

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS356/2011

In the matter between:

**NATIONAL EDUCATION HEALTH
AND ALLIED WORKERS UNION**

Applicant

**INDIVIDUALS LISTED IN ANNEXURE 'A'
HERETO**

Second to Further Applicants

and

NORTHWEST UNIVERSITY: MAFIKENG CAMPUS

Respondent

Heard: 30 August 2019 and 20 September 2019

Submissions: 1 October 2019

Delivered: 29 October 2019

Summary: Dismissal for operational requirements – employer has no obligation to consult with individual employees when it has consulted with their trade union – the employer has a statutory obligation to consider alternatives in order to avoid retrenchment – filling a vacant post with an affected employee is one of the measures to avoid retrenchment.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The genesis of this litigation is the decision by the respondent, North West University: Mafikeng Campus (University) to restructure its Maintenance Department in 2009. There were protracted consultations between the University and the University of North West Staff Association (UNWSA) on behalf of its members that were concluded in November 2010 and followed by the retrenchment of the second to further applicants (applicant employees) who were 13 in total. Unfortunately, nine years down the line there is no finality on the matter due to delays, mostly at the instance of the applicants.
- [2] These proceedings were initiated by the UNWSA. On 12 February 2012, it was deregistered as a trade union and substituted by the first applicant, National Education Health and Allied Workers Union (NEHAWU) as per the order of Shai AJ dated 30 April 2014. Nonetheless, it is common cause that throughout the consultation meetings, the applicant employees were represented by UNWSA. 12 of the applicant employees have since withdrawn from the litigation and Mr Naransamy Naidoo (Mr Naidoo) is the only one remaining.
- [3] In the light of the turn of events, the parties held a further pre-trial hearing meeting and filed a supplementary minute on 29 August 2019, dealing specifically with Mr Naidoo. I deal with its contents later in the judgment. Suffice to mention at this stage, though, that the essence of Mr Naidoo's impugn is that his retrenchment was procedurally and substantively unfair because it was not effected in accordance with section 189 of the Labour Relations Act¹ (LRA). The University is defending its decision to retrench Mr Naidoo.

¹ Act 66 of 1995 as amended.

- [4] These proceedings sat over a period of two days, 30 August 2019 and 20 September 2019. The parties were directed to file written submissions and they were received by the Court on 1 October 2019.

Issues for determination

- [5] The issues in dispute in relation to the substantive fairness of Mr Naidoo's dismissal are summarised in the supplementary pre-trial minute as follows:

- 5.1 Whether Mr Naidoo could have been accommodated in an alternative maintenance or other positions at the University;
- 5.2 Whether the University had upskilled Mr Naidoo before;
- 5.3 Whether Mr Naidoo could have been a service provider to the University; and
- 5.4 To what extent Mr Naidoo could have been accommodated within the Strategic Plan.

- [6] When it comes to procedure, the following was placed in dispute:

- 6.1 Whether the selection criteria of last in first out (LIFO) and skills retention was adhered to completely;
- 6.2 Whether the notice commencing the consultation complies with section 189(3) of the LRA;
- 6.3 Whether the University did provide the information that was requested by UNWSA during the consultation meetings (particularly, the costs of utilising the services of the contractors and the viability of those services, reports on the skills audit, job analysis and psychometric tests).

Pertinent facts

- [7] The University commenced the consultation process by issuing a section 189(3) notice which was duly served on UNWSA on 22 October 2009. The rationale for the contemplated restructuring was to optimise the service offering by the Maintenance Department as per the University's strategic plan. Attached to the section 189(3) notice was the names of the applicant employees.
- [8] It is common cause that there were about 12 consultation meetings between 26 October 2009 and 22 November 2010. After the meeting of 9 December 2009, the consultation process was halted only to resume on 6 August 2010. The minutes of all the consultation meetings are not disputed. According to Mr Robert Kettles (Mr Kettles), who was the Campus Registrar at that time and participated in all the consultation meetings, the consultation meetings dealt with all the applicant employees in general terms. UNWSA never addressed the individual applicant employees' specific circumstances. Also, the employees that had already been placed in terms of the proposed organogram were the members of UNWSA. As, such their placement was never challenged.
- [9] However, on 20 November 2009, Mr Kettles addressed a letter to the President of UNWSA, Mr M Ndandani (Mr Ndandani) with the skills audit report, the strategic plan and the proposed organogram attached thereto. Amongst the proposals made by the University was an invitation to the applicant employees to apply for the positions that were vacant in the proposed organogram. According to Mr Kettles, that proposal was rejected by the staff association even without extending it to their members during their feedback sessions.
- [10] Mr Naidoo conceded that the Staff Association did hold feedback sessions with the affected employees, however he was never made aware that his position was affected and that there were vacant positions which he could have applied for. In fact, Mr Naidoo's main qualm was that the University

ought to have consulted him directly despite his concession that he was a member of UNWSA in good standing and had mandated it to represent him during the consultation process.

- [11] Mr Petrus Joubert (Mr Joubert), who was the Manager for Projects at that time, testified that he was the author of the strategic plan and the proposed organogram. He also conducted the skills audit that was subsequently used to place the employees in the proposed organogram. He populated the proposed organogram with the names of the employees that were already the incumbents in those positions as a mere proposal for the purpose of consultation with UNWSA but nothing was conclusive at that stage. However, he conceded that the proposed organogram was ultimately implemented as is.
- [12] Mr Naidoo was employed as a Machine Carpenter and was qualified in furniture manufacturing, a fact he confirmed during his skills audit interview. Even though he testified that he was the most experienced Carpenter and had been utilised as a Maintenance Carpenter, he conceded that he was employed as a Machine Carpenter. Mr Naidoo was adamant that the University knew his skills as Mr Joubert used to instruct him to do maintenance tasks. However, this version was not put to Mr Joubert.
- [13] The essence of Mr Naidoo's evidence was that he ought to have been accommodated in the position of Maintenance Carpenter as he was more experienced than Messrs Manda and Mosia who were both employed as Maintenance Carpenters. Alternatively, he should have been offered a junior position of Assistant Carpenter and bumped the incumbents in those positions as he was more experienced and with longer service of employment.
- [14] Conversely, Mr Kettles testified that the focus in terms of the positions in the proposed organogram was that of supervisory and project co-ordination skills and not the technical skills *per se*. However, UNWSA was invited to come up with proposals on the proposed organogram and placement of staff but failed to do so. There were no suggestions put forward by UNWSA in relation to Mr Naidoo specifically as to whether he was interested in any of the Carpenter

positions or junior positions or whether he ought to have been placed in an alternative position instead of his colleagues. He also explained that it would not have been possible for the University to deal directly with Mr Naidoo as the UNWSA had objected to such an action previously.

- [15] On the issue of re-skilling, Mr Kettles testified that the University did contact the Skills Development Officer to request for the re-skilling of the applicant employees, including Mr Naidoo, in terms of the layoff scheme fund of the ETDP SETA. However, the request was unsuccessful. Mr Naidoo as well as all the retrenched employees were paid an *ex gratia* skills allowance of R2000.00, respectively. Mr Naidoo conceded that he never requested to be upskilled before the restructuring process but had requested the upskilling on behalf of the general workers.
- [16] On the issue of procedure, the section 189(3) notice clearly stipulated that the purpose of the consultation would be to deal with the impending restructuring of the maintenance department and contemplated retrenchment of the applicant employees. Mr Kettles conceded that he made a typographical error when he referred to 'transfer' as opposed to 'retrenchment'.
- [17] Mr Kettles testified that the University did provide a response to UNWSA's request for information. In essence, the University was of the view that the requested information was irrelevant: firstly, there was no need to deal with all service providers contracted by the University given the fact that the scope of the restructuring was limited to the Maintenance Department; secondly, the restructuring was never about saving costs, but efficient and optimal rendering of services with a focus on supervision and co-ordination; and lastly, UNWSA had already been favoured with the copies of the skills audit report and the job profiles that were utilised as the basis for consultation on the proposed organogram.
- [18] It is not clear as why the information had been requested. However, Mr Naidoo did not even attempt to traverse this issue in his evidence. His evidence was simply that he has a skill that could have been useful in the new

Maintenance Department structure hence he ought to have been accommodated.

Legal principles and application

[19] The crisp issue for determination is whether the dismissal of Mr Naidoo could have been avoided or, put differently, was operationally justifiable. In *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings*,² referred to by TSSA, the Labour Appeal Court (LAC) held as follows:

'For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process.' (Emphasis added)

[20] Mr Naidoo did not dispute the University's decision to restructure the Maintenance Department. However, his impugn is that the changes in terms of the new structure did not render him redundant as he had the requisite skills and the job experience in his favour.

² See: *SACTWU and Others v Discreto (A Division of Trump and Springbok Holdings)* [1998] 12 BLLR 1228 (LAC) at para 8; see also *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19; *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) at paras 69 – 70.

[21] Mr Kettles testified that Mr Naidoo was employed as a Machine Carpenter and was skilled in furniture manufacturing, a skill that was not needed in terms of the new structure. The skills audit did not reveal any additional skills, especially in project coordination, hence he was retrenched. This evidence was corroborated by Mr Joubert. However, both conceded that the employees that were retained were never assessed in terms of their capabilities or experience. The only reason they were retained is because they were the incumbents in those positions. When challenged about Messrs Manda and Mosia who were both Carpenters, Mr Kettles was adamant that they were retained because they were also skilled co-ordinators. This is, however, not true when it comes to Mr Mosia, as he had no other skills other than an allegation that he was a qualified Carpenter without proof of his qualification. Still, he was never asked to apply for the Maintenance Carpenter position in the new structure.

[22] Mr Naidoo is a qualified Machine Carpenter who had been in the Maintenance Department longer than everyone as he had 18 years' experience. His capacity and experience were never challenged. The only issue that emerged from his cross examination was that a carpenter can do all carpentry tasks and as a Machine Carpenter he could also manufacture furniture. Mr Kettles, himself, conceded that Mr Naidoo would have been able to repair and maintain all the wooden work and structures at the University by virtue of his qualification.

[23] It is also apparent from the minutes of the consultation meetings that the legitimacy of the skills audit conducted by Mr Joubert was disputed. The UNWSA persistently requested the names of that the seven skilled employees that would have been lost had LIFO been applied, but to no avail. In the end, this issue was never resolved.

[24] I, accordingly, accept Mr Naidoo's evidence that, as a Carpenter, he could perform all the maintenance tasks; and he was senior and most experienced than Messrs Manda and Mosia. Clearly the University was confronted with a situation where it had three Carpenters when, in terms of the new structure, it

needed only two. In my view, the University ought to have, at least, assessed their suitability in terms of a competitive placement. Failure to do so resulted in an irrational decision to displace Mr Naidoo.

- [25] Even if the decision to retrench Mr Naidoo was commercially rational, it was incumbent upon the University to show that it had considered all the alternatives to retrenchment. Mr Kettles testified that the University did consider alternatives to retrenchment and all were not viable. However, he had advised UNWSA to consider the vacant positions in the proposed organogram and apply on behalf of the applicant employees, that offer that was not taken up.
- [26] Equally, Mr Kettles was adamant that Mr Naidoo did not qualify for any of the vacant positions (particularly, the two Maintenance Buildings Co-ordinator positions, numbered 6 and 7 in the organogram, and Assistant Maintenance Co-ordinator position, numbered 13 in the organogram) because he had no skills in control and project co-ordination. It may be true that Mr Naidoo could not have qualified for the Maintenance Buildings Co-ordinator positions as they were pitched at a management level. However, the Assistant Maintenance Co-ordinator is merely a semi-skilled position with no requirement for academic qualifications. The incumbent would have been responsible for supervision of building maintenance work and carrying out building inspections. Mr Naidoo was not only suitable, but over qualified for this position. Any perceivable gaps, if at all, could have been dealt with through additional training. Mr Naidoo testified that he was prepared to take a salary cut in order to secure his employment. The fact that he did not apply for this position did not absolve the University from offering it to Mr Naidoo as an alternative to retrenchment, especially since his fellow Carpenters were placed in the new structure without applying for their positions.
- [27] Section 189(2)(a)(i) and (ii) enjoins the employer to consult on measures to avoid or minimise retrenchments. Whilst in terms of section 189(3)(a) and (b) the employer must disclose the reasons for the proposed retrenchments and the alternatives that it had considered before proposing the dismissals, and

the reasons for rejecting each of those alternatives. Pertinently, in *Oosthuizen v Telkom SA Ltd*,³ the Labour appeal Court (LAC), per Zondo JP as he then was, stated that:

[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. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirement. It is in accordance with this obligation of the employer that in the General Foods case, supra, 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)

[28] In this instance, the University failed to consider the vacant position of Assistant Maintenance Co-ordinator as an alternative to the retrenchment of Mr Naidoo. No plausible explanation has been offered for this failure, despite the University's statutory obligation to consider all possible alternatives in order to avoid the retrenchment of Mr Naidoo.⁴

[29] Turning to the issue of procedural fairness, Mr Naidoo conceded that he was represented by the UNWSA during the consultation process. Accordingly, the University had no obligation to consult with him separately and directly. In this

³ [2007] 11 BLLR 1013 (LAC) at para 8.

⁴ See: *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* (2019) 40 ILJ 87 (CC); 2019 (3) BCLR 412 (CC); [2019] 4 BLLR 323 (CC) at paras 34 -38.

regard, in *Baloyi v M & P Manufacturing*,⁵ referred to by the University, the LAC stated that:

[23] In keeping with a premise of the Act, section 189(1) envisages that the collectivities of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented. To interpret the section so as to allow an employee represented by a union to engage in a parallel process of consultation would undermine the very purpose of the section. (Emphasis added)

[30] Also, in my view, nothing turns on the word 'transfer' in the section 189(3) notice as its contents clearly refer to the operational requirements as the reason for the restructuring and retrenchments. It is also clear from the minutes of the consultation meetings that the subject matter for discussion was the restructuring due to operational requirements and not transfer of employees.

[31] Given the dispositive nature of the findings I have arrived at above, there is no need to deal with the rest of the other issues.

Conclusion

[32] In all the circumstances, I am satisfied that the retrenchment of Mr Naidoo was procedurally fair but substantively unfair.

Remedy

[33] Mr Naidoo seeks reinstatement with full back pay; alternatively, compensation. Even though reinstatement is a primary remedy in terms of the LRA, in the present case, there are compelling reasons tendered by the University to debar Mr Naidoo of the primary remedy. As mentioned above, the retrenchment occurred in 2010 and the delay in finalising this matter is about nine years. The delay is mostly attributed to the applicants. As a result, Mr Naidoo is just about a year from reaching the official retirement age.

⁵ [2001] 4 BLLR 389 (LAC) at para 23. See also *Oosthuizen* above n 3 at para 25-32.

[34] In the light of circumstances of this case, I deem it just and equitable to order compensation equivalent to 12 months' salary (R29 000.00 x 12 = 348 000.00).

Costs

[35] The only issue lingering is that of costs. Since both parties are partially successful, it accords with canons of law and fairness that each party pays its own costs.

[36] In the circumstances, I make the following order:

Order

1. The dismissal of the applicant employee, Mr Naidoo, is procedurally fair but substantively unfair.
2. Mr Naidoo is awarded compensation of R 348 000.00 which is equivalent to 12 months' remuneration.
3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate M Sekhethela

Instructed by: Thaanyane Attorneys

For the respondent: Ms M Chenia from Cliffe Dekker Hofmeyr Inc.

LABOUR COURT