

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN.

Case No. D687/98.

In the matter between :

LOUIS ALBERTO FERNANDES Applicant.

and

**H.M. LEIBOWITZ
(PROPRIETARY) LIMITED
t/a THE AUTO INDUSTRIAL
CENTRE GROUP OF COMPANIES
("AIC") Respondent.**

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J U D G M E N T.
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1.

LOUIS ALBERTO FERNANDES ("the applicant") joined **H.M. LEIBOWITZ (PROPRIETARY) LIMITED** trading as **THE AUTO INDUSTRIAL CENTRE GROUP OF COMPANIES (AIC)** ("the respondent") on 1 April 1997 as a Trainee Manager. At the

time of his appointment, he was informed by **JOHN FRIEL**, the Human Resources General Manager of the respondent, that there was at the time no definite position available for him, but that the respondent was embarking on an expansion programme and that he would be appointed to a position immediately one became available.

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A position became available during June 1997 when he was appointed as the Group Research and Development Manager of the respondent. Two other Trainee Managers were, at about the same time, also appointed to positions which then became available. The applicant's appointment to the said position became possible after the respondent had decided to consolidate, expand and develop its research and development capabilities at its Durban Head Office. This function had, until then, been dealt with on a regional basis.

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The applicant's employment was uneventful until January 1998. **STEPHEN WILLIAM BALDWIN** ("Baldwin"), the Regional Director of the respondent's KwaZulu-Natal Operations, summoned the applicant to a meeting towards the end of January 1998. According to the applicant, Baldwin

informed him that he was investigating either markedly enlarging the Research and Development Department, or reverting to its original structure. Baldwin was uncertain as to the route which was to be adopted, but indicated to the applicant that in the event the option of reverting to the original regional structure was adopted, that the applicant should consider an alternative career within the ranks of the respondent. After the applicant indicated that he might in such event consider a career in Operations, Baldwin suggested that he discuss this option with the Director of Operations, **JAMES NIELSON WILKES** ("Wilkes"). The meeting ended inconclusively and Baldwin informed the applicant that they would meet again to discuss the matter further. Baldwin's version as to what transpired at this meeting differed in fundamental respects from the above. I propose to revert to and deal with the respondent's version in this regard later.

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The applicant met with Wilkes and discussed with him a possible alternative career in Operations.

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During February 1998, the applicant prepared and submitted

to Baldwin a written proposal detailing the manner in which he could be incorporated into a restructured marketing department. Baldwin undertook to study this document and to revert to the applicant in connection therewith.

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On 20 February 1998, Baldwin informed the applicant that the Research and Development Department would revert to its original regional structures and that his position as Group Research and Development Manager had become redundant. Baldwin requested the applicant to consider other career options within the respondent and indicated that he would, over the impending management conference which had been scheduled for that weekend (21-22 February 1998), investigate such options with Wilkes and other Senior Managers of the respondent who would be attending the conference. Baldwin undertook to revert to the applicant in this regard after the management meeting.

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He did not do so. After the applicant approached him, he informed the applicant that he would like to meet with him, together with Friel. This meeting never materialised.

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On 24 February 1998, the applicant was requested by Wilkes to attend the respondent's SAMCOR Plant in Gauteng in order to undertake a certain project. The applicant complied and completed the said project. He returned to Durban on or about 18 March 1998.

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No discussions thereafter took place between Baldwin or the applicant until 17 April 1998 when Baldwin informed the applicant that no position was available for him and that he would have "to let the applicant go". He informed the applicant that the Salary Department would communicate with him regarding his remuneration until the end of May 1998 and that it would not be necessary for him to render his services with effect from 20 April 2000.

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According to the applicant, he received the news of his dismissal with shock, as he had not expected or anticipated the possibility of his dismissal. He was at a total loss as to what he should do.

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He discussed the matter with a former girlfriend, an attorney, **SHARON GOATLEY**. Based on her recommendations, he

sought advice from his present attorneys on an "informal" basis. Consequent thereupon, he requested reasons from Baldwin as to the reasons for his dismissal. Baldwin indicated that he would discuss the matter with Friel and revert to him. Baldwin failed to do so, or to respond to the applicant's subsequent telephone calls.

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On 5 May 1998, the applicant addressed a letter to **F.D. JANEKE**, the Managing Director of the respondent, recording Baldwin's refusal to furnish the said reasons. The letter also records the applicant's intention to refer the dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA").

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Janeke telephoned the applicant upon receipt of the letter and informed him that Friel would contact him in connection therewith. Friel did so and invited the applicant to a meeting which was scheduled for 8 May 1998.

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At this meeting, Friel presented the applicant with two options. In terms of the first option, the applicant could

pursue his legal recourse against the respondent, but in the event that the applicant opted therefor, the respondent would discredit his name. Friel also indicated that it was not necessary for the respondent to have consulted formally with him regarding his retrenchment in view of the senior position which he held with the respondent. Friel also alluded to the fact that he was very familiar with the provisions of the applicable legislation.

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The second option available to the applicant was to resolve the dispute on the basis that Friel would endeavour to persuade the respondent to repay to the applicant the amount of the study loan which had been deducted from the final cheque made out to him and ensure that the applicant was furnished with a good reference.

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The applicant informed Friel that he would consider his options and revert to him in connection therewith the following Monday.

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The applicant's impression of the meeting with Friel was that the respondent was endeavouring to bully him into silence.

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During the course of his meeting with Friel, Baldwin arrived and handed to the applicant an envelope which it later transpired contained a letter dated 4 May 1998 recording Baldwin's version of the events leading to the applicant's dismissal.

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Shortly after the meeting, the applicant prepared a Minute of his discussions thereat. This Minute was later transcribed and formed part of the bundle of documents.

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The applicant elected to pursue his legal remedies against the respondent. He established that the CCMA was not the appropriate forum for the referral of the dispute, but that the Motor Industry Bargaining Council ("MIBC") was. Conciliation failed to resolve the dispute. Hence the referral to this Court.

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Friel confirmed the applicant's testimony as to the circumstances underlying his initial appointment. He was aware of the programme involving the expansion of the

reconstruction and development programme in Durban.

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He was not directly involved with the applicant regarding the discussions which preceded his retrenchment. He investigated the possibility of securing alternative employment within the ranks of the respondent for the applicant.

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Janeke handed to Friel the letter dated 5 May 1998 written by the applicant recording, **inter alia**, Baldwin's refusal to furnish the applicant with reasons regarding his redundancy and requested Friel to communicate with the applicant in connection therewith.

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He confirmed that he met with the applicant on 8 May 1998, but disputed the applicant's version as to the events at the meeting.

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During the course of the meeting, he informed the applicant that the MIBC and not the CCMA was the appropriate forum to

which the dispute should be referred to and that failing resolution by the MIBC, the dispute should be referred to this Court.

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His impression of the applicant at the meeting was that he was seeking compensation and not his employment.

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He claimed that the respondent engaged in a consultation process with the applicant regarding his dismissal prior to his retrenchment and that during this period endeavours were undertaken to secure alternative employment for the applicant.

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He conceded that the respondent failed to comply "to the letter" with the requirements of Section 189 (3) of the Labour Relations Act No. 66 of 1995

("LRA") and suggested that the reason for the respondent's failure to do so was that it wanted to "minimise the effects" of the respondent's dismissal.

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He testified that as far as the vacant positions which were advertised by the respondent on 12 July 1998 were

concerned, the applicant would not have been considered therefor as the positions required incumbents with experience and/or qualifications. According to him, it would have been embarrassing for the applicant to be re-employed as a Trainee Manager.

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He claimed that the respondent paid to the applicant severance pay which was calculated over a period of two weeks' remuneration.

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Under cross-examination, he intimated that the respondent adopted a flexible recruitment and training policy and undertook, within reasonable levels, to accommodate the requirements of its staff.

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The applicant's position was not discussed at the management conference in February 1998.

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Although he was unable to rebut the applicant's assertion to the effect that he did not, until 17 April 1998, during his

discussions with Baldwin, recognise that his retrenchment was a possibility, he claimed that the applicant was naive in the extreme not to have done so.

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He claimed that the applicant was unwilling to relocate to Gauteng with a view to securing alternative employment there.

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He disputed the applicant's assertion that Baldwin handed the letter of 4 May 1998 to the applicant during the course of his meeting with the applicant.

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Wilkes was at the relevant time the Operations Director of the respondent. He confirmed that he was canvassed regarding alternative employment for the applicant. He confirmed that he had assigned the applicant to undertake a task at the SAMCOR Plant in Gauteng. The applicant duly complied with his obligations in this regard.

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Baldwin was the Regional Director of the KwaZulu-Natal Operations of the respondent. From January to May 1998, he

was the Marketing Director of the respondent. He confirmed the evidence of the applicant and Friel to the effect that the applicant was appointed as a Management Trainee and that consequent thereupon he was appointed as Manager of the Reconstruction and Development Programme. He also confirmed the rationale underlying the proposed expansion of the reconstruction and development structures and the applicant's appointment as Manager to head the structure.

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During the last week of January 1998, he consulted with the applicant and informed him of the proposal by the respondent to revert to the original Reconstruction and Development Programme. During the course of his consultation with the applicant, it became obvious that his position would become redundant. The applicant accepted this situation and agreed to examine alternative areas of employment within the ranks of the respondent. He testified that the applicant recognised, during the course of this consultation, that his job was "on the line".

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He diarised certain dates on which he spoke to the applicant. He spoke to the applicant literally on a daily basis about his retrenchment and about ways in which it could be avoided.

At the end of February 1998, the applicant submitted a proposal on alternative career prospects. He promised to look at the paper and to revert to the applicant in connection therewith. When he did, he informed the applicant that the persons whom he considered appointing in the Marketing Divisions were persons who possessed an appropriate degree or experience. As the applicant did not hold an appropriate degree or experience, he could not be considered for appointment to the Marketing Division.

He indicated that he followed a three-phase consulting process with the applicant, the first when he explained to the applicant the restructuring proposal and warned him of the likely consequence of his retrenchment and when it was decided to explore alternative areas of employment for the applicant. The second phase was when the applicant suggested that he had a future in marketing and produced a written proposal in this regard. The final phase was when it was agreed that all local options were exhausted and that the retrenchment of the applicant was unavoidable.

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He maintained no written record of his consultations with the applicant. He did not consider it to be necessary to do so. The consultations were maintained at an informal level. The management team comprised seven or eight individuals, including the Managing Director. It was an intimate team and each of the members thereof were familiar with the workings of the others and the business of the respondent.

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He stated that the issue of the applicant's severance pay was discussed during his first meeting with the applicant and that he informed the applicant that he would receive payment of what was lawfully due to him.

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He confirmed the flexible employment approach adopted by the respondent whereby management trainees were recruited, put through training courses and appointed to specific positions as and when they arose.

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He disputed the applicant's testimony to the effect that on his return from the management conference he informed the applicant that he would meet with him in the presence of Friel.

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He claimed that the marketing proposal submitted by the applicant was not an original piece of work, but extracted from a book on marketing. He did not find anything innovative in the proposal and in any event was not willing to appoint the applicant to a marketing position because he lacked the necessary qualifications and expertise in this regard.

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As the applicant had not been able to come up with any meaningful employment proposals, he had no option but to "let him go". Approximately a week after his dismissal, the applicant requested reasons for his redundancy. He indicated to the applicant that he would discuss the matter with Friel and revert to the applicant in connection therewith. He discussed the matter with Friel, who indicated that there was no reason for not providing the said reasons. He then prepared the letter dated 4 May 1998 and left it at the respondent's reception for collection by the applicant. He disputed the applicant's contention that he handed the letter to the applicant during his meeting with Friel on 8 May 1998.

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He disputed the applicant's version to the effect that he was

unaware, during his meeting with Baldwin, that he was likely to lose his employment with the respondent. He claimed that during the course of the very first meeting, the applicant's likely retrenchment and severance package was discussed. He also disputed the applicant's version to the effect that he was only informed that his position had been made redundant at the meeting on 20 February 1998. He claimed that the applicant accepted from their first meeting that his position had been made redundant.

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The applicant, according to Baldwin, was ambivalent about having to relocate to another centre to take up alternative employment.

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As far as the vacancies which the respondent advertised during July 1998 were concerned, he was of the view that the applicant would probably not have qualified for the position of Logistics Manager or Industrial Engineer. The applicant had already undertaken the Management Trainee Course and he was unaware whether any position would have arisen which the applicant could have filled.

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The diary entries made by him did not necessarily imply that he spoke to the applicant on the occasions referred to. They may well have been reminders for him to speak to the applicant.

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He claimed that as part of an intimate management team, the applicant was privy to the internal workings of the respondent.

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Of the witnesses who testified, I was most impressed with the applicant. He was subjected to relentless, thorough, searching and sometimes repetitive cross-examination over a protracted period. He nevertheless came through and struck me as an honest and credible witness. I do not agree with the submission made by Mr. Farrell, for the respondent, to the effect that he was an appalling witness, argumentative, evasive, contradictory or unclear in his testimony. On the contrary, I did not consider the applicant to be an appalling, argumentative or evasive witness. Nor, in my view, did he contradict himself in any significant or material respects. I do not recall any significant aspect of his testimony which was unclear. I was also impressed by the applicant's composure, particularly when Mr. Farrell resorted, during cross-

examination, to the use of epithets to describe his behaviour and conduct which would ordinarily have provoked hostile responses. By way of example, Mr. Farrell described the applicant as a cunning and disingenuous person and a lying witness. He also referred to a proposal prepared by the applicant as being pathetic. Throughout his cross-examination, the applicant maintained commendable composure and restraint.

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The distinct impression I was left with after listening to the respondent's witnesses and particularly Friel and Baldwin, was that they recognised that Mr. Baldwin had failed to properly comply with the requirements of Section 189 of the LRA. They sought, in my view, to gloss over and downplay the nature and extent of such non-compliance. As is evident from what follows, I prefer the applicant's version where it is contradicted by the respondent's testimony.

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It was common cause between the parties that the applicant had been dismissed from his employment.

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The first and fundamental question which arises for consideration is whether the dismissal was fair. The applicant contends that his dismissal was both substantively and procedurally unfair.

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In the light of the provisions of Section 192 (2) of the LRA, both parties accepted that the onus of establishing that the dismissal was fair, rested on the respondent.

DID THE RESPONDENT SUCCEED IN DISCHARGING SUCH ONUS?

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The respondent seeks to justify the applicant's dismissal as being founded on its operational requirements. Section 213 of the LRA defines operational requirements to mean :

"Requirements based on the economic, technological, structural or similar needs of an employer".

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Broadly speaking, these requirements relate to the financial strength of the business and its continued viability, the introduction of new equipment and reorganisation of the enterprise to meet jobs in the market or to enhance

productivity. In **National Union of Mine Workers of S.A. v. Atlantis Diesel Engines Ltd. (1993) 14 ILJ 642 (LAC)**, the Labour Appeal Court held that :

"Fairness in this context goes further than a **bona fide** and commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the Courts to state that termination of employment for disciplinary and performance related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons".

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Du Toit **et al** in the Labour Relations Act of 1995, **A Comprehensive Guide, 2nd Edition, 1998, Butterworths**, at page 401, submit that important decisions, such as the decision to retrench, should be subject to the greatest possible degree of consultation with employees or their representatives, not merely for reasons of procedural fairness, but as part of establishing whether substantive grounds for dismissal are present. Our Courts have a clear responsibility to ensure that the provisions of the Act are complied with. In the present context, the employer is required to prove that such dismissals are fair (Section 192 (2) of the LRA). "Fair" means that a reason for dismissal based on the employer's operational requirements (as defined in Section 213 of the

LRA) is present.

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Ms Posemann for the applicant, accepted that the respondent had made a decision to restructure its operations and render the position of the applicant as Manager of the Reconstruction and Development Department redundant. This did not, however, relieve the respondent from the obligation of providing alternative employment for the applicant. She argued that the respondent had maintained a flexible approach towards employees generally and in fact recruited management trainees who were afforded two to six months to complete their induction or management training programmes, whereupon they were appointed to positions as and when they arose. The applicant's position, she argued, was only rendered redundant on the applicant's version on 20 February 1998. However, it was only after his return from Gauteng on 18 March 1998, that he was without a job description.

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Ms Posemann relied upon the judgment in **Sayles v. Tartan Steel CC (1999) 20 ILJ 647 (LC)** as authority for the proposition that the mere fact that an employee's position

becomes redundant does not mean that his services are therefore terminated. Dismissal is not an inevitable consequence of redundancy. The redundant employee may be redeployed. In that case, the respondent employer failed to consult with the applicant employee following upon the closure of one of its divisions as it proposed to redeploy him elsewhere. The applicant employee refused to take up the alternative position because it did not utilise his skills and qualifications. The dismissal was held to be unfair.

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In **Imperial Transport Services v. Stirling (1999) 3 BLLR 201 (LAC)**, the Labour Appeal Court held that a distinction ought to be made between a loss of jobs brought about by external factors such as a downturn in the economy and a loss of jobs brought about by reason of internal factors such as restructuring or the introduction of new technology. At **paragraph 24**, Ngcobo, J.A. stated as follows:

"A distinction ought to be made between the loss of jobs, which is brought about by external factors such as a downturn in the economy, on the one hand, and the loss of jobs by reason of internal factors, such as the restructuring or the introduction of new technology, on the other hand. Although both these factors result in the retrenchment of employees, there is an important distinction which is relevant when one considers the stage at which the duty to consult arises. In

general, in the case of a loss of jobs brought about by internal changes, the employer is in control of the situation and need not make hasty decisions. Time is not crucial as it is when retrenchment is due to an economic downturn, and where any delay might severely prejudice the employer. **Hlongwane and Another v. Plastix (Pty) Ltd. (1990) 11 ILJ 191 (IC) at 176 D.**"

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In **Stirling's** case **supra**, the Court held that where an employee is retrenched during a restructuring operation, the employer is obliged to consult with him before the changes are implemented. The appellant had not consulted with the respondent prior to the reallocation of his functions, but simply presented him with a **fait accompli**. The Court held that the decision to terminate the employment of the respondent was unfair for want of compliance with the requirements of prior consultation.

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There was no evidence of any meaningful consultations which took place between Baldwin and the applicant after his return from Gauteng on 18 March 1998 and until his dismissal on 17 April 1998. The evidence did not reveal any evidence of the applicant being offered a position at a lower level or reverting to the position of a Management Trainee until an appropriate or suitable position arose. The fact that the respondent

advertised vacant positions for new staff in July 1998 suggests that the management of the respondent must have known by the stage when the decision to dismiss the applicant was taken, of the likelihood of such positions arising in the future. This is particularly so in an organisation such as the respondent, which resorts to the recruitment of Trainee Managers, their induction and appointment when positions do become available. It is most unlikely that the applicant would not have accepted a position at a lower level or reverting to the position of a Management Trainee until a suitable position arose. Had a proper consultative process taken place, such likely would, in all probability, have been properly explored and exploited to the applicant's benefit.

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On the proven facts, it is most unlikely that a proper consultation process took place between the applicant and the respondent regarding his redeployment in an alternative position. Had such a process taken place, it is probable that the applicant would have accepted an appointment as a Management Trainee or some other measure on a holding basis until a position for which he was suited arose. It is most unlikely that the respondent was not aware at the time it dismissed the applicant of the fact that vacancies for which he was likely to be suitable, would arise in the not too distant

future.

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I am not convinced on the evidence that Baldwin's explanation for refusing to incorporate the applicant into a restructured marketing department was reasonable. The practice of the respondent did not require a strict insistence on proper qualifications or expertise. The respondent, it appears, was willing to afford the necessary training where this was required and there does not appear to be any reason why the applicant could not have been appointed to a marketing position and afforded the necessary training.

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Furthermore, it seems that the applicant could well have been appointed to any of the positions which were advertised in July 1998 and particularly the position of a Management Trainee.

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The decision by the respondent to restructure its research and development function was clearly an internal decision. On the available facts, there does not appear to have been any urgency in implementing the decision. To put it another way, the decision to restructure could well have been suspended until a suitable alternative position became available to the

applicant.

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I turn now to consider the procedural fairness of the dismissal.

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Section 188 of the LRA requires that a dismissal for operational reasons must be procedurally fair. The requirements for a procedurally fair dismissal for operational reasons are set out in Section 189 of the LRA, read with Schedule 8 **The Code of Good Practice Dismissals** based on operational requirements and Section 41 of the Basic Conditions of Employment Act No. 75 of 1997 ("BCEA").

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The requirements which an employer must comply with are the following, **inter alia**, namely :

- (a)0 Prior consultation.
- (a)1 Attempt to reach consensus over certain matters.
- (a)2 Written disclosure of relevant information.
- (a)3 Allow an opportunity to make representations.
- (a)4 Consider representations.
- (a)5 Selection of employees for dismissal.

(a)6 Severance pay.

PRIOR CONSULTATION :

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Section 189 (1) stipulates that :

"When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult ..."

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In **Atlantis Diesel Engines (Pty) Ltd. v. National Union of Mine Workers of South Africa (1994) 15 ILJ 1247 A at 1252 F**, the Appellate Division ruled that :

"The duty to consult arises as a general rule both in logic and in law when an employer having seen the need for it contemplates retrenchment".

The word "contemplate" indicates that the employer must consult at the stage when a final decision to dismiss has not yet been reached, but the possibility of dismissal has only been foreseen. This requirement ensures that the employees are afforded the opportunity to influence the employer in its final decision to dismiss or not.

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Item 3 of the Code of Good Practice states that the purpose of consultation is to permit the parties in the form of joint

problem-solving exercise, to strive for consensus if possible. The employer "should in all good faith keep an open mind throughout and seriously consider proposals put forward". This view is supported by Section 189 (2) of the LRA which requires the parties to "attempt to reach consensus" on the matters listed.

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It was common cause between the parties that the party whom the respondent was obliged to consult with in terms of Section 189 (1) was the applicant.

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Before proceeding to consider whether the respondent complied with the requirements of the applicable legislation and the Code of Good Practice, I consider it necessary to point out that in my view an employer is obliged to apply the relevant provisions as best as it can and justify any deviations in the event of a dispute. I accept that in certain instances a dismissal may be held to be fair, even though the said requirements have not strictly been complied with.

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The requirements of the section must be complied with. It does not, however, follow that due compliance is a pre-

condition to a fair dismissal, or that non-compliance necessarily invalidates the dismissal. Nor does it follow that merely because the requirements of the section were complied with, that a dismissal is necessarily fair. The LRA does not stipulate any sanction or consequence which would arise from the non-compliance with the requirements thereof. It seems to me that this Court would be at large in such circumstances to consider whether the dismissal is truly unfair.

Moloi v. Aviprint Consulting CC t/a Sir Speedy Instant Print (1998) 2 BLLR 147 (LC).

Elias v. Germiston Uitgewers (Pty) Ltd. t/a Evalulab (1997) 18 ILJ 1346 (LC).

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In **Johnson & Johnson (Pty) Ltd. v. CWIU (1999) 20 ILJ 89 (LAC) at 97 B-E (paragraph 31)**, Froneman, D.J.P. stated :

"In testing compliance with its provisions by determining whether the purpose of the occurrence of a joint consensus seeking process has been achieved or frustrated, a finding of non-compliance by the employer will almost invariably result also in the dismissal being unfair for failure to follow proper procedure. It is difficult to envisage a situation where the result could be different. Non-compliance would not, however,

necessarily result in the dismissal being substantively unfair, as the facts of this case show".

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The learned Deputy Judge President (as he then was) did, however, emphasise at **96 (paragraph 29)** that a "mechanical checklist" kind of approach to determine whether the requirements of the section have been complied with, is inappropriate.

**FAWU and Another v. National Sorghum
Breweries (1998) 19 ILU 613 (LC).**

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What would be important appears to be the nature, extent and degree of non-compliance and the reasons therefor and the question whether substantive grounds for the dismissal exist. Each case would necessarily depend on its own facts.

**DID THE RESPONDENT CONSULT WITH THE APPLICANT
IN THE SENSE CONTEMPLATED BY SECTION 189 (1) ?**

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I have already demonstrated that according to the

respondent, Baldwin followed a three-phase consultation process. The first phase involved :

- (a)0 notifying the applicant of the proposed restructuring and the reasons therefor ;
- (a)1 cautioning him of the likely consequences of his retrenchment;
- (a)2 a decision to look for alternative areas where the applicant could be employed.

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The second phase involved the communication by Baldwin to the applicant of the decision that the applicant had no future in marketing. During this phase, the applicant prepared and presented Baldwin with his proposals on the manner in which he could be incorporated into the Marketing Department.

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The third phase arose after all local options were exhausted and it was established that no suitable positions were available for the applicant. The retrenchment of the applicant was an inevitable consequence.

The applicant disputed the above evidence. He testified that no meaningful consultation process was followed or adhered to by the respondent. In any event, and more significantly, the applicant contended that at no stage during the course of his meetings with Baldwin until 17 April 1998 when Baldwin notified the applicant of the decision to dismiss him, was the applicant ever made aware of the likelihood that his employment with the respondent was in jeopardy and/or that he was likely to be retrenched in the event that no alternative position or employment could be secured for him within the ranks of the respondent.

According to the applicant, during his meeting with Baldwin late in January 1998, he was informed that the respondent was considering either markedly enlarging the Research and Development Department, or reducing it to its original structure. No final decision had been achieved in this regard and he was advised to consider his options in the event that the restructuring became a reality. During the course of this meeting, Baldwin suggested to the applicant that he consider his options within the proposed restructuring and whether he was desirous of remaining with the restructured

Reconstruction and Development Department or whether he wanted to consider alternative career options within the respondent. The applicant informed Baldwin that he was interested in pursuing a career in Operations and that he would discuss this option with the Director of Operations, Wilkes. Baldwin suggested that they meet at a later date and discuss the issue further.

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At his next meeting with Baldwin, the applicant was informed by Baldwin that the Reconstruction and Development Department would revert to its previous regional structures and that his position as Group Research and Development Manager had become redundant. Baldwin requested the applicant to consider alternative employment opportunities within the respondent and informed the applicant that a marketing position in which the applicant had indicated an interest, and for which the applicant had submitted a written proposal, was not an option as the respondent required a person with marketing experience and/or qualifications in that position. The applicant indicated to Baldwin that Wilkes had indicated to him that an opportunity existed for him to pursue a career at a management level in Operations. Baldwin undertook to discuss this position over the pending management conference which was scheduled for 21 and 22

February 1998 and to revert to the applicant once he had done so.

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The next meeting between the applicant and Baldwin occurred on 17 April 1998 when Baldwin indicated to him that there were no employment opportunities available for the applicant within the ranks of the respondent and that the applicant would be retrenched. The applicant was informed that he would be paid until the end of May 1998 and that it would not be necessary for him to tender his services with effect from 20 April 1998.

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I consider it unlikely and improbable that Baldwin informed the applicant either at their first meeting at the end of January 1998, or at any subsequent meeting prior to 17 April 1998, that his employment with the respondent was in jeopardy and/or that he was likely to be retrenched in the event that no suitable alternative position could be found for the applicant. The reasons for my finding in this regard are **inter alia** that :

(a)0 Had such information been imparted to the applicant, one would reasonably have expected that he would have pursued his quest for

alternative positions within the respondent with greater zest and seriousness. I do not mean to suggest that it does not appear that the applicant pursued his quest for alternative employment within the respondent with any zest or seriousness. The evidence reveals that the applicant did undertake investigations in this regard, but it does not appear that he ever left the comfort zone of his belief that his employment with the respondent was secure and that it would be a matter of time before some alternative position was secured for him. In this regard, I would have expected that the applicant would have pursued more seriously and intently Wilkes' statement that the Production Department required management personnel and that the applicant could be reclassified as a Management Trainee for a posting in this regard. It is evident that this aspect was not pursued with Baldwin or Wilkes after the management conference.

- (a)1 The applicant testified that and there is no reason to disbelieve his evidence, that had he been informed of or appreciated the likelihood of his retrenchment, he would, apart from seeking

alternative positions within the respondent, have sought outside opportunities for employment in order to minimise the effects of his likely retrenchment. He only did so after being informed of his retrenchment on 17 April 1998.

- (a)2 The respondent did not seek to controvert the applicant's evidence to the effect that he was in a state of shock after being informed of his retrenchment. The applicant stated that this was never mentioned as a possibility until then and that he did not know what to do. It was only about a week later that he commenced his investigations for employment. I would reasonably have expected that this reaction on the part of the applicant would have arisen at the meeting with Baldwin at the end of January, if indeed Baldwin had revealed to the applicant the likelihood of his retrenchment in the event that no alternative position could be found for him.

On a proper conspectus of all the acceptable evidence, I am unable to find that the meetings and exchanges between

Baldwin and the applicant amounted to the consultation process foreshadowed by Section 189 (1).

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Section 189 (2) of the LRA prescribes that the consulting parties must attempt to reach consensus on :

(a)0 Appropriate measures :

- (i)0 to avoid the dismissals ;
- (i)1 to minimise the number of dismissals ;
- (i)2 to change the timing of the dismissals ;
- (i)3 to mitigate the adverse effects of the dismissals.

(a)1 The method for selecting the employees to be dismissed.

(a)2 The severance pay for dismissed employees.

920

The section does not require consensus. It requires consultation in good faith in an endeavour to achieve consensus on the issues contemplated thereby.

The employer must, in the process of consultation, explore means of avoiding or limiting retrenchments. This would include a moratorium on new hirings, early retirement, redeployment, training, short time, unpaid leave, or even a cut in pay. If the dismissals cannot be avoided, their effects must be mitigated where this is reasonably possible. This can be done by providing employees with testimonials, giving them time off to search for alternative employment, networking on their behalf in the job market, equipping them with new skills by retraining etcetera.

Item 12 of the Code of Good Practice recommends that employees dismissed for operational reasons be guaranteed preferential consideration when suitable vacancies arise. On being retrenched, the employee can be required to express a desire to be re-hired and the obligation to re-hire can be made limited in time. When vacancies arise, the employer must take reasonable steps to let the applicable employee and the Union know of the fact.

It is correct that the discussions between Baldwin and the

applicant revolved around the alternative placing of the applicant within the ranks of the respondent. Beyond this consideration, it does not, in my view, appear that the discussions between Baldwin and the applicant extended to include any of the other matters foreshadowed by Section 189 (2). No evidence was adduced by the respondent revealing any endeavours undertaken by it to achieve consensus with the respondent on either :

- (a)0 the granting of paid or unpaid leave ;
- (a)1 the training or re-training of the applicant to take up alternative positions within the respondent ;
- (a)2 seeking volunteers, other than the applicant, for retrenchment;
- (a)3 delaying the retrenchment ;
- (a)4 affording the applicant an opportunity to seek alternative employment ;
- (a)5 affording the applicant any priority in the event that future vacancies arose ;

- (a)6 notifying the applicant of any new vacancies which arose ;
- (a)7 any other of the issues on which consensus could have been achieved.

960

Even though the applicant was not entitled to any significant amount by way of severance pay, and even though Baldwin claimed that he notified the applicant at their initial meeting in January 1998, that the applicant would, in the event of him being retrenched be paid what was lawfully due to him, the respondent did not place any evidence before me suggesting that any endeavour was undertaken to achieve consensus on the severance pay which would be payable by the respondent to the applicant. Merely informing the applicant that he would be paid what was lawfully due to him in respect of severance pay does not, in my view, meet the requirements of the section which foreshadows, as I have indicated, an attempt to reach consensus. I have already indicated that in my view the issue of the applicant's possible retrenchment was not a subject of the discussion between the applicant and Baldwin during January 1998. I accordingly reject Baldwin's evidence to the effect that the applicant was informed by him

that he would be paid the severance pay that was lawfully due to him.

970

It is also unlikely that the issue of the applicant's severance pay was raised at the meeting between the applicant and Baldwin on 17 April 1998. If it was raised at that meeting, I would have expected that Baldwin would have informed the applicant that it was the respondent's intention to pay to him twice the amount of the severance pay to which he was entitled. As hereinafter appears, the respondent claimed that it paid to the applicant twice the amount of the severance pay to which he was entitled. There was no evidence of any such discussion.

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It is obvious from the foregoing that I am not satisfied that the requirements of Section 189 (2) of the LRA were fulfilled.

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Section 189 (3) of the LRA provides as follows :

"The employer must disclose in writing to the other consulting party all relevant information including, but not limited to :

(a) the reasons for the proposed dismissal ;

- (b) the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives ;
- (c) the number of employees likely to be affected and the job categories in which they are employed ;
- (d) the proposed method for selecting which employees to dismiss ;
- (e) the time when, or the period during which, the dismissals are likely to take effect ;
- (f) the severance pay proposed".

1000

Section 16 (5) of the LRA regulates the information which the employer is not required to disclose.

1010

Upon the commencement of the proceedings, the respondent conceded that it failed to comply with the "writing" requirement of this section. In the light of such concession, it made an open **ex gratia** offer of payment to the applicant in an amount of R75 000,00 during the course of its opening address to the Court. The respondent nevertheless contended that it would demonstrate that it had complied substantially with the requirements of Section 189 of the LRA and that the applicant's dismissal was, in the circumstances, fair.

The requirement of the section that the information contemplated thereby should be disclosed in writing is, in my considered value, a salutary one. Such writing would serve as a record of the disclosure of the proposed or contemplated retrenchment by the employer and would obviate any subsequent disputes as to the disclosures made. Indeed, as Mr. Farrell conceded, had a written disclosure as contemplated by Section 189 (3) of the LRA, been made by the respondent to the applicant, it is probable that the dispute relating to the applicant's dismissal would not have arisen.

Although the section does not stipulate the stage at which the disclosure must be made, I am of the view that the most appropriate stage therefore, would be prior to or at the time the retrenchments are contemplated or proposed and certainly by the stage the consultation process commences.

Brassey in his **Commentary on the Labour Relations Act, Employment and Labour Law, Vol. 3, 1999, Juta, at A8:48, in his comment on Section 189 (3)** notes :

"The tenor of the specific paragraphs suggests that disclosure must be made only after the alternatives to dismissal have been employed and rejected. See for instance paragraph (b) which talks of the alternatives that the employer considered. But this instruction

cannot survive when seen in the light of the introductory words, which created an obligation to disclose all relevant information, including, but not limited to, 'the matters listed'."

I respectfully agree.

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The section requires the disclosure by the employer of all such information as is necessary to enable effective consultation to take place.

Atlantis Diesel Engines (Pty) Ltd. v. NUMSA
(1994) 15 ILJ 1247 A at 1245 B.

Such information is not limited to the checklist provided thereby.

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Whilst the available and acceptable evidence reveals that Baldwin informed the applicant of the proposed restructuring of the Reconstruction and Development Department and invited the applicant to consider alternative positions within the respondent as a consequence, it does not appear that the applicant had any say in the decision to restructure his department. The decision was presented to him as a **fait accompli** by Baldwin. Likewise, it seems to me that the decision to dismiss the applicant was presented as a **fait**

accompli at the meeting on 17 April 1998.

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In my considered view, the respondent did not properly disclose to or meaningfully consult with the applicant regarding any of the issues foreshadowed by the checklist provided in Section 189 (3). Whilst it may be possible and acceptable in an appropriate and proper case for the disclosure of the information foreshadowed by the section to be made orally and for an employer in such circumstances to be deemed to have substantially complied with the requirements thereof, this does not seem to be such a case. It seems to me that the respondent has failed to establish that it substantially complied with the requirements of Section 189 (3). The exchanges which took place between the applicant and Baldwin in this regard related fundamentally to finding the applicant an alternative position and did not extend to include such information as was necessary to enable effective consultation to take place regarding the applicant's retrenchment.

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Section 89 (5) of the LRA provides as follows :

"The employer must allow the other consulting party

an opportunity during consultation to make representations about any matter on which they are consulting".

1080

In that the applicant was not aware of the respondent's intention to retrench him until the decision was made, it was not possible for the parties to comply with the requirements of this section.

1090

Section 189 (6) of the LRA provides as follows :

"The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing".

1100

This section follows upon the requirements of Section 189 (5) of the LRA. For the reasons set out in dealing with the provisions of Section 189 (5) of the LRA, I hold that the respondent failed to comply with the requirements of Section 189 (6) of the LRA.

1110

Section 189 (7) of the LRA provides as follows :

"The employer must select the employees to be dismissed according to selection criteria -

- (a)0 that have been agreed to by the consulting parties ; or
- (a)1 if no criteria have been agreed, criteria that are fair and objective".

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This requirement becomes relevant once the parties have accepted that dismissal is necessary. I found that there was no consultation between the parties in this regard. The applicant was simply presented with his dismissal as a **fait accompli** on 17 April 1998.

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An opportunity for the respondent to comply with the requirements of this section accordingly did not arise.

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It follows from the foregoing that in my view the respondent failed to discharge the onus resting upon it of establishing that the dismissal of the applicant was fair. I am satisfied that the dismissal of the applicant was both substantively and procedurally unfair.

SEVERANCE PAY :

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Section 41 (2) of the Basic Conditions of Employment Act provides as follows:

"An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer ...".

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It is common cause that the applicant was employed by the respondent for the period 1 April 1997 until 31 May 1998, that is approximately 14 months. He was accordingly entitled to severance pay equal to at least one week's

remuneration.

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The respondent claimed that it paid to the applicant as severance pay an amount equal to at least two weeks remuneration.

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It claimed that such severance pay was included in the "notice pay" amounting to R19 075,68 paid to the applicant. No

evidence was produced by the respondent as to the computation of the said amount.

1190

The applicant testified that at the date of his dismissal he was entitled to payment of :

(a)0 his salary for the month
of May 1998 (the notice
period) in an amount of R15 000,00

(a)1 his leave pay over a period
of 5 to 7 days amounting
to approximately R 4 000,00

(a)2 a total of approximately R19 000,00

1200

The applicant estimated that the amount which would have been payable to him as and by way of severance pay, being two weeks remuneration, would have approximated R7 500,00. He accordingly denied that the aforesaid amount of R19 075,68 paid to him was inclusive of any consideration in respect of severance pay. The respondent did not challenge or refute the latter testimony of the applicant by way of cross-examination. I was not surprised. It does not appear to me that the amount of R19 075,68 paid by the respondent to the applicant was inclusive of severance pay.

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I am satisfied that the respondent did not make any payment to the applicant as and by way of severance pay.

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In my view, the respondent is liable to pay to the applicant an amount equivalent to one week's remuneration as severance pay.

COMPENSATION :

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The applicant seeks an Order directing the respondent to pay compensation in terms of Section 194 (2) **alternatively** 194 (1) of the LRA.

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Section 194 of the LRA provides as follows :

"1. If a dismissal is fair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

2. The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in sub-section (1), and not more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal".

1250

The section affords an employee an absolute right to compensation equivalent to back-pay when a dismissal is procedurally and/or substantively unfair. In **Johnson & Johnson (Pty) Ltd. v. CWIU (1999) 20 ILJ 89 (LAC)**, the Labour Appeal Court, in dealing with Sections 193 and 194 of the LRA, said at **99** :

"If a dismissal is found to be unfair solely for want of compliance with the proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not. If compensation is awarded, it must be in accordance with the formula set out in Section 194 (1) ; nothing more, nothing less. The discretion not to award compensation in particular circumstances of a case must, of course, be exercised judicially".

1260

The judgment at **100** continues :

"The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached that right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another ... The nature of an employee's right to compensation under Section 194 (1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of Section 194 (1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee".

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In resisting the applicant's claim for compensation, the respondent contended that the applicant had mitigated the losses and damages suffered by him and

that the applicant's claim for compensation constituted an attempt to extort money from the respondent. Mr Farrell argued that an award of 12 months remuneration would be punitive. In Johnson's case (*supra*) the Court refused to make an award of compensation on the grounds that

"the wrong done to the employees, namely the loss of the right to proper procedure lasted for about 4 days. In addition the employees received a generous retrenchment package. The effect in this case of awarding compensation under Section 194(1) would be to reward the Union and the employees for their unreasonable obstinacy, echoing their earlier refusal to discuss anything except the need to retrench. Our

Courts have since refused to award compensation in cases where the employee's genuine offer to redress the procedural wrong had been "unreasonably" rejected by the employees."

See: **Burger v Alert Engine Parts (Pty) Ltd (1999) 4 LLD 90 LC** and **Mamabolo & Others v Manchu Consulting CC (1999) 20 ILJ 1826 (LC)**.

1280

Other factors taken into account in this regard have included the model obliquity of the employees misconduct, the magnitude of the procedural non-compliance and other benefits received by the employee upon dismissal.

See: **De Bruin v Sunnyside Locksmith Supplies (Pty) Ltd (1999) 20 ILJ 1753 (LC)**.

Buthelezi v Amalgamated Beverage Industries (1999) 9 BLLR 907 (LC).

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On the facts in this case I am satisfied that there are no circumstances which are present which would justify depriving the applicant of the compensation to which he is entitled to. Unlike the respondent the applicant's conduct is free from any criticism. Furthermore the fact that the applicant was able to mitigate the losses suffered by him by securing employment after his dismissal is relevant. The compensation is a

solatium for the loss of the right to a fair procedure and is punitive to the extent that the respondent (who breached the right) must pay a fixed penalty for causing the loss.

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In **Auf der Heyde v University of Cape Town (2000) 8 BLLR 877 (LC)** at paragraph 82 Jammy, A.J. recorded that there is a plethora of authority to the effect that the limitation to the equivalent of 12 months remuneration prescribed in Section 194(2) relating to substantively unfair dismissal is equally applicable to that which will be payable in terms of Section 194(1) where the period between the date of the employee's dismissal and the last day of the hearing of the arbitration or adjudication exceeds that period. That is the position in this matter and the compensation to which I hold that the applicant is entitled must therefore be calculated on that basis.

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In all the circumstances I am satisfied that this is an appropriate case where compensation should be awarded in terms of Section 194(2) of the LRA and the respondent directed to pay to the applicant compensation equivalent to 12 months remuneration calculated at the applicant's rate of

remuneration at the date of the termination of his employment. Even if the dismissal of the applicant was found to be unfair only for the reason that the respondent did not follow a fair procedure I would have made a similar award of compensation in terms of Section 194(1) of the LRA.

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In my view there are no circumstances which militate against an award of costs in favour of the applicant and I consider that such an award would accord with the requirements of the law and fairness.

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In the result I make the following order :

- (a)0 The dismissal of the applicant by the respondent on 17 April 1998 was unfair.
- (a)1 The respondent is directed to pay to the applicant within 14 days from the date of this judgment :
 - (i)0 compensation equivalent to 12 months' remuneration calculated at the applicant's rate of remuneration at the date of the termination of his employment;

- (i)1 severance pay equivalent to one week's remuneration calculated at the applicant's rate of remuneration at the date of the termination of his employment;
- (a)2 The amounts contemplated by paragraph (b)(i) and (ii) hereof shall bear interest at the rate of 15.5% per annum with effect from the 15th day after the date of this judgment to the date of payment.
- (a)3 The respondent is ordered to pay the applicant's costs of suit.

.....
V. I. GAJOO,
A.J.

DATE :