IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

CASE NUMBER: JS 487/09

In the matter between:

Sonica Matthee Applicant

and

Kerradam Properties (Pty) Ltd

t/a Cabanga Conference Centre Respondent

Reasons for the order

BHOOLA J:

Introduction

[1] The applicant sought compensation arising from her substantively and procedurally unfair dismissal for operational requirements on 30 March 2009. The respondent opposed the claim on the basis that her termination of employment was for a good reason and was effected in accordance with the requirements of procedural fairness set out in the Labour Relations Act, 66 of 1995 ("the Act"). At the conclusion of the matter on 26 May 2010 I issued an ex *tempore* order as follows:

(a) The dismissal of the applicant by the respondent is declared to be procedurally unfair but substantively fair ;

(b) The respondent is ordered to pay the applicant compensation in the sum of twelve (12) months' remuneration;

(c) The respondent is to pay the applicant's costs.

These are the reasons for the order.

The facts

[2] The applicant was employment by the respondent on 10 March 2008 as a Conference and Functions Administrator. Her duties changed at some point to include supervision of two other employees as well as marketing functions. At the time of her dismissal she earned a monthly salary of R15 500-00.

[3] On 28 November 2008 she commenced maternity leave and was expected to resume her duties on 1 April 2009.

[4] In the afternoon of 23 March 2009 a notice in terms of section 189 (3) of the Act was delivered to her at her home by the respondent. The notice referred to a meeting held with all staff held that day and stated that the respondent was considering possible retrenchment in order to address its financial situation. The applicant had not been invited to attend the meeting. The notice stated that no final decision had been taken and the respondent first wished to consult its employees in regard to in *inter alia* appropriate measures to avoid the need to retrench; minimise the number of employees to be affected; change the timing of the retrenchments and/or mitigate adverse effects. The notice stated that staff would be advised of the next steps and would be consulted in due course. Prior to delivery of the notice the applicant was telephonically informed to expect it and that the respondent was having financial problems.

[5] On the afternoon of 30 March 2009, following a meeting with her colleague Kiara Mew (Ms Mew"), who showed her a second notice headed "Rationalisation of Staff" ("the second notice") issued to staff that day, she received a copy as well as an Agreement of Settlement (which was predated 31 March and had already been signed by the respondent). Heather Farah ("Ms Farah"), who was at that time an employee of the respondent, then telephoned her. This was followed by a call from Michelle Kerrigan ("Mrs Kerrigan"), the respondent's General Manager, who was the applicant's immediate superior.

[6] She obtained legal advice and the following day her attorneys wrote to the respondent proposing that the matter be settled on the basis of 5 month's salary. The respondent's attorneys replied on 1 April 2009 confirming that her dismissal was substantively and procedurally fair.

[7] The sum of R19 076.35 was paid into the applicant's bank account by the respondent on 17 April 2009, being one month and one week's salary. She commenced employment recently and until then has been employed in various jobs as a casual employee.

[8] The applicant received a certificate of service reflecting 30 March 2009 as the date of termination of her employment. The certificate is signed and dated 31 March 2009.

[9] On 30 April 2009 the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration, and following the respondent's objection to a con-arb process a certificate of non-resolution was issued.

The applicant's case

[10] The applicant testified that the notice of 23 March 2009 was the first indication she had of the apparently dire financial situation of the respondent. She was shocked and understood that she would be contacted to arrange a meeting since she had not been invited to attend the staff meeting held that day, and the notice in fact stated that she would be contacted about the next steps.

[11] On 30 March 2009 she was informed by Ms Mew that they had both been retrenched. They met for coffee that morning and she was shown the second notice listed her as among four employees whose retrenchment was "envisaged" by the respondent. She then received a telephone call from Ms Farah, with whom she refused to engage and expressed her outrage that Mrs Kerrigan, her immediate superior, had not contacted her directly. This was followed by a telephone call from Mrs Kerrigan. She could not recall the exact details of the conversation given that she was still in a state of shock at the time, but understood that her retrenchment was necessary as a result of the respondent's dire financial situation and that she had to report to the respondent's office for the purposes of signing the necessary documentation. She understood her retrenchment to be final. Her version on the events of 30 March was corroborated by Ms Mew in her evidence.

[12] She sought legal advice the following day and was advised not to sign any documents. On 1 April 2009 she reported to the respondent's office and Mrs Kerrigan requested signature of the Settlement Agreement. She refused to sign and was informed that this did not alter the fact that she had been retrenched.

The respondent's case

[13] Maurice Kerrigan, the Managing Director of the respondent, sketched the backdrop to the downturn in the respondent's business. He confirmed that it had become apparent from February 2009 that drastic measures had to be taken given the 30% decline in turnover and anticipated further decline in March and April. Staff costs were the largest operating costs and other cost – cutting measures would have had little impact. The retrenchments were undertaken in a "real rush" due to the "shoddy predicted cash flow" for April. He was not directly involved in the process, which was conducted by his wife, Mrs Kerrigan, in her capacity as General Manager. When the financial difficulties first emerged some staff had agreed to waive overtime pay in order to avoid retrenchment, and three employees had resigned as a result of the prevailing uncertainty. The two members of the kitchen staff were selected for retrenchment based on LIFO and their relatively junior skills. The selection criteria applied to the applicant included considering retaining skills which were absolutely necessary to a streamlined business operation and eliminating surplus skills. The applicant and Ms Mew earned the highest salaries other than Mrs Kerrigan, and

restructuring their jobs in order to utilise less skilled employees in combined roles was considered to be appropriate to address the respondent's decline in business. He said "we felt we could do with a lesser skilled person – that's all the company could afford".

[14] He conceded that the notice of 23 March was the first notice to consult issued to the applicant, and that the respondent had made attempts to telephone her that morning "to appear, if she needed to appear" at the staff consultation to be held later that day. His wife also had a telephone conversation with her on 30 March in order to consult about alternatives to her proposed retrenchment, and it would still have been open to her to have made proposals on 1 April prior to the final decision being made. His view was that the fact that the applicant was on maternity leave was "desperately unfortunate" given that the timing of the retrenchments was of the utmost urgency, and he could identify no justification for treating her differently from other staff. The respondent could not have waited until her return from maternity leave a day later to initiate the consultation process with her, but more importantly this would have made no difference to its decision. The respondent tried to consult with the applicant but her attitude was "do what you have to do – I don't care".

[15] The respondent also led the evidence of its Financial Manager to confirm that its salary bill represented about 30% of its monthly turnover, as well as Ms Farah and Mrs Kerrigan.

Evaluation

Substantive fairness

[16] The applicant conceded that given the respondent's financial position there was a need to retrench, and only questions her selection and the hasty nature of the process. She does not seek reinstatement. Furthermore, in its closing submissions applicant's counsel conceded that the applicant could neither admit nor deny that there was a general need to retrench. In the light of these concessions it cannot but be found that there was a need to retrench.

Procedural unfairness

[17] It is well established that the employer bears a statutory duty emanating from section 189 of the Act to consult with employees likely to be affected as soon as it "contemplates retrenchment":*Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* (1994) 15 ILJ 1247 (A)[1]. The duty to consult arises at

[1] Applied in *inter alia Manqindi & others v Continental Barrel Plating (Pty) Ltd* (1994) 15 ILJ 400 (IC) ; *Chetty v Scotts Select A Shoe* (1998) 19 ILJ 1465 (LC)

the time the decision to retrench is made, not when it is implemented: *Food & Allied Workers' Union & others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC). Section 189 (2) requires the parties to engage in "a meaningful joint consensus seeking process" in an attempt to reach consensus on measures to avoid, minimise or change the timing of the retrenchment, and the obligation is on the employer to use its own initiative to take whatever steps may be appropriate in this regard: *SA Chemical Workers' Union v Afrox Ltd (*1999) 20 ILJ 1718 (LAC). Furthermore, it is trite that the employer is required to act in good faith in this process (*SACCAWU v Sun International SA Ltd (A division of Kersaf Investments Ltd)* (2003) 24 ILJ 594 (LC)), and that even though a retrenchment may be justified by its financial position, a genuine attempt to consult is still required: *Vickers v Aquahydro Projects (Pty) Ltd* (1999) 20 ILJ 1308 (LC) at 1312B. The decision to retrench must not be a *fait accompli: Chetty v Scotts Select a Shoe (1998) 19 ILJ 1465 (LC)*. Where the employer frustrates the purpose of the Act or fails to comply with its statutory obligations, the retrenchment is procedurally unfair: *Johnson & Johnson v Chemical Industrial Workers Union* (1999) 20 ILJ 89 (LAC).

[18] The respondent bears the onus of proving the procedural fairness of the retrenchment. The respondent submitted that attempts were made to consult with the applicant as required by section 189 (3), but that she was dilatory and intransigent. Proper and meaningful consensus seeking occurred between the respondent and the other retrenched employees, and had the attitude of the applicant been different consensus may well have been reached with her as well. It cannot by any stretch of logic be countenanced how the respondent can contend that the applicant had been afforded an opportunity to consult and that it made a genuine attempt to seek consensus with her, but that she was intransigent and dilatory. Mr Kerrigan's evidence in this regard that "we opened the door to consult but she did not take it any further" reflects a rather nonchalant approach to the employer's statutory duty. It is not sufficient to simply give notice and then leave the ball in the employee's court, particularly in the face of the fact that she was on maternity leave and had no information about the processes being engaged in by her employer in respect of other affected employees.

[19] The respondent already anticipated that its financial circumstances would decline drastically in about January or February 2009 but only sought to give notice to the applicant on 23 March. At this stage it appears that a decision had already been taken to give effect to the retrenchments at the end of March in order to avoid the salary bill for April. It was furthermore common cause that during the week preceding 30 March no consultation was held with the applicant. She was at no stage invited to consult with the respondent in order to present alternatives to the proposed retrenchment nor was she presented with any such alternatives by the respondent. She was at no stage presented with assistance to seek alternative

employment despite being on leave at the time she was retrenched, nor was she offered the opportunity to consider whether she would remain in the employ of the respondent at a lower salary or work shorter hours. The facts clearly established that the respondent failed to comply with its duty to consult with the applicant. In fact Mrs Kerrigan's explanation for her failure to contact the applicant prior to 30 March was that she expected the applicant to telephone her. The applicant was not invited to the staff meeting on 30 March nor did she form part of the consultation held with the other three proposed retrenchees on the same date. In fact, Mrs Kerrigan's approach appears to have been that the respondent did her a favour by not expecting her to attend the staff meeting.

[20] Mrs Kerrigan testified that the selection of the applicant "came down to money", and conceded that she had not consulted with her about whether she would be prepared to accept a reduction in her salary. She spent a lot of time explaining the financial situation to her given that she was not aware of the situation on 23 March when she informed her telephonically that the driver was bringing a letter to her. She stated both that the address was obtained from records and that someone had called her that day to verify her address. She then contradicted this by stating that she only had the discussion with her *after* the notice had been delivered to her. She had not been considered for retrenchment at that stage. Thereafter the applicant did not contact her nor did she contact the applicant because she left it to each manager to consult with their direct reports (although she was the applicant's immediate superior). No one else had a discussion with the applicant. This was in stark contrast to Mr Kerrigan's evidence that numerous attempts had been made to consult with her and she had refused to do so. Both Kerrigans testified that an exception could not have been made despite the fact that the applicant was on maternity leave, and it would have led to the same outcome. Mrs Kerrigan further assumed that the applicant would not have accepted a reduction of her salary. She confirmed that the respondent had to act quickly given its financial situation.

[21] Insofar as the respondent's representative contended that the Act does not require consultation to be conducted *in person* with the employee likely to be affected by the proposed retrenchment, and that the correspondence and telephonic discussions between the parties would suffice in this regard, I did not understand him to seriously contend that the conduct of the respondent constituted compliance with its duty to consult. Although the employee should obviously co-operate in that the Act envisages a joint consultation process, the submission that the applicant was intransigent and dilatory is not borne out by the respondent's own evidence. The duty was on the respondent to have invited her to consult, which it failed to do. It is not disputed that she indicated a willingness to meet with Mrs Kerrigan after the telephonic discussion on 30 March and said she understood the financial situation of the respondent. This is generally indicative of her attitude to this matter and it cannot be contended that she failed or refused to consult.

[22] It was common cause that not only was the applicant dismissed while she was on maternity leave (although the respondent submitted that the final decision was made on 1 April, the day she returned from leave, this is not in my view material), but a mere week had elapsed between the first section 189(3) notice and the second notice of 30 March confirming that she was on a list of envisaged employees to be retrenched. The section 189 (3) notice was issued to her during this period, delivered to her home, and referred to a meeting with staff that she had not been invited to attend. She accordingly formed the view that a meeting would be arranged in due course with her, although she took no steps herself in this regard. It is clear from the facts that the respondent made no attempt to consult with the applicant or to reach consensus with her on the legal requirements stipulated in section 189 (3) prior to the decision to retrench her being taken. In fact, the essence of the respondent's case is that the applicant should have come forward voluntarily with proposals regarding alternatives to retrenchment, and it was submitted that the communication of notices to her and the telephonic discussions with Mrs Kerrigan constituted sufficient consultation for the purposes of the Act. In the absence of her coming forward, the respondent had no proposals to consider or consult about. It was furthermore clear that no consensus had been reached with her in regard to the selection criteria, and that salary was the criterion used to select her and Mew. At no stage was she invited to consult or present alternatives, and her evidence was that she would have been amenable to a reduction in salary and even casual employment given her new family responsibilities. This was in the light of Mrs Kerrigan's volunteering evidence to the effect that a new person had been employed to perform some of the responsibilities that the applicant had performed, and which responsibilities had been amalgamated during the restructuring exercise into one job. Having realised her admission and the obvious difficulty this created in light of the undertaking to re-employ conveyed in the retrenchment notices, she sought to recant in cross-examination by stating that this had been purely on a casual basis.

[23] Insofar as the respondent sought to contend that the retrenchment only took effect on 1 April, this is not material in my view. By all accounts the retrenchment of the applicant was a *fait accompli*, and in fact on the respondent's own version, was inevitable. This was borne out by the evidence that waiting until she returned from maternity leave would have made no difference. Insofar as it was suggested that it would still have been open to her to engage the respondent in regard to alternatives on 31 March or 1 April, instead of seeking legal advice, in the circumstances it was not improbable that she concluded that her retrenchment was final. She had met with Ms Mew who told her they had been retrenched; she had received the second notice accompanied by the pre-signed settlement agreement; and the gist of her telephone conversation with Mrs Kerrigan on 30 March was that she should come in to sign the documents to give effect to the respondent's decision. The reasonableness of her view is confirmed by the date of termination reflected on her certificate of service.

[24] From the above facts it is clear that no genuine attempt was made by the respondent to consult with the applicant, and on this basis alone her dismissal can be said to be procedurally unfair.

Relief

[25] I turn then to consider the appropriate measure of compensation given that the applicant does not seek reinstatement. It is trite that when assessing the appropriate compensation the court exercises a discretion which requires determining an amount that is fair to both parties, and that it is required to have regard to the magnitude and nature of the procedural defect[2]. In *casu* it is not the case that a delay of the retrenchment of the applicant by a further month would have caused unsustainable and irreparable loss to the respondent (moreover given that three employees had resigned), and the respondent could have waited until her return from maternity leave either to initiate the process in regard to her or to consult sufficiently with her. The respondent made no attempt to distinguish her situation from that of other employees retrenched, or to accommodate her circumstances, and led no evidence that this would have compounded its financial difficulties substantially. The conduct of the respondent smacks of gross insensitivity, and had the applicant brought a claim based on unfair discrimination I would have had no hesitation in finding in her favour. For a young mother to be given notice of one week during maternity leave in respect of a retrenchment that is concluded on her first day back at work, and without any attempt to consult, is nothing short of contempt for the legal protection afforded to employees on the grounds of gender, pregnancy and family responsibilities. In this context whether her retrenchment became final on 1 April is of no consequence. Accordingly, I consider compensation in the sum of 12 months' remuneration to be fair given the egregious nature of the procedural unfairness and the blatant non-compliance by the respondent of the requirements of section 189.

[26] The parties agreed that there were no reasons why costs should not follow the result.

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Bhoola J
Judge of the Labour Court of South Africa

[2] See in this regard *Fouldien & others v House of Trucks (Pty) Ltd* (2002) 23 ILJ 2259 cited by Van Niekerk J in *Wilna van Rooyen and 12 others v Blue Financial Services (South Africa) (Pty) Ltd* (unreported case JS 374/08 11 May 2010). See also *BMD Knitting Mills (Pty) Ltd v S A Clothing & Textile Workers Union* (2001) 22 ILJ 2364 (LAC) where the LAC stated the applicable approach, although pre the 2002 amendments to section 193.

Date of hearing: 24 – 26 May 2010
Date of reasons: 4 June 2010
Appearance:
For the Applicant: Adv C Bruwer instructed by Vogel Malan Attorneys
For the Respondents: Mr A Hinds, Alan Hinds Attorneys