CASE NO. 314/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE COUNCIL FOR SCIENTIFIC AND INDUSTRIAL RESEARCH

APPELLANT

and

A P M FIJEN

RESPONDENT

CORAM: VAN HEERDEN, SMALBERGER, VAN DEN HEEVER, HARMS et OLIVIER, JJA

HEARD: 9 NOVEMBER 1995

DELIVERED: 24 NOVEMBER 1995

J U D G M E N T

HARMS JA/ ...

HARMS JA:

This is an appeal from the Labour Appeal Court, Cape (the "LAC"). The LAC upheld an appeal from the Industrial Court and determined a labour dispute between the respondent, as employee, and the appellant, the employer, in favour of the former. It found that the dismissal of the respondent by the appellant was substantively and procedurally unfair and therefore constituted an unfair labour practice. An order for compensation was made. The LAC was divided. Farlam J and one assessor, Mr Dodson, were responsible for the majority finding. Another assessor, Mr Loubser, agreed with the view of the Industrial Court (Prof Schwietering AM) that the dismissal had been fully justified. The appellant appeals with the leave of Farlam J against the determination of the unfairness only. The amount of the compensation is not in issue.

The respondent is a marine pollution engineer. He

obtained his engineering qualification at the University of Delft and entered the employ of the appellant during November 1985. It is not disputed that until the determination of his employment with effect from 30 April 1992, he had been a conscientious and competent employee. However, towards the beginning of that year a confidence crisis developed and this led to his action referred to later and the appellant's reaction of dismissing him.

The material facts are not in dispute and the LAC did not make any factual findings of consequence - it merely recited the evidence. This Court is thus not unduly hamstrung by the judgment of the LAC.

During December 1991 the appellant received information from Mr Botes, a co-worker of the respondent, to the effect that the respondent had breached his conditions of service. He had, allegedly, offered to do private work for remuneration without the consent of the appellant. Botes also implicated himself and as a result

the respondent and Botes were both charged in January 1992 with misconduct under the disciplinary code that forms part of the conditions of service. Their immediate superior, Mr Russell, seems to have been the only witness at the hearing on 5 February 1992. The two accused refused to testify. They were found not guilty on the basis that the charge had not been proved beyond reasonable doubt. After the disciplinary hearing, its chairman and the head of the division in which the respondent was employed, Dr Swart, had a conversation with the respondent. The purpose of the conversation was to smooth the working relationship between the respondent and Russell. Clearly it had been severely damaged: Russell believed that the respondent's questioning of him was not based on the truth, and the respondent that Russell had lied. According to the respondent Swart left the impression with him that Swart did not believe in his innocence.

It serves no purpose to deal in any greater

detail with the facts except in as far as they appear from

letters exchanged between the parties. Although tedious, it

is necessary to quote them fully.

[1] A letter from the respondent to Dr Swart dated 13

February 1992:

> "Herewith I want to confirm in writing a discussion I had with Mr K S Russell on Thursday February 6th.
>
> I informed Mr Russell that I do not want to continue being in the employment of the CSIR.
>
> The disciplinary hearing on Wednesday February 5th and the weeks leading up to this hearing, have made it clear that a normal working relationship between the CSIR/EMATEK and myself has been permanently damaged.
>
> I am not putting in my resignation as the reasons for asking termination of the working relationship are not voluntary. In my opinion, the actions of the CSIR/EMATEK are largely responsible for the fact that I consider a normal working relationship no longer possible.
>
> Maybe a voluntary redundancy, together with a financial package which include a full pension refund, is the appropriate mechanism for terminating our working relationship.
>
> I will be very pleased to receive your early reply."

[2] Dr Swart's reply of 24 February:

> "I confirm receipt of your letter dated 1992-02-13.
>
> During my discussion with you I explained the policy followed by EMATEK regarding retrenchments. Your letter, however, necessitates a more formal clarification regarding the above.
>
> The procedures followed, leading up to and including the disciplinary hearing were all correct and necessary under the circumstances. The resultant outcome was such that the status quo as prior to the action leading to the hearing was reinstated.
>
> It is unfortunate if you should regard the working relationship between EMATEK and yourself as changed in any way. Where EMATEK is concerned, with myself as the spokesman, we have concluded a disciplinary procedure and are regarding the outcome as the conclusion of the procedure with no resultant change in the working relationship.
>
> With regards to your suggestion for voluntary retrenchment, I would like to clarify the CSIR policy and thus rule out any negotiation regarding this policy:
>
> Retrenchment is the last action taken after meticulous investigation into the viability or necessity of certain positions, linked to our strategic market focus.

It should be noted that once a position has been declared redundant, we are not allowed to refill the position without having the objectivity of our investigation questioned.

In your instance the position you are currently filling is a key position and we would not consider declaring it redundant as that would jeopardise our future operational viability.

Please do not hesitate to contact your programme manager, the Human Resources department or myself should you have any further questions in this regard."

[3] The respondent's immediate reaction of the same date

but transmitted the following morning:

"TERMINATION OF WORKING RELATIONSHIP

Dear Harry

Reference is made to your LAN-message dated 24/2/1992 as answer to my original letter dated 13/2/1992.

You will recall that in my original letter I suggested that maybe a voluntary redundancy would be the appropriate mechanism for terminating our working relationship. During our discussion that same day (13/2/1992) after I handed in my letter, I also stated that this was only one suggestion and that there are other mechanisms as well, which would include some form of financial compensation.

The fact remains that a normal working relationship between the CSIR/EMATEK and myself is totally and permanently damaged.

How can you say in your letter that you regard there is no resultant change in the working relationship, when you yourself stated at our meeting immediately after the hearing, that you thought my relationship with Mr Ken Russell was seriously damaged? In addition, several remarks by both you and Mr Russell, have made it abundantly clear that neither of you have accepted that I actually really could be innocent.

You claim in your letter, that the procedures followed leading up to and including the disciplinary hearing were all correct and necessary, I disagree. They were not necessary: an initial discussion between you and me would have been much more appropriate especially considering the fact that I have been a loyal employee for over 6 years. The procedures were also not correct:

* The letter from Ms Bodenstein (typed on 13/1/1992 but received on 15/1/1992) assumes I am guilty.

* Both this letter and article 3.2 page B2 of the conditions of contract state that an investigation will be held. This never took place according to Mr Russell's evidence.

* Only after the investigation is it

decided that a disciplinary hearing will take place. You however decided on a disciplinary hearing way before I even got Ms Bodenstein's letter.

* Mr Russell made various incorrect statements at the hearing.

* Allowing Mr Botes and myself the option to make a statement either under oath or not under oath is a deviation of the procedures that is not contained in the conditions of contract.

* Both you and Mr Russell were clearly biased: You insisted on a hearing before carrying out an investigation while Mr Russell said at the hearing that he still considered that I had sent a private proposal to Mossgas, although he had absolutely no proof of this matter whatsoever.

The above, as well as the clumsiness of the charges, have the appearance of a 'witch-hunt', rather than wishing to find out what actually happened.

As a result I have completely lost faith in you as my divisional director and in Mr Russell as my immediate supervisor. That is why our working relationship is totally and permanently damaged, through actions beyond my control.

The fact that you consider a redundancy not to be a viable mechanism in my case can actually also

be questioned. I was a marine pollution engineer in the marine pollution programme. Not only was the marine pollution programme disbanded, but the group was also strongly reduced in numbers and project leadership for marine pollution projects was effectively transferred to Mss Taljaard and Skibbe (something for which no reasons were ever given). My position has already disappeared. Nevertheless you as director can financially compensate me by any other mechanism you may care to think of. I am sure you have full authority to write such a letter right now.

Our working relationship finished the day after the hearing. That was 3 weeks ago already and it is now time to bury this affair.

I look forward to hearing your reply by no later than Friday morning."

[4] Dr Swart's provisional answer of 28 February:

"RETRENCHMENT

I acknowledge receipt of your telefax dated 1992-02-25.

I refer you to my letter dated the 1992-02-24. I reiterate that retrenchment is not a possibility as fully discussed in my said letter.

With regard to the other letters [matters] mentioned in your telefax, I must inform you that I am considering same and am also taking advice. A further communication will accordingly be addressed to you as soon as possible."

[5] Dr Swart's final letter of 27 March:

"TERMINATION OF SERVICES

I refer to your electronic mail communication received on 25 February 1992 and my letter to you dated 28 February 1992. I have now had the opportunity to consider the matter in detail and wish to advise you as follows.

As previously indicated to you, there are no grounds on which you can be considered for redundancy. For its part the CSIR has accepted the findings of the Disciplinary Committee and regards the matter as closed.

From the contents of your abovementioned communication it is clear, however, that you do not wish to continue your working relationship with the CSIR. You had already indicated in your hand written note date 13 February 1992 that you '... do not want to continue being in the employment of the CSIR'.

This statement together with the heading to your message of 25 February 1992 (ie TERMINATION OF WORKING RELATIONSHIP) read together with the remark in the penultimate paragraph of the latter, namely that *(o)ur working relationship finished the day after the hearing', clearly constitutes a repudiation of your service contract with the CSIR. You have quite clearly persisted in this attitude in spite of all efforts from our side to preserve the working relationship.

In the circumstances I am left with no

alternative but to inform you that it has been decided to accept your repudiation of your service contract. In terms of the CSIR Conditions of Service you would ordinarily be obliged to give one (1) calender month's notice of termination of service. In the circumstances, however, we are prepared to waive this requirement and should you so wish your services may terminate immediately. Should I not hear from you to the contrary your services will terminate with close of duty on 30 April 1992.

As your salary for March 1992 has already been paid into your banking account no further remuneration will be payable to you if you choose to terminate your services immediately. As your services have not been terminated for disciplinary reasons you will, as in the case of an ordinary resignation, be entitled to payment of the cash value of the accumulated leave to your credit. Up to the end of March 1992, ten (10) days leave are due to you to the value of R3022,84. You will also be paid a pro rata share of your annual service bonus.

The Associated Institutions Pension Fund of which you are a member will be notified of the termination of your services immediately and the resignation benefit to which you will be entitled will be forwarded to you upon receipt. Please keep us advised of any change of address.

It would be appreciated if you would kindly hand back all CSIR property in your possession, such as library books, calculators etc. Your CSIR identity card must please be handed to the

Personnel Office upon your departure.

In closing, I would like to wish you success in your future career."

This letter did not bring to an end the argument, but the subsequent correspondence is not of relevance in determining whether or not the termination of the respondent's services was an unfair labour practice.

The respondent based his claim before the Industrial Court on two grounds. The first was that his dismissal was substantively unlawful and unfair in that he had been dismissed without having breached his contract of employment. His dismissal was thus without lawful cause or without a valid, fair or sufficient reason. The other ground was that it had been procedurally unfair because he was dismissed without being afforded a hearing. Although it is usually convenient in considering whether a dismissal amounts to an unfair labour practice to have the twofold inquiry envisaged in the claim, it is hardly essential. Sometimes it may even be impossible to do so. It is in this

case particularly difficult to maintain the dichotomy, but I shall nevertheless attempt to do so.

The appellant's case was, to an extent, that it did not dismiss the respondent; it was the respondent who had ended the working relationship. It is true that in the letter [5] the appellant did at times attempt to interpret the respondent's action as a resignation, but I agree with the LAC that the appellant's argument must, in this regard, be rejected. There can be no doubt that the respondent was dismissed. The fact that the appellant annexed unilateral conditions to the dismissal, makes no difference to that conclusion. (I refer here to the fact that the dismissal was only to take effect on 30 April and that the ordinary "resignation benefits" were accorded to the respondent.)

As far as the respondent's allegation that he was dismissed without having breached his contract is concerned, the appellant's response in its "pleading" was that the respondent's "attitude" evinced in the quoted

letters "constituted a repudiation of his service contract". Both the Industrial Court and the majority of the LAC came to the conclusion that the letters did not amount to a repudiation of the contract. It was on the simple basis that the respondent in both letters made it quite clear that he wished to remain in the employ of the appellant pending a settlement of his claim. He was entitled to inform his employer of his intention to leave at some future date and to attempt to extract in the meantime some kind of compensation. He continued in his employment and proceeded to do his day-to-day work on a full-time and satisfactory basis. He thus did not evince a clear and unambiguous intention not to go on with his contract of employment.

I agree that the respondent did not repudiate the contract of employment in the narrow sense set out by the courts below. That is not the end of the inquiry. The correct question to ask appears to me to be whether the

respondent's "attitude" constituted a material breach of his contract ("repudiation" in the wide sense), a breach that entitled the appellant to cancel it. This issue was, in spite of the label of "repudiation", properly raised by the appellant.

Before attempting to answer the question thus formulated, it should be noted that the conditions of service do not allow the employer to cancel the employment contract on notice unless certain other factors are present, none of which is now pertinent. The disciplinary code permits the dismissal if, after a formal hearing, the employee is found guilty of "misconduct", a term defined in the code with a great degree of particularity. I shall in due course return to the applicability of the code. It suffices to state at this juncture that the respondent was not dismissed in accordance with the provisions of his contract.

Mr Pretorius, on behalf of the appellant, relied

> on an English rule of law. It is that in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. This implied term may be breached without the intention to repudiate the contract. It is sufficient if the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. See Halsbury's Laws of England, 4th edition (reissue) par 44 and the cases there cited. He submitted that a reciprocal duty rests on the employee although he was not able to quote any English authority to that effect. These principles, he said, apply

in our law.

It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly

inconsistent therewith entitles the "innocent" party to cancel the agreement (Angehrn and Piel v Federal Cold Storage Co Ltd 1908 TS 761 at 777-778.) On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgments in the LAC to this effect (e g Humphries & Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union (1991) 12 ILJ 1032 (LAC) 1037G). I may add that this much was not placed in issue for the respondent by Mr Scholtz. It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from naturalia contractus.

As far as the breach of the duty by the respondent is concerned, Mr Scholtz, quite correctly in my view, conceded that the letters do establish it. The respondent not merely stated his intention to leave the employ. He repeatedly emphasised that the working

> relationship between him and the appellant, and also between him and his superiors, had been permanently and totally damaged and "was finished". He accused his superiors of "clear bias" and stated that he had lost all faith in them. He accused them of conducting a witch hunt against him. And he emphasised that he was only staying on in order to extract from the appellant (a public statutory body) a payment to which he had no entitlement. The expression of such sentiments places an employer in an invidious position. It destroys his faith in and goodwill towards the employee. This means that the appellant was, in my view, in law entitled to dismiss the respondent.

The LAC held that since the conduct of the respondent "did not go so far as to constitute a repudiation", his conduct did not amount to a fair reason for dismissal and that in these circumstances the dismissal was substantively unfair. I have already expressed the view that the conduct complained of did amount to a material

breach of the contract in the sense set out. It follows that I disagree with the basis of the LAC's judgment on this aspect of the case.

A lawful dismissal is not necessarily a fair dismissal. On this part of the inquiry Schwietering AM in the Industrial Court held as follows:

> "Why did respondent [the present appellant] terminate applicant's employment? Because it wanted to get rid of an employee who had made up his mind and who had made it quite clear to respondent that he wanted to remain in respondent' s employment for only as long as it took him to induce respondent to sever relations with applicant on a basis which applicant found acceptable. Respondent could not be expected to put up indefinitely with an ongoing confrontation in which mutually contradictory arguments were tossed to and fro. Applicant since the hearing in February had taken the stand that a healthy working relationship had ceased to exist. He tried to bring the unhealthy relationship to an end in a certain way. Respondent told him that that way was not open. Applicant would not take no for an answer. He thought that respondent would eventually capitulate. Respondent decided to end the game. I cannot regard this as a decision not based upon a fair reason."

The majority of the LAC disagreed. It was of the

view that the respondent was merely proposing the termination of the agreement and he had the right to motivate it. This is in my judgment not a fair interpretation of the correspondence. It emphasises the one leg of the letters and ignores the other. The majority of the LAC also found that the evidence is clear that the appellant took no steps, once the respondent's dissatisfaction became clear, to restore a normal working relationship between the respondent and his superiors. What these steps should have been, was not stated. Mr Scholtz suggested that there should have been a consultation. Since the respondent was only interested in discussing financial compensation as a condition for his resignation, I fail to see what the purpose of the consultation would have been.

I believe that the letter [2] was a fair and reasonable response from an employer in the circumstances of the case.

The respondent's emotional outburst in [3] was inappropriate, especially if one considers that he is a

well-educated professional employed by a scientific, public and professional body.

A value judgment must now be made, taking into account all the evidence and factors set out earlier. On balance I believe the dismissal was fair especially in the light of the seriousness of the respondent's allegations against his employer. His fixed state of mind as expressed in his letters did not require of the appellant to act in any other manner. Had the nature of the employment been different and the employee an unsophisticated labourer, the conclusion may have been different.

As far as procedural fairness is concerned, Mr Scholtz relied on the disciplinary code. He submitted that the respondent's conduct as manifested in his letters amounted to misconduct as defined in the code; the respondent should have been charged; the prescribed procedure should have been followed; the failure to comply with the prescribed and agreed procedure made the dismissal

unfair. This was never the respondent's case. The definition of "misconduct" relied upon by counsel does in any event not fit the facts of this case. By no stretch of the imagination can it be said that the respondent refused or neglected "to comply with any of these conditions of service which apply to him" or that he conducted himself "in a disgraceful, improper or unbecoming manner".

I should point out that although no hearing in the conventional sense of the word preceded the dismissal, it does not mean that the audi alteram partem rule was not complied with. This rule has no fixed content. The respondent stated his case twice, in [1] and [3]. The appellant had no factual version to put to the respondent. There were no facts that the respondent had to meet. There were no allegations he had to answer. His views, stated plainly, were known. All that was really left, was for the appellant to value their import and to decide how to act or react.

It was submitted that the respondent was entitled to a reasonable ultimatum. He had received none. The LAC took a similar approach to the issue. It relied on a dictum by Smalberger JA in a minority judgment in Administrator Transvaal v Theletsane 1991 (2) SA 192 (A) at 206D to the effect that a hearing cannot be said to be fair unless there is "notice of the contemplated action", something that is missing in this case.

In Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union 1994 (2) SA 204 (A) it was held, in the context of dismissal due to disciplinary reasons, that an employer should not act overhastily and that a reasonable ultimatum should first issue (at 216B-D). That was not a legal requirement but was predicated on the facts of the particular case (cf at 215F-216B). See also Slagment (Pty) Ltd v Building Construction and Allied Workers' Union 1995 (1) SA 742 (A) at 755F-756B. The appellant in this case did not act

with undue haste. On the contrary, Mr Scholtz argued that the appellant was dilatory in not acting sooner after the receipt of the letter [3] - it had delayed its action for a month. As far as the lack of an ultimatum is concerned, it should be noted that it was not an issue raised by the respondent in its statement of case and I doubt that he is entitled to rely on this point. It was not even canvassed during the evidence. (Of Slagment at 752H-J.) In addition, I again fail to see what an ultimatum should have comprised or what its purpose would have been. It may have been different if the respondent's breach were not accompanied by the expression of his fixed intention to leave.

Concerning the dictum from Theletsane, I am unable to subscribe to it as a general proposition. It is not expected of a judicial officer to give notice of his "contemplated action" in, say, a criminal trial and there is no reason why, as a general rule, an employer should do so. To "contemplate" the specific action before the hearing

may also, in given circumstances, be unfair. The employee need not be informed of all the alternative disciplinary measures available to the employer to make a hearing fair. In any event, I do not believe that Smalberger JA intended to formulate a general rule for fairness. This appears from his remarks (at 206A-D) preceding the quoted dictum. Having concluded earlier that an ultimatum was not called for, it follows that in my judgment it was not incumbent on the appellant to have given the respondent notice of the contemplated action of dismissal.

In the result the appeal must succeed and the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced by an order that "the appeal from the

Industrial Court is dismissed with costs."

L T C HARMS JUDGE
OF APPEAL

VAN HEERDEN, JA)
VAN DEN HEEVER, JA) AGREE
OLIVIER, JA)