

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J1407/98

In the matter between

Applicant

and

Respondent

JUDGMENT

de VILLIERS A J

- [1] On 1 June 1998 the Applicant was dismissed from his position as an oxygen mask assembler and supervisor with the Respondent. The reason for the dismissal was based on the Respondent's operational requirements. Unhappy, he referred the matter to the Metal and Engineering Industries Bargaining Council for conciliation. When conciliation failed to resolve the dispute, he referred it to this Court for adjudication.

[2] During the pre-trial conference and discussions between the parties prior to the hearing, the parties agreed that the only issues in dispute were (a) whether the Respondent consulted adequately with the Applicant prior to the retrenchment and (b) whether the Respondent, having chosen to select employees for retrenchment on the basis of LIFO (Last In First Out) and skills, applied this to the Applicant, who alleged that employees who had shorter service than himself had not been retrenched.

[3] As the Court understands it, therefore, the issue for determination is whether the dismissal of the Applicant by the Respondent was substantively and procedurally fair, in that the Applicant contends that the Respondent failed to consult with him as provided for in section 189 of the Labour Relations Act 66 of 1995 (“the Act”) and that the Respondent’s own selection criteria were not followed in respect of his dismissal.

Consultation

[4] The Respondent relied on the testimony of Alan Pollard (“Pollard”), the Managing Director of the Respondent, in support of its assertion that it had complied with the requirements of s189 of the Act. Pollard testified that the Respondent was involved in the manufacture of medical products, and was heavily dependent on

the receipt of state tenders for its business. In February 1998 the Respondent was advised that it had not won two state tenders. Because the Respondent was awaiting the outcome of a further tender, which would involve the appointment of 35 additional employees, it decided not to reduce the number of employees but rather to institute short time arrangements in the hope that its bid would succeed. It therefore issued a memorandum to its staff, informing them that they would in the future be employed on a short time basis, until “decent awards” on its tenders were received. Employees were invited to take voluntary retrenchment packages rather than work short time and to make suggestions “to help us get through the next difficult months”. They were also advised that if the awards did not materialise, then a “program of retrenchment will have to follow”. Pollard testified that the staff were called in department by department to discuss the matter, and that the memorandum was presented to them when they met.

- [5] By the end of April no new tenders had been received. The Respondent called together the production supervisors to discuss retrenchment and they agreed that retrenchments would be done according to the LIFO principle, within departments with regard to skills. The employees were called to a meeting on 15 April 1998 at which a discussion of the Respondent’s situation took place, and after which the employees selected for retrenchment were handed letters terminating their contracts of employment.

[6] The Respondent subsequently discovered that, in terms of the Bargaining Council agreement, it was obliged to give employees three weeks' notice, rather than the two it had given. It therefore recalled all the employees, held a further meeting on 1 May 1998, and handed them a letter asking them to attend a further meeting on 15 May 1998 at which the following issues would be discussed:

- (a) The reasons for the proposed retrenchment/redundancy;
- (b) The need to effect the proposed retrenchment/redundancy;
- (c) The measures taken and to be taken to reduce the effect of the proposed retrenchment/redundancy;
- (d) The manner of the proposed retrenchment/redundancy;
- (e) The proposed number of employees to be retrenched;
- (f) The proposed effective date of the retrenchment/redundancy;
- (g) The basis of the selection of employees to be retrenched;
- (h) The means to be adopted to ameliorate the hardship of the retrenchment/redundancy.

[7] At the meeting on 15 May 1998, which was attended by the Applicant, Pollard testified that, in addition to the matters listed, the selection criteria were explained to the employees and they were invited to see him after the meeting if they had any difficulties. Several employees did approach him pleading not to be retrenched. The Applicant was not amongst them.

[8] Under cross-examination, the Applicant conceded that he had been present at the meeting in February, and the meeting in May 1998 (he had been absent from the meeting in April), and confirmed that discussions as described by Pollard had taken place. He further confirmed that the employees been asked if they had any input to make, and that he had not offered any.

[9] On the evidence before me, I am satisfied that the Respondent complied substantially with the requirements of s189, insofar as they relate to consultation. When it was advised that the first process had been defective, it immediately remedied the situation by recalling the employees and holding further discussions with them. The Applicant confirmed that he had been party to those discussions and that he had nothing to suggest which could change his situation.

The Selection Procedure

[10] The Respondent alleged that the dismissals had been effected according to LIFO, with regard to skills categories. This was disputed by the Applicant, who claimed that employees with shorter periods of service than his had not been retrenched and that people had been recalled and employed in his position after he had been retrenched. He supplied several names to the Court, specifically Chantelle Damons, Sharon Botha, George Jacobs, Anna Moloi and Andrew Dzhombe. Pollard testified that all five of these employees were skilled workers, and thus not

in the same skills category as the Applicant. This evidence was not challenged by the Applicant.

[11] Pollard testified further that one of the tenders that had been lost was for oxygen mask assembly, and as a result that department had been closed down. While a small number of masks were still produced for other private tenders, this work was now done by workers in the intravenous department, in addition to their normal tasks, and the position of the Applicant no longer existed.

[12] Pollard testified further that the Applicant did not have sufficient skills to be employed in any of its other departments. Although he was described as an acting supervisor, this entailed only supervision of the two other employees in his department. This too was not disputed by the Applicant.

[13] The Applicant also alleged that employees dismissed at the same time as himself were re-employed by the Respondent. Pollard gave evidence that certain employees had in fact been employed by its competitors, although he had assisted by circulating the names of all the retrenchees amongst them.

[14] In response to Pollard's testimony that several employees with both longer service than the Applicant and better skills were also retrenched, the Applicant questioned Pollard about Julia Motsepe ("Motsepe"), one of the employees mentioned by

Pollard, whom, the Applicant claimed, had shorter service than himself and who he claimed had not been retrenched. Pollard denied this, saying that Motsepe had been employed by a competitor after he had given the competitor the names of all retrenched employees. However, after the Applicant had given evidence under cross-examination that he had seen Motsepe after his retrenchment at the Respondent's premises assembling masks when he went to collect his provident fund cheque, the Respondent applied to re-open its case and Pollard testified that it was possible that the Applicant had seen Motsepe working as a casual employee in one of the "clean" rooms which the Respondent had hired out to a former employee, one Ian Evans.

[15] Motsepe was thus called to give evidence as to her current employment and length of service. She testified that she was retrenched by the Respondent in 1998, her last working day being 23 August 1998 and that she was subsequently employed by the Respondent's competitor. She also testified that she had visited the Respondent's premises after that date and that while she had been there she had helped out "because I knew the job".

[16] The Respondent submitted the IRP 2 forms of both Motsepe and the Applicant, which were admitted into evidence after confirmation by Motsepe and the Applicant that the information contained thereon was correct. These indicate that Motsepe had been employed on 6 July 1993 and that the Applicant had been

employed on 17 June 1994.

[17] Section 189 (7) of the Act obliges an employer to select employees to be dismissed according to selection criteria that are either agreed to by the parties or which are fair and objective.

[18] With regard to selection criteria which are fair and objective, the Code of Good Practice on Dismissals Based on Operational Requirements has this to say.

(9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the “last in first out” (LIFO) principle. There may be instances where the LIFO principle or other criteria needs to be adapted. The LIFO principle for example should not operate so as to undermine an agreed affirmative action programme. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should however be treated with caution.

(See also **Jones v KPMG Aiken and Peat Management Services Limited** [1995] 3 BLLR 49 (IC); **Môrester Bande (Pty) Ltd v NUMSA & Another** (1990) 11 ILJ 687 (LAC); Le Roux and Van Niekerk **The South African Law of Unfair Dismissal** pp. 253-262)

[19] On the evidence before me I am satisfied that the Respondent has proved that the selection criteria used by it in choosing employees for retrenchment were fair and objective and that employees, including the Applicant, were retrenched on this basis. Those named by the Applicant either had different skills or longer service, justifying their continued employment by the Respondent. While the Applicant may have honestly believed, as he argued in his closing statement, that:

- (a) others with less service and the same skills had remained on;
- (b) other people were employed to take his position after he was dismissed; and
- (c) other employees who were retrenched at the same time as him were recalled to service,

he was unable to support this with any hard evidence and therefore I must find that the Applicant was retrenched in accordance with fair and objective criteria.

[20] While costs should follow the result in accordance with normal principles, the Respondent's representative indicated in closing that the Respondent would not be pursuing its prayer for costs as it believed the Applicant was entitled to approach the Court for relief. I therefore make the following order:

[21] I find that the dismissal of the Applicant was both substantively and procedurally fair. There is no order as to costs.

I de VILLIERS A J

Acting Judge of the Labour Court

OF HEARING: 03 - 04 March 1999

OF JUDGMENT: 25 March 1999

Applicant: In person

Respondent: Bell Dewar & Hall