FAWU & others v Rainbow Chicken Farms
[2000] 1 BLLR 70 (LC)

Division:	Labour Court, Cape Town
Date:	Not given
Case No:	**C258/98**
Before:	Revelas, Judge

Flynote

Application in terms of section 191(5)(b)(i)

Dismissal – Automatically unfair – Employees dismissed for collectively deciding to take day off to celebrate religious holiday – Dismissal operationally justified as employees' action could have brought production to a halt or forced all employees to take day off, irrespective of their religious persuasion.

Disciplinary procedure – Sanction – Employer offering employees choice between dismissal subject to appeal and accepting final warning without right of appeal – Forcing employees to make this choice ambiguous and unfair.

Disciplinary penalty – Employer offering employees choice between dismissal subject to appeal and accepting final warning without right of appeal – Forcing employees to make this choice ambiguous and unfair.

Discrimination – Religious – Employer refusing to allow workers day off to celebrate religious holiday – Such refusal not unfair unless employer permits some members of religion concerned to take day off, and others not.

Dismissal – Misconduct – Unauthorised absence – Employer not generally permitted to dismiss for unauthorised absence at first instance unless absence accompanied by element of insubordination – Employees dismissed for staying away from work to celebrate religious holiday – Dismissal unfair.

Strike – What constitutes – Employees unilaterally deciding to stay away from work to celebrate religious holiday – Such action, though collective, not amounting to strike as not accompanied by demand with which employer could comply.

Sections of the Act considered:

Section 187(1)(f)

Section 213 (definition of "strike")

Editor's Summary

The individual applicants, all butchers at the respondent's chicken processing plant, were dismissed for collectively refusing to work on a religious holiday. They were all Muslims, and had been appointed specifically because the respondent's chickens are slaughtered according to Halaal standards. This requires slaughtering to be done by persons who practice the Islamic faith. The holiday concerned was the day of the Eid ul Fitr. In terms of a collective agreement between the first applicant and the respondent, employees were entitled only to gazetted public holidays, which did not include Eid ul Fitr. The Muslim employees advised the respondent in 1998 that they would rather not

work on that day. The individual applicants then proposed to work on Saturdays and overtime so that production that would be lost if they did not work over the holiday could be made up. The respondent did not accept these proposals, and the individual applicants stated that they would not attend work on the Eid ul Fitr. After they failed to report for work on that day, the individual applicants were found guilty on a charge of "collectively refusing to work as per contract", they were offered the choice between being dismissed, with the right of appeal, or receiving final warnings, but without the right to appeal. They chose the former option and their dismissals were upheld on appeal. The applicants contended that their dismissals were automatically unfair or, alternatively, that their conduct did not warrant dismissal. The respondent contended that the individual applicants' conduct amounted to an unprotected strike.

The Court noted that operations at the respondent's plant were saved from being brought to a complete standstill on the day in question only by the respondent's efforts to obtain replacement butchers. The Court held that the individual applicants were not discriminated against unfairly. Unfair discrimination could only be said to have taken place if it were shown that the employer had permitted some employees to take a particular day off to celebrate their religion and refused to allow others to do so, provided that giving all employees of that religion the day off would bring work to a standstill. If the applicants had been given the day off on Eid, no work could have been done at the respondent's plant. This meant all the respondent's employees would have had to take the day off, irrespective of which faiths they belonged to. Although the individual applicants had been employed specifically because they were Muslims, it was operationally justified to compel them to work on religious holidays that were not official public holidays.

Turning to the respondent's contention that the individual applicants had engaged in an unprotected strike, the Court held that the individual applicants had simply refused to work because of their religious beliefs. They had not made any demand with which the respondent could have complied if it so wished.

As to whether the applicants' conduct warranted dismissal, the Court held that, in the absence of prior offences, an employer is not entitled to dismiss an employee for unauthorised absence, particularly when the employee had given some explanation for the absence, unless the absence was coupled with an element of insubordination. The intransigence of the individual applicants had been indicative of insubordination. Even so, dismissal was not the appropriate sanction. The respondent's decision to make them choose between a dismissal subject to appeal and an unappealable final warning was ambiguous and unfair. Furthermore, the individual applicants had not absented themselves from work for a frivolous reason; they were standing up for a principle. Effectively, the choice had meant that the individual applicants had been forced to "dismiss themselves".

The Court observed that its judgment should not be read as a licence for workers of the Muslim faith to absent themselves from work on their religious holidays. However, it suggested that a compromise should be reached in terms of which the butchers could participate in religious celebrations.

The individual applicants were reinstated.

Judgment

Revelas J

[1] There are thirteen individual applicants in this matter. Twelve of them had been in the employ of the respondent as butchers until their dismissal by the respondent. The second applicant was the supervisor.

[2] The respondent is a well-known company which carries on business as an integrated farming operation, involved in the production, processing and marketing of broiler chickens.

[3] The processing of the chickens involves slaughtering, plucking, cleaning and the removal of internal organs. 120 000 chickens are slaughtered daily at the respondent's Worcester plant, where the applicants were employed.

[4] Country-wide, not only at the Worcester plant, the respondent's slaughtering methods conform to Halaal standards, approved by the Muslim Judicial Council ("MJC"). The respondent sells chickens slaughtered in accordance with this standard only. Accordingly, it is an operational requirement that the butchers who slaughter the chickens are persons who practise the Islamic faith and who have the approval of the MJC to slaughter according to the Halaal method, which briefly means that an Islamic butcher may not consume alcohol or take drugs. According to the evidence of Dr Faried Essack, the expert witness who gave evidence about the Muslim religion, such butchers must be of a certain "religiosity". I understood his evidence to mean that Halaal butchers should ideally be, and often are, more serious about practising the Islamic faith than other Muslims who do not perform their daily work in accordance with a particular Islamic ritual.

[5] In the applicants' statement of claim the following was said about the respondent's butchers [at paragraph 13]:

> "The most valuable people [*sic*] at the respondent are the slaughterers, because without them there is no need for the plus/minus 2 000 other workers who are

employed in packaging. Their work is dependent on the slaughtering to take place and without slaughtering no products will be forwarded to them."

[6] The twelve slaughterers are divided in two groups of six each, who operate two working shifts. The working hours for the first shift is from 06h00 to 14h30, and the second shift is from 15h00 to 24h00. Six slaughterers and one supervisor present themselves for the first shift, and the other six slaughterers and one supervisor present themselves later for the second shift. 60 000 chickens are slaughtered per shift. There are approximately 1 400 other employees at the respondent's premises. There was no evidence presented as to which faith they belonged to.

[7] It is common cause that the second applicant and the twelve butchers ("the individual applicants") were absent from work without the respondent's permission on 30 January 1996. This was the day of Eid ul Fitr ("Eid"), a Muslim religious day annually celebrated by the Muslim community. The individual applicants wished to celebrate this day with their families and say the relevant prayers. In the past, the individual applicants worked on this particular religious day. However, since the Constitution has seen the light as explained to me by Dr Essack a stronger sentiment developed that employees, particularly Halaal butchers, should not work on Eid.

[8] It was undisputed evidence before me that on 10 November 1995 the respondent entered into a collective agreement with the first applicant declaring that all the respondent's employees would be entitled only to

gazetted public holidays. Eid ul Fitr is not a statutory public holiday. As early as November 1995 then, a wish was expressed by the respondent's Muslim employees to be able to celebrate Eid. According to the collective agreement with the first applicant:

> "Islamic employees required to celebrate Eid ul Fitr and Eid ul Adha each year, may be granted reasonable unpaid time off, subject to the employees concerned making the necessary arrangements with their appropriate manager prior to the date. Due to business constraints all employees may not be granted time off at the same time."

[9] During January 1998, the employees advised the respondent's management that they would rather not work at all on Eid. Because the respondent felt that due to the extreme financial difficulties it had, and that uninterrupted production was of paramount concern, it could not concede to this request. The individual applicants, still in pursuance of their goal not to work on Eid, proposed to work on a Saturday to restore production, alternatively, they suggested that the whole workforce could start half an hour early and work half an hour late every day to restore lost production.

[10] According to the respondent, these proposals were unacceptable. Firstly, work could not be done on a Saturday due to the fact that engineering activities were taking place on a Saturday as a result of a move of chickens from one plant of the respondent to its Worcester Plant. Secondly, the respondent also deemed the suggestion impractical. To motivate employees who did not necessarily want to take Eid off, to work on Saturdays and half an hour extra every day seemed a remote prospect to the respondent. No agreement was reached. The respondent was firm in its stance that the individual applicants were expected to work on Eid and, as in accordance with custom and practice, work half a shift before being released in order to attend their religious obligations, as they had done in the past. The aforesaid practice had the result that the individual applicants who were in the first shift would miss the morning prayer on Eid, which was the most important prayer. According to the expert evidence of Dr Faried Essack, this prayer could not, as in the case of some other prayers, be "made good", so to speak, by praying later.

[11] On 29 January 1998, the individual applicants informed the respondent that they would definitely not attend work at all on Eid, 30 January 1998 and a further meeting was held between the parties, which was also attended by a representative of the MJC. All Muslim butchers have to be approved by the MJC, who also makes the necessary arrangements for the employment of these butchers with the respondent. The parties were unable to resolve their problem, and when the individual applicants indicated that they would not work on 30 January 1998, they were warned that their absence would be viewed in a very serious light.

[12] The thirteen individual applicants did not attend work on 30 January 1998, which resulted in their suspension on full pay and they were summonsed to a disciplinary enquiry which was held on 5 February 1999. The charge levelled against the individual applicants was that they participated in a "collective refusal to work as per contract".

[13] The individual applicants were found guilty as charged and informed that they could be dismissed, with the right to an appeal, or receive a final

warning, but without the right to an appeal. They chose to be dismissed and the dismissal was upheld at an appeal hearing.

[14] The respondent expected everyone to work on 30 January 1998. I accepted the evidence of Mr van der Westerhuizen of the respondent's management, that if all the butchers were absent on 30 January 1998, the operations of the respondent would have come to a complete standstill. On the day in question, (Eid), the respondent managed to retain the services of some butchers to replace the individual applicants. This was after the MJC was unable to supply the respondent with butchers as was usually the case when the respondent needed butchers.

[15] The respondent was compelled to make inquiries at County Fair, one of its competitors, to obtain butchers. Finally, butchers were obtained and the respondent had to arrange specially for the transport of these butchers. Operations fortunately did not come to a standstill at the respondent's plant, but this was not due to any effort on the part of the individual applicants. Mr Moosa testified that he had asked around for the replacements, but only at the Worcester Plant. He did not go to any trouble to find butchers anywhere else.

[16] I also gained the impression, from the evidence of Sheik Kahn of the MJC, that he was somewhat duplicitous in his dealings with the respondent. On the one hand he supported the view that the individual applicants should have reported for duty, and on the other hand, Mr Moosa's evidence, that Mr Kahn supported their stance, had a distinct ring of truth about it. Mr Kahn perhaps had more to do with the fact that no butchers could be obtained on Eid, through the MJC, than he would admit to.

[17] The applicants decided to challenge the dismissal, and after conciliation at the Commission for Conciliation, Mediation and Arbitration ("the CCMA") proved to be unsuccessful the matter was referred to the Labour Court. The applicants contended that their dismissals were automatically unfair in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 ("the Act"). Alternatively, they contended that their dismissal was substantively and procedurally unfair in terms of section 188 of the Act.

[18] The applicants also submitted that if I should find that their actions amounted to misconduct, such misconduct was not serious enough, in the circumstances to justify dismissal. The applicants sought reinstatement and compensation.

[19] Section 187(1)(f) of the Act provides that a dismissal is automatically unfair if the reason for the dismissal is:

> "[t]hat the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief . . ."

[20] The individual applicants were not discriminated against unfairly, as envisaged by section 187 of the Act. All employees of the respondent were required to work on Eid, which is not a public holiday. The individual applicants were specifically employed because they were Muslims. The respondent wishes to sell only chickens that are slaughtered in accordance

with the Halaal standard. In the past, all the individual applicants worked on Eid, even though they may have resented to do so, but they also never referred their dispute to the CCMA. The applicants' legal representative, Mr Conradie, referred me to American cases where it was held that an employer's refusal to permit an employee to celebrate his or her religion, constituted unfair discrimination. I would agree with the aforesaid proposition, where it was established that a particular employer permitted only some employees to take a day off to celebrate their religion, whereas others were not permitted, provided that the granting of such permission does not have the result that no work can be done because of the religious holiday of one or more employees.

[21] In this case, Christmas (a public holiday) is not a working day for any employee of the respondent. If all the butchers are given the day off on Eid, no work could be done on Eid, and all the respondent's employees would have to take that day off and be paid, irrespective of whether they belong to the Islamic faith or not. This, of course, is the case as well, insofar as Christmas is concerned. Christmas, however, is a public holiday, and Eid is not. The individual applicants were specifically employed because they are Muslims. It was an operational requirement. Consequently I do not believe that the respondent's conduct, by not consenting to giving the butchers the day off on Eid, amounts to unfair discrimination as envisaged by section 187(1)(f) of the Act.

[22] The respondent argued that the conduct of the individual applicants amounted to collective industrial action, in other words, a strike as envisaged by section 213 of the Act. If the conduct of the individual applicants indeed amounted to a strike, such a strike would have been unprotected, because the procedures prescribed by the Act were not followed. If this were the case, their conduct could perhaps be regarded in a more serious light than ordinary

absenteeism without leave.

[23] In section 213 of the Act, describes a strike as follows:

> "The partial or complete concerned refusal to work, or the retardation or obstruction of work, by persons who are who have been employed by the same employer or by different employers, for the purpose of *remedying a grievance* or *resolving a dispute* in respect of any matter of mutual interest between employer and employee and every reference to '*work*' includes overtime work, whether it is voluntary or compulsory" [my emphases].

[24] I am of the view that even though their actions were collective, the individual applicants did not conduct themselves as they did, to remedy a grievance or to resolve a dispute. They made no demand. The respondent was also not placed under the type of pressure which, for instance, would accompany a wage demand prior to a strike. The respondent was also not placed in a position where, if it acceded to a demand of the individual applicants, that they would resume work. That would be the case in a strike. A strike would then be called off if the demand was met or the grievance was remedied or the dispute was resolved. This was not the case in this matter. The individual applicants simply refused to work on Eid because of their religious beliefs. Their conduct was similar to the conduct of any employee who decided to be absent from work, for whatever reason.

The fact that the individual applicants gave prior notice of their absenteeism makes no difference.

[25] The next question is whether or not their conduct warranted dismissal.

[26] Generally, in cases where there have been no prior instances of absenteeism without leave, the employer is not entitled to dismiss an employee for absence from work, particularly when there is some explanation for the absence. However, where the employee's absence is coupled with some element of insubordination, a dismissal would be justified. In *Mkele v South African Breweries Ltd* (1991) 12 *ILJ* 900 (IC), the Industrial Court upheld a dismissal where employees had been expressly advised to report for duty in accordance with specific shift working arrangements. In *Frasers Ltd v CCAWUSA* (1987) ARB 8.17.5, the arbitrator upheld a dismissal where an official attended a union conference when he had been refused leave to do so. The Labour Appeal Court, in *Agbro (Pty) Ltd v Mzimkhulu & others* (1993) 2 LCD 23 (LAC), upheld the dismissal of security guards who were absent from work during a stay-away, when an agreement between the employer and the union provided that they would not participate in stay-aways unless management had been informed and replacements arranged (see also C Bennett *A Guide to the South African Law of Unfair Dismissals* Lexicon 1992 at 30).

[27] The intransigence of the individual applicants, and the fact that they gave the respondent very short notice of their absence on Eid, in my view, was indicative of insubordination on their part. Even so, I do not believe that dismissal was the appropriate sanction. Firstly, the fact that the employer gave the employees a choice between dismissal and a final warning (without an appeal) was ambiguous and unfair in the circumstances. It cannot be argued that the individual applicants had only themselves to blame for their predicament because they chose dismissal (with an appeal). This was not a matter where the employees took the day off to watch a soccer game or for any other frivolous reason. They stood up for a principle, albeit in the face of breaching their contracts of employment. If I understood Mr Moosa correctly, his explanation for not accepting the final warning was because the individual applicants felt that if they accepted a final warning without an appeal, they could not raise the matter again. That would be seen as forsaking the principle which they stood for.

[28] It was argued on behalf of the respondent, by Mr Maeso, that the chairperson of the enquiry was merely "throwing out a lifeboat" to the individual applicants to save themselves from dismissal. That may be so, but in my view, if the respondent wanted to dismiss the individual applicants it should have done so itself, and not have left it to the individual applicants to dismiss themselves. Mr Moosa also conceded under cross-examination that the individual applicants did not appreciate that they would in fact be dismissed. I therefore gained the strong impression that the employment relationship between the respondent and the individual applicants was not destroyed by this incident and that the dispute between the respondent and the individual applicants was one which was capable of being resolved through negotiation.

[29] The applicants did not refer their dispute for conciliation, which is something they should have done. Instead, they raised their stance very shortly before they absented themselves, thereby inconveniencing the respondent and challenging its authority. It is for this reason that I adopted the approach that, although the individual applicants are entitled to reinstatement, such reinstatement should not be with retrospective effect.

[30] Having concluded that the dismissal was not for a fair reason, I now turn to the question of whether or not the dismissal was procedurally unfair. The individual applicants alleged that the chairman of the disciplinary enquiry was biased. The applicants contended that the chairman tended to put his own submissions, rather than to listen to the complaints of the individual applicants. It was also alleged that the individual applicants were not permitted to be represented by an expert on the Islamic faith.

[31] I have read the record of the enquiry, and insofar as the chairman may have been slightly interventionist, I did not detect any bias on his part. The very fact that he gave the individual applicants the option of accepting a final warning is indicative of his lack of bias.

[32] There is no merit in the argument that the applicants were not allowed to be represented by the expert in the Muslim faith. The respondent indicated that this person could testify on behalf of the individual applicants as a witness which, in the circumstances, would have been of more assistance to them, than if he represented them. Therefore I cannot find that the dismissal was procedurally unfair.

[33] These reasons for judgment should not be interpreted to mean that it is justified for employees who belong to the Muslim faith, to absent themselves from work on Muslim holidays which are not public holidays. The respondent was reluctant to consider any other alternatives to its stance, namely that the individual applicants should always work on Eid, as they have done before. I am not suggesting that no work should be done on Eid. This would cause substantial financial losses. With the meaningful assistance of the MJC, a sensible solution could perhaps be reached. If the respondent wishes to supply chickens for the Muslim market, and is therefore solely dependent on employing Muslim butchers for that purpose, as was illustrated, the respondent should be seen to be less intransigent in its stance. The parties should perhaps endeavour to find a solution whereby no production is lost on Eid, and it is also possible for the butchers to take the day off, at least on some Eid celebrations. It was possible for the respondent, even though it was inconvenienced by the short notice given by the applicants, to obtain butchers for the day in question. Through proper and *bona fide* negotiations such a solution might be achieved on future days when Eid is celebrated.

[34] This is a matter where costs should follow the result and therefore the respondent is to pay the costs of the application.

[35] For all the aforesaid reasons, I made the following order on 14 September 1999:

[36] The dismissal of the individual applicants was not for fair reason.

[37] The individual applicants are reinstated in the employ of the respondent on the same terms and conditions which applied to them prior to their dismissal.

[38] The reinstatement is not to operate retrospectively.

[39] The individual applicants are to report for duty by no later than 1 October 1999, failing which the respondent will not be obliged to comply with the order.

[40] The respondent is to pay the costs of this application.

For applicant:

Mr B Conradie, Cheadle Thompson & Haysom

For respondent:

Mr Maeso, Shepstone & Wylie

Cases referred to

Agbro (Pty) Ltd v Mzimkhulu & others (1993) 2 LCD 23 (LAC)	76
Frasers Ltd v CCAWUSA (1987) ARB 8.17.5	76
Mkele v South African Breweries Limited Ltd (1991) 12 *ILJ* 900 (IC)	76