IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

NOT REPORTABLE

CASE NO: JS319/2022

In the matter between:

PRATIBA GOVINDER Applicant

and

HARTMANN VITAMED (PTY) LTD Respondent

Date heard: 8 August 2025

Judgment delivered: 14 October 2025

Summary: Alleged automatically unfair dismissal - dismissal not automatically unfair but procedurally and substantively unfair - claim in contract not proven - respondent ordered to pay compensation for unfair dismissal.

JUDGMENT

DANIELS J

Introduction

1. The applicant alleges that she was dismissed for reasons based on her race and her religion, and her dismissal was therefore automatically unfair as contemplated in section 187(1)(f) of the Labour Relations Act No. 66 of 1995 as amended (the "LRA").

2. In the alternative, the applicant alleges that she was dismissed for reasons based on the respondent's operational requirements, but her dismissal was both procedurally and substantively unfair.

3. In addition, the applicant alleges that the respondent unlawfully breached her employment contract and its policies by failing to pay her a performance bonus, by unfairly applying its travel policy, and by failing to honour its agreement to pay for the bursary it had awarded to her son.

Contractual claims

4. The claim is brought under section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997. The applicant bears the onus of proving the terms of the contract, proving the breach, and providing evidence of the contractual damages resulting from the breach.[1] For the reasons set out below, the claims cannot be sustained.

   4.1. In respect of the performance bonus, the applicant pleaded that she did not have the financial figures at her disposal to quantify the amount claimed but that the respondent could do so. The applicant did not give evidence that she had satisfied the requirements for the

[1] *SM Goldstein & Co v Gerber* 1979 4 SA 930 (A) at 937G

bonus, only that she was 'on track' to do so at the time of her dismissal. The respondent provided no evidence as to the quantum of the performance bonus and gave evidence that the bonus is only payable if the employee is in employment at the time the bonuses are paid.[2] Furthermore, the respondent testified, whether the applicant qualified for a bonus can only have been determined after the end of the financial year - 31 December. In these circumstances, the applicant has not proven her entitlement to the bonus.

4.2. The applicant alleged that she suffered damages because she was required to take a loan of R79 000, 00 because of the respondent's alleged breach of its travel policy. However, no evidence was presented demonstrating that such a loan was taken. The applicant alleged that her damages arose from the 'shortened time period' allocated to her to purchase a new vehicle. The applicants given six months, from 1 October 2020 to 31 March 2021, to purchase a new vehicle. It is unclear what period the applicant alleges she was entitled to. It is also unclear why the applicant could not secure a new vehicle within the six months period provided to her. If the applicant and her husband had purchased a vehicle which complied with the policy, the applicant would have suffered no damages. In the circumstances, any damages which occurred resulted from the applicant's own negligent conduct. In any event, as I explain later, I do not accept that the respondent breached the travel policy.

4.3. The applicant presented no evidence that she suffered damages in respect of the bursary. She did not present evidence that her son did in fact study, and that he paid R40 000, 00 or more for such studies. Furthermore, although the respondent pleaded that the bursary was subject to a work back period which was impossible after the dismissal, the applicant did not dispute this.

[22] See clause 4.7 of the applicant's employment contract, Bundle C p109

Witnesses called by the parties

5. The respondent called four witnesses:

    5.1. The respondent called Mr Bruce Atkinson ("Atkinson"), its chief financial officer. Atkinson testified about the rationale for the retrenchment, the absence of any alternatives to the retrenchment, and the travel policy.

    5.2. Next, the respondent called Mr Jean Du Preez, an employee of the Guardian Employers Organisation, who assisted and advised the respondent through the retrenchment consultation process.

    5.3. Thereafter, the respondent called Ms Julia O Grady ("O Grady"), the managing director. O Grady testified about the allegation that she had victimized the applicant and discriminated against her.

    5.4. Finally, the respondent called Ms Tatjana Konig ("Konig"), its regional human resources business partner, who testified about the grievance laid by the applicant in respect of the application of its travel policy.

6. The applicant testified on her own behalf and called no further witnesses.

<u>Material facts</u>

7. The facts, as extracted from the testimony and the pleadings, are summarized below. Note that this part excludes any facts relating the retrenchment which are dealt with separately.

8. The respondent is a supplier of medical devices and health care products, forming part of the Hartmann Group headquartered in Germany.

9. The applicant commenced employment with the respondent on 2 September 2019 as its national sales manager. The applicant was responsible for sales in the respondent's three main divisions namely, Incontinence, Wound Care and Risk Prevention.

10. The Incontinence division was composed of three "channels" namely: (1) Nursing Homes, (2) Hospitals, (3) Wholesalers and Pharmacies. Within the respondent, the wholesalers and pharmacies channel is also referred to as "channel 30". Channel 30 brings in the bulk of the revenue of incontinence division. Each division, and channel, has its own financial reporting systems. The costs of the business are allocated and shared among the divisions and channels.

11. When the applicant commenced her employment, there were twelve sales representatives nationally who reported to her. The applicant herself reported to O Grady until 1 April 2020, when a new line manager was assigned, namely Ms Paayal Seechoonparsad ("Seechoonparsad").

12. The applicant gave evidence about several occasions when she clashed with O Grady:

    12.1. The applicant testified that O Grady was dissatisfied with her selection of a venue for the national sales conference because several individuals became sick with gastroenteritis. The applicant testified that O Grady accused her of selecting a venue with poor food because she (the applicant) was fasting for religious reasons. O Grady denied this and testified that, while she also became sick, she understood that the venue had been selected by the applicant *and* the Hollister Sales Manager. In addition, O Grady testified, she was disappointed that the applicant was often not available during the conference.

12.2. The applicant testified that, while on a business trip, she commented to her team that she felt uncomfortable with flying because there was inadequate social distancing. O Grady was critical of her comments. O Grady admitted that she was critical of the applicant’s comments because they could have increased the sales team’s anxiety about flying during the COVID19 pandemic.

12.3. The applicant testified that O Grady lost her temper with her, shouted at her, and told Seechoonparsad to get the applicant out of her office. O Grady admitted this occurred and explained that she had become frustrated at the applicant’s persistent refusal to accept her decision in relation to the travel policy. The applicant complained to head office, and O Grady was asked to apologize, which she did.

13. There is no need to resolve the factual disputes referred to in paragraph 12 above, because such clashes do not suggest any form of hostility to the applicant based on race, ethnicity, or religion. These kinds of personality clashes, although unfortunate, are common in most workplaces.

Sue Doyle

14. One of the sales representatives, who reported to the applicant, was Ms Sue Doyle (“Doyle”). The applicant clashed with Doyle on several occasions. The applicant highlighted the following:

14.1. Doyle failed or refused to submit her daily call logs to the Customer Relationship Management system,

14.2. Doyle took two days sick leave, on a Friday and a Monday, but failed to produce a medical certificate in contravention of the sick leave policy, 14.3. Doyle failed to report for work for three days without informing the applicant of her absence,

14.4. Doyle accused the applicant of failing to submit a reimbursement claim to the finance department. It transpired that the supplier had not been paid for over four months, although the applicant had instructed Doyle to pay the supplier and thereafter submit a claim for reimbursement to the finance department.

14.5. Doyle made disparaging statements about the applicant on a WhatsApp group for the sales team.

14.6. The applicant believed Doyle made "ghost calls" to customers, a dismissible offence under the disciplinary code and procedure.

15. The inferior performance, and misconduct, of Doyle, as explained above, resulted in the applicant laying a grievance against Doyle, the issue of a written warning to Doyle, and the resignation of Doyle in May 2021.

16. The applicant perceived that O Grady was friendly with, and protective of, Doyle. However, O Grady denied that Doyle was her friend and denied that she was protective of Doyle.

17. The applicant testified that O Grady delayed the performance appraisal of Doyle, delayed the taking of disciplinary action against Doyle, and downplayed Doyle's lack of respect for the applicant. O Grady disputed this and testified that there was no evidence that Doyle was making "ghost calls."

18. The applicant testified that O Grady approved the provision of "advanced paid leave" for Doyle, while denying this to others. However, the applicant did not call those employees to corroborate her version that, though similarly placed, they were denied "advanced paid leave." Accordingly, this testimony constituted inadmissible hearsay evidence.

19. The applicant testified, when Doyle failed to pay the supplier as she had instructed, O Grady reprimanded them both. O Grady admitted that she had reprimanded them both and explained that she had done so because they were both being nasty to each other and behaving unprofessionally.

20. The applicant testified that O Grady defended Doyle by saying: "*perhaps Sue is going through personal issues*." O Grady testified, while she did not favour Doyle, give her preferential treatment, or obstruct disciplinary action against Doyle. O Grady explained that her lenient approach to Doyle was informed by Doyle's medical condition and her fragile mental health, of which the applicant was unaware.

Application of the travel policy

21. The respondent has a Travel Allowance Policy (the "travel policy"), the relevant parts of which are reflected below:

> "2. Acquisition of Vehicles
>
> a. The employee is free to purchase any new vehicle, provided that:
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> i. it is deemed to be adequate for the performance of duties,
> ii. it reflects the image that the Company wishes to present to its customers, partners and any other business associates.
>
> b. Management reserve (*sic*) the right to disqualify any vehicle chosen by an employee that is considered unsuitable or impractical for business use.

c. The vehicle must meet the following requirements: if in doubt about any of the definitions below, please consult your Line Manager.

i. Vehicle must have at least 4 doors
ii. 4 adult seats
iii. Less than 7 years old or inside of maintenance plan
iv. Must be a sedan or SUV

4.General

g. For new employees whose vehicles do not the requirements in terms of paragraph 2 above, they must change their vehicle to comply with the requirements as determined in discussion with their Line Manager, but in any event by no later than 12 months.

h. For existing employees whose vehicles do not comply with the requirements of paragraph 2 above, when they replace their vehicle, the new vehicle must be in compliance with these requirements."

22. It is apparent from a purposive interpretation of the travel policy, taking into consideration the language, grammar, and context, that:

22.1. While the words "new employees" relates to those employed after the introduction of the policy, clause 4(g) applies only to new employees who, at the time of their engagement, do not own a vehicle that complies with the policy. Accordingly, clause 4(g) did not apply to the applicant, who had a compliant vehicle when she was engaged.

22.2. The words "existing employees" relates to individuals in respondent's employ when the policy was introduced. Accordingly, clause 4(h) did not apply to the applicant, who was engaged after the policy was introduced.

22.3. The policy did not contemplate that employees may dispose of their compliant vehicles and thereafter, either deliberately or mistakenly, purchase a vehicle that did not comply with the policy.

22.4. The purpose of the policy is to guarantee that senior managers, who are required to use their own vehicles for business purposes are paid a travel allowance - provided their vehicle complies with the policy.

23. During September 2020, the applicant and her husband began searching for a new vehicle for the applicant. On 28 September, the applicant's husband purchased a new two door, four seat, BMW 220i coupe (the "BMW") for the applicant. I accept that the applicant's husband concluded the deal by himself, without the knowledge of the applicant. The applicant admitted that she had failed to make her husband aware of the policy requirement that the vehicle must have four doors.

24. On 1 October, the applicant emailed Seechoonparsad and asked her for permission to purchase the BMW, even though the vehicle did not comply with the travel policy. Seechoonparsad consulted human resources, who informed her that the final decision lay with O Grady. Neither human resources, nor Seechoonparsad, had any difficulty with the request.

25. Later that same day, O Grady emailed Seechoonparsad and informed her that she was not prepared to "break policy" to accommodate the applicant. In her email, O Grady gave reasons for her decision. O Grady indicated that the applicant may be requested to transport two overseas visitors, and she must be able to transport them comfortably. O Grady also indicated that the applicant was a senior employee and must be a role model.

26. The applicant did not accept the decision of O Grady and implored her to change her mind. The applicant made a proposal to rent a vehicle, at her own cost, if she is required to either transport customers to an event or take more than one person on a field trip. The applicant suggested there were other employees who do not comply with the travel policy.

27. O Grady convened a meeting with the applicant for 6 October. O Grady asked the applicant to explain when she planned to secure a vehicle that

was compliant with the travel policy. O Grady also asked the applicant to explain which vehicle she had used to travel to the meeting. At the conclusion of the meeting, O Grady handed the applicant a written warning, which had earlier been signed by Seechoonparsad. The warning was issued to the applicant for her alleged disregard of the travel policy.

28. On 14 October, the applicant appealed against the warning and, following an appeal hearing, the written warning was set aside. In her appeal, the applicant stressed that she had not purchased the vehicle and that she did not deliberately breach the travel policy. In her evidence, O Grady readily admitted that she had overreacted when she issued the warning.

29. On 15 October, O Grady emailed the applicant and advised her that she may not use the BMW for business purposes.

30. On 1 December, the respondent informed her that she would be permitted to use the BMW for a period of six months, but she was also required to change the vehicle during that period.

31. On 17 December, the respondent informed the applicant that her travel allowance would be stopped if she were unable to register a vehicle which was compliant with the travel policy by 1 April 2021.[3]

32. The applicant alleged that the respondent applied the travel policy inconsistently and highlighted the following as examples:

32.1. Mr Thabo Mokhobo ("Mokhobo") was employed in May 2019 at which time he had a vehicle that was not compliant with the travel

[3] Although the applicant was dismissed on 15 December 2021, her travel allowance never terminated. It was unclear from the evidence whether or when the applicant purchased a vehicle that was compliant with the travel policy.

policy. Mokhobo obtained a new vehicle in October 2020, but that vehicle was also not compliant. When Mokhobo fell ill, respondent granted him until March 2021 to purchase another vehicle. Mokhobo was given from May 2019 to March 2021, a period of approximately 22 months, to obtain a vehicle that was compliant with the policy.

32.2. Ms Mohau Shole ("Shole") was given more than twelve months to obtain a vehicle that was compliant with the travel policy. However, as respondent points out, Shole was an "existing employee" as contemplated in clause 4(h) of the travel policy.

33. The applicant appealed to Konig, respondent's regional human resources partner, regarding the respondent's implementation of its travel policy. Konig considered the matter and found there was no merit in the appeal. Konig noted that the applicant was aware of the travel policy and had failed to inform her husband of the policy, although they were both involved in the search for a new vehicle.

34. The applicant was given from 1 October 2020 to 31 March 2021 to purchase a vehicle that was compliant with the policy. She was also permitted to drive the vehicle to and from work between 17 December 2020 to 31 March 2021.

Legal principles: alleged automatic unfairness of the dismissal

35. Section 187(1)(f) of the LRA states that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee, whether directly or indirectly, on the grounds *inter alia* of race, ethnic origin, or religion. The applicant contends that her dismissal is automatically unfair because the true reason for her dismissal was her race, ethnic origin, or religion.

36. By reference to the evidence, this Court must objectively determine the reason for the dismissal of the applicant. Our courts have provided ample guidance as to how to approach this task:

36.1. In South *African Chemical Workers Union and others v Afrox Ltd*[4] Froneman DJP (as he then was) held as follows:

> "[32] The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare *S v Mokgethi & others* 1990 (1) SA 32 (A) at 39D41A; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further."
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> (own emphasis)

36.2. In *Kroukam v* SA *Airlink (Pty) Ltd*[5] Davis AJA (as he then was) held:

> "In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show

[4] (1999) 20 ILJ 1718 (LAC)
[5] (2005) 26 ILJ 2153 (LAC)

> that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."
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> (own emphasis)

37. The applicant's evidence that O Grady treated other Black employees less favourably than Doyle in respect of sick leave was vehemently disputed by O Grady. The evidence that O Grady favoured Doyle over other Black employees, besides herself, constituted hearsay evidence.

38. There being no direct evidence that O Grady treated Doyle more favourably was because of her race or ethnicity, the applicant sought to draw an inference to that effect. O Grady testified that she wished to deal with Doyle in a manner suited to her medical condition and her fragile mental health. The applicant did not dispute that Doyle had a medical condition and suffered from poor mental health. As our courts stated the "*process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn' and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities.*"[6] Here, the inference is not consistent with all the proved facts, and is therefore inappropriate. In the circumstances, I accept that any indulgences granted to Doyle, resulted from her medical condition, not because she was White.

39. The applicant sought to show that respondent treated her less favourably than others in respect of the travel policy. However, the two comparators, Mokhobo and Shole, were both Black. Thus, those examples cannot signify that O Grady, and the respondent, applied the policy more strictly to the applicant because she was Black. To the extent that Mokhobo was

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[6] *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at para [35]

treated more leniently than the applicant, and he was, this can hardly be called racist given that he was Black. Atkinson and O Grady both testified that the travel policy was not designed, or implemented, to favour Whites and there is no reason to doubt their evidence. As explained in para 22, I do not accept that the respondent breached its travel policy. The applicant presented no credible evidence showing that she was treated less favourably than White employees in respect of the travel policy. The travel policy was designed not to disadvantage existing employees because it would be unfair to introduce a policy which would have a negative impact on existing employees. This was a deliberate policy decision, and, in my view, it was neither irrational nor unfair. O Grady and Atkinson testified that, insofar as their vehicles were not compliant, this was because they were existing employees, and their vehicles were purchased before the policy came into effect.

40. For the reasons set out above, the applicant failed to discharge the evidential burden by raising a credible possibility that she was dismissed based on her race, ethnicity, or religion.

Substantive fairness

41. On 11 November 2021, Mr Marc Perez Pey, the regional director for the Hartmann Group, sent an email to O Grady recording that the Board had decided that, during 2022, the respondent must *inter alia* increase MEBIT[7] within incontinence by 100 000 euros. At current exchange rates, this required respondent to either increase sales or reduce costs, within incontinence, by R1.8million.

42. On 30 November, the respondent addressed a letter to the applicant advising that two channels within incontinence, namely nursing homes, and hospitals, were not achieving the desired revenue and profit margin

[7] management earnings before interest and taxes

levels and were forecasted to deliver negative EBIT[8] during 2022. The respondent indicated that it required all its divisions to achieve profitability at the EBIT level, which may be achieved by increasing sales or cutting costs related to 'sales, general and administration' ("SGA") by R1.8million. The respondent informed the applicant that it had already implemented measures to cut costs such as by reducing marketing and advertising, reducing BBBEE related costs, not replacing the sales representative for Johannesburg (Northern Suburbs), and reducing its travel and conference related expenditure. As a result of the financial pressure, the respondent advised the applicant that it needed to consolidate two existing positions, namely the national sales manager position and product manager (incontinence). The respondent called for the employees holding these two positions to volunteer for retrenchment and set out its proposed voluntary retrenchment package. The package was open for acceptance until 2 December.

43. The applicant did not volunteer for retrenchment and neither did the product manager for incontinence, Ms Caroline Cromb ("Cromb").

44. The applicant communicated her rejection of voluntary retrenchment by email on 3 December. In the same email, the applicant suggested various alternatives including the reduction of the 13th cheque, dissolution of the incentive scheme, the suspension of bonuses, and elimination of the home office allowance. The applicant also questioned the appointment of a data analyst, and the business development manager.

45. That same day, 3 December, the respondent issued, to the applicant, a notice contemplated in section 189(3) of the LRA. The notice informed the applicant that two positions would be affected, the product manager (incontinence) position and the national sales manager position. The respondent stated that the selection criteria would be LIFO ("Last In - First

[88] earnings before interest and taxes

Out") *with skills.* The respondent indicated that the first consultation meeting would be held on 8 December.

46. On 8 December, the consultation meeting was attended by the applicant, Cromb, Atkinson and Mr Jean Du Preez ("Du Preez"), an advisor from the Guardian Employer's Organisation. According to the applicant, the duration of meeting appears to have lasted no more than an hour. The issues discussed were those set out in the section 189(3) notice read with the information in the respondent's letter dated 30 November. The rationale for the retrenchment was discussed further. The applicant questioned the inclusion of the hospital channel in the motivation for the retrenchment and stated that, during 2021, that channel had seen growth and the respondent had achieved its target for that channel for the year. Atkinson responded that the respondent forecast a loss for the channel during 2022. He undertook to respond further in writing. Atkinson and Du Preez indicated that the process would continue through correspondence and further consultation meetings would only be held if required. The applicant and Cromb stated that the retrenchment was a *fait accompli*.

47. During the consultation, there was little discussion of alternatives and no discussion about what criteria would be used to fill the new position arising from the consolidation of the two affected positions (the "consolidated position"). Atkinson agreed both affected positions were considered 'business critical'.

48. On 9 December, the applicant sent an email to Atkinson. In her email, she made various suggestions to cuts costs. She noted that the incontinence division constitutes 70.2% of the respondent's business and most salaries are paid from that division. She pointed out that the hospital channel had grown by 46.6% year to date. She questioned why the two affected positions were being consolidated. She stated that, with the selection criteria being LIFO with skills, she was not the last person engaged by the respondent.

49. On that day, 9 December, the applicant emailed to the respondent a one and half page written motivation for her appointment to the consolidated position. The applicant indicated that success of the incontinence division would depend on the ability of the sales team to be flexible, agile, and motivated. The applicant indicated that she had ten years of experience in sales, moving from being a medical representative, to a regional sales manager and finally a national sales manager. The applicant indicated that she had mentored individuals who are now in product management, and she indicated that she had been recognized as a 'sales representative of the year' on two occasions. Finally, the applicant indicated that product management was an extension of the sales function and could be learnt on the go. The respondent did not respond to the motivation.

50. Atkinson testified that Cromb, while experienced in product management, had little to no sales experience while the applicant, while experienced in sales, had little to no experience in product management.

51. On 10 December, Atkinson responded to the applicant by letter. In his letter, Atkinson stated that costs are allocated to each division and channel based on the 'most appropriate allocation method.' Atkinson stated that the savings proposed by the applicant were small and the proposals would be detrimental to the business. He indicated that the reduction or elimination of bonuses, incentives, and home allowances would undermine staff morale. He advised that at least one of the two affected positions had become redundant because of the decision to combine the positions. He agreed that the hospital channel had done well in 2021, but this was due to opportunistic demand created by the COVID19 pandemic. Atkinson agreed that the timing of the process was "less than ideal" but the respondent was also cognisant that a drawn-out process would create anxiety for all those involved. He stated that the applicant was the last employee to join the Incontinence division because

her role would be consolidated with product manager (incontinence) and she had the least service of two affected positions.

52. On 14 December, the applicant emailed Atkinson in response to his letter dated 10 December. In her email, the applicant requested figures concerning the costs saved in respect of marketing, travel, conferencing, and BBBEE expenditure. She questioned why the sales team of the incontinence division was being targeted when there are many other employees in the division. The applicant requested the figures demonstrating that channel 30 was behind the planned revenue for 2021, and the benefits from sales to pharmacy groups at higher prices. The applicant pointed out that savings from the home office allowance would be closer to R100 000, 00 and not R50 000, 00 as the respondent had indicated. She pointed out that the elimination of the 13th cheque which was already budgeted would contribute significantly to saving the costs required. The applicant indicated that suspension or elimination of the bonuses would cut costs of between R800 000, 00 and R1million. She pointed out that the decision not to fill “Allisons’ position” and the sales position in Port Elizabeth would save the respondent about R800 000, 00.

53. Later that day, on 14 December, Atkinson addressed a letter to the applicant. In the letter, among other things, Atkinson advised that the respondent was not prepared to disclose any detailed information relating to the monies saved through cost cutting measures. Atkinson also stated that the respondent was not prepared to disclose information relating to the profitability of channel 30. During his evidence, Atkinson stressed that the respondent could not share financial information requested because this could be given to competitors and hurt its business. Significantly, in that letter, Atkinson informed the applicant that the respondent considered the consultation process to be closed.

54. At 06h55 on 15 December, the applicant emailed Atkinson. She informed Atkinson that he had misunderstood her on certain issues raised in her

previous email and she recorded that Atkinson had failed to clarify certain issues she had raised. Atkinson did not respond.

55. Later that day, 15 December, the applicant was informed of her dismissal and Cromb was informed that she would be appointed to the consolidated position. No interview was convened beforehand. Atkinson confirmed that, as of 15 December, there was no job description for the consolidated position.

56. Despite the early indications that the respondent would use "LIFO with skills", only LIFO was applied. Atkinson did not clarify when the selection criteria was changed, or why.

57. Furthermore, in *Oosthuizen v Telkom SA Ltd*[9] the Labour Appeal Court ("LAC") held:

> "[4] …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'. … [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. . . . A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason."
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> (own emphasis)

58. In his article titled "*Corporate Restructuring and Applying for Your Own Job*"[10] Professor Rycroft states:

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[9] [2007] 11 BLLR 1013 (LAC) at paras 4 and 8.

"South African labour law does not formally make the retrenchment/redundancy distinction. In fact, the word 'redundancy' is used in many other jurisdictions to mean what South African law means by 'dismissal for operational requirements' (see W L Keller *International Labor and Employment Laws* (1997))…. In summary, an employer intending to restructure by way of defining jobs and making all or a group of existing jobs redundant must be able to show: (i) a reasonable and commercial rationale for the decision to restructure; (ii) that the particular decision has been taken in a manner which is also fair to the employees to be retrenched; (iii) that the retrenchment of the employees is essential to achieve the purposes of the restructuring; (iv) that the criteria for appointment to the 'new' jobs are clear and justifiable, linked specifically to the new job descriptions; (v) that guidance is given to employees as to which of the restructured jobs they might be eligible; (vi) that employees are given an opportunity in the interview to answer any concerns about past performance that might be used as a criterion for not appointing them to the job; and (vii) that the eventual selections are objectively justifiable."

(own emphasis)

59. It is clear therefore that an employer is duty bound to avoid the retrenchment of an employee wherever this is possible. This flows from the constitutional right against unfair dismissal, the purpose being to advance job security.

60. Accordingly, an employer, who restructures the business and declares certain posts redundant because of the restructuring, is duty bound to afford the affected employees a fair opportunity and process to compete for the restructured posts.[11]

61. In *SA Breweries (Pty) Ltd v Louw*[12] the LAC held: "*an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in*

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[10] (2002) 23 ILJ 678

[11] It may be that, in this context, the duties on an employer go further. See *Greig v Afrox Ltd* (2001) 22 ILJ 2102 (ARB) where the arbitrator held that the only justifiable 'prerequisites' for a job may be used to avoid the random exclusion of employees and *Food & Allied Workers Union & others v SA Breweries Ltd* (2004) 25 ILJ 1979 (LC) where the court held that an employer must inform the affected employees in clear and unequivocal terms of the inadequacy of their qualifications and provide reasonable means for those employees to obtain the requisite levels of competence.

[12] (2018) 39 ILJ 189 (LAC) at paras [19]

another suitable post have been explored and exhausted, may they be fairly dismissed". This does not concern selection criteria in the same sense envisaged by section 189(2). Instead, the process is concerned with ensuring that there is a fair process to discern the relative strengths and weaknesses of the candidates with a view to selecting candidates that can best perform the new role.

62. In *Telkom SA SOC Ltd v Van Staden & Others*[13] the LAC held that:

> "where legitimate operational justification for restructuring exists, there is nothing innately unfair in requiring an employee with job security whose position is affected by such restructuring to apply for placement into a position in the restructured operation. The dismissal of an employee is not, however, made easier because it arises out of a restructuring process. <u>An arbitrator or court in the context of a retrenchment dispute is entitled to scrutinise the placement process and the decisions taken in terms of it given that an employee enjoys job security. That scrutiny does not however entitle the arbitrator or court to decide what process it would have adopted or the placement decision it would have preferred, but whether the process put in place and decisions taken in terms of it by the employer were fair</u>."
>
> (own emphasis)

63. In the present context, the applicant's post was declared redundant, and her function subsumed into the consolidated post. The respondent was duty bound to clarify the job description and the requirements for the consolidated position. The respondent ought to have invited the applicant, and the former product manager, to compete for the post in fair and transparent process. However, here, the applicant was not invited to apply and was simply excluded. In the circumstances, the dismissal of the applicant was substantively unfair.

<u>Procedural fairness</u>

64. Section 189 of the LRA places certain obligations on an employer to ensure that the dismissal of an employee, for operational reasons, is fair.

[13] (2021) 42 ILJ 869 (LAC) at para 33

For instance, an employer must initiate the consultation process when it contemplates dismissals for operational reasons, it must disclose relevant information to the other consulting party; it must allow the other consulting party an opportunity to make representations about any matter on which they are consulting; it must consider those representations and, if it does not agree with them, it must give its reasons.

65. All these obligations are geared to a specific purpose, namely, to attempt to reach consensus on the objects listed in s 189(2). The ultimate purpose is to *achieve a joint consensus seeking process*. The LRA recognizes an employer's right to dismiss for operational reasons, but only if a fair process aimed at achieving consensus has failed.[14] The object of the consultation process is to genuinely attempt to reach consensus on various issues, particularly measures to avoid dismissals, measures to change the timing of dismissals, measures to mitigate the adverse effects of the dismissals and the method for selecting employees to be dismissed.

66. These principles were recently confirmed by the *National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another*[15] where the Constitutional Court held as follows:

> "[40] Retrenchments should not be resorted to until 'certain procedural requirements intended to minimise the impact on employees' have been complied with. When employers contemplate dismissing their employees for operational requirements, they are required to consult in terms of s 189(1) of the LRA. The nature of such a consultation process, including 'its objective and agenda,' is prescribed by s 189(2) of the LRA. <u>This consultation 'requires engagement by all the consulting parties with the purpose of reaching consensus.'</u> It is important to note that the approach to this consultation must not merely be a checklist approach — that is, it must not be purely formalistic. There is both a procedural and substantive aspect to this consultation process. This has been clarified by the Labour Appeal Court in *Afrox* where the court stated: 'It is implicit in the terms of s 189(2) that <u>an employer, apart from taking part in the formal consultations on the aspects set</u>

[14] See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at para 27

[15] (2021) 42 ILJ 67 (CC)

out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals; to minimize the number of dismissals; to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees."

(own emphasis)

67. Furthermore, in *Solidarity obo Members v Barloworld Equipment Southern Africa and Others*[16] the Constitutional Court held:

> "… for a consultation process to be meaningful, in the context of section 189, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations, and seriously consider the representations. This entails that the employer is under an obligation to furnish reasons for rejecting representations after it has considered them carefully. Approaching the consultation with a pre-determined outcome and failure to provide reasons for rejecting representations will render the consultation process not meaningful."

(own emphasis)

68. In my view, the consultation process fell well short of the genuine joint consensus seeking process envisaged by section 189 of the LRA. The respondent failed to make disclosure of relevant information to enable constructive engagement. The restructuring process was conceived based on saving costs and increasing profitability. Information relating to these issues ought to have been disclosed. Instead, the respondent refused to disclose such information but did not explore alternative methods to make disclosure. There was a single consultation meeting during which the process commenced but was hardly completed. The transcription of that meeting shows that alternatives were not explored. In particular, the nature, duties, and requirements for the consolidated position were not explored. The subsequent correspondence between the parties did not deal with these issues either. The consultation process was not thorough and did not rise to the level of a joint consensus seeking process. Furthermore, the respondent did not, during the process, respond to all the queries raised by the applicant. For these reasons, the dismissal of the applicant was procedurally unfair.

[16] (2022) 43 ILJ 1757 (CC) at paras 45 - 46

Remedy

69. The applicant sought reinstatement. Section 193(2) states that, where the dismissal is substantively unfair, the court must require the employer to reinstate (or re-employ) the employee unless the employee does not wish to be reinstated, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not reasonably practicable to reinstate the employee.

70. In my view, reinstatement of the applicant would be intolerable, given the serious, but unsubstantiated, allegations levelled by the applicant against the respondent – that it discriminated against her based on her race, ethnic origin, and religion. The relationship between the applicant and the respondent remains strained, and the relationship between the applicant and the managing director, who was labelled as racist, is less than less than congenial. It is clear the trust relationship has been irretrievably damaged. A further reason not to order reinstatement exists, the applicant's position no longer exists. Accordingly, it is not reasonably practicable to order reinstatement.

71. Section 193(1)(c) provides that the court may award compensation where reinstatement (or re-employment) is not appropriate. Such compensation must be just and equitable in all the circumstances, but it may not exceed twelve months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. Our courts have set out various guidelines and principles, to be applied in the exercise of the discretion, to determine what is just and equitable:

71.1. Firstly, compensation for the loss of a procedural right[17] is in the form of a solatium[18] and it does not relate to patrimonial loss. However,

[17] *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* (2020) 41 ILJ 1360 (LAC) at para 50

when substantive unfairness is involved, the patrimonial loss does play a role.[19]

71.2. Compensation constitutes relief for the humiliation suffered by the employee, and the impairment of his or her dignity.[20]

71.3. Compensation relates to the loss of the constitutionally protected right against unfair dismissal.[21]

71.4. Compensation does not assume a punitive character.[22]

72. In *Kemp t/a Centralmed v Rawlins*[23] the Labour Appeal Court articulated other factors, some of which are relevant: (a) the nature of the reason for dismissal; (b) whether the unfairness of the dismissal is based on substantive or procedural grounds or both; (c) if the dismissal is only procedurally unfair, the nature and extent of the deviation from the requirements; (d) …. (e) the consequences to the parties if compensation is, or is not awarded; (f) the need for the courts, generally speaking, to provide a remedy where a wrong has been committed - though there are cases where no remedy should be provided, despite a wrong having been committed; (g) whether the employee committed a wrong which gave rise to his dismissal; (h) any conduct by either party that promotes or undermines any of the objects of the LRA, for example, the effective resolution of disputes.

73. In *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*[24] at para 35 the *Constitutional* Court stated:

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[18] *Johnson and Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at para 41

[19] *Kemp t/a Centralmed v Rawlins* (2009) 30 *ILJ* 2677 (LAC) at para 20; Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others (2007) 28 ILJ 2238 (LAC) at para 30

[20] *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 *ILJ* 2989 (LAC) at paras 22 and 23

[21] Ibid.

[22] *Maroveke v Talane NO & others* (2021) 42 ILJ 1871 (CC) at para 27

[23] See fn. 30

[24] (2021) 42 ILJ 1643 (CC)

> "It is true that generally speaking, procedural unfairness in a dismissal is not insignificant and invites compensation to ensure that dismissals take place with the 'sensitivity and care' properly required when the fate of people's livelihoods is at stake. The rationale behind an award of compensation is to give meaning to the right not to be unfairly dismissed; to discourage a 'shotgun approach' to dismissals; and, as Dr McGregor avers, 'to recognise the right of an employee to be heard before action is taken against them. It is an acknowledgment of an employee's worth as a person." (own emphasis)

74. In the exercise of my discretion, an award of compensation in an amount equal to five months remuneration (three of which relates to procedural fairness and two of which relates to substantive unfairness) is just and equitable. In arriving at this conclusion, I considered all the relevant factors but the following resonated most strongly:

74.1. The applicant's dismissal was both procedurally and substantively unfair.

74.2. Compensation is a means to address the humiliation suffered by the applicant, and the impairment of her dignity,

74.3. The extent of the procedural unfairness was significant, as was the extent of the substantive unfairness,

74.4. The cavalier approach of the respondent to the consultation process was problematic, and

74.5. The dismissal left its blemish on the applicant's employment record.

74.6. The applicant was dismissed in mid-December, shortly before the festive period, at a time when finding alternative employment would have been extremely difficult and stressful.

74.7. The applicant has two dependants, her son, and her mother.

74.8. The applicant failed to present any evidence of the financial harm occasioned because of her dismissal.

Costs

75. There is no reason to depart from the usual rule in this court that costs do not follow the result. Accordingly, there is no order as to costs.

Conclusion

76. In the result, the dismissal of the applicant, by the respondent, is procedurally and substantively unfair. The dismissal is not automatically unfair. The applicant's contractual claims are dismissed.

Court Order

77. In the circumstances, the following order is made:

77.1. The applicant's dismissal by the respondent was not automatically unfair, but was procedurally and substantively unfair,

77.2. The applicant's contractual claims under the BCEA are dismissed,

77.3. The respondent is ordered to pay the applicant compensation equivalent to five months of remuneration, to be paid within ten (10) court days,

77.4. There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

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