

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: CA 2/2001

In the matter between:

SOUTH AFRICAN TYPOGRAPHICAL UNION
(obo J.G. VAN AS & 6 OTHERS)
Appellant

and

KOHLER FLEXIBLE PACKAGING (CAPE)
a division of KOHLER PACKAGING LIMITED
Respondent

JUDGMENT :

TRAVERSO, A.J.A. :

[1] The Appellant trade union was recognised by the Respondent and has bargained on behalf of the Respondent's weekly paid staff since 1988.

[2] The Respondent is a separate entity in a group of companies trading under the Kohler Corporate barrier.

[3] The Appellant represents certain weekly paid employees of the Respondent. These workers were employed on a rotating shift system. In terms of their conditions of employment, they were entitled to receive an additional amount, referred to as the “*shift allowance*” for each shift worked. This shift allowance was added to their basic salary, and calculated on the following basis:

3.1	06h00 - 14h00 shift	15% of basic salary
3.2	14h00 - 22h00 shift	16% of basic salary
3.3	22h00 - 06h00 shift	17% of basic salary

[4] During 1990 the Appellant and the Respondent entered into a main collective agreement which regulated, *inter alia*, the retrenchment procedure of the employees of the Respondent. In terms of this agreement, retrenched employees would be entitled to severance pay of one week per year of service. This notwithstanding, it is common cause that the Kohler Corporate Group had in the past applied a policy of offering a severance benefit of two weeks per year service, excluding the shift allowance.

[5] Due to financial difficulties, the Respondent engaged in a series of retrenchment exercises, the first of which was concluded in late 1997. In respect of this retrenchment exercise, retrenched shift workers received two weeks' pay for each year of service. This amount excluded the shift allowance referred to above.

[6] During September 1998 the Respondent engaged in a second round of retrenchments. The parties agreed that these retrenchments would be treated *de novo* and with a full consultation process.

[7] At the conclusion of these consultations both voluntary and compulsory retrenchments took place. The Appellant in this appeal only represents the compulsory retrenchees.

[8] The Appellant is not challenging the fairness of the dismissals either procedurally or substantively.

[9] At the final meeting Respondent adopted the stance that two

weeks per year of service severance pay was to be paid to each employee, but that such pay was to exclude the shift allowance. The shift allowance was however applied to accrued leave pay and was paid out at 16%.

[10] The Appellant disputed the failure by the Respondent to include the shift allowance and addressed this in a communication to the Respondent. Respondent's attitude remained unchanged, namely that as the severance pay was greater than the statutory minimum provided for in Section 41 of the Basic Conditions of Employment Act, No. 75 of 1997 ("the Act"), the Respondent was under no obligation to consider the inclusion of a shift allowance.

[11] The parties were *ad idem* that at the heart of this appeal lies the question of the interpretation of section 41(2) of the Act, and its application (if any) to the present facts.

[12] Section 41(2) of the Act provides:

"Any employer must pay an employee who is dismissed for

***reasons based on the employer's operational requirements
severance pay equal to at least one week's remuneration for
each completed year of continuous service with that
employer, calculated in accordance with section 35."***

[13] It was common cause that “*remuneration*” in Section 41(2) of the Act, is to be afforded the meaning of remuneration as defined in Section 1 of the Act namely:

***““remuneration” means any payment in money or in kind,
or both in money and in kind, made or owing to any person
in return for that person working for any other person,
including the State, and “remunerate” has a corresponding
meaning;”***

[14] Mr. Whyte, who appeared for the Appellant, conceded that the severance packages which the Respondent had paid to the employees was higher than the minimum remuneration stipulated for in Section 41(2) of the Act. He however submitted that Section 41(2) of the Act should not be read in isolation and should be read subject to the provisions of Section 35(5) of the Act.

[15] Section 35(5) of the Act provides:

“(5) For the purposes of calculating an employee’s annual leave pay in terms of section 21, notice pay in terms of section 38 or severance pay in terms of section 41, an employee’s remuneration -

- a) includes the cash value of any payment in kind that forms part of the employee’s remuneration unless the employee receives that payment in kind; but***
- b) excludes -***
 - (i) gratuities;***
 - (ii) allowances paid to an employee for the purposes of enabling an employee to work; and***
 - (iii) any discretionary payments not related to the employee’s hours of work or work performance.”***

[16] Accordingly, it was argued that even if the severance package exceeds the statutory minimum of one week’s remuneration per completed year of service, it had to be calculated in accordance with the provisions of Section 35(5) of the Act.

[17] In my view Section 35(5) of the Act takes the matter no further. It does not expand on the definition of “*remuneration*” as contained in Section 1 of the Act. If anything it curtails it.

[18] Section 35(5) of the Act, in any event, expressly provides that it applies only to the calculation of severance pay in terms of Section 41 of the Act. Section 41(2) of the Act deals with the minimum severance pay.

[19] Mr. Whyte conceded that there was no agreement as to whether the shift allowance should be included in the severance package or not. He however argued that the agreement that the employees would receive “*two weeks*” salary per completed year of service brings the agreement of retrenchment within the ambit of Section 41(2) of the Act. Accordingly, he argued that the calculation of the severance pay had to be effected in accordance with Section 35 of the Act.

[20] The effect of this argument is rather startling. If I have to accept this argument it will mean that if any employer ever had to express the amount of severance pay in multiples of “*weeks*”, Section 41(2) would find application, irrespective of whether the amount paid by means of a severance package exceeds the minimum stipulated for in Section 41(2) of the Act, or not.

[21] The purpose of the legislation is clear. It creates a statutory minimum that has to be paid when an employee is dismissed for reasons based on the employers operational requirements. The only logical interpretation that can be given to the words “*at least*” in Section 41(2) of the Act is that it should mean “*not less than*”. In my view the section is aimed at providing a safety net of a minimum of one week’s pay per year of completed continuous service. Section 189(2)(c) of the Labour Relations Act, No. 66 of 1995 requires parties consult over severance pay. The aim of the consultation is to reach consensus. In the context of severance pay this can logically only mean consensus on the payment of more than the guaranteed statutory entitlement.

[22] In the circumstances I am satisfied that the finding of the Court *a quo* in respect of the interpretation of Section 41(2) of the Act cannot be faulted.

[23] In the alternative Mr. Whyte argued that the Respondent acted in breach of its corporate policy, in that in terms of the Kohler Corporate Group policy the Respondent was bound to offer the retrenchees two weeks' per year service. He seemed to suggest that this "*policy*" was tacitly incorporated into the conditions of service of the employees. I fail to understand this argument. The Appellant must either base its appeal on a breach of a statutory provision, or it must base its case on a breach of contract. The Appellant's case was at all times based solely on the Respondent's alleged failure to comply with the provisions of Section 41(2) of the Act.

[24] It is common cause that there was no agreement between the Appellant and the Respondent in respect of the payment of the

shift allowance. It is self-evident that if there was no agreement, there could not be a breach of contract, either expressly or tacitly.

[25] In view of the above, the appeal is dismissed with costs.

JHM TRAVERSO
Acting Judge of Appeal

I agree:

RMM ZONDO
President

I agree:

CR NICHOLSON
Judge of Appeal

Counsel for Appellants : **Attorney J. Whyte**
Attorneys for Appellants : **Chennells Albertyn**

Counsel for Respondent : Advocate M.L. Norton

Attorneys for Respondent : Cliffe Dekker Fuller Moore
Inc.

Date of Hearing : 6 March 2002

Date of Judgment : 8 May 2002