IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN
JOHANNESBURG

CASE NO JS817/02
REPORT

ABLE

DATE 2005-05-03

In the matter between

LINDA YVONNE JOHNSON Applicant

and

ANGLO OPERATIONS LIMITED t/a

BOART LONGYEAR OPERATIONS Respondent

J U D G M E N T

REVELAS, J:

[1] The applicant in this matter was employed by the respondent as a credit supervisor in its financial department at its Springs branch. In this department fourteen individuals were employed. The applicant's services were terminated with effect from 13 May 2002 by the respondent, following a restructuring exercise which commenced in April 2002. At the onset of the exercise, negotiations were commenced with the unionised employees.

[2] This matter concerns the fairness of the applicant's retrenchment, which the applicant contends was both procedurally and substantively unfair. She was not a member of a union in the aforesaid context. The applicant was advised at a meeting held on 11 April 2002, that the respondent needed to retrench three persons in the finance department. One person would be from the debtor's department and two persons were to be from the creditor's department. This meeting was held with other employees in the finance department as well and the manager of the financial department Mr Truter and Miss Grobler the respondent's human resources official, was also present. The reason advanced

for the retrenchment was that the respondent's Roodepoort branch would commence operating its own stores and accordingly those stores which had been used by the respondent at the Springs branch, would be moved to Roodepoort where their customers would be diverted to. At this stage I make the following finding: Even though the applicant stated that she had never processed any payments in respect of the goods stored by the respondent in Springs of its Roodepoort branch, the financial manager gave sufficient evidence how the respondent was affected by this change in its operations. I accept that there was indeed a need to restructure and retrench.

[3] On 22 April 2002, the applicant was (on her version) called in twice into Mr Truter's office. On the respondent's version she was called in once, in the afternoon to the office of Miss Grobler and advised that there had been no requests for early retirement or voluntarily retrenchment, therefore the applicant's position had become redundant. She was told that the respondent no longer had a need for a supervisor to supervise subordinates in its financial department.

[4] The applicant had been employed by the respondent since 2001. On April 2002, at the meeting with Miss Grobler, the applicant was given a letter dated 19 April 2002 which was signed by Miss Grobler. It can be found at page 5 of the record and reads as follows:

**"Dear Miss Johnson,**

**Restructuring. The following serves to confirm the discussions held on 22 April 2002 between yourself, G Truter and myself:**

1. **Due to operational requirements the company has to review and restructure your department.**
2. **Resulting from this exercise the position you currently held has become redundant.**
3. **You can contact your union/staff representative. Management will set time aside to meet with yourself and your union/staff representative should you wish to discuss the possible retrenchment.**
4. **Management is giving you 21 calendar days' notice of the possible retrenchment (22 April 2002 to 13 May 2002). This time is to be utilised by you to think of any possible way of saving your position. These 21 days are taken as paid leave.**
5. **Management will keep in contact with you during this period and you are urged to contact me should you require more information or need to discuss your position.**
6. **Should no satisfactory agreement be reached regarding your position by the close of business on 13 May 2002, the company will have no option but to give you one month's notice of retrenchment."**

The letter is dated 19 April 2002 and yet the wording thereof is constructed as if it had been written on 22 April 2002 which was a Monday. On the probabilities, the letter was written the previous Friday (the 19th April ). The significance of the discrepancy is that a decision had probably already been taken by then (Friday) and that the earlier meeting to which this letter by

implication refers to, was of no consequence.

[5] In my view, to have given the applicant 21 days to save her own position was very unfair in the circumstances. It is the respondent who bears the onus of proving that its retrenchment was fair. In this letter the applicant was given the entire initiative and responsibility to provide alternatives to her redundancy which was already decided upon. This goes a bit further than the situation where the employer presents the employee with a *fait accompli* in principle, but gives the employee the opportunity to change the decision taken and such a process has been regarded as fair.

On the facts of this case, that was not the position in Miss Grobler's office on the 22nd of April.

The applicant responded to this letter as if she accepted the situation therein and created the impression that she was not taking the matter further. She wrote a letter to the respondent: (Miss Grobler):

> **"Dear Amanda,**
>
> **Please can I be paid for my 21 days my one month notice as soon as possible? I will be leaving for England on 8 May to join my sister's company there. Please send my blue card and RP5 as well. Thank you."**

This letter is signed by the applicant. The letter is dated 29 April 2002. On the same day, the respondent responded to this letter and the relevant portion of that letter, dated the same day, to the applicant reads as follows:

> **"SECO Products is to be moved back to SECO thus resulting in your position becoming redundant. The company requested employees with the department to consider voluntary retrenchment/early retirement. Nobody, however, applied. The company looked at LIFO as well as skill when considering retrenchment. Two positions became redundant, one employee retired and one (forced retrenchment). Management gave you 21 calendar days' notice of a possible retrenchment (22 April 2002 to 13 May 2002). This time was to be utilised by you to think of any possible way of saving your position. These 21 days were to be taken as paid leave because of the nature of your position in the finance department. Should no satisfactory agreement be reached regarding your position by the close of business on 13 May 2002, the company would have no option but to give you one month's notice of retrenchment. Management has considered and agreed to your request to waive the 21 days for consultation and to pay you for this period plus your one month's notice as you intend leaving the country."**

Then there is an invitation in this letter to the applicant, to sign the letter as her acceptance of the aforesaid facts. She did and the letter was returned to the respondent.

At first the applicant denied signing this letter. No signed copy was available at first. The suggestion sought to be inferred therefrom, was that this letter was typed up after the fact and she was not a party to these settlement proceedings. When the original document eventually surfaced during the trial proceedings, it reflected her signature. At first she denied that it was her signature. The inference sought to be drawn therefrom, was that somebody from the respondent had forged her signature. When it was pointed out to her that other documents contained her signature which looked the same. She probably reflected during the adjournment, and rather belatedly apologised and admitted that it was her signature.

The letter is significant in many ways. Matters such as LIFO and the proper motivation for the retrenchment are set out in this letter for the first time in writing, well after the retrenchment and the purported consultation meetings. In my view, the respondent should have discussed LIFO from the onset with the applicant. The respondent wanted the applicant to merely attach her signature to a letter, as an acceptance of certain events which were factually incorrect and never occured. The respondent's hands are not therefore clean either when I consider the applicant's less then honest conduct. An agreement containing in-correct facts drawn up by the employer, to later claim some form of exemption, is clearly not an acceptable labour practice.

[6] It was submitted that a settlement agreement to dispose of a retrenchment can only be signed by an employee after consultation. In such matters the settlement agreement is an attempt to dispose of any future claim against the employee's employer. This matter is however distinguishable. The letter dated 29 April, signed by Miss Grobler, was the result of the applicant's letter to the respondent, advising that she was leaving the country. This employer was therefore entitled to believe that the matter had come to an end and that there would be no consequences, even though on 16 May 2002, the applicant nonetheless referred a dispute about an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration. ("the CCMA").

[7] I considered, apart from the applicant's conduct, denying her signature, the fact that she created the impression that she was leaving. She is entitled to compensation but these two factors would impact on the amount of compensation. Other factors I have taken into account is that the applicant lost her house as a result of her retrenchment. If there was proper consultation, where the parties sought to reach consensus, the applicant's position might have been saved. She might even have understood that she was chosen for retrenchment on the basis of LIFO and skills retention, as the respondent stated in its letter.

In my view, the dismissal of the applicant was procedurally unfair and that compensation equal to six months' remuneration would be appropriate in this case. For her partial success in this matter she is also entitled to costs. I therefore order:

1. The dismissal of the applicant was procedurally unfair.

2. The respondent is to pay the applicant compensation, equal to six months' remuneration as at the time of her dismissal (R8 100 times six).
3. The respondent is to pay the applicant's costs in this matter.

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E. REVELAS

DATE OF HEARING: 3 MAY 2005

DATE OF JUDGMENT: 4 MAY 2005

ON BEHALF OF THE APPLICANT: ALLAN LEVINE AND ASSOCIATES
ON BEHALF OF THE RESPONDENT: LEPPAN BEECH ATTORNEYS