

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO.:JA69/98

In the matter between:

EC LENNING LIMITED t/a BESAANS DU PLESSIS

FOUNDRIES

Appellant

and

PIETER ENGELBRECHT

Respondent

JUDGMENT

CONRADIE JA

- [1] Pieter Engelbrecht, the respondent, worked in the appellant=s foundry for close on twenty years. By the time of his dismissal for incapacity due to chronic lung damage contracted as a result of exposure to dust in his workplace, he had risen to the position of supervisor. It is common cause that the respondent handed to Ms Donald, the appellant=s personnel manager, a note from his medical practitioner, Dr Wyers, reading as follows:

“Onlangs deur Dr GB Irsigler evalueer met aanbeveling as volg:

(1) Peter is ongeskik om sy vorige werksverpligting te hervat;

(2) Die bepaling geld onbepaald.

Ons doen hiermee aansoek vir sy ongeskiktheidspensioen en mediese voordeel wat hom mag toekom”.

- [2] The appellant contends that following the handing over of the note Donald explained to the respondent that before becoming entitled to his disability pension from the Metal and Engineering Industries Permanent Disability Scheme

(‘the Scheme’) his services would have to be terminated. It is her evidence that the respondent agreed to this procedure, saying Aek is nou klaar, ek kan nie meer werk nie.@ The respondent’s version is that, on meeting Donald, he was confronted with a decision that he was to be dismissed from his employment.

- [3] The presiding officer in the court a quo found that Donald had misread the note from Dr Weyers. She interpreted it to mean that the respondent was incapacitated to the extent of being unemployable. She then set in motion the steps which she considered necessary for ensuring that the respondent received his disability pension. The first of these steps, she thought, had to be his dismissal; he could not apply for a disability pension while he was still employed; having received Dr Weyers’s note the day before her interview with the respondent, she informed him of the steps she had taken or proposed taking.
- [4] If Donald had not misread the Doctor’s note in this way, the respondent may not have received (as he ultimately did) any disability benefits from the scheme. A scheme member who had been permanently disabled for an uninterrupted period of six complete months became entitled to certain benefits depending on his years of service in the metal industries. In the case of the respondent this was 75% of his remuneration at the date of his ceasing employment due to permanent disability. Permanent Disability in terms of the Scheme rules meant ‘a Member becoming permanently disabled or incapacitated and not being able to engage in further employment in whatsoever capacity in the Industries.’ A threshold requirement of the Scheme rules is permanent total disability. Ms Donald, from her own observation, gained the impression that the respondent was totally disabled. Dr Weyers’s note would have informed her that his disability was permanent . If she had studied the note more closely she would have seen that it indicated no more than that the respondent was (permanently) incapable of resuming his previous work. This is also the respondent’s case. He testified that he was not totally disabled, and that, realising this, Donald should have given him the opportunity of discussing with her the possibility of remaining on in the appellant’s employ, working in a less noxious environment.
- [5] An exploration of this possibility would have been fair, not only to the respondent but also to the Scheme and its members. It would have been fair to the respondent because it would have helped him to maintain the self-esteem which is provided by holding down a job. It would have been fair to the Scheme (and ultimately to the appellant which is a contributor to it) because it would not have been required to lay out a disability income benefit in circumstances where none were payable.
- [6] The duty on the appellant to explore these possibilities and to offer the respondent an alternative job if it was at all able to do so was an onerous one:

the occupational disease from which the latter which suffered had been contracted while working for his employer. This is the approach which has been adopted by the industrial court. I have no doubt that it is the correct one. (Davies v Clean Deale CC (1992) 13 ILJ 1230 (IC) at 1232 E - 1233 B; followed in Food Workers' Council of SA & Another v SA Breweries Ltd (1992) 13 ILJ 204 (IC) at 208 D - I.) It has been approved by the labour appeal court in Num & Nongalo v Libanon Gold Mining Co Ltd (1994) 5 (1) SALLR 26 (LAC) at 28 H – J.) The initiative should have come from the employer and the employer should have guided the discussions. The respondent's remark that he was finished and could no longer work, was so laconic that it cried out for further elucidation and, in any event, was contradicted by the medical certificate.

- [7] Donald also erred in another respect. She thought that for the respondent to become entitled to benefits from the Scheme, he had to be dismissed. Mr. Barrie, who appeared before us for the appellant, conceded that this had been a mistaken view of the legal situation. The respondent had to have been incapacitated for six months. Assuming him to have been permanently totally disabled, there was no obligation on the appellant to employ him for another six months, let alone to employ him at his full remuneration. The fact that the respondent was dismissed immediately, rather than when his disability grant became payable, therefore had no adverse patrimonial consequences for him. The additional member in the court a quo seems to have thought that it did. He considered that 'fairness and equity demand that he be compensated for the period that he was without an income up to until March 1997 when he first received his disability grant.' This reasoning cannot be supported. There is no evidence to show that the respondent would have received an income for those six months if he had not been dismissed. The additional member went even further . He awarded the respondent '25% of the monthly salary calculated from March 1997 to August 1998.' The determination is dated 4 September 1998. This (unascertained) amount was awarded as 'a *solatium* for the unjust (read; unjust) manner in which he was treated by the respondent after 18 years of loyal service, and also taking into account that his medical condition was as a result of the years of service he committed to the Respondent.' The determination, in total, is equal to ten and a half months' income.

- [8] In my view the respondent has been overcompensated by the industrial court. The case presents a number of unusual features. If the respondent's claim for permanent total disability had not been (wrongly) supported by the appellant, he might or might not have been given a job which might, but probably would not, have yielded the same income as the job which he had been obliged to quit. If the appellant could not have found an alternative job for the respondent he would have been dismissed without disability income benefit from the Scheme. He would then have been without an income and would, patrimonially, have been

much worse off. The appellant could not, having first unsuccessfully tried to find the respondent an alternative job, have assisted him in making application to the Scheme for a permanent total disability grant. That would have been in contravention of the Scheme rule regarding payment to disabled members.

- [9] Mr. Barrie strenuously argued that there had been no dismissal but rather a consensual termination of employment in the nature of a resignation, and that, under these circumstances, there had been no obligation on the part of the appellant to discuss alternatives with the respondent. He relied heavily on the words in the note of Dr Weyers 'Ons doen hiermee aansoek vir sy ongesiktheidspensioen en mediese voordeel wat hom mag toekom.' I am not satisfied that one can construe a consensual termination from this request. Properly understood, the note says no more than that the respondent would like his permanent disability benefits to be paid if he should be dismissed for incapacity. In correspondence which subsequently ensued between Donald and a labour consultant representing the respondent, it was not suggested by Donald that she understood there to have been a consensual termination. She consistently in her letters referred to it as a dismissal. I think that the dismissal was procedurally unfair.
- [10] We now have the very curious circumstance that the appellant's commission of an unfair labour practice has yielded the respondent an undeserved benefit. He said in his evidence in the industrial court that he was well enough to work and would, in fact, like the appellant to re-employ him. Rule 3(4) of the Scheme rules provides that a member in receipt of a permanent disability income benefit may at any time be examined by a medical practitioner appointed or approved by the Scheme's board. If the board decides that the medical examination shows that the member is 'capable of engaging in further employment in any capacity in the Industries,' the board may direct that his permanent disability benefit shall cease. Having regard to what may occur if the appellant's evidence comes to the notice of the Scheme's board, it would be presumptuous to suppose that the income benefit will continue.
- [11] Assuming that an employee who is unfairly dismissed and immediately finds a better paid job with better prospects is nonetheless entitled to compensation for the unfair labour practice, the only function of an award in his favour in the absence of an *injuria*, would be to remind the employer not to do it again. If the employer had not seriously misbehaved, such an award would be small. In casu the appellant did not act disgracefully. There was no *injuria*. There was a silly misunderstanding. Well directed discussions with the respondent would have cleared it up. Such discussions were not held. I think that they should have been, but this was the employer's only lapse. It was not a big one. It was not *contumelious*. It should not be censured by substantial *solatium*. In my view it

would have been quite enough if the respondent had been awarded the equivalent of two months' wages.

[12] The respondent's heads of argument were delivered late. The explanation for the delay in the delivery of the heads is so unsatisfactory that one is tempted to think that it is not altogether honest. The court's dismay with the delay and the derisory explanation for it should find expression in the costs order.

[15] The appellant has achieved a substantial measure of success on appeal. It has not, however, succeeded in overturning the judgment in the court a quo. It would, bearing in mind, also, what I said about the condonation application, be in accordance with the law and fairness if each party were to pay its own costs on appeal. Indeed, Mr. Barrie indicated that the appellant would not ask for costs on appeal. Since it is necessary to make certain other adjustments to the determination, it would be expedient to set it aside and substitute our own order for it.

A. The appeal succeeds in part. The determination of the industrial court is replaced by the following order:

1. The termination of the applicant's services by the respondent was an unfair labour practice.
3. The respondent is to pay to the applicant an amount of R6615.18.
3. There is no order as to costs.@

B. Each party pays its own costs of the appeal.

I agree

NGCOBO AJP

I agree

FRONEMAN DJP

DATE OF HEARING: **22 June 1999**

DATE OF JUDGMENT: **24 June 1999**

APPLICANT'S REPRESENTATIVE: **Adv Barrie**

RESPONDENT'S REPRESENTATIVE: **Adv Beaton**

Appellant's attorney: **Mr. G Higgins from Sampson
Okes Higgins Inc.**

Respondent's attorney: **Ms. R Jordaan form Rita Jordaan
Attorneys**

