

REVISED AND REPORTABLE

CASE NO. J4333/99

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

2000-08-29

In the matter between:

J MIDDLETON AND 16 OTHERS

Applicants

and

INDUSTRIAL CHEMICAL CARRIERS (PTY) LTD
(10)

Respondent

J U D G M E N T

(10)

PILLAY AJ:

1.This is a referral in terms of section 2(1)(a) of Schedule 7 of the Labour Relations Act 66 of 1995 ("the Labour Relations Act"). The applicants seek an order, declaring the failure by AECI, the first respondent, to pay the applicants the same retrenchment packages and gratuities that were paid to the so-called payroll employees to be unfair discrimination and directing that the applicant⁽²⁰⁾ be paid the same retrenchment packages and gratuities as the payroll employees.

2.The facts were as follows: The applicants were formally employed by Industrial Chemical Carriers, ICC, the second respondent, a subsidiary of AECI. AECI and ICC entered⁽³⁰⁾ into a Sale of Asset Agreement with Tanker Services (Pty) Ltd, in terms of which all the assets of ICC were sold to Tanker Services. The effective date of the sale was 31 December 1998.

3. The terms of the Sale of Assets Agreement material to this dispute were the following and can be found at paragraph 9 of the agreement:

"9.1 Tanker Services undertakes to AECI that it will, within seven days of the signature date, make offers of employment to the people named in Annexure "D" hereto on the same or better terms and conditions on which they were employed by AECI on the signature date.

9.2 Tanker Services undertakes to AECI that it will within seven days of the signature date make offers of employment to the people listed in Annexure "E" hereto on terms and conditions determined by Tanker Services in its sole and absolute discretion.

9.3 AECI undertakes to find alternative employment or retrench at AECI's cost any person listed in Annexure "E" who rejects Tanker Services' offer or any other person for whom no position exists at Tanker Services."

Annexure "D" to the Sale of Assets Agreement represented the list of the employees who had substantively equivalent conditions of service, and who were mainly the so-called salaried staff, and Annexure "E" represented those who had substantively different conditions of service at Tanker Services. The latter were mainly the payroll employees.

4. Pursuant to the agreement the applicants, amongst other salaried staff, were employed by Tanker Services from 1 January 1999. The payroll employees were retrenched and paid the retrenchment packages in accordance with AECI's retrenchment guide lines. Some of the payroll employees approached the South African Chemical Workers' Union, SACWU, and the Mine Workers' Union, MWU, for assistance in challenging the fairness of their retrenchment. After negotiations these disputes were resolved on the basis that AECI would pay the **union members who were**

payroll employees, a gratuity being the equivalent of two extra months' salary.

5. In May 1999, five months after being employed by Tanker Services, the applicants referred this dispute for conciliation. The applicants contended that they were discriminated against on arbitrary grounds by not being retrenched and paid a package and gratuity.
6. It was further contended on their behalf that because the terms and conditions were not the same or better at Tanker Services than at AECl, they were disadvantaged, more so as there was no consultation with them prior to their employment at Tanker Services.
7. It is common cause that AECl and ICC had differentiated between the payroll employees and the salaried staff. The issue to be decided is whether the differentiation was unfair discrimination. This approach has been followed in previous decisions of this court and the Constitutional Court. (Leonard Dingler Employees' Representative Council v Leonard Dingler (Pty) Ltd 1998 19 ILJ 285 (LC); Brink v Kitshoff 1996 (4) SA 197 (CC); Prinsloo v Van der Linde 1997 (3) SA 1012 (CC); President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC); Harksen v Lane N.O. and Others 1998 (1) SA 300 (CC); Larbi-Ordam and others v Members of the Executive Council for Education and Another (North West Province) 1998 (1) SA 745 (CC); City Council of Pretoria v Walker 1998 (2) SA 363 (CC); National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) and Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC)).

8. Discrimination may be on a ground specified or unspecified in Item 2(1)(a) of Schedule 7. If it is on a specified ground then the unfairness is automatically presumed. If the differentiation is on an unspecified ground then the complainant must prove that the differentiation amounts to discrimination, which is unfair (Harksen v Lane NO and Others.)

9. Not every differentiation would amount to discrimination. The law anticipates that individuals and groups may be regulated differently without it being unfair (10) (Prinsloo v Van der Linde and Another) The kind of discrimination on an unspecified ground that is prohibited is one that has

"the potential to impair the fundamental dignity of persons as human beings, or to affect them in a comparably serious manner" (Harksen v Lane NO.)

This is clearly not a case where the impairment of the fundamental dignity of the applicants was in issue. Whether the differentiation affected the applicants in a ~~(20)~~ comparably serious manner will now be considered.

10. Prior to determination of their employment becoming an issue, payroll employees were treated differently from the salaried staff. Their terms and conditions of employment which were determined through collective bargaining were different from those of the salaried staff. For instance, they qualified for overtime pay whereas the salaried staff did not. The nature of their duties and the level of responsibility also differed. In all the circumstances there was a pre-existing valid basis

for the differentiation between the payroll employees and the salaried staff.

11. The Sale of Assets Agreement entitled Tanker Services to approach the payroll employees direct with offers of employment. There is no evidence that AECI knew which of the payroll employees were offered employment and whether any of them had refused the offer. All the payroll employees were paid the retrenchment benefit irrespective of whether they were employed at Tanker Services. (10)

12. It was contended on behalf of the applicants that the payment of the retrenchment benefit to those payroll employees who had refused employment with Tanker Services and not to offer a similar option to the applicants was discriminatory.

13. The decision to treat the payroll employees differently from the salaried staff on termination of employment was therefore neither arbitrary nor unfair (South African Society of Bank Officials v Standard Bank of South Africa Limited 1998 2 SA 1 SCA; Mans v Mondicraf Ltd 2000 21 ILJ 213 (LC)). (20)

14. As it transpired, treatment of the applicants on termination of their employment was qualitatively superior than the treatment of the payroll employees. Despite their complaint of being discriminated against, the applicants did not seek to be treated the same as the payroll employees in every respect. They were selective about the way in which they wanted their treatment to be equal to that of the payroll employees. This is not surprising, considering that the payroll employees' terms

and conditions of employment at Tanker Services were overall inferior to those of the applicants. The payroll employees suffered an average of between 50% and 60% reduction in their rates of remuneration. Their leave entitlement fell from 20 to 15 days per annum. There was no guarantee of employment and their security of tenure was not carried forward to Tanker Services.

15. Implicit in the notion of unfair discrimination is the requirement of disadvantage and prejudice (⁽¹⁰⁾Prinsloo v Van der Linde and Another 1997 3 SA 1012; see also Chaskalson et al The Constitutional Law of South Africa at pages 14-13 and 14-40). Whether an individual or group has been disadvantaged or prejudiced will depend on, amongst other things, the effect of the discrimination on the interests of those concerned (President of the Republic of South Africa v Hugo above; Larbi-Ordam and others v Members of the Executive Council for Education and Another above).

16. In this case the payroll employees were in a weaker and less advantaged position than the salaried staff who were more privileged. The salaried staff were therefore not a "vulnerable group" and were not disadvantaged or prejudiced in relation to the payroll employees (Larbi-Ordam and Others v Members of the Executive Council for Education and Another above).

17. Based on the Aristotelian adage that likes must be treated alike (Catherine Albertyn and Janet Kentridge Introducing the right to Equality in the Interim Constitution SAJHR 149), a complaint of unfair discrimination on any of the unspecified grounds should establish why the treatment should be the same. The applicants accepted the practice

of distinguishing between payroll and salaried employees. It is therefore inappropriate to compare terms and conditions of employment of payroll and salaried employees without establishing a rationale as to why they should have been treated the same.

18.The conduct of the respondent has been entirely consistent with the tenor of section 189 of the Labour Relations Act, namely to preserve and promote job security and employment over dismissal and unemployment. Furthermore, the respondent complied with section 41 of the Basic Conditions of Employment Act No. 75 Of 1997 ("Basic Conditions of Employment Act") by providing similar alternative employment for the applicants. Consequently, if the applicants had refused the employment with Tanker Services, such refusal would have been unreasonable. This was confirmed in the arbitration Patricia Tenant v ICC.

19.The respondent did not force the applicants to accept employment with Tanker Services, but merely reminded them of the possible consequences of their failure to do so.

20.With regard to the payroll employees who had no guarantee of employment with Tanker Services, AECI was obliged to pay severance pay in terms of section 41 of the Basic Conditions of Employment Act. Therefore the payment of severance pay to the payroll employees and not to the salaried staff was in compliance with the statutory obligation. It was therefore not unfair.

21.It is also convenient for the applicants to now demand payment of the retrenchment package and gratuity when there is no risk to their employment at Tanker Services. If they had the courage of their

convictions to enforce their claim at that stage for the retrenchment package and the gratuity, they ran the risk of losing both the package and the alternative employment, as was established in the arbitration between Patricia Tenant v ICC.

22.Finally, it was contended for the applicants that as the transaction with Tanker Services was the sale of assets and not the transfer of a business as a going concern in terms of section 197 of the Labour Relations Act, there was no need to consult with any of the employees. By consulting with the payroll employees and not the salaried staff the respondents had discriminated unfairly against the latter, so it was submitted.

23.Apart from not being specifically pleaded the argument is quite misconstrued and counter-productive to the applicants' cause. The need to consult, apart from it being good industrial relations practice, stems from section 189. The sale of the assets brought about the need to dismiss for operational reasons. Section 197 does not apply to this arbitration. Furthermore, AECI and ICC denied that there was no consultation with the applicants.

24.The applicants' case is not based on one of the specified grounds of discrimination. The onus therefore rests on the applicants to prove, not only discrimination but also that it was unfair. The applicants allege that the discrimination was arbitrary. They have failed to prove that the treatment was indeed arbitrary or unfair.
As a result the applicants have not discharged the onus.

The matter is accordingly dismissed with costs.

Pillay J

APPEARANCES IN CASE J4333/99

Trial	:	29-30 August 2000
Judgment	:	1 September 2000
Before her Honourable Judge	:	Pillay AJ
For the Applicants	:	Mr D Short
For the Respondents	:	Adv Watt-Pringle