

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**CASE NO. J 1232/98**

In the matter between:

**MOTOR INDUSTRY STAFF INDUSTRY**

**ON BEHALF OF MR MURRAY**

Applicant

and

**MERKIN MOTORS**

Respondent

**JUDGMENT**

**BASSON,J**

[1] This is the referral of an alleged unfair dismissal based on operational requirements.

[2] Such dismissal (which is not automatically unfair) is unfair in terms of section 188 of the Labour Relations Act, 66 of 1995 (“the Act”) if the employer fails to prove (a) that the reason for dismissal is a fair reason related to the employer's conduct of capacity, or, (as in this case) based on the employers operational requirements and (b) that the dismissal was effected

in accordance with a fair procedure.

[3] The applicant referred the unfair dismissal dispute to the relevant bargaining council.

[4] The bargaining council has issued a certificate stating that the matter remains unresolved.

[5] In the event, the applicant properly referred the matter to the Labour Court in terms of the relevant provisions of the Act.

[6] Eventually, the dispute that remained to be resolved was the question whether the said dismissal was effected in accordance with a fair procedure as required by section 189 of the Act.

[7] Based on the evidence before the court, the respondent in this matter did not follow any of the required procedures that are prescribed by section 189 of the Act in the event of a dismissal for operational requirements, more in particular, the requirement of exhaustive consultations on the prescribed matters was not complied with.

[8] A recent judgment of the Labour Appeal Court, in the matter of Johnson and Johnson (Pty) Ltd v CWIU (Case No. PA 15/97 especially at paragraph [40] and [41]), addressed the issue of limits on compensation as it appears from section 194(1) of the Act which reads as

follows:

"If a dismissal is unfair 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 initiating or prosecuting a claim."

[9] On the papers before the court no such unreasonable period of delay appears to present itself.

[10] The Labour Appeal Court in the abovementioned judgment held that "compensation" as prescribed by section 194(1) above is actually in the form of a *solatium* or punitive damages and not compensation as understood usually, that is, in the form of "compensation paid for something lost".

[11] In the event, the court has a very narrow discretion either to award no compensation at all or to award the minimum which is also at the same time, of course, the maximum amount of compensation as is required in terms of section 194(1).

[12] The applicant in this matter only relies on the question of procedural unfairness.

[13] Having found, on the evidence presented to the Court, that there was a complete absence of procedural fairness in this retrenchment exercise, I regard it as fair in the circumstances, and correct, that the applicant must receive the *solatium* as is required by law.

[14] The applicant led evidence to the effect that his monthly remuneration was an amount of R11 269,00 and that he was dismissed with effect the end of February 1998.

[15] In the event, from the date of dismissal to the last day of the hearing is a period of eight months.

[16] The amount of compensation, calculated at the applicable rate of remuneration at the date of dismissal and for the said period, works out to R94 083,00 as compensation in the form of a *solatium*.

[17] It must be noted that the respondent did appear previously to oppose the referral of this matter and the application for default judgment.

[18] The respondent has, however, not to date filed a proper response. I am therefore satisfied that the respondent knew of the date of set-down, as it also appears from the note on the file when this matter was adjourned to this day at the respondent's costs. The matter accordingly proceeded as an application for default judgment.

[19] In the event, I find that the dismissal was procedurally unfair as alleged by the applicant and I award compensation in terms of section 194(1) of the Act to the amount of R94 083,00.

[20] Considering the application for a costs order in terms of section 162(1) of the Act, I have a wide discretion to award costs in the interests of fairness to both parties before the Court.

[21] I take the account that the respondent has seen fit in the end not to oppose this matter. I also take into account the fact that the applicant was in the employ of the respondent for a very short period and is being awarded the full amount of the *solatium* as is required by law. Accordingly, I make no order as to costs.

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**BASSON, J**

**JUDGE OF THE LABOUR COURT OF SOUTH AFRICA**

DATE OF PROCEEDINGS: 10 NOVEMBER 1998

DATE OF JUDGMENT: *EX TEMPORE* (edited version)

ON BEHALF OF APPLICANT: MR P S FOUCHE

Instructed by: Hofmeyr Herbststein Ghwala and Cluver Inc.

ON BEHALF OF RESPONDENT: NO APPEARANCE