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## NEWSLETTER 14

### NUM & others v Billard Contractors CC & another [2006] 12 BLLR 1191 (LC)

After the second respondent purchased an insolvent brick manufacturing business, the first respondent was formed to supply labour to that enterprise. Workers engaged by the first respondent raised a number of grievances, including the suspension of a NUM shop steward. After several brief work stoppages, the first respondent met the union representative, who denied that the previous work stoppages constituted strike action because, so he said, no dispute had been declared and the matter had not been referred to the CCMA, and because the workers were "frustrated". The first respondent indicated that the next unprotected strike would lead to dismissals. The following day, the employees left their work stations and congregated at the entrance to the second respondent's premises. Soon after this, the workers were issued with a lengthy memorandum in which the workers were inter alia informed that they were engaged in an unprotected strike, and invited to provide reasons why they should not be dismissed. The first respondent then dismissed about 240 workers, among whom were 14 who had not been on duty on any of the five days on which work stoppages had occurred, and 25 of whom were not on duty on the day they were dismissed. About 40 employees were subsequently re-employed by the second respondent. The union contended that the dismissals of all the employees were substantively and procedurally unfair, and that relief should be granted against the second respondent, who was the true employer. The respondents conceded that the dismissal of the 14 was unfair, but contended that the 25 had made common cause with the other strikers during the work stoppages preceding the final strike, and that the dismissals of all these strikers were fair.

Dealing first with the **substantive fairness** of the dismissals, the Court rejected the argument that the dismissal of the 25 could be said to be fair simply because they had participated in the earlier stoppages. They were dismissed for the work stoppage that occurred on the final day of their service, and had not been called to account for the earlier incidents. Their dismissals were therefore substantively unfair. As for the remaining employees, the Court accepted that each work stoppage had been initiated by the workers themselves, and not by either of the respondents, as the union claimed. The workers had not based their case on a claim that the strikes were a response to unjustified conduct by the respondents. Having regard to the seriousness of these strikers' contravention of the LRA, the Court held that there was a fair reason to dismiss them.

**Turning to the claim of procedural unfairness**, the Court noted that in *Modise v Steve's Spar Blackheath [2000] 5 BLLR 496 (LAC)* the Labour Appeal Court had held that strikers must be afforded a hearing before being dismissed, but had not indicated whether hearings should be held before or after the ultimatum was issued. However, the LAC had in that case inclined to the view that strikers should be afforded a hearing before an ultimatum is issued. The Court held that the hearing contemplated in Steve's Spar is part of pre-dismssal procedure. An ultimatum is akin to a final warning, the purpose of which is to provide for a cooling off period before a final decision to dismiss is taken. This is why an ultimatum is among the procedural steps prescribed by item 6 of the Code of Good Practice: Dismissal.

The **Court held further that** a hearing before an ultimatum is issued should deal with whether it is fair to issue a final warning in the form of an ultimatum. Material to this question is whether the strikers are engaged in an unprotected strike and, if so, whether it would be fair to dismiss strikers who might fail to comply with the ultimatum. However, a hearing before an ultimatum cannot deal with whether, as a matter of fact, workers subsequently complied or attempted to comply with the ultimatum. For this reason, it may be necessary to apply the audi rule both before issuing an ultimatum and again after the ultimatum has expired, either before or after workers who have failed to comply with the ultimatum have been dismissed. Whether such a hearing, which would of necessity be collective in nature, should be held before or after the dismissal would depend on the circumstances. Turning to the facts, the Court noted that no hearings had been afforded the strikers before or after their dismissals. The respondents had taken the view that once the strikers had been dismissed, their opportunity to make representations had passed. However, this view failed to take into account the distinction between an ultimatum and the kind of hearing contemplated in Steve's Spar. The strikers' representatives had been afforded an opportunity to defend their contention that they had not engaged in unlawful strikes before the notice was given. But that notice was not an ultimatum in the true sense; it merely requested the workers to give reasons to state why they should not be dismissed. However, the respondent had not given the strikers a reasonable time to do so before dismissing them. The dismissals were accordingly premature and therefore procedurally unfair. Turning to **relief**, the Court held that, although it was clear that the second respondent had considerable influence over the first respondent, labour broking arrangements are specifically permitted by the LRA, and there is no provision for holding labour brokers and their clients jointly and severally liable in the case of dismissals.The **Court ordered** the first respondent to reinstate the 14 employees who had been dismissed for taking part in the earlier strikes, with back pay equivalent to 12 months' remuneration. The remaining employees were each granted compensation equivalent to two weeks' wages.


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