

LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case: JS 892/08

In the matter between:

SOLIDARITY obo JA WEHNCKE

Applicant

and

SURF4CARS (PTY) LTD

First Respondent

JUDGMENT

LAGRANGE, J:

^{1]} This is an application for a default judgment. The applicant claims that his dismissal by the respondent on 2 June 2008 was automatically unfair in terms of section 187(1)(c) of the Labour Relations Act, 66 of 1995 ('the LRA'). He claims he was dismissed in order to compel him to accept a demand in respect of a matter of mutual interest.

^{2]} The demand in issue relates to the respondent employer's dismissal of the applicant for failing to sign a written contract of employment which contained a term the applicant objected to. The offending term related to a condition attached to his use of a company vehicle as part of his remuneration package. In his statement of claim he claims that he commenced employment with the

respondent on 1 November 2007 as a data Capturer/Photographer after concluding an oral agreement the previous month. One of the terms of that oral agreement was that he would be given the use of a company vehicle.

3] However, when he requested a written contract recording what had been agreed, the version he finally received in March 2008, contained a provision he had not agreed to. The full provision reads:

“Your package will include the use of a company vehicle. I must advise you that should you have any accident, in the vehicle, you will be responsible for the excess amount.”

(emphasis added)

4] The applicant claims the emphasised portion of the above provision had never been part of the oral agreement. Consequently, he would not sign the written agreement. On 29 April 2008, the applicant sent a letter to the employer regarding what he describes as the ‘Proposed employment contract’. In it he recorded, his dissatisfaction with the contract, without providing further details about his reasons for saying so. Interestingly, in the letter he does not say that the written contract was contrary to what had been orally agreed, as might have been expected given his claim that the letter changed the terms of that

agreement. Instead he says:

“It would not be in my best interest to agree to the terms as set out in the proposed employment contract dated 01 April 2007.”

5] In his letter of termination issued on 2 June 2008, the employer recorded that he had failed to sign the contract and that in the circumstances he could no longer be allowed to use the company car, whereas his use of a branded company vehicle was an essential part of his duties due to the marketing component of his work. It is evident from the applicant's own description of his duties that he would be spending some time on the road in the course of performing his duties and driving a branded vehicle would have served the firms' marketing goals. Be that as it may, the employer also stated in the letter that:

“It is company policy that company motor vehicles can not be used by employees whether on probation or not without acceptance of the terms and conditions for the use thereof” (sic)

6] The applicant did not dispute that the condition mentioned was part of the employer's policy on company vehicles.

The legal considerations

7] Section 187(1)(c) of the LRA states:

'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is - . . .

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.'

8] The interpretation of the section was considered by the Labour Appeal Court and the Supreme Court of Appeal in the *Fry's Metals* case.¹ The SCA concurred with the LAC on the narrow circumstances in which the reasons for a dismissal would fall within the ambit of section 187(1)(c). The SCA identified the central characteristic of a dismissal falling within the section thus:

"[55] In the LAC, Zondo JP implicitly - and in our view correctly - rejected the 'migration' approach. He considered that the construction of s 187(1)(c) should start with the meaning of 'dismissal' as it appears in s 186(1)(a). Section 186(1) defines 'dismissal' as meaning, inter alia, that '(a) an employer has terminated a contract of employment with or without notice'.

The learned Judge President concluded that there was a difference between a dismissal as defined in s 186(1) and a dismissal as contemplated by s 187(1)(c). The two categories do not overlap. A s 187(1)(c) dismissal must be effected 'for the specific purpose given in s 187(1)(c) and that purpose is absent in an ordinary dismissal such as is defined in s 186(1)(a)'. Zondo JP expanded

¹ *National Union of Metalworkers of SA & Others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) and *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003) 24 ILJ 133 (LAC).

(para 31):

'[T]here is a distinction between a dismissal for a reason based on operational requirements and a dismissal the purpose of which is to compel an employee or employees to accept a demand in respect of a matter of mutual interest between employer and employee. The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions to meet the employer's requirements.'

[56] The LAC's solution to the conundrum of the statutory concepts was thus to assign a distinctive meaning to 'dismissal' in s 187(1)(c), and then to restrict this category of automatically unfair dismissals to those effected for the purpose of inducing employees to change their minds regarding the employer's demand. On this approach, only conditional dismissals can fall under s 187(1)(c), and it is this that distinguishes them from the broader category of dismissals where the employer - irreversibly - 'has terminated' the employment contract. Dismissals intended to be and operating as final - not, in other words, reversible on acceptance of the demand - can thus never have as their reason 'to compel the employee to accept' that demand. They will therefore not be automatically unfair. In such cases, the only factual enquiry confronting a court is the employer's reason for effecting the dismissal: once compulsion to accept the disputed demand (with ensuing reversal of the dismissal) is excluded, no further enquiry into the nature or categorization of the demand is required.

...

[59] In our view neither s 187(1)(c) nor the collective bargaining structure of the statute as a whole contemplates the 'migration' of disputes from one part of the

LRA's taxonomy to another. Nor can we accept the union's contention that the category of dismissals protected by s 187(1)(c) must be more expansively construed than the LAC found."²

(emphasis added)

^{9]} In *Fry's Metals* the courts were grappling with the distinction between a dismissal for operational reasons and a dismissal to compel employees to comply with a demand. In this instance, the issue is whether the employer was threatening the applicant with dismissal in order to get him to accept a new term of employment (the condition attached to the use of the company vehicle) or whether it was simply insisting that he comply with the existing company policy which required employee's to accept responsibility for any excess amount due in terms of the vehicle insurance, in the event of an accident.

^{10]} In order to succeed the applicant needed to demonstrate on a balance of probabilities that the first scenario described his circumstances. However, even though the matter is unopposed, his own initial written response to the request to sign the contract of employment does not suggest that his problem was that the employer was imposing a new term which had not previously been agreed upon. Secondly, the employer's description of the conditions of company car usage tends to support the interpretation that it was already part of existing company policy and not an amendment of it.

² At 708-709 of the SCA judgment.

^{11]} Thirdly, even if the conditions attaching to company car usage had amounted to an alteration of the applicant's orally agreed terms of employment, his dismissal was not conditional in the narrow sense meant by the SCA in *Fry's Metals*. Nothing in the applicant's statement of case, as confirmed on affidavit, shows that the respondent made it clear that he would be reinstated if he signed the contract. Likewise, the minutes of meetings which the applicant provided only go to show that from January 2008 he had been asked to sign a contract and that he had indicated he was not satisfied with some of the provisions. The minutes do not reveal that the contentious provision was a new condition of employment he was being asked to agree to, which was contrary to what had been agreed to orally.

^{12]} Rather, the limited evidence tends to show that the decision to dismiss the applicant was a final decision because he would not agree to the contract, not in order to compel him to submit to the employer's will on the contentious term.

Conclusion

Consequently, I am satisfied, following the reasoning in *Fry's Metals* that the applicant has failed to satisfy me on a balance of probabilities that the reason for his dismissal

was to compel him to comply with a demand to amend his terms of employment and accordingly the reason for his dismissal was not automatically unfair in terms of section 187(1)(c).

Order

^{13]} Consequently, the following order is made –

- a. The application is dismissed
- b. There is no order of costs.

R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 11 May 2011

Date of judgment: 13 July 2011.

Representation -

For the Applicant: A J van der Bijl of Solidarity

For the Respondent: No appearance

LABOUR COURT