stop-order forms which had been submitted by the trade union. PACT made it clear, however, that it was willing to enter into recognition negotiations subject to satisfactory proof of paid-up membership of 50% plus 1 of PACT'S employees.

On 19 June 1990 a third meeting was held. In a letter making reference thereto, dated 22 June 1990, PACT undertook to prepare an interim recognition agreement which, inter alia, would provide for the remittance of workers' membership fees to the trade union.

A fourth meeting was held on 21 June 1990. A few days prior to this meeting the employees refused to

work unless they could first speak to Bezuidenhout. It would appear that they were dissatisfied because of the slow progress made with regard to recognition of the trade union by PACT.

At the meeting on 21 June 1990 Motau was not present. However, Bezuidenhout explained to the shop stewards who were present the nature of collective bargaining and undertook to respond to certain issues by the following day. He warned that should the employees "down tools" before then, their conduct could be considered an illegal strike which, in turn, could lead to their dismissal.

On 28 June 1990 PACT submitted a draft "procedural agreement" to the trade union. It was discussed at the fifth meeting, held on 19 July 1990, which was attended by Motau. He had with him the trade union's own draft agreement. It was shown to PACT'S representatives. However Motau refused to give them a

copy of it. During the course of the meeting Motau stated that the trade union intended declaring a dispute with PACT on the ground that it had adopted delaying tactics in order to avoid negotiations cm "substantive issues". Motau had not discussed the declaration of a dispute with the shop stewards or the workers. Oosthuizen responded by stating that PACT had acted in good faith and had every intention of granting the trade union full recognition once it proved majority representation.

On 20 July 1990 PACT, by telefax, requested the trade union to submit its draft procedural agreement to its executive and members and furnish PACT with suggested changes. The trade union was also requested to submit to PACT its draft recognition agreement.

On the same day the trade union sent a telefax to PACT demanding that it remit stop-order deductions for August 1990, failing which a dispute would be declared.

Within thirty minutes of the telefax having been sent to PACT, the trade union declared a dispute in respect of the recognition of the trade union, stop-order facilities, "substantive issues" and intimidation of union members.

On 25 July 1990 PACT responded by letter in which detailed proposals were made for the resolution of the disputes. There then followed, on 26 July 1990, the sixth meeting between PACT and the trade union. The latter refused to accept PACT'S aforementioned proposals. PACT nevertheless undertook to assist the trade union to obtain stop-order facilities. The minutes of the meeting record the following arrangements:

> "1. The stop-orders will be used to determine representation of the union in PACT.
>
> 2. Negotiations will continue only if the union has 50% plus 1 representation of <u>all</u> staff excluding management.

3. PACT will respond the moment they receive approval in respect of stop-order facilities from the Department of Manpower."

On Motau's insistence PACT, on 27 July 1990, applied to the Director-General of the Department of Manpower for leave to implement stop-order facilities. However, on 1 August 1990 the trade union informed PACT that the dispute remained. On 3 August 1990 PACT requested the trade union to furnish it with details of the "substantive issues" and alleged intimidation. The trade union failed to furnish such detail.

On 20 August 1990 PACT sought to involve the trade union in problems being experienced in the cleaning department of the state Theatre. The trade union refused to assist and gave PACT until the following day to respond to the stop-order issue. It warned that a

failure to do so would result in a deadlock. A request by PACT for details relating to the subject of the envisaged deadlock met with no response.

On 28 August 1990 the seventh meeting was held. Its purpose was to discuss the problems in the cleaning department. Motau was not present. It concluded cm the basis that a further meeting would be convened to deal with proposals from the employees.

In late August or early September 1990 the Director-General of Manpower informed PACT that if it wished to implement stop-order facilities it was necessary to seek exemption from the industrial council. On 6 September 1990 Bezuidenhout, with the concurrence of Motau, applied to the Secretary of the Industrial Council of the Theatre Industry of South Africa for exemption to introduce stop-order facilities in respect of the trade union. In a letter dated 12 September 1990 the industrial council requested further information from

PACT. The letter was received on 17 September and a reply was sent on the following day.

A meeting was arranged with Motau for 24 September 1990. Its purpose again related to the problems with regard to the cleaning department. However those problems were soon thereafter resolved internally. Although Bezuidenhout cancelled the meeting Motau and the shop stewards arrived and were informed by Bezuidenhout that the problems had been solved. A friendly discussion ensued. During the discussion Motau agreed to the terms in which Bezuidenhout proposed to reply to the request from the industrial council for further information. He signified his agreement by signing Bezuidenhout's file copy of the reply.

I come now to the all important strike and consequent summary dismissal of the employees. It will be convenient to quote from the judgment of the Court a quo (at 1444C-1445F):

"It appears to be common cause that, during the lunch hour on 25 September 1990, the workers engaged in an illegal so-called 'wildcat' strike. The workers gathered at the loading zone of the State Theatre in Pretoria. Bezuidenhout was informed of the gathering of the workers at approximately 13:45. When he went to investigate he came across certain of the shop stewards, including Phetla, the only witness who testified for the workers in the court a quo. The evidence of what was said at this brief meeting is divergent. The fact that Bezuidenhout ordered the workers, through the shop stewards, to return to work immediately is, however, common cause.

Since he expected problems with the workers, Bezuidenhout immediately telephoned PACT'S attorney, Mr van Deventer, whose offices are a few hundred metres away from the State Theatre. Van Deventer immediately set off to his client's premises to investigate the matter. He arrived at Bezuidenhout's office a few minutes later, at approximately 14:00. A brief discussion of the situation followed between Van Deventer and Bezuidenhout, whereupon Van Deventer enquired as to the

whereabouts of Motau. He was informed that Motau was out of town. Thereupon he indicated that he wished to speak to the shop stewards. Mawasha, Phetla and Temane were summoned. The apparent cause of the strike was PACT'S failure to provide the workers with stop-order facilities to pay their monthly union subscription. Van Deventer explained why the said facilities had not as yet been granted. He likewise explained that the work stoppage constituted an illegal strike. He requested the shop stewards to assist him in ending the strike. They pointed out that the workers were refusing to return to their work. Van Deventer then decided to address the workers. He obtained a megaphone, introduced himself as a representative of PACT and once again explained the problems relating to the stop-orders.

At approximately 14:20 he requested the workers to return to work by 14:30. Should they do so, no steps would be taken against them. If they refused to comply, PACT would seriously consider their dismissal.

Having issued the said ultimatum Van Deventer accompanied Bezuidenhout to the office of the chief director of PACT, one Reyneke, to discuss the matter. Reyneke advised him that,

should there be an absolute refusal by the workers to return to work, he (Van Deventer) would have the authority to dismiss them. The police were then called in to be present in case problems should arise.

At approximately 15:00 Van Deventer again addressed the workers. At that stage they were singing and dancing and appeared to be more restless than when he had first spoken to them. He pleaded with them to return to work. Their concerted reaction was that they refused to do so. He asked whether there was no one who wished to return to work. Their reaction remained the same. He then informed them that, since they persisted in their refusal, they were summarily dismissed with immediate effect.

Some of the workers thereafter went to their union office to report on the aforesaid events. One Masala, a union official, immediately phoned Bezuidenhout and informed him that the workers were prepared to return to work. This offer was rejected. Further offers made later that day and on the following day were similarly rejected."

It was found by the Labour Appeal Court that there was concern among the workers that their demand for stop-order facilities had not been finalised after having been a bone of contention for several months (at 1447A). At the time the workers received the ultimatum from Van Deventer they "were restless and clearly emotional" (at 1447E).

On the question of the unfair labour practice the broad principles applied by the Court a quo were the following (at 1446C-H):

(a) Public policy does not support the protection of illegal strikers;

(b) Nevertheless it must still be considered whether the dismissal as such was fair;

(c) Of paramount importance in this regard was whether or not the ultimatum issued prior

to the dismissal was fair and unambiguous;

(d) In judging the fairness:

"Sufficient time, from the moment of giving the ultimatum, must elapse to allow the workers to receive the ultimatum, digest and reflect upon it, and to respond thereto by either compliance or rejection." (Liberty Box & Bag Manufacturing Co. (Pty) Ltd v Paper Wood & Allied Workers Union (1990) 11 ILJ 427 (ARB) at 435.)

In the application of those principles the Court a quo came to the conclusion that the ultimatum issued on behalf of PACT was not fair. The reasons which led it so to conclude were the following (at 1447A-D):

(a) The cause for concern among the workers that their demand for stop-order facilities had not been finalised;

(b) That it was unreasonable for Van Deventer not to wait for Motau, the representative of the trade union, before issuing the ultimatum. It could have been postponed, or at least extended, until Motau became available.

(c) That the time afforded the workers in terms of the ultimatum, viz. ten minutes which was extended to forty minutes, was an insufficient period for the workers to reflect cm how to react to it. A more adequate period would probably have

resulted in a different decision as was borne out by their offers to return to work shortly after their dismissal.

The Court a quo went on to hold that although the strike was illegal, the precipitate and ill-considered ultimatum were circumstances which justified reinstatement of the workers as "eminently fair and reasonable" (at 1448B-D).

On behalf of PACT the main grounds of appeal advanced in this Court were that:

1. The dismissal of the employees was by way of disciplinary action, with a valid and fair reason and in compliance with a fair procedure and was therefore not an unfair labour practice: see the definition of "unfair labour practice" in s 1 of the Act.

2. In any event, having regard to the conduct of the employees, the order for their reinstatement was inappropriate and wrong.

I shall consider these grounds in turn.

This appeal is governed by the provisions of s 17C of the Act. Ss (l)(a) provides for an appeal against a decision or order of the Labour Appeal Court "except a decision on a question of fact". The appeal must therefore be decided on the facts found by the Labour Appeal Court. Counsel on both sides were agreed, however, that this Court is also entitled to have regard to additional facts which appear from the record of the industrial court proceedings in so far as they are not inconsistent with facts found by the Labour Appeal Court. I agree. Were it otherwise this Court would be in the invidious position of having to ignore facts (even if undisputed) because, for whatever reason, they were not

referred to in the judgment of the Labour Appeal Court. That could not have intended by the draftsman of s 17C of the Act.

The conclusion of the Labour Appeal Court that PACT committed an unfair labour practice is not a "decision on a question of fact" and may therefore be reconsidered by this Court: Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor") 1992(4) SA 791(A) at 802B-I.

In terms of s 1 of the Act, as it read in 1990, "unfair labour practice" was defined to mean, inter alia:

> "... any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following:
>
> (a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason

> and not in compliance with a fair procedure ..."

It was not in issue that the dismissal of the employees constituted disciplinary action against them. I also did not understand counsel for the respondents to submit that the dismissal of the employees was without a valid and fair reason. That is hardly surprising if one has regard to the illegal, prejudicial and precipitate action they took. The principal issue which was debated in argument was whether the dismissal was in compliance with a fair procedure.

On behalf of the employees it was submitted in this Court that the delay by PACT in affording them stop-order facilities was the result of a stratagem on the part of PACT to hinder and obstruct recognition being granted to the trade union. However, having regard to the events which occurred after the commencement of the

strike it is unnecessary to come to any firm conclusion on this issue. I shall assume in favour of PACT that it did not act in bad faith in its dealings with the trade union. It follows that the appeal must be determined on the basis that the strike by the employees was not provoked by any improper conduct on the part of PACT.

One has the situation, therefore, that up to 24 September 1990 there had been reasonably amicable if desultory negotiations between PACT and the trade union. Although no recognition agreement had been signed, it was alleged in the respondents' application in the industrial court that the trade union had been granted de facto recognition by PACT. That was admitted by PACT in its reply. In all of those negotiations the trade union had been represented by Motau.

That the employees were impatient at the lack of progress in arranging stop-order facilities is

illustrated by the threat to down tools over that issue during June 1990.

As far as PACT was concerned, the wildcat strike at lunch time on 25 September 1990 was an unexpected and inexplicable, if not bizarre, occurrence. The issue which must now be decided is whether the response to it by PACT, in all the circumstances, constituted an unfair labour practice.

Counsel for PACT conceded, correctly in my view, that it would have been unfair, without more, to have summarily dismissed the employees. Such an extreme response would have been unfair, in my opinion, having regard to the following considerations:

1. Most of the 299 employees had given many years of service to PACT. Twelve of them had given in excess of 20 years service; 32 had given in excess of 10 years service; and 122 in excess of four years service.

2. The cause of the unhappiness related to a matter which was of legitimate concern to the employees in relation to their employment.

3. The employees had not acted in a manner threatening to the safety of PACT'S personnel or property. The police were called by Bezuidenhout as a precaution and not because of any overt threat from any of the employees. Certainly there was no suggestion that either Bezuidenhout or Van Deventer was physically threatened by the employees.

4. On the face of it the very unexpectedness and irrationality of the behaviour of the employees should have suggested to Bezuidenhout that something had gone wrong in the communication between the trade union and the employees. That suggestion should have been strengthened by the fact that the trade union was not associated with the strike.

5. The employees, according to Bezuidenhout and Van Deventer, were in an emotional state. They were described by Van Deventer as " 'n singende, senutergende massa werkers". As mentioned above, the Court a quo found that they

> "were restless and clearly emotional".

6. The workers had been on strike for barely one hour.

In all of those circumstances fairness and good sense dictated that the employees should have been given a reasonable ultimatum. As it was put by Van Rensburg J in Plaschem (Pty) Ltd v Chemical Workers Industrial Union (1993) 14 ILJ 1000(LAC) at 1006 H-I:

> "When considering the question of dismissal it is important that an employer does not act overhastily. He must give fair warning or ultimatum that he intends to dismiss so that

> the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited."

Before turning to consider the fairness of the ultimatum I would like to emphasize that whether an illegal strike may fairly be met with an immediate dismissal or whether fairness calls for an ultimatum or other appropriate action short of dismissal is an issue which can only be determined on the facts of each case. An illegal strike constitutes serious and unacceptable misconduct by employees. The present enquiry is whether on the facts of this case it would have been unfair to dismiss the employees without giving them a reasonable ultimatum - an opportunity to calm down and reflect upon the serious consequences for them of continuing to act in

illegal manner in breach of their obligations to their employer.

According to the uncontradicted evidence of Bezuidenhout and Van Deventer, and as held by the Court a quo, at 14:20 Van Deventer addressed the employees and informed them that if they were not back at work by 14:30 they could be dismissed. Then, forty minutes later he returned. I quote his own words:

> "Ek het weer by dieselfde plek gaan staan. Op daardie stadium het die toneel redelik meer atmosfeer gedra as die - as die eerste keer. Daar was weer die singery, die dansery, die een shop steward PHILIP TEMANE het reg voor my gedans. Hy het op daardie stadium reeds van sy hemp, nie ontslae geraak nie, maar oopgeknoop. Dit was redelik angswekkend gewees. Ek moes ook twee, drie keer op die megafoon vra vir stilte om met hulle te praat. Toe ek die stilte kry het ek vir hulle gesê ek het vir - die ultimatum gegee tot 14h30. Dit is nou 15h00, 'n halfuur later, hulle is nog nie terug by die werk nie, asseblief, wil julle nie

> teruggaan werk toe nie? Op daardie stadium het daar 'n koor van stemme geskreeu nee, hulle gaan nie terug werk toe nie. Ek het herhalend gesê dat die ene wat teruggaan sal geen aantekening kry op 'n personeelleer of enige dissiplinêre stappe nie, dit word vergeet. Ek het inderdaad een kant toe gestaan en uitgewys die van u wat wil teruggaan werk toe, stap by my verby in die gang af en dit is die einde van die episode. Daar was geen reaksie nie. Ek het gevra is daar niemand wat wil teruggaan nie en die koor van stemme wat deurgekom met 'n geskreeu en gesê nee, ons gaan nie werk nie. Op daardie stadium het ek aan hulle gese as dit die houding is dat julle nie teruggaan werk toe nie dan is julle ontslaan met onmiddelike effek."

In the charged atmosphere that Van Deventer described, to have expected employees to file past him into the passage on the way to resuming work was to have expected an unusual reaction from an excited group of almost 300 workers. It would have required exceptional

bravery (or stupidity) for any one of them to have accepted such an invitation. In my opinion Van Deventer's actions and words in that respect showed a distinct lack of appreciation of human behaviour.

In my judgment a fair ultimatum in the circumstances of this case should have been of sufficient duration to have enabled:

(a) PACT to have ascertained what had gone wrong and caused the employees to behave as they did either by direct enquiry from the employees, the shop stewards, Motau or some other representative of the trade union;

(b) the employees time to cool down, reflect and take a rational decision with regard to their continued employment, and for that purpose to seek advice from their trade union.

The ultimatum given by PACT to the employees was clearly insufficient. It was of too short a duration by far to have achieved either of the aforegoing objectives. It is not necessary to decide what a reasonable period would have been. I would suggest, however, that it should not have expired prior to the commencement of work on the following day.

Having regard to the six factors referred to above, in my opinion there was a distinct probability that had a fair ultimatum been given to the employees the strike would have come to a speedy conclusion. It appears from the evidence that the trade union was certainly opposed to the continuation of the strike and that attitude would, as a probability, have weighed with the employees, at any rate, after they had cooled down.

Counsel for the respondents also submitted that the ultimatum given by Van Deventer was not in clear and unambiguous terms. He suggested that it did not convey

to the empoyees that the choice given to them was to return to work or be dismissed. Having found that the period of time given to the employees in terms of the ultimatum was inadequate it is not necessary to express an opinion on this issue.

In considering the issues in this case I have attempted to eschew an armchair approach. I am fully cognisant of the difficult position in which the illegal conduct of the employees placed their employer. I am also conscious that the use of hindsight can easily result in unfair criticism. I am of the opinion, however, that in requiring that PACT should have given a fair ultimatum to the employees, and in finding that it failed to do so, I have not judged it unfairly. Any reasonable employer would and should have taken into consideration the factors to which I have made reference and in consequence have acted in the manner suggested.

It follows, in my opinion, that the industrial court and the Court a quo correctly decided that in dismissing the employees PACT committed an unfair labour practice.

The substantive issue which remains to be considered is whether the order for the reinstatement of the employees and the order for back-pay made retrospective for six months was appropriate relief. The reasons which caused the industrial court to grant that form of relief appears from the following passage of the judgment (at 199C-G):

> "It is now accepted that the industrial court may come to the assistance of employees who embark on illegal industrial action provided they can show good cause, such as necessity, self-defence, provocation or as in this case, precipitate action by the employer. In short, when an employer opposes reinstatement of dismissed employees on the ground that they

participated in illegal industrial action, he must also show that his own hands are not unclean and that he had acted fairly and reasonably before resorting to dismissal as a weapon of last resort. The Labour Appeal Court, in National Union of Metalworkers of SA v Tek Corporation Ltd & others (1991) 12 ILJ 577 (LAC) at 582F has endorsed the view of the industrial court that 'even if the actions by the applicants may have been unlawful, regard still has to be had to both the fairness of ensuing procedural steps and the fairness of the sanction which was meted out in such procedure'. (See SA Chemical Workers Union & others v Cape Lime Ltd (1988) 9 ILJ 441(IC) at 455C-D.) Nicholas AJA has reminded us that labour law operates at the interface between law and industrial relations. Accordingly, 'its problems are delicate and complex and not to be solved solely by statutory fiat or legal analysis. Labour law has social, economic and psychological dimensions which cannot be constrained in legal formulas'. (See Benjamin, Jacobus & Albertyn Strikes, Lock-outs and Arbitration in South African Labour Law (1989) at xxii.)"

In my judgment there is a glaring omission from that analysis, namely an appreciation of the effect of the illegal, unreasonable and prejudicial conduct of the employees in embarking upon the wildcat strike.

The function of the industrial court was to:

> "... determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation ..." (s 46(9)(c) of the Act).

Having found that the employees were unfairly dismissed the industrial court was required to decide whether the appropriate relief was reinstatement or compensation. No other type of relief was suggested by counsel or suggests itself to me. In this case, it would appear that no consideration was given to the grant of compensation.

This question was taken no further by the Court a quo. It was dealt with in the following short passage (at 1448C-D):

> "On consideration of all the facts and circumstances of the present matter, I am satisfied that the court a quo was entitled to order reinstatement as it did. It is true that the workers were involved in an illegal strike but it was of very short duration and the matter could, to my mind, have been resolved amicably without Van Deventer's resorting to the drastic action upon which PACT had decided. The nature of the ultimatum and the subsequent dismissals were indeed precipitate and ill-considered. In the circumstances I believe that reinstatement was eminently fair and reasonable."

In a number of decisions of the industrial court and the Labour Appeal Court it has been regarded almost as axiomatic that in the absence of special

circumstances an unfair dismissal should have as its consequence an order for reinstatement. This approach is exemplified in the judgment in Sentraal-Wes (Koöperatief) Bpk v Food and Allied Workers Union and Others (1990) 11 ILJ 977 (LAC) at 994E:

> "Prima facie, if an unfair dismissal occurs the inference is that fairness demands reinstatement. And it is for the employer to raise the factors which displace such inference."

No reasons are furnished for those conclusions and, in my opinion, they are far too widely stated. In every case the industrial court must make a reasonable determination. In some cases fairness and justice may dictate that reinstatement is the proper relief. In others compensation or some other form of relief may be more appropriate. Each case must depend on its own

facts. A rule of thumb, even if applied on a prima facie basis, will tend to fetter the wide discretion of the industrial court (or the Labour Appeal Court). That result is one to be avoided. In my opinion the correct approach is to give due consideration to the relevant conduct of the parties and, in the light thereof, to decide upon the appropriate relief: compare Nomaqumbe and Others v Multi Office (Pty) Ltd (1992) 13 ILJ 152 (IC) at 164I-165A.

In a number of judgments of the industrial court and the Labour Appeal Court in s 46(9) proceedings reference has been made in the context of reinstatement to the following passage from the judgment in Tshabalala and Others v Minister of Health and Others 1987(1) SA 513(W) at 523B-C:

> "As a matter of public policy I do not believe that a Court should order the reinstatement of an employee who admits or is found to have

> participated in an illegal strike. As I have already said, such conduct subverts the very purpose and being of the profession which such person is seeking to join. In other words, the third applicant has not come to Court with clean hands, as it were, and in my judgment I should not exercise my discretion in favour of that applicant."

That case was decided under the common law and not under the unfair labour procedure of the Act. It related to a student in the nursing profession, described in the same judgment as follows (at 518B-D):

> "The nursing profession is a venerable and noble one. The services it renders very properly can be described as essential services in the sense that if they are withheld, the lives or health of many people may be endangered. It is no doubt for that reason that the Legislature has seen fit to render strike action unlawful and punishable by the criminal courts. Similar legislation in respect of essential services is by no means

> peculiar to this country, and may be found on the statute books of most Western nations. A strike by members of the nursing profession, apart from being a repudiation of their contract of employment, undermines the very fundamental ethic of their calling and constitutes a material breach of contract."

In s 46(9) proceedings the concept of "clean hands" is relevant only to the extent that the conduct of the parties must be considered in the context to which I have already referred. The passage from the Tshabalala judgment is not apposite or relevant in such cases.

Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been

granted by the industrial court an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order.

The determination of the industrial court was made on 16 September 1991, i e just short of one year after the dismissal of the employees. In my opinion the most important considerations which should have been taken into account in determining the appropriate relief were the following:

1. The illegal and unacceptable conduct of the employees which clearly constituted an unfair labour practice on their part, and also a breach of their employment contracts;

2. The over-hasty dismissal of the employees which I have already held also constituted an unfair labour practice;

3. The substantial length of service of the majority of the employees;

4. The short duration of the strike at the time of the unfair dismissal;

5. The absence of prior improper conduct by the employees.

6. The likelihood that if a fair and reasonable ultimatum had been given to the employees the strike would have been of very short duration.

This Court is empowered by the provisions of s 17C(2) of the Act to:

> "... confirm amend or set aside the decision or order against which the appeal has been noted or make any other decision or order, including an order for costs, according to the requirements of the law and fairness."

44 In my judgment the appropriate relief which should have been granted to the employees by the industrial court was, as it correctly held, one of reinstatement. The long service of the majority of the employees with PACT and their pension rights to which reference is made in paragraph 3 of the determination of the industrial court (at 200A) would have made it unfair and unjust for them to be have been awarded compensation of one or even a few months salary.

Indeed, compensation is a rather blunt remedy. In respect of those employees who might not have found other employment it would have been inadequate relief. And, in the case of those employees who might have found immediate alternative employment compensation would have constituted an inappropriate enrichment.

I am further of the opinion that the industrial court should have marked its disapproval of the

misconduct of the employees by refusing them any back-pay. In effect those of them who did not take up other employment at the same or a better wage will have lost almost one year's wages - a most substantial punishment to pay for a couple of hours of unlawful and ill-considered conduct. Nevertheless the principle is an important one. Employees and their trade unions must take into account the high risk which they run when the provisions of the law are flouted and the whole purpose of collective bargaining is subverted - for that is the inevitable consequence of an illegal strike.

It is now a little more than three years since the dismissal of the employees. The effective date of their reinstatement is 16 September 1991, viz the date of the determination of the industrial court. Problems could arise with regard to the effect of reinstatement in a particular case. No argument was addressed to this Court on this topic and it would therefore be

inappropriate to anticipate such problems or their resolution. Should they arise and not be amicably resolved, the industrial court would have to be approached for a determination in terms of the earlier reference of this matter to it under s 46(9) read with the provisions of s 17(11)(h) of the Act.

The deletion of that part of the order of the industrial court relating to back-pay for six months prior to the date of its order represents substantial success for PACT. The average salary of each employee was in excess of R550 per month. The wages of the 299 employees for six months would amount to approximately Rl million. On the other hand PACT failed on the main issue in the appeal. In these circumstances I am of the opinion that there should be no order as to costs in the Labour Appeal Court, in respect of the petition for leave to appeal, or in this Court.

The following order is made:

A. The order of the Labour Appeal Court is set aside and it is replaced by the following:

''1. The appeal succeeds to the extent that the determination of the industrial court is amended by the deletion of -

(a) the second sentence of paragraph 2 thereof;

(b) paragraph 4 thereof.

2. No order as to the costs of the appeal is made."

B. If any dispute arises between any such employee and PACT concerning a claim arising out of the order for reinstatement that dispute shall be determined by the industrial court in terms of the provisions of s 46(9) read with s 17(11)(h) of the Labour Relation Acts, 28 of 1956. The procedure for resolving such a dispute shall be determined by the President of the Industrial Court.

C. No order is made as to the costs of the appeal or of the application for leave to appeal.

R J
GOLDSTONE
JUDGE OF
APPEAL

CORBETT CJ)
NICHOLAS AJA)
KRIEGLER AJA)
CONCUR

UITSPRAAK

VAN HEERDEN AR:

2 Met die oog op die omskrywing van "onbil-like arbeidspraktyk" in art 1 van die Wet op Arbeids-verhoudinge 28 van 1956, soos dit in 1990 gelui het, is ek bereid om ten gunste van die respondente te veronderstel dat die ontslag van die betrokke werk-nemers in die afwesigheid van enige ultimatum wel so 'n praktyk sou gewees het. In hierdie veronderstel-ling is ek egter van mening dat die ultimatum wat wel gegee is nie onredelik of onbillik was nie.

Die ultimatum moet in die lig van die volgende geëvalueer word.

1) Die appellant was nie te blameer vir die vertraging wat in verband met die toestaan van aftrekorderfasiliteite ondervind is nie; veral nie vanaf Junie 1990 nie. Reeds op 8 Junie het Motau gesê dat hy die Nywerheidsraad om 'n vrystelling sou nader. Om redes wat hy as onopgeroepte getuie nie verduidelik het nie, het hy egter nooit die daad by

die woord gevoeg nie. Daarna was dit hy wat in Julie daarop aangedring het dat so 'n aansoek aan die Departement van Mannekrag gerig moes word.

2) Toe daardie aansoek futiel geblyk te wees het, het Motau weer nie handelend opgetree nie. Dit was inteendeel Bezuidenhout wat toe die aansoek aan die Nywerheidsraad gerig het.

3) Op die vergadering van 24 September waarop Motau, en van die vertrouensmanne wat deur die werknemers verkies was, teenwoordig was, is Bezuidenhout se optrede nie bevraagteken nie. Motau het inteendeel aangedui dat hy daardie optrede aanvaar het en as blyke van sy instemming 'n afskrif van die skrywe aan die Nywerheidsraad geteken.

4) Met toestemming van die appellant het die vertrouensmanne die volgende dag 'n inligtingsvergadering vir die werkers gehou. In alle waarskynlikheid het hulle toe die werkers vertel wat-

die vorige dag gebeur het. In elk geval was die appellant se amptenare volkome geregtig om te aanvaar dat hulle dit wel gedoen het.

5) Daar was dus nie die geringste objektiewe rede nie vir 'n weiering om te werk totdat die genoemde fasiliteite toegestaan sou word. Dlt kan trouens aanvaar word dat die werkers meegedeel was dat sonder die vergunning van die Nywerheidsraad - wat nog nie toegestaan was nie - die fasiliteite nie bewillig kon word nie.

6) Geen kennis van 'n voorneme om te staak is aan die respondent gegee nie. Die eerste keer dat Bezuidenhout van probleme bewus geword het, was toe hy 'n mededeling van die hoof van die teater-afdeling ontvang het. Op pad na die vergaderplek is hy toe deur 'n vertrouensman meegedeel dat die werkers nie na hul werk sou terugkeer nie tensy die fasiliteite nog daardie selfde middag beskikbaar

gemaak sou word. Hulle was dus toe reeds aan die staak.

7) Voordat hy die werkers toegespreek het, is Bezuidenhout op sy navraag meegedeel dat Motau uitstedig was. Hy is voorts meegedeel dat "die enigste persoon op kantoor by die vakbond se kantoor is 'n mnr Masala en hy het ook vir hulle [die werkers] gesê hulle moet gaan werk, maar die mense wil nie". Hieruit kan afgelei word dat Masala se mededeling - waarskynlik aan een van die vertrouens-manne - aan die werkers oorgedra was. 'n Oproep van Bezuidenhout aan Masala sou dus vrugteloos gewees het.

8) Indien die werkers wonder bo wonder nie bewus was dat die fasiliteite volgens die opvatting van al die belanghebbendes nie terstond toegestaan kon word nie, het Van Deventer dit vir hulle duidelik gemaak. Hy het dit trouens meermale gedoen.

Eerstens het hy aan drie van die vertrouensmanne 'n volledige verduideliking vir die vertraging gegee, wat weens hul kennis skaars nodig was. Daarna het hy aan die werkers stap vir stap verduidelik waarom die fasiliteite nog nie beskikbaar was nie, en in hierdie verband na die korrespondensie met die Departement van Mannekrag en die Nywerheidsraad verwys. Om-streeks 3 nm het hy sy uiteensetting herhaal, maar die werkers se reaksie was om uit te klok of ander-sins die gebou te verlaat.

In baie gevalle vereis billikheid dat aan stakende werkers 'n substansiële tydperk gegun word om oor die konsekwensies van 'n moontlike ontslag volgende op 'n ultimatum te besin. Dit is egter geen onwrikbare reël nie. So byvoorbeeld kan 'n baie kort ultimatum billik wees indien die werkgewer as 'n kwessie van dringendheid alternatiewe staf in diens sal moet neem indien nie aan sy ul timatum gehoor

gegee word nie. Ander faktore wat ter sprake kan kom, is die al of nie billikheid van die werkers se eise, die werkgewer se vermoë om daaraan te voldoen, die werknemers se reaksie op die werkgewer se ver-duidelikings en ultimatum, ens.

Ten koste van herhaling moet die klem nou op die volgende geplaas word. Die werkers se griewe was nie terug te voer na voorafgaande onredelike optrede van die appellant nie. ('n Betoog dat die appellant opsetlik erkenning van die vakbond en die toestaan van aftrekorderfasiliteite probeer vertraag het, het niks om die lyf nie.) Geen kennis van 'n voorneme om te staak wat onderhandelinge moontlik sou maak, is gegee nie. Die werkers se eise was tot hul kennis grof onredelik. Hul reaksie na die finale ultimatum en pleidooie om na hul werk terug te keer was een van 'n finale besluit om met die staking voort te gaan deurdat hulle uitgeklok en die gebou

verlaat het. Dit was ook nie asof hulle nog advies van die vakbond afgewag het nie - hulle was reeds deur Masala geadviseer dat hulle nie moes staak nie. Ten slotte was die werkers bewus dat dit vir die appellant baie moeilik sou wees om daardie aand sy produksies aan te bied indien die staking sou voortgaan. Vanaf Bezuidenhout se eerste versweë ultimatum aan die vertrouensmanne wat stellig aan die werkers oorgedra is, het ongeveer 'n uur verloop waarin die werkers kon besin het. Om onder hierdie omstandighede aan te voer, soos die respondent wel gedoen het, dat die ultimatums onredelik kort was, staan gelyk aan die stel van 'n premie op 'n summiere staking en grof onbillike optrede van die werkers in verband daarmee.

Maar selfs al sou die appellant 'n langer ultimatum moes gegee het, volg dit nie dat die ontslag onbillik was nie. Dit sou die geval ge-

wees het slegs indien wat as 'n redelike tydperk vir besinning beskou word nie tot ontslag sou gelei het nie. Immers, indien dit volgens een of ander bewys-maatstaf vasstaan dat 'n redelike ultimatum in elk geval nie tot 'n beëindiging van die staking sou gely het nie, kan die ontslag na 'n korter ultimatum nie as onbillik aangemerk word nie. En waar die werkers in casu hulle daaroor bekla dat die appellant hom aan 'n onbillike arbeidspraktyk skuldig gemaak het, rus die las na my mening op hulle om juis dit te bewys. Hulle moet dus ook bewys dat indien hulle 'n redelike tyd vir oorweging gehad het, hulle nie ontslaan sou gewees het nie omdat hulle aan die ultimatum gehoor sou gegee het.

Nie een van die werkers, behalwe Phetla, het getuig nie. Ek meen dan ook dat die appellant hom met reg bekla het oor die selektiewe wyse waarop die respondente getuies opgeroep het, of liewer nie

0 opgeroep het nie. Trouens, die respondente se enigste getuie was Phetla wat heel toevallig die enigste vertrouensman was wat nie die byeenkoms van 24 September bygewoon het nie. Daar is dus geen direkte getuienis dat indien die ultimatum gelui het dat die werkers die volgende oggend op hul poste moes wees, hulle die staking sou beëindig het nie.

Die respondente vra egter dat 'n afleiding in hulle guns gemaak moet word. Hulle wys naamlik daarop dat Masala reeds kort na die werkers se ontslag aangebied het dat hulle na hul werk sou terugkeer. In eerste instansie is daar egter niks wat daarop dui dat Masala hierdie aanbod namens die werkers gemaak het nie. Uit Phetla se getuienis blyk naamlik dat op hierdie stadium slegs die vertrouensmanne en 'n handvol werkers by die vakbond se kantore was - die grootste gros werkers was reeds huistoe. Tweedens is 'n reaksie na 'n afdanking hoegenaamd nie met een tydens die duur van 'n

ultimatum gelyk te stel nie. Die waarskynlikhede is dat die werkers die middag toe die ultimatums gerig is, gemeen het dat die appellant met 'n blufspel besig was en dat die appellant dit nooit sou waag om die daad by die woord te voeg nie. Daar is dan ook niks wat daarop dui dat indien die ultimatum eers die volgende oggend sou verstryk, hul opvatting van die blufspel enigsins anders sou gewees het nie. En indien dit die geval was, sou hulle gereageer het eers nadat dit die volgende dag geblyk het dat hulle hul aangaande die appellant se erns misreken het. Dit blyk vir my dus nie as 'n waarskynlikheid dat 'n langer ultimatum die werkers tot hulle sinne sou geruk het nie.

Ek sou dus die appèl handhaaf en die bevel van die hof a quo en die toekenning van die nywer-heidshof tersyde stel.

H J O VAN HEERDEN AR