IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: JS286/09

In the matter between:

CLAIRE TETLEY Applicant

AND

CATERPLUS (PTY) LTD Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant has in this matter launched an unfair dismissal claim arising from the termination of her employment for operation reasons by the respondent. The applicant seeks to have the dismissal declared unfair on the grounds of both procedural and substantive reasons.

Background facts

[2] The applicant who was initially employed by Bidserv a division of Bidvest was transferred to the respondent during September 2006 as an e-commerce manager. The respondent was part of the Group Solutions and Group Procurement function of Bidserv. One of the operating

divisions of Bidserv has electronic procurement management system that facilitates trade between buyers and sellers known as My Market.

[3] The position into which the applicant had been transferred to was a newly created position. In the new position the applicant's duties were to act as an interface between the respondent and My Market for the purpose of increasing, the respondent's clients' use of the My Market procurement system, by providing e-commerce solutions to the clients.

[4] The objective of establishing the position of the applicant seems to have failed largely because the interface problems experienced between the respondent, its branches and My-Market. It was for this reason, according to the respondent, that during October 2008, the respondent's board examined the commercial viability of employing a dedicated e-commerce manager for My Market. The My Market procurement system was at the time of the retrenchment of the applicant used only by two major clients of the respondent, namely Fedics and Campus. The board then resolved that the administration of My Market should be shifted from respondent's Head Office to the financial managers of each branch. The administration of the My Market was thus decentralized to the branches. This resulted in the position of the e-commerce manager becoming redundant.

[5] After the decision to decentralize and declaring the position of the e-commerce manager redundant, a meeting was convened with the

applicant on 5th November 2008. The case of the respondent is that that meetings were part of the consultation process as envisaged by the provisions of s189 of the Labour Relations Act 66 of 1995(the LRA).

[6] The key issues which the parties require this court to determine in terms of the pre-trial minutes are; whether the dismissal of the applicant by the respondent was both procedurally and substantively fair and if so what relief should be afforded to the applicant? Should it be found that the dismissal was unfair, the applicant seeks compensation in equivalent to 12 (twelve) months pay.

The case of the respondent

[7] The respondent being the party responsible for showing that the dismissal was for a fair reason led one witness, Mr Lockley, its former HR manager. The case of the applicant is that although the notice in terms of s189 (3) of the LRA was not issued to the applicant the dismissal still remains fair. The respondent says the dismissal remains fair because the applicant was a senior employee who was aware of what was happening and could therefore not have been prejudiced by the failure to formerly issue her the notice as required by the law.

[8] Mr Lockey testified in support of the respondent's case that the applicant had transferred to the respondent to assist in the setting of the e-market as a consultant at Bidvest. She was transferred to the

respondent to assist in the implementation of the e-commerce. Her main responsibility according to him was to focus in and serve as an intermediate for the e-commerce.

[9] Mr Lockey further testified that the applicant could have saved her job by agreeing to take a transfer back to My Market which would have been on the same terms and conditions. He also testified that the reason for the redundancy of the position of the applicant was not because of her performance but rather the problem of the buy-in into the system by the traders and My Market. The redundancy of her position occurred when she refused to accept the transfer back to My Market. According to him the position became redundant at the point when she refused to accept the transfer back to My Market. It was also after her refusal to accept the transfer that dismissal was contemplated.

The applicant's case

[10] The applicant, who was the only witness to testify in support of the allegation that the dismissal was unfair, contended that there was no reason to make her position redundant because the My Market system is still running. She further in her testimony pointed to the frustration she had encountered with the My Market in as far she attempted to implement the e-commerce system. She was surprised when she heard that her position had become redundant. She however indicated to the

respondent that the one model that could be looked at to address the problems with the e-commerce was that of the Australian.

[11] On the 5th November 2008, Mr Lockey had a meeting with the applicant where it was suggested that the applicant should undertake the PP profile. The applicant was informed after the PP profiling that her strength was in marketing. She was also told that her CV would be sent around. The applicant was also told that the other position which was available for her was a commissioned position which she did not accept.

[12] The applicant testified that another meeting was held on the 10 November 2008 where the transfer back to My Market was discussed but she declined the transfer because in her view this would have amounted to taking a demotion as by the time she left that place she had already reached the highest position she could occupy.

[13] Another meeting was held on the 5th December where the applicant was informed that she would be finishing off on the 19th December 2008 but that the notice period would take effect in January.

[14] The applicant also testified that she was told by Mr Ramos, HR and financial manager, that there were no positions available at My Market. This version was never put to the respondent's witness neither did the applicant call Mr Ramus to testify. In my view this evidence adds no value to the case of the applicant. The evidence does not carry

weight also because at the stage she enquired as to the availability of positions at My Market she had already rejected the offer of transfer to that business unit. It is common cause that the offer transfer to My Market had been made to the applicant.

[15] The applicant further conceded that had she accepted the offer to transfer she could still be in the employ of the respondent. The only reason that the applicant tendered for rejecting the offer to transfer back to My Market was that the offer was not in writing.

The legal principles

[16] Section 189 of the LRA requires an employer who contemplates dismissal for operational reasons to consult with any of the various stakeholders listed in that section. Sub-section (2) of that section sets out the items upon which the employer and the consulting parties must consult with the view towards reaching consensus. The parties are required to consult on the following items:

> *"(a) appropriate measures –*
>
> *(i) to avoid the dismissals;*
>
> *(ii) to minimise the number of dismissals;*
>
> *(iii) to change the timing of the dismissals; and*
>
> *(iv) to mitigate the adverse effects of the dismissals;*

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.''

[17] Section 189 (3) of the LRA further requires the employer to disclose in writing to the other consulting party all relevant information relating to the intended termination of the employment for the reason of operational requirements. The information to be disclosed includes but is not limited to the following:

"(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting 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 period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

(h) the possibility of the future re-employment of the employees who are dismissed."

[18] It is further required of the employer to allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting. The employer must consider and respond to the representations made by the consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

[19] In my view the above provisions of the LRA were to be interpreted rigidly and strictly the possibility of compliance by the employer would probably be impossible. The rigid interpretation would entail that even if the employer complies in terms of the practical approach, every failure to comply with the strict provision of the LRA would automatically result in an unfair dismissal.

[20] The approach to be adopted in interpreting and applying the provisions of s189 of the LRA received attention in the case of ***Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC).*** In that case the court held that s189 has to be understood in the context of the provisions of s23(1) (a) of the Constitution which provides that every person has a fundamental right to fair labour practices and also that employees have in terms s185 of the LRA, a right not to be dismissed unfairly.

[21] The employer has on the other hand the right to terminate the employment relationship on the basis of operational requirements and in accordance with a fair procedure. It is clear from this analysis that whilst giving both parties rights in relation to termination of employment on the grounds of operational requirements, the law also in terms of s189 of the LRA imposes certain duties on each of the parties.

[22] In the recent decision of ***Hussein Dinat and Others v Edgars Consolidated case number*** *JS 786/04*, this court in dealing with the duties imposed on both the parties when confronted with the issue of retrenchment and as concerning procedural fairness, had the following to say:

> *"In terms of s189 (1) of the LRA an employer is required to consult with the employees or their representatives when it contemplates a dismissal because of operational requirements. This is the first duty imposed by the law on an employer who contemplates dismissal due to operational reasons. The second duty imposed by the provision of s189 is on the other parties to the consultation process. The other parties to the consultation process are required to also participate constructively in the consultation process with the view to reaching consensus on how to avoid the possible retrenchment or if it cannot be avoided how to minimize its impact. In other words the duty to*

put an effort in seeking consensus on how to avoid or minimize the impact of a retrenchment exercise is on both parties. An employee party who after being invited to participate in a consultation process fails to do so or embarks on a process which is counter productive to the objectives of the consultation process cannot later be heard to complain about the fairness of the dismissal.

[23] In addition to requiring the employer to have a good and valid reason for termination of an employee's employment for the reasons of operational requirements, the key purpose of s189 of LRA is to achieve an agreement through the *joint consensus-seeking* process which has to be guided by the fundamental principle that it is no fault of the employee that the retrenchment process has to be initiated. The main objective of the consultation process is to either avoid the dismissal or to minimise its consequences on the employee. Any of the parties who frustrate this process must take full responsibility and live with the consequence thereof. There are various tactics and strategies that any of the parties to the consultation process may adopt that may frustrate the objective of the process.

[24] Returning to the interpretation and application of the provisions of s189 of the LRA, it has been accepted that a ***mechanical, checklist approach*** in the determination of whether or not there has been compliance with the provisions of that section should not be adopted.

Th**e** proper approach which has been endorsed by a number of cases is to determine whether or not the purpose of the section which is stated above has been complied with. In dealing with this issue ***in Johnson and Johnson*** (supra), at page 1209 paragraph 30, the court held: .

> "*If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving the purpose must be sought. If the employer alone frustrated the process in some way or another, there be no compliance. If the employer was not at fault and did all it could, from its side, to achieve the kind of consultation referred to above, the purpose of the section would also have been achieved."*

Evaluation

[25] In the present instance the contention that the substantive reason for the termination of the applicant's contract of employment was unfair is in my view, unsustainable. The applicant did not during her testimony and in particular during cross examination dispute that there were indeed some problems with My Market. The duty of the applicant when she was transferred from My Market and made the e-commerce manager was to increase the clients' usage of My Market. That business objective seems to have failed largely because of lack of cooperation and buy- in by My Market. It is also undisputed that the client's usage of My Market even after the appointment of the

applicant as the e-commerce manager did not for the problem stated improve.

[26] The applicant conceded that that the problem in achieving the business objective was frustrated by My Market. This concession seems to support the contention of the respondent that because of those problems the need to restructure arose and it was for that reason that the position of the applicant became redundant. It is for this reasons that I do not belief that it would be improper for this court to interfere the decision of the respondent to restructure, which in my view is based on business imperatives.

Procedural fairness

[27] It is common cause that the respondent did not issue the applicant with the formal notice in terms of s189 (3) of the LRA. It is also common cause that the parties did have a discussion about the position of the applicant arising from the problems referred to above. The question that then arises is whether or not the process which the parties engaged in was of such a nature that it could be said that there was sufficient compliance with the requirement of the law or otherwise.

[28] In my view, although there was no formal notice as required by the provisions of s189 of the LRA, there was however substantial compliance with the provision thereof. Although the applicant contended that the meetings she attended with the respondent were

informal and did not comply with the requirements of the law, the facts and the circumstance in this matter point to the contrary. The facts and the circumstances of this case evince a formal process which point towards a process which was genuinely designed to produce the consensus outcome, with the view to avoiding the retrenchment or minimising its consequences. The conduct of the applicant during the consultation process indicate that she appreciated the formality and the importance of the process. The applicant took details notes of the engagement she had with the respondent's representative. Those minutes were attached to the pleadings of the applicant.

[29] There is nothing before this court that suggests that the alternative position which was offered to the applicant was not genuine. I do however note that the applicant says that she was told after the offer was made by one of the officers in the human resources that the position which the applicant was offered was already allocated to another person. The applicant did not however call that person to corroborate what he said but also that what he said was factually correct. In fact during cross examination the applicant conceded that had she accepted the offer of transferring her back to her previous position it would have been without any loss of benefit or change in the terms and conditions of her employment including no change in her salary.

[30] It is for the above reasons that I am of the view that the termination of the employment contract of the applicant was both substantively and procedurally fair. Accordingly, the applicant's claims stand to fail. I do not however belief that it would be fair to allow the costs to follow the results.

[31] In the premises the following order is made:

(i) The dismissal of the applicant for operational reasons was both substantively and procedurally fair.

(ii) Accordingly the applicant's claim is dismissed.

(iii) There is no order as costs.

Molahlehi J

Date of hearing : 5th April 2010

Date of Judgment : 27th October 2010

Representatives

For the Applicant : Ms Corne` Boshoff

Instructed by : EVS Inc

For the Respondent: Adv M. Jackson

Instructed by : Allardyce and Partners