

WIKUS VAN RENSBURG ATTORNEYS

Labour Law Practitioner & Attorneys

36 Western Road, CENTRAL, PORT ELIZABETH, 6001 P O Box 12339, CENTRAHIL, 6006
Tel: +(27) 41 582-2205 / 582-2737, Fax: +(27) 41 582-3131
eMail: wvratt@mweb.co.za

NEWSLETTER 12

Jabari v Telkom SA (Pty) Ltd [2006] 10 BLLR 924 (LC)

Dismissal – Automatically unfair – Victimisation – Employee dismissed for initiating grievances and litigating against employer – Dismissal automatically unfair. Dismissal – Incompatibility – Employee dismissed for alleged incompatibility but true reasons were his complaints against management and fact that he litigated against employer – Dismissal automatically unfair. Dismissal – Incompatibility – Test for – Employer must prove that disharmony in workplace was cause of employee's conduct and give employee opportunity to correct conduct.

Summary

The applicant, a specialist investigator, was dismissed after the chairperson of a disciplinary inquiry found that the employment relationship had irretrievably broken down because he was incompatible with the respondent's "corporate culture". The applicant contended that his dismissal was automatically unfair because he was dismissed for initiating grievance and legal proceedings against the respondent's management and for rejecting a voluntary severance package. At the trial, however, the applicant declined to give evidence, and called no witnesses on his behalf. The respondent alleged that as a result of a deterioration of the trust relationship with the applicant, he was approached to discuss an amicable means of terminating the employment relationship. This course was chosen because the applicant had persistently litigated against the respondent, in most instances unsuccessfully. When applicant finally refused a voluntary severance package, disciplinary steps had been instituted.

After reviewing the incidents on which the respondent relied for its claim of incompatibility, the Court noted that the respondent had conceded that the applicant had not been accused of misconduct and that he had at all times performed his duties in terms of his contract of employment. If, as the respondent claimed, the applicant had been arrogant, uncooperative and insubordinate, it was inconceivable that disciplinary action would not have been taken against him earlier. No evidence was presented to support the respondent's claim that the applicant had demoralised his colleagues. The issue was therefore whether the applicant was incompatible.

Incompatibility is a species of incapacity, relating essentially to the subjective relationship of an employee to his or her colleagues. It is an amorphous and nebulous concept, based on subjective value judgments. However, an employer is entitled to set reasonable standards pertaining to relationships in the workplace. When the conduct of an employee creates disharmony, the employer must evaluate the problem and attempt to assist the employee to overcome his or her personal difficulties, effect remedial action and, if necessary, place the employee in an alternative position. To justify a dismissal for incompatibility, the employer must prove that the intolerable conduct on the part of the employee was the primary cause of the disharmony. The inquiry entails proof that the disharmony was the fault of the employee. The employee must be given an opportunity to remove the cause of the disharmony, and if this cannot be achieved, to reply to the allegation. The respondent had led no evidence to prove that any of these steps had been followed, or that the applicant's conduct was the cause of any disharmony. His dismissal was accordingly unfair.

The Court held further that the dominant reason for the applicant's dismissal was that he had initiated grievance proceedings against management, and challenged its unfair labour practices. A secondary reason was that he had refused to accept a voluntary severance package. The respondent's contention that the employment relationship had irretrievably broken down was not proven by the evidence. The applicant's dismissal therefore constituted victimisation, and rendered the dismissal automatically unfair.

Turning to relief, the Court held that it would be contrary to public policy to protect the respondent from its illegitimate and unfair conduct by denying the applicant reinstatement. The applicant was reinstated with retrospective effect to the date of his dismissal.

Senior Attorney: Lodewikus van Rensburg, B. Proc, MA in Conflict and Conflict Resolution
Attorney: Julius B Pauw, LLB
Candidate Attorneys: J Forbes, LLB; D Gondoza, LLB, LLM in Labour Law
Consultant: Martinus Jacobs, ND: HRM
Office Manager: Amy Stone