THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG

Of Interest to other Judges

Case no: C 270/2021

In the matter between:

THE NATIONAL UNION OF METALWORKERS	**First Applicant**
COLLISON C & 10 OTHERS	**Second and Further Applicants**
And	
JONWIN (PTY) LTD T/A DESIGNAMATE	**Respondent**

Heard: **6 May, 22 and 23 August 2022; 16 March 2023**

Delivered: **(This judgment was handed down electronically by emailing a copy to the parties. The date of delivery of this judgment is deemed to be 22 April 2024).**

Summary: (S 189A(13) dismissal for operational reasons – No alternative full time employment available as an alternative to retrenchment - Employer failing to justify why it could not have engaged redundant employees in fixed-term contract posts as an alternative to retrenchment, when original reason for not doing so fell away before affected employees' employment was terminated – retrenchments substantively unfair – Reinstatement or re-employment in indeterminate fixed-term contracts not practicable – Compensation awarded)

JUDGMENT

LAGRANGE, J

<u>Introduction</u>

[1] This is an unfair retrenchment case arising from the retrenchment of the second and further applicants ('the individual applicants') on 30 March 2021. The parties agreed that the retrenchment fell under s 189A of the Labour Relations Act, 66 of 1995. The individual applicants were members of the first applicant ('Numsa'), which was the union management consulted with over the retrenchments.

<u>Key issues in dispute</u>

[2] The applicants accepted the 'rationale' of the respondent ('Jonwin') for the retrenchment but argued that the retrenchments could have been avoided if some or all of their proposals made during consultations had been implemented. Jonwin maintains it is unclear precisely what proposed alternatives the applicants claim to have made, which could have avoided the retrenchments.

[3] Two issues emerged in the trial as central to the existence of alternatives. The pre-trial minute reflects that the parties are in dispute about whether Jonwin's failure to terminate the service of employees on fixed-term contracts rather than the terminating the employment of the individual applicants was substantively fair. The second issue essentially concerned whether certain of the individual applicants were unfairly refused appointment in available jobs in the grinding department as an alternative to retrenchment.

[4] More generally, even though the applicants agreed that the selection criteria adopted by Jonwin were fair and objective, they disputed that the criteria were fairly and objectively applied. In particular, they claimed that employees with long service were selected for retrenchment. The criteria proposed in Jonwin's s 189(3) notice were: "*skills, experience, and failing which length of service (LIFO).*" Jonwin maintains that, in keeping with the criteria it had first sought to retain employees with the necessary skill and experience, and only applied LIFO when it was necessary to choose between employees with similar skills and experience.

[5] The applicants also argued that Jonwin did not engage in the consultation process with a view to reaching consensus and it failed to give serious consideration to Numsa's proposals to retain the individual applicants. Jonwin maintained that the precise nature of such alleged proposals was in dispute but that it did seriously consider any proposed alternatives to dismissal that the union made. It asserted that it had engaged in consultations with the applicants over a four-month period to try and reach consensus, but the failure to reach agreement did not make the retrenchments unfair. This point was tied up with the claim that Jonwin did not take steps it could have to avoid the dismissal.

[6] As the retrenchments fell under s 189A of the LRA and the applicants had not brought an application under s 189A(13) to compel Jonwin to comply with a fair procedure within 30 days of the notices of termination as required by s 189A(17), they were barred under s 189A(18) from pursuing claims of procedural fairness of the retrenchment, and could not raise matters such as their allegation that Jonwin prematurely curtailed the consultation process. Consequently, in these proceedings under s 191(5)()b)(ii) the court can only entertain the applicants' claim that the retrenchments were substantively unfair.

Chronology

[7] To contextualise the substantive fairness dispute, a brief chronology setting out the rationale for the retrenchment and the failure to reach agreement on alternatives is necessary.

[8] Jonwin's business entails the production of a variety of shopfitting equipment, ranging from display stands to cashier counters for use in various retail environments. The products are custom made for each order. According to Mr M Swartz ('Swartz'), Jonwin's operations director, the reputation of the company rests on the visual quality of the products. Because products are made to order the firm does not keep stock. Jonwin also does not have fixed orders from customers, except in one case. Even then, the orders placed by that firm would not be for more than a

three month period. Orders are normally completed in a four to six week period. Rushed jobs are processed in two to three weeks.

[9] The company employed about 120 full time staff and approximately 50 fixed-term contractors at the time retrenchments were contemplated in late 2020. The HR officer recalled that this number could rise to 70 in certain circumstances. Swartz testified that if the value of the order book stood below about R 7 million, the business utilised full time staff, but above that value it also used fixed-term contractors. The need for fixed-term contractors varied with the orders received and the staff requirements could alter within a couple of days. When the nature of the business described above was put to Smit during cross-examination, he said he was unaware of these details, and stated that none of this information about the business was shared with the union during consultations, which could have explained why certain alternatives might not have been viable. Mr M Eksteen ('Eksteen'), the production director of Jonwin, testified that there had been times when they had no contract workers for six months and normally they would not require them for two to three months around June and July.

[10] The retrenchment process was initiated by notice of contemplated retrenchment issued on 9 November 2020 to employees. Pertinent portions of the letter read:

"We are compelled to consider the future of your role in the organisation. Due to the competitive nature of our market, we are forced to upgrade production facilities with additional equipment, which if duly commissioned will result in as requiring fewer employees.

We believe that we will need less posts as follows

Cutting department	*Operator Cutter*	*Three less posts needed*
Drilling Department	*Operator*	*Three less posts needed*
Press Shop	*Operator*	*Four less posts needed*
Tool Room	*Operator*	*Two less posts needed*

In this regard, we appear to be in a position that rendering your current role redundant is a possibility. We would like to invite you to make representations of alternatives or any other ideas/proposals you may have in this regard.

We have considered the following alternatives:

1. We are willing to look at volunteers for early retirement and voluntary retrenchment. We have an informally [sic] of who may be interested.

2. Can we reduce the number of temporary employees? Yes, we are in the process of ending temporary employment within the confines of their respective employment agreements. We still need to cut further posts.

In the circumstances with these considerations in mind we must now commence A consultation process in which we need to consider various options, but most importantly measure[s] to avoid job loss.

…

We propose that we use selection criteria of skills, experience, and failing which length of service (LIFO).

… "

[11] The jobs identified as potentially redundant were directly related to the firm's decision to buy a tube laser machine. The laser machine would automatically perform certain tasks previously performed by operators in the four departments as described in the letter above. For example, in the cutting section, the machine would be able to perform cutting and deburring functions previously done by operators. In the drilling department it would drill holes. Similarly, the use of the machine for these various functions meant that the need to service tools used by the operators who previously performed those functions would be reduced. Eksteen testified that the firm employed 23 operators performing specific functions in each of the four departments, at the time of issuing the notice.

[12] It was expected that the machine would be installed and operating at the end of March 2021. Hence, the s 189(3) notice mentioned that it was envisaged that the retrenchments would take place "*over the next few months*".

[13] According to Eksteen, the meeting on 9 November was only with staff and was merely to present the s 189(3) notice to them and elaborate on it. The first

proper consultation meeting with the union took place on 18 November. Efforts were made to hold another meeting before the year end, but Smit could not accommodate the firm during that time. The annual shutdown was a lengthy one and the first meeting in 2021 took place on 20 January, followed by two more on 11 February and 24 February, respectively.

[14] It should be mentioned that Smit testified that the firm had invited applications for voluntary severance packages before the s 189 notice was issued, but the firm abandoned that initiative when the union complained about it doing so without first addressing VSPs with the union.

18 November 2020 consultation

[15] What stood out for Eksteen about this meeting was the focus on voluntary severance packages and the contract workers. He said that the company did not really entertain the issue of contract workers, because at the time it was anticipated the fixed contract employees' contracts were due to expire around the end of March 2021. Notes of the meeting by one of the management representatives did not reflect any discussion of contract workers at this meeting, nor record any alternatives proposed by the union at that stage. The notes focused on the rational for the redundancies based on the planned introduction of the laser machine. Be that as it may, these notes were not confirmed in any subsequent consultation meetings as a an accurate record of the meeting.

[16] Eksteen did not recall the union questioning the proposed selection criteria or proposing alternative selection methods, but did ask if there were other available positions the affected employees could be placed in. An email from Smit dated 29 November 2020, gave the feedback from the union members. It asked Jonwin to reconsider its intention to retrench and mentioned they were not happy with the rationale. Nonetheless, it proposed that the parties look for candidates for VSPs, which could be the basis for reaching an agreement on the retrenchments. The union proposed that the s 189 process should only proceed once a VSP process was exhausted. At that stage no specific mention appears to have been made about

contract workers and the union was focusing its attention on VSPs offering a solution.

20 January 2021 consultation

[17] Eksteen confirmed that VSPs were raised at this meeting and that Smit asked why the company would retrench workers while it still employed fixed-term contract employees. He also recalled that the union wanted the company to look at alternative employment for all the affected employees, but did not recall any mention being made of any specific proposals about departments where they might be placed.

[18] A note drawn up by a Jonwin representative at the meeting also mentions the union wanting a written response to its proposal to consider VSPs and that it wanted the company to look at alternative employment for all of them. It appears that it was at this meeting that Eksteen mooted the possibility of accommodating some employees in a particular department to reduce the total number of retrenchees, but the grinding department appears not to have been specifically identified.

11 February 2021 consultation

[19] In the applicants' statement of case it was alleged:

"On the 11th of February 2021 the first applicant tabled a comprehensive list of alternatives, chief amongst them was that the Respondent had more than fifty (50) fixed-term contract workers occupying various positions within its employ. The expectation of the first Applicant was that these contract workers should make way for permanent employees likely to be retrenched. Whist finalising this exercise the respondent was expected to delay the postponement contemplated date of termination."

[20] The first point to be made, is that no document was produced in evidence in support of the existence of such a 'comprehensive list'. Eksteen recalled the union 'disputing' the continued employment of fixed-term contractors and that the issue of alternative work in the grinding department came up at this meeting. However, he did not recall a comprehensive list of alternatives being tabled. Mr B Guy ('Guy'), Jonwin's attorney, denied any list relating to fixed-term contractors was tabled on this or any other day. He claimed that, until the meeting on 24 February, the principal focus was on utilising VSPs as a means of avoiding retrenchments. He made the point that Smit's email of 22 February made absolutely no reference to a proposal about fixed-term employees when referring to alternatives proposed. Nevertheless, he conceded it was possible that the issue of moving the retrenchment date had been discussed at this meeting but he believed this was simply an attempt to extend the duration of the affected employees' employment. By contrast, the HR officer, Ms Cecilia Williams, recalled that the issue of fixed-term contracts had always been raised as an issue since the start of the consultation process. She remembered that management had explained to the union that owing to the way the company worked it could not do without contract workers. I note that she was not present during all the consultations, so her recollection does not necessarily reflect the constancy with which the union raised the issue in consultations.

[21] There were no management notes of the 11 February meeting, but Smit did send an email to Jonwin on 22 February 2021. He confirmed that the parties were still in consultations over the retrenchment process including the issues of selection criteria and alternative positions. His email then expressed the union's view that Jonwin had not substantiated its claim that VSPs would be too costly and disputed the firm's argument that training was not feasible. It called for further discussions on the alternative options available, so they could be satisfied they had done everything they could to save jobs.

[22] His email seems to have been prompted by the company having approached three of the affected employees directly to offer them jobs in the grinding department, whereas it had been agreed that the union should canvass the applicants to see who might be interested in the grinding department jobs. Cecilia

Williams ‘ email of 18 February was pressing Smit to provide those suggestions by the next day. Smit objected to management having acted independently in identifying the affected employees who had allegedly been told to accept the offered positions. By that stage Smit had not yet canvassed the issue with members. He only did so on the morning before the following consultation meeting began on 24 February.

[23] It was put to Swartz that it was at the meeting of 11 March that the union had proposed that affected employees should be placed in fixed-term contract positions. Swartz was not at the meeting, but said he was unaware of such a proposal. He said he had relied on Eksteen to keep him up to speed on what transpired in the consultations. Eksteen did remember the union raising the issue of the retrenchment timeline and he did not dispute that it had proposed to change the termination date until the issue of replacing fixed-term contract employees had been addressed.

[24] Another allegation made by Smit, though not pleaded by the union, was that at this meeting the union had specifically requested a list of all contract workers employed at that time, but management never reverted to the union on this issue. None of the company witnesses recalled such a request and it was not referred to in any of the correspondence between the parties nor in meeting notes. When asked why it did not appear in his email of 22 February, Smit said it was because the union was only expecting feedback on the issue from management at the following meeting, two days later.

[25] Jonwin offered three vacancies in the grinding department which might be filled by affected employees to reduce the number of retrenchments. Smit undertook that the union would take this proposal to members to obtain names of persons interested in taking up one of these placements. Before the next meeting Smit obtained names of members who were interested in the posts, namely Mr S Van Wyk, Mr Q Mphahlele, Ms C Collinson, Ms K Jacobs and Ms Tatum Williams. At the time Williams had been working in the grinding department for about six months. Likewise, Jacobs was had been temporarily working in the assembly department, which was not one of the affected departments.

[26] Although management asked Numsa to canvass applicants who might be interested in one of the three positions in the grinding deparment, Jonwin independently approached three of the applicants with the same offer. It selected them on the basis of their length of service, but the individuals advised management that they could not respond as individuals because the offer should be canvassed with Smit as part of the consultation process. Cecilia William testified that the three individuals also said they were not interested in the jobs because it would entail a drop in their hourly rates. The three persons approached by the firm were Mr S Ngubelanga, Mr B Hendricks and Mr P Penang ('Ngubelanga', 'Hendricks' and 'Penang'). Smit was advised of the firm's approach to these individuals. As mentioned, in his email of 22 February he raised his concern about this direct approach to members whilst a consultation process was underway, in terms of which it had been agreed that the union would canvass members for volunteers for the posts. He said it was reported to him that the three individuals were told they had to take up the positions, but he conceded he could not be sure if that was so.

[27] Ultimately none of the employees identified by the union or management for possible retrenchment were appointed in these positions. Smit claimed that the three positions were filled by fixed-term contract employees, whereas the posts had been offered to volunteers on the basis the appointments would be to permanent positions. Although he agreed that there might have been ten fixed-term employees in the grinding department as well, the correctness of his understanding that the three posts offered were permanent ones was not challenged.

[28] Jonwin claimed it could not appoint any of the five volunteers proposed by the union because the grinding work entailed heavy duty work using a pedestal grinder, which required the operator to manually hold the item being ground in the grinding machine. Accordingly, it maintained that it would not be suitable work for any of the three female volunteers, namely Collinson, Williams and Jacobs.

24 February 2021 consultation

[29] At this meeting, management raised its concern that the process had been dragging on for months and that it was necessary for it to take a decision. Eksteen explained this was owing to the anticipated arrival and installation of the tube laser machine to commence operations in April and contract workers were also due to end their contracts during March. The firm's reasons for not agreeing to offer VSPs to other employees were explained, namely that they either had long service, which would make it expensive, or the they had important skills, which the firm needed to retain. The company stated its view that it was impractical to train the applicants to replace volunteers for VSPs in epoxy coating and welding jobs.

[30] It is only at this stage, for the first time, that specific reference to 'limited duration' employees appeared in a document. Management notes of the meeting stated that the discussion relating to fixed-term contract employees concerned night shift work in particular. According to Eksteen, this was the shift worked by 90 percent of fixed-term contract employees. He testified that he, Cecilia Williams and Smit spoke about some of the retrenchees not being willing to work night shift when they had previously been seconded to certain departments prior to the retrenchment process. Smit did not dispute this, but pointed out that the attitude of the affected employees towards night shift work was not canvassed in the context of the retrenchment exercise, and they might have a different view of night work if it was necessary to remain in employment.

[31] Guy claimed the issue of fixed-term employees only came up at this meeting, but as an allegation not as an alternative, "*…it was your are going through a retrenchment exercise, but you are still using temporary labour*".

[32] Eksteen testified that he also told Smit in the consultation meeting that Jonwin would be ending all fixed-term contracts shortly, based on an assessment of the order book as it stood at that time, and that the firm could not prematurely shorten existing limited duration contracts because it had to honour its obligations to the fixed-term employees under those contracts. Eksteen also stated that, at that stage, the business was also struggling to get raw materials as one of the two mills supplying it had shut down and it was difficult getting imported supplies post-Covid.

At the time of the meeting the situation with regard to future orders was not clear. There was no indication from the sales team by 24 February that any sales were guaranteed going forward. However, sometime in mid-March an order for a new Woolworths store was received and fixed-term contracts were extended.

[33] Smit claimed that Eksteen told him that the fixed-term contracts may end in May, June or July 2021, but the firm could only assess if such employees would be needed again when that time came. Smit could not dispute that the business of the firm was volatile because it did not have long term orders and that necessitated the use of fixed-term contract employees. He also did not dispute that the firm did not carry stock of its products, each sale being made to order. Further he did not dispute that the usual turnaround time for an order was four to six weeks and could be as short as two to three weeks, but pointed out that none of this information was conveyed to the union during the consultations. However, he did acknowledge that he was aware that the business model necessitated the firm sometimes hiring contract employees on one or two days' notice.

[34] Swartz testified that the fixed-term contracts expired on 26 March and, in February 2021, the order book was low. It improved slightly in March.

[35] Even so, Smit claimed that the union had raised the question that if the order book was unpredictable, it should still look at replacing contract workers with the applicants until there was no more work for them and then they could be retrenched or the consultation process could resume. Eksteen denied that the union had ever made a proposal that the affected employees be given fixed-term employment. He alleged that Smit had been looking for permanent appointments, which could not be guaranteed. However, Smit's recollection is also echoed in Guy's account of that meeting.

[36] Smit maintained that the firm did not want to give consideration to replacing fixed-term contract employees with the affected employees. He said there were 'probably' around 25 such employees working in the business since the dismissals and in his view the affected employees could have been absorbed in those positions.

However, he had no direct knowledge of the compliment of fixed-term employees engaged at the time of the trial.

[37] When Smit was asked what specific proposals the union had made about which other departments affected employees could be placed in, he claimed that they were prevented by the firm from getting into the specifics of each department. He cited various current contract positions members had advised him of. None of the members who provided him with this information were called to corroborate this hearsay evidence. He acknowledged that Jonwin had proposed a preferential employment offer to re-employ affected employees if the firm found it necessary to refill any of their posts, but pointed out that this was never agreed upon. The focus of discussion was on preventing retrenchments in the first place.

[38] In any event, at the meeting on 24 February, no agreement could be reached on the appointment of affected employees to the three grinding posts. Eksteen recalled that it was just after this meeting that the managing director, Mr J Winter ('Winter') then decided that the posts could not just be offered to certain individuals amongst the affected employees but should be offered to all eleven of them. He instructed Cecilia Williams to approach all of them to ascertain their respective skill, experience and interest in the grinding job, which she did. She also advised them of the hourly rate of pay attached to the job. Smit said he was not aware of this subsequent step taken by Cecilia Williams. Cecilia She had apprised Eksteen of the results of her enquiries, but did not know what steps, if any, were taken based on the outcome thereof. The survey she did is discussed in more detail below.

[39] Notices of retrenchment were issued to the applicants on 1 March 2021. The notices confirmed that the retrenchment 'process' was now complete and that they had been given enough time to make representations. Jonwin had taken a final decision to proceed with the retrenchment. The applicants last working day was 31 March 2021.

29 March 2021.

[40] Eksteen testified that when documentation was issued to the retrenched employees on 29 March, they expressed their unhappiness with the retrenchment and asked why they had been selected rather than the contract workers. Eksteen responded that Winter had decided it was necessary to 'clean the slate' but that if anything came up he would advise them. The applicants remained unhappy and came back the next day. Winter then addressed them. He told them it was the 'end of a chapter' but going forward the company might assess their positions.

The three positions in the grinding department

[41] The sequence of discussions and respective actions of the union and Jonwin in trying to identify suitable candidates for the three posts has been outlined above. The company's case is that when Cecilia Williams approached the eleven affected individuals, the following responses were received to each of her enquiries relating to performing pedestal grinding work:

Name	***Skill***	***Experience***	***Interest***
S Ngubelanga	*No*	*No*	*No. Drop in rate.*
P Perang	*No*	*No*	*No*
B Hendricks	*Yes*	*Partial*	*No*
S van Wyk	*Yes*	*Yes*	*No due to rate drop.*
Q Mphahlele	*Yes*	*Yes*	*Yes (?)*
D Gidimane	*Yes*	*Yes*	*Yes, if no decrease*
M Gwayisa	*No*	*No*	*Yes, despite lower rate.*
C Collison	*No*	*No*	*Yes.*
T Williams	*No*	*Yes*	*No*
C Jacobs	*No*	*No*	*Yes*
V Cook	*No*	*No*	*No due to rate*

Name	Skill	Experience	Interest
			drop..

Key:

1. 'Yes, if no decrease' means the individual was only interested in the position if their salary did not drop.
2. 'Yes (?)' means the individual was interested but would suffer a salary decrease. However, it was not clear from Cecilia Williams' testimony whether the individual also implied they were only interested if their salary remained unchanged.
3. Names in ***bold typeface*** are the names of volunteers for grinding posts put forward by the union.

[42] Of the five applicants, whose names the union put forward, only van Wyk and Mphahlele met the requirements according to Cecilia Williams's assessment. She claimed that her diary notes reflected what the employees themselves told her about their experience and ability to do the work. Because she had been advised by a supervisor that pedestal grinding was not suitable for women because it was heavy duty work, she did not discuss the question of training for the job with most of the women who were interested. However, she testified that Jacobs and Van Wyk had expressed a willingness to be trained. Eksteen conceded that Gwayisa and Tatum Williams had been working in the grinding department doing stainless steel polishing, but they could not do pedestal grinding work, which was the available job. The union maintained both these applicants were also doing pedestal grinding work, but no direct evidence to support this claim was led.

[43] Cecilia Williams strongly disputed the union's contention that Cook had said he was interested in the position despite the rate drop. She testified that van Wyk, Jacobs and Mphahlele were interested in being trained for the pedestal grinding work. Van Wyk's and Mphahlele's interest in training is difficult to reconcile with the fact that she recorded both saying they had experience and skill, but her claim that they had expressed an interest in being training was not challenged. She could not respond to the allegation that Ngubelanga had ten years' experience in the grinding

department, except to say she knew he had previously worked there but she did not know what kind of work he did.

[44] Smit disputed that none of the applicants were suitable and willing to take up the positions. He contended that Jacobs, Gidimane, Tatum Williams, Gwayisa and Van Wyk were suitable. He did not believe they would have volunteered for the positions when the union called for volunteers but then declined them when approached by Cecilia Williams. He also contended that Tatum Williams had experience in pedestal grinding. However, no direct evidence was led by any of the individual applicants to dispute Cecilia Williams's account of their responses to her.

<u>Evaluation</u>

[45] As already mentioned, strictly speaking, the case is concerned only with the substantive fairness of the dismissals and the key issues are whether Jonwin's failure to adopt alternatives to retrenchment by employing the affected employees in fixed-term employment in place of existing fixed-term contract employees, or to employ three of them in positions in the grinding department was unfair. Nonetheless, the union still argued in its heads of argument that there was no meaningful consultation process under s 189(2) of the LRA because of the way the two issues were dealt with by the company.

[46] Jonwin argues that because the union conceded there was an economic rationale for the retrenchments and that there was no dispute about the fairness of the selection criteria, which it used, that ended any dispute which might have existed about substantive fairness. Consequently, the court has no jurisdiction to consider any procedural issues in the retrenchment process. It characterised the union's complaint about the fixed-term contract employees as amounting only to a complaint about a prematurely curtailed consultation process, because the issue of offering such positions to affected employees was not properly canvassed in the consultation process. As such this could not be the basis for a claim of substantive unfairness.

[47] An ancillary argument advanced by Jonwin is that it had no choice but to proceed with the retrenchments by the time the last consultation meeting was held on 24 February 2021, because there had been four consultation meetings and the union had delayed the process. It could not have been expected to extend consultations when it was unknown at the end of February if the order book would improve. The fact that the order book did improve later in March could not have been foreseen at the time. The applicants' jobs were redundant and the laser machine, which was the cause of such redundancy, was expected to be up and running by the end of March 2021 which justified the conclusion of the process by the end of February.

[48] Lastly, the company argues that the union made no detailed proposal that the affected employees should replace fixed-term employees and it was never tabled as a serious proposal but was an afterthought on the union's part. In the absence of a proposal from the union setting out which fixed-term employees should be replaced by them, accordingly, it had no obligation to deal with the issue. Even at the trial, Smit could not identify whom the applicants might replace.

[49] Concerning the three jobs in the grinding department, Jonwin argues that firstly, the offer of this alternative originated with it, demonstrating that it tried to find alternatives to retrenchment. Although it attempted to see if any of them could accommodated in those posts, it was unsuccessful for one or more reasons, namely that they not experienced, skilled or willing to accept the appointments. Those who would have been able to work on the pedestal grinder were either not interested or only willing to take up appointment if they did not suffer a drop in pay.

Legal Principles

[50] The legal principles governing substantive fairness in retrenchment dismissals have been canvassed in several judgments of the Labour Appeal Court and this court. In this matter, the union accepted that the applicants' positions were rendered redundant by the introduction of the laser machine which would automate the jobs they previously performed, which meant Jonwin no longer required their services.

Consequently, there was no dispute that there was a genuine operational reason for the decision to embark on retrenchment consultations. There was also no dispute that the retrenchment criteria adopted by Jonwin, if retrenchments took place, were fair.

[51] The union had nonetheless argued that the criteria were not properly applied, but this was not an issue that was pursued in the retrenchment consultations or during the trial. The core of the applicants' substantive unfairness case was that the company failed to adopt alternatives it should have to avoid retrenching the redundant employees, in that it failed to engage three of the applicants in the grinding room positions and failed to offer the applicants fixed-term employment in place of existing fixed-term employees. It is convenient to deal with each claim separately.

[52] Before delving into the factual issues, the legal questions arising from disputes over the existence and relevance of alternatives to retrenchment needs to be briefly canvassed.

[53] Not only is there an obligation on the consulting parties to try and reach agreement on alternatives under s 189 of the LRA, but there is also a distinct obligation on an employer to try and implement alternatives if feasible. In *Oosthuizen v Telkom SA Ltd*[1] the Labour Appeal Court expressed the dual components of fairness in relation to the handling of alternatives thus:

"[4] Section 189 of the Act governs dismissals for operational requirements. Section 189(1) requires the employer to engage employees or their representatives, depending on the circumstances, in a consultation I process when it contemplates dismissals based on its operational requirements. Section 189(2)(a) (i) of the Act provides that the employer and the employees or their representatives must attempt to reach consensus on appropriate measures to avoid the contemplated dismissals. ***<u>Section 189(3)(b) requires the employer to disclose to the other consulting party in writing the reasons for the proposed dismissals and 'the alternatives that the</u>***

[11] (2007) 28 *ILJ* 2531 (LAC). See also *SA Airways v Bogopa & others* (2007) 28 *ILJ* 2718 (LAC) at para [60].

employer considered before proposing the dismissals and the reasons for rejecting each one of those alternatives'. Implicit in s 189(2)(a) (i) and (ii) and s 189(3)(a) and (b) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if that can be avoided. Accordingly, these provisions envisage that the employer will resort to dismissal as a measure of last resort. Such an obligation is understandable because dismissals based on the employer's operational requirements constitute the so-called 'no-fault terminations'.

[5] The obligation of an employer not to dismiss an employee for reasons of its operational requirements where it can avoid such employee's dismissal as now provided for implicitly in s 189(2)(a) (i) and (ii) and 189(3)(a) and (b) of the Act is not a new obligation that came with the enactment of the Act. It is as old as our modern law of retrenchment in this country. (See Halton Cheadle 'Retrenchment: The New Guide-lines' (1985) 6 ILJ 127 at 128-9 particularly guideline no 5 at the top of 129 and the case of Gumede & others Richdens (Pty) Ltd t/a Richdens Foodliner (1984) 5 ILJ 84 (IC) at 91B-C.) Recently this court re-affirmed this principle in General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & others (2004) 25 ILJ 1655 (LAC). In this regard it is to be noted that article 13(1)(b) of ILO Convention 158, the Termination of Employment Convention, provides that the employer must give workers' representatives an opportunity to consult on measures to be taken to avert dismissals or to find alternative employment. This obligation also includes that, where the employee may need some training in order to be able to perform the duties attached to an alternative position, the employer should afford the employee the opportunity to get such training. Naturally, this has to be within reason because, obviously, the employer should also not be burdened with an exercise that may have undue cost implications. I note that para 21 of ILO Recommendation 166, the Termination of Employment Recommendation 1982 provides as follows:

'The measures which should be considered with a view to averting or minimising termination of employment for reasons of an economic, technological, structural or similar nature might include, ***inter alia, ... internal transfers, training and retraining ...****.' (Emphasis added.)*

….

[8] In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such employee can

perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements. <u>Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirement.</u> It is in accordance with this obligation of the employer that in the General Foods case referred to above this court found the dismissal of the employees unfair. In that case while the employer was retrenching some employees, it was busy recruiting new employees for work which the employees being retrenched could perform. As already stated, this court found the dismissal substantively unfair for this reason. In such a case the dismissal is a dismissal that could have been avoided. A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason."
(emphasis added)

[54] In this matter, the union is precluded from contending that Jonwin did not attempt to explore the alternative of replacing fixed-term contractors with the applicants because it cannot dispute the procedural fairness of their retrenchment. However, its submission that Jonwin failed to implement reasonable alternatives to the retrenchment goes to the substantive fairness of their dismissal.

The failure to employ any of the applicants in a permanent pedestal grinding position

[55] It it is common cause there were three pedestal grinding positions available and the applicants were considered for the posts. The issue is whether there was any justifiable reason, none of them were employed. It is apparent from the evidence that, after Cecilia Williams canvassed the applicants about the jobs after the meeting on 24 February that management provided no feedback on the outcome of her investigation. It was only during the trial that the results of her survey were made known to the applicants.

[56] It has been noted that only Van Wyk and Mphahlele met the requirements according to Cecilia Williams survey, but both of them wanted training and Van Wyk

was not happy with the drop in the pay rate. The union agreed that these two applicants were willing to take up the position but made no mention of whether they required training. In addition, Jacobs, Tatum Williams and Gwayisa had volunteered for one of the jobs. However, according to Cecilia Williams, Tatum Williams did not have the necessary skill to do the job and was not interested. Gwayisa had neither the experience nor the skill. Eksteen had also testified that Gwayisa's experience in the grinding department was confined to polishing work. Jacobs and van Wyk had expressed interest in being trained for the job.

[57] While Smit expressed his doubts that the five individuals who expressed an interest in the jobs to him, would have given a different version to Cecilia Williams, he did not ask them about their skill and experience or if they would accept a drop in rate if that was required.

[58] It was put to Cecilia Williams that she only asked each individual if they were interested in the job. She strongly disputed this and none of the individual applicants were called to testify to dispute Cecilia Williams's version. As Cecilia Williams's enquiry was more recent, more systematic, more detailed and not disputed by any of the individuals concerned, I am inclined to accept her version of her interaction with the applicants on 24 February 2021. I note also that her survey did not purport to be an objective assessment of the individuals' capabilities but merely a record of their own self-evaluation of their suitability for the job, so there is no reason to assume that the results reflected a subjective managerial assessment. Cecilia Williams made it clear she did not attempt to assess them herself.

[59] It is common cause nothing came of the survey, as management did not take any action. Cecilia Williams's survey was conducted after the last consultation meeting and yielded no came of it. It was not canvassed at any stage with the union, and it is apparent Smit only became aware of its existence under cross-examination.

[60] As an initiative to attempt to reduce the number of retrenches, I accept management was *bona fide* in trying to provide alternative employment for three individuals, even though the exercise was undertaken in an unsatisfactory disjointed

way because the employer took steps independently outside of the consultation process. Moreover, once it became apparent that none of management's three preferred candidates among the applicants coincided with the volunteers put forward by the union, it still canvassed all of them before taking the final decision to retrench.

[61] Was it substantively unfair of Jonwin not to employ any of the applicants in the positions? Considering all the applicants, the only one who might have been suitable was Mphahlele, but Eksteen had testified that the pedestal grinding machine work was not suitable for women because it required the operator to manually hold the item to be ground against the grinder, which was physically arduous work. No evidence was led to rebut this claim.

[62] In the circumstances, I am satisfied that Jonwin did not act unfairly by failing to appoint any of the applicants in one of the three pedestal grinding vacancies.

Failure to replace fixed contract employees with the applicants

[63] In relation to the argument that the employer ought to have retrenched fixed-term employees before any of the applicants, the question to be answered is whether a retrenchment is substantively unfair if an employer fails to first retrench temporary employees before permanent employees, even if no detailed proposal was made in this regard during the consultations?

[64] On whether a union is prevented from raising an issue of an alternative to retrenchment at trial, this has been addressed by the Labour Appeal Court. In *General Food Industries Ltd t/a Blue Ribbon Bakeries v Food & Allied Workers Union & others*[2], the LAC held that even if a union has not raised an alternative in the consultations that did not bar it from raising it at trial, even though the failure to raise in the consultations might affect any relief the court might order if that proposal could have resolved a substantial portion of the dispute or avoided the litigation[3].

[22] (2004) 25 *ILJ* 1655 (LAC)

[3] At paragraphs [31] to [32].

[65] At the outset of the retrenchment consultations, Jonwin confirmed in its s 189(3) notice that it was already reducing the number of temporary employees, subject to not prematurely terminating their services before their contracts expired, though it believed retrenchments would still be necessary. It maintained that the fixed-term contracts would be discontinued at the end of March. In the last meeting on 24 February 2021, Eksteen mentioned that the prospects for orders appeared to be uncertain and on the existing order book the fixed-term contracts would all be ending shortly.

[66] Smit maintained that the issue of replacing fixed-term contract employees with permanent employees was something that had always been on the table throughout the consultations. Eksteen did recall contract workers being part of the focus of the meeting on 18 November 2020, but maintained that the company did not consider it at that stage because it anticipated their contracts would terminate at the end of March 2021. He also recalled Smit asking during the meeting on 20 January 2021 why the company was retrenching full time employees but retaining contract workers. However, he maintained there was no such thing as a 'comprehensive list of alternatives' tabled by the union. Cecilia Williams remembered that the issue of fixed-term contract employees had been raised by the union from the beginning of the consultations, but the firm had explained it could not do without contract workers. By contrast, Guy insisted that it was only at the last meeting on 24 February that the issue of moving the retrenchment date was discussed, but he interpreted this simply as an attempt to prolong the applicants' employment.

[67] On balance it seems most likely that the union had queried why permanent workers were being considered for retrenchment while contract workers were still employed, but did not devote enough attention to the issue until the retrenchments were imminent. Management was aware of the union's reference to the fixed-term employees, but took the view that there was unlikely to be any scope for contract work by the end of March 2021 so it was not a tenable alternative to retrenching the applicants. As the union did not come up with a specific proposal as to which of the

applicants should replace which contract workers, it did not see the need to engage on this alternative, particularly as the focus of the union had been on VSPs.

[68] At the last consultation on 24 February 2021, when management confirmed that it had no reason at that stage to believe the order book would improve and, consequently, that the contract workers would end their engagements in March, the union responded that Jonwin should just halt the retrenchment process pending what happened with the order book. If it then improved, the applicants could be employed in positions normally occupied by contract workers.

[69] As it happened, apparently unexpectedly, the order book did improve in March and Jonwin decided to retain contract workers it would otherwise have shed at the end of that month. It was never clear how many contracts were rolled over as a result of the turnaround in circumstances. By that time, the applicants had already received notice of their retrenchment and their employment was due to end shortly. On 29 March, they protested their unhappiness at being overlooked for temporary work, given that fixed-term employees were still being retained. The managing director was not willing to revise the retrenchment decision that had been taken and would not give them anything more than a very vague undertaking that they would be advised if something materialised. Having made the decision to proceed with the retrenchments, Jonwin clearly was plainly unwilling at that point to pause the retrenchments or see if any of the applicants could have been offered temporary employment instead of just re-enrolling some of the temporary workers whose contracts were due to end in March.

[70] Accepting that at the end of February it was true that the prospect of even retaining any temporary workers after the end of March seemed poor, it was understandable the employer would not entertain a proposal, which Guy believed was just a ruse to prolong the retrenchment consultations and the applicants' employment. Nonetheless, when things did turn out differently, and work for fixed-term employees became available even before the applicants' employment ended, should Jonwin not have tried to minimise the retrenchment of the applicants by offering them some of the fixed-term employment positions now available?

[71] Jonwin never led any evidence why that was not a tenable alternative to retrenchment, even if it did not amount to permanent employment. I note that the evidence that, despite fluctuations in its need for temporary employment, the employment of a significant compliment of temporary employees relative to the permanent workforce, was a normal feature of Jonwin's operations and the firm drew regularly on the same pool of temporary employees to perform this work.

[72] Jonwin's attitude in the trial was that it was for Numsa to prove that the firm would have been able to accommodate the applicants as fixed-term employees, and that it was not enough for Numsa just to raise, in general terms, the idea that the applicants should replace temporary employees. Jonwin's response as to why that idea was not tenable was because it envisaged such work would no longer be available by the time the retrenchments were due to take place. Accordingly, there was no need to consider this idea. However, when the anticipated scenario was reversed in March before the applicants' employment had ended, this did not lead the company to rethink matters. It took the view that there was no need to reconsider its view because it had now taken the decision to retrench the applicants and their employment was due to end soon. Eksteen's evidence of Winter's statements when the applicants protested against their retrenchment, conveyed the sense that Jonwin regarded the retrenchments as 'water under bridge' by March and it was unnecessary to revisit it, even though the rationale for rejecting an alternative to retrenchment had fallen away and the applicants' services had not yet ended.

[73] In circumstances where the employer knew that the union wanted it to replace some of the fixed-term contract employees with the applicants when fixed-term contracts had to be renewed, it was under a duty to consider if that was feasible. When the reason it believed it would not be feasible had fallen away and the retrenchees' employment had not yet terminated, it was up to the employer to demonstrate why the alternative of not renewing some of the fixed-term contractors and offering the new contracts to the applicants was still not a reasonable alternative to proceeding with their retrenchment. It should be mentioned that it has been held that the duty on an employer to seriously consider alternatives raised in

consultations in cases where the cause of the retrenchment is redundancy is more onerous[4]. It is true, in this instance, that the introduction of the new laser machinery, which replaced the work done by the applicants, was to enable Jonwin to remain competitive compete, which meant it was felt it was a necessary measure. Nonetheless, it had the opportunity to sign fresh fixed-term contracts but provided no evidence to justify its failure to use that opportunity to provide fixed-term employment to its permanent workers as an alternative to retrenching them.

[74] In light of the discussion above, I am satisfied that Jonwin did not establish that it could not have done this when it became clear in March 2021 it was again going to be engaging fixed-term contract employees. Proceeding with the retrenchment of the individual applicants at the end of that month, under the circumstances, made their dismissals substantively unfair.

<u>Relief</u>

[75] The applicants sought reinstatement as relief. Reinstatement or re-employment is the primary remedy for a substantively unfair dismissal unless employees do not seek reinstatement, or restoring the employment relationship would be intolerable, or it would not be reasonably practical to do so[5]. In the Constitutional Court's decision *South African Commercial, Catering and Allied Workers' Union and others v Woolworths (Pty) Limited*[6], the court held that that "the term 'not reasonably practicable' means more than mere inconvenience and requires evidence of compelling operational burden"[7]. In *Woolworths* the employees who had been retrenched were cashiers. They had not been willing to accept a flexi-time work arrangement, but the work of cashiers still existed. Moreover, towards the end of the consultations, the union in that case had proposed an arrangement in terms of which the affected cashiers were willing to work flexi-time subject to certain conditions. The

[4] *Van Rooyen & others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 *ILJ* 2735 (LC) at paraagraph [25].

[5] S 193(2) of the LRA.

[6] [2019] 40 ILJ 87 (CC)

[7] At paragraph [40].

court was confident the parties could resume fruitful consultations where they had left off if it reinstated them.

[76] It is common cause in this matter that the actual work the applicants performed no longer existed and reinstatement would not be possible in those posts. By the end of the consultations in March 2024, the union was no longer arguing that there was work of other permanent employees the applicants could have performed. The permanent positions, which had been identified by Numsa, required substantial training in new skills. The prospect of alternative work in the drilling department for the applicants had been explored and had yielded nothing. The focus turned to whether the applicants could replace employees on fixed-term contracts as an alternative to retrenchment.

[77] Is it feasible to order the re-employment of the applicants in fixed-term positions? The number of such contracts available, the dates of commencement and the specific types of work entailed, are all unknown. With these imponderable factors, the court cannot be confident that any relief of this kind which it might order will not generate a number of ancillary disputes when any attempt is made to implement it. To my mind this would be an exercise in futility. I am not satisfied the facts of this case are on a par with those in *Woolworths* and that it would not be practicable to order the reinstatement or re-employment of the applicants. Accordingly, an award of compensation for the substantive unfairness of their dismissals is appropriate. In determining the amount of compensation, I have considered the fact that the best outcome they could have faced at the time was occasional employment on fixed-term contracts, and the principle mentioned in *General Food Industries* that the extent to which an alternative had been raised in consultations might affect the relief awarded.

[78] In the result the following order is made:

<u>Order</u>

1. The dismissal of the Second and Further Applicants by the Respondent on 31 March 2021 was substantively unfair.

2. Within 14 (fourteen) days of this judgment, the Respondent must pay each of the Second and Further Applicants 7 (seven) months' remuneration calculated at their rates of pay as at the date of their dismissal.

3. No order is made as to costs.

R G Lagrange

Judge of the Labour Court of South Africa.

<u>Appearances:</u>

For the Applicant: --- G Shiba of NUMSA

For the Respondent: L W Ackermann

Instructed by: --- Guy & Associates