IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

"REPORTABLE"

CASE NO: JS 958/09

In the matter between:

MICHAEL LENCOANE & 75 OTHERS Applicants

and

VECTOR LOGISTICS (PTY) LTD Respondent

JUDGMENT

Nyman A J

INTRODUCTION

1. The issue to be determined is whether the collective dismissal of the 76 applicants from their employment in and during April 2005 as a result of their refusal to agree to a change in the starting time for work from 6h45 to 5h45, constitutes an automatically unfair dismissal in terms of section 187(1) (c) of the Labour Relations Act 65 of 1995 ("the LRA").

PRELIMINARY ISSUES

2. Eleven of the Applicants numbered 4, 70, 68, 55, 48, 6, 9, 12, 19, 27, 10 are deceased. On 7 September 2010 I made an Order of Substitution in respect of 6 of the deceased applicants numbered 4, 70, 68, 55, 48 and 6. The remaining five are therefore not before the Court.

3. On 15 September 2010 I ruled that the Court has jurisdiction in respect of the 13 applicants listed in Annexure "A2". The respondent's special plea was thus dismissed.

4. On 16 September 2010 I upheld the respondent's special plea that the Court does not have jurisdiction in respect of Daniel Sithole (applicant number 76) on the ground that no CCMA referral had been made.

5. The remainder of the 70 applicants are properly before the Court.

BACKGROUND

6. The respondent is in the business of transporting frozen and fresh food to amongst others; retail stores, fast-food outlets and restaurants. It has branches in Nelspruit, Polokwane, Klerksdorp and Roodepoort. All the applicants were employed at the Roodepoort branch as truck drivers and van assistants.

7. The business was formerly owned by Irvin and Johnson Ltd ("I & J") until it was transferred to the respondent in and during 2002 in terms of section 197 of the LRA. The individual contracts of employment with I & J were transferred to the respondent.

8. The working conditions of the employees were regulated by annual Wage and Conditions of Service Agreements ("Wage Agreement") that I & J and subsequently, the respondent, concluded with the Food and Allied Workers Union ("FAWU") and the South African Food and Allied Trade Union ("SAFATU"), the two recognised minority trade unions.

9. Centralised collective bargaining took place at the Inland Bargaining Unit which was made up of representatives from the Nelspruit, Polokwane, Klerksdorp and Roodepoort divisions. The applicable wage agreement at the time of dismissal was concluded on 14 October 2004 and was in operation for the period 1 July 2004 to 30 June 2005.

10. While I & J had only transported the food that it produced, the respondent transported foods produced by a number of other producers. When the respondent took over the business, it introduced a number of changes to the business, one of the main changes being the introduction of "Roadshow", a computerised mapping network. Before the introduction of Roadshow, the drivers mapped their own routes manually, while Roadshow now mapped their routes from a centralised computer.

6 An additional change that the respondent sought to introduce was to change the starting time of work of the drivers and van assistants employed at the Roodepoort division, an hour earlier from 6h45 to 5h45. Hours of work were stipulated as a specific term of the individual contracts of employment. These hours of work were later regulated by annual Wage Agreements.

THE CONSULTATIONS

7 It is common cause that the respondent sought to engage with FAWU, SAFATU and the individual applicants in the proposed implementation of the change in starting times in and during 2003 and 2005.

8 Christopher Mmesi who was a FAWU shop steward and the applicants' main witness at the trial, testified that the earliest time that the issue of the change in working hours was raised by the company, was at a meeting with the two trade unions in and during 2003. In terms of the minutes, the meeting was held on 20 March 2003 and was attended by representatives of the company and the two trade unions, Mmesi having attended the meeting as a FAWU representative.

9 At this particular meeting, the company explained the rationale for the proposed change in the starting time in the following passage:

> 'Returns[1] are caused by late departures. If you are early for your shift you will be helped early by the customers. It is a fact that we cannot deliver, we will lose customers and it will affect all of us, management and employees. There are no intentions of the company to set traps to dismiss employees; this [is] merely an operational requirement. Changes are not because of the change in the name of the business, but because of market forces and market needs beyond our control.'

10 The company highlighted that the three reasons for the changes were, to reduce returns, Provincial Legislation and to enhance better customer service. The union representatives expressed the reservations of the employees that this could not be the only reason for implementing the change. They made the following recommendations to address the problems of returns that would obviate the need to introduce the change in starting time:

10.1 Fix the routing by revisiting the manual routing system and comparing it with the new Roadshow system.

10.2 The manpower had to be addressed by increasing the number of van assistants because the respondent was the only perishable company with only one van assistant.

10.3 The loading in the warehouse had to be sorted out to give better customer service.

[1] The goods that were not delivered for the day and were then returned.

10.4 The company had to employ a person who would specialise in only doing returns.

11 It was only on 25 January 2005, nearly two years later, that the company issued an internal memorandum to all the drivers and van assistants wherein it indicated the need to communicate with recognised representatives regarding the proposed change in work starting time.

12 According to the evidence of Rin de Wet, the respondent's former Regional Distribution Manager, the reason for the break in the consultation process was because the company experienced difficulties in consulting with SAFATU and FAWU in that their level of representation had dropped substantially because they had lost membership to the South African Intelligence Workers Union ("SAIWU"), a rival trade union. Furthermore, he did not recognise Mmesi as a shop steward because when he wanted to communicate with him, Mmesi would reply that he was not a messenger. This also contributed to a breakdown in the communication.

13 SAIWU had sought recognition from the respondent in and during September 2004. Peter Hosken, the respondent's Labour Relations Manager, had testified that the respondent could not recognise SAIWU until a proper verification exercise had been carried out with all three trade unions. It was to this end that on 27 October 2004, Hosken sent a letter to FAWU indicating

that of the 335 employees within the Inland Bargaining Unit, 122 (36%) were members of FAWU. FAWU was then formally notified that 33 of their members had given notice that they intended to resign from FAWU and join a rival union, which would result in a drop in representivity to 27%.

14 A similar letter was sent to SAFATU on the same day indicating that of the 335 employees within the Inland Bargaining Unit, 115 (34%) were members of SAFATU and 38 of their members had given notice that they intended to resign and join a rival union, which would result in a drop in representivity to 23%.

15 On 1 December 2004 and in order to address the question of trade union representivity, the company held a meeting with the FAWU and SAFATU where it was agreed that by the end of January 2005, shop stewards should be in place and a meeting with constituents should be held.

16 The consultation process recommenced thereafter on 25 January 2005 when the respondent issued an internal memorandum to all drivers and van assistants expressing the need to communicate with recognised representatives regarding the proposed change in work starting time.

17 In the meantime, on the following day at a conciliation meeting, the CCMA dismissed the dispute regarding recognition that SAIWU had referred to it because of non-attendance by SAIWU.

18 On 26 January 2005 the company issued an internal memorandum to employees in the transport department alleging that an illegal meeting had taken place on the premises that disrupted business. Thereafter and on the same day, the participants in this action received a first written warning.

19 Mmesi testified that employees conducted a meeting to elect representatives that could negotiate with management. This meeting was disbanded by management after 15 minutes and therefore, no representatives could be elected. The respondent's witnesses testified that this meeting carried on for about 1 to 2 hours.

20 On 31 January 2005 de Wet issued a memorandum indicating that it had no way of communicating with the union interest group effectively because there were now three sets of union memberships, all in the minority. The respondent suggested that a ballot be conducted so that employees could identify representatives that could communicate with management on behalf of the employees.

21 Thereafter FAWU sent a letter to Hosken on 10 February 2005 proposing a meeting on 22 and 23 February 2005 to discuss outstanding deferred matters from the previous wage negotiations and the Rainbow-Vector Logistics merger process and impacts.

22 Needless to say and not unexpectedly, none of the employees participated in the ballot which resulted in de Wet indicating to the employees in a memorandum dated 14 February 2005 that management would be forced to implement any business changes without consultation.

23 On 17 February 2005 de Wet posted a memorandum on the notice board advising that the company was obliged to change the transport department's standard starting time from 6h45 to 5h45 with effect from 7 March 2005. In the memorandum he explained that since October 2005 management had been attempting to facilitate the election of mandated employee representatives and that request to the union for assistance in this regard had proved futile, so he had appealed to the employees to independently hold elections in each department. The end result was that management was reduced to consult solely with union officials who are not on the site and are not fully familiar with the day-to-day problems faced by the company and its employees.

24 The memorandum set out the following reasons for the introduction of the change in starting time:

24.1 The company operates in a fiercely competitive business environment and to ensure its survival and to 'stay ahead of the pack'; there is a need to respond promptly to changing service demands from both customers and principals/suppliers.

24.2 The company's customers were no longer prepared to accept late deliveries.

24.3 The company's failure to respond to the need for early deliveries is adding an estimated R1 million per year to its running costs.

24.4 The company cannot continue to carry on absorbing these costs or upsetting its customers, without losing customers and endangering employees' job security.

25 In conclusion, the union officials were requested to assist employees by collating any reported problems and reverting to management within 10 days from the date of the notice.

26 The above memorandum was annexed to a letter sent to FAWU and SAFATU confirming the date of the annual wage negotiations meeting to be held on 3 and 4 March 2005. Included on the agenda was "the new starting times for Roodepoort transport department staff".

27 The minutes of the meeting of 4 March 2005 record that management objected to the presence of Mmesi indicating that it had sent a letter to FAWU informing it that management did not recognise Mmesi as a shop steward any more. Management also alleged certain complaints concerning Mmesi's "disruptive" conduct. Under cross-examination Mmesi pointed out that the minutes did not record the inputs and response that he had made at the

meeting. He categorically denied management’s accusations regarding his conduct and stated that management attempted to give him a bad name. He had only been representing the interest of employees.

28 In respect of the new starting time, management indicated that it had consulted properly on the issue and had followed all avenues. De Wet presented the following motivation for the change in the work starting time.

28.1 The proposed new starting time was an operational requirement.

28.2 The customers did not want to receive late deliveries.

28.3 The trucks of the company's opposition delivered early which gave them an advantage over the company.

28.4 The trade moved its receiving times and the company had to adhere to this change, otherwise it would stay behind. The company had no other option but to implement the new starting time otherwise it would be detrimental to its business.

29 The minutes reflect the trade unions’ concerns regarding the change in the starting time:

29.1 It did not help for the company’s trucks to arrive early when the retail stores’ receiving opened later.

29.2 The company had to consider whether it was possible for deliveries to be effected by appointment.

29.3 The big problem was the routing.

30 According to the minutes, an agreement was reached on a follow-up meeting on 11 March 2005 "to sort out whatever issues are still outstanding with the starting times" and where the implementation of the starting time would be discussed. The union would have seven days to raise outstanding issues and concerns regarding the starting time which the company would investigate and address at the following meeting.

31 It is in dispute whether the parties had concluded an agreement on the implementation of the new starting time at this meeting. Mr Mmesi emphatically denied that any such agreement was reached. Franklin Oosthuizen, who was employed as the Logistics Manager at the time of the dismissals and who had attended the meeting of 4 March 2005, conceded under cross examination that no agreement was concluded. Hosken and de Wet testified that an agreement was reached at the meeting.

32 At the follow-up meeting of 11 March 2005 the employees' representatives tabled five points for discussion which impacted on the starting time of 5h45:

32.1 Cold Chain, one of the company's competitors, provided several van assistants.

32.2 An incentive should be given to drivers who took out a second delivery.

32.3 The question of what would happen if a truck was not ready to leave the branch at the new starting time of 5h45.

32.4 The relative effectiveness of the Manual vs. Road Show procedures.

32.5 Problems experienced by staff unable to get taxis to bring them to work on time.

33 The company responded to each of the tabled points. The minutes record an agreement that the shop stewards would brief their members verbally of the new starting time on 14 March 2005 and that implementation of the new starting time would take place on Thursday 31 March 2005. Mmesi disputed that the minutes were a correct reflection of the meeting. He denied categorically that an agreement was reached on the new starting time.

34 Oosthuizen who was the minute-taker at the meeting on 4 March 2005 testified that no agreement took place on the new starting time at this meeting but an agreement was reached at the meeting of 11 March 2005. De Wet had testified that an agreement was reached at the meeting of 4 March 2005.

35 I am not satisfied based on the evidence that an agreement was concluded at either of the two meetings. The five points raised by the employees' representatives at the meeting of 11 March 2005 are an indication that consultations were still in progress and that until their concerns had been addressed to their satisfaction, no agreement would be reached. To my mind, Mmesi remained steadfast in his position that no such agreement had been concluded, despite rigorous cross examination. His conduct as a shop steward and demeanour in the witness box show that he took his representative responsibilities very seriously.

36 The respondent's insistence that such an agreement had been concluded is more a reflection of its determination to push ahead with the change in starting time, irrespective of the arguments advanced in opposition thereto. It is difficult not to reach the conclusion that the respondent did not hold the objections and concerns raised by the unions, in a serious light. Hosken demonstrated this approach in his testimony that the applicants; "*were merely raising formal issues as obstructions which could be sorted out in a few minutes*".

37 On 18 March 2005 the respondent posted a memorandum on the notice board indicating that as per the agreement with the trade unions, the date for the new the starting time for drivers and van assistants would be 31 March 2005.

38 It is common cause that the drivers and van assistants did not report for duty at 5h45, but reported for duty at the usual time of 6h45. This resulted in the respondent issuing a memorandum on 8 April 2005 with the ultimatum that if employees did not implement the new starting time from Wednesday, 13 April 2005, "*disciplinary action would be taken against them which could result in termination of employees' contract of employment.*"

39 On the same day the contents of the memorandum were sent in the form of a letter to FAWU and SAFATU. On 8 April 2005 FAWU and SAFATU, in a joint reply to the letter, indicated that the new starting time had been discussed and the unions had made written proposals to management, yet no response had been received thereto. The unions denied that an agreement was reached and proposed an urgent meeting on 14 April 2005 to resolve the matter. The respondent failed to reply to this letter.

<u>THE FINAL WRITTTEN WARNINGS</u>

40 On 13 April 2005 the respondent issued a final written warning to 65 of the applicants, describing the details of the misconduct as:

> 'On-going refusal to obey lawful instructions to comply with the operational need for transport staff to start work at 5h45, in order to meet our customer's demands for timeous delivery of their orders.'

41 On 13 April 2005 the respondent's attorneys issued a letter to drivers and van assistants instructing them to obey a lawful instruction to commence work at the agreed starting time of 5h45. The letter furthermore called on the employees to provide a written undertaking by 16h00 that they would commence work by 5h45 the following day, failing which, an urgent application would be launched.

42 The applicants did not provide such written undertaking nor did they report to work at 5h45 on 14 April 2005. Instead, they delivered a written response recording that on 13 April 2005 they reported to work at 6h45 but management (Deon Henningse and Peter Hosken) issued each of them with a disciplinary action form containing a final written warning. They were ordered to go home and report for duty the next day at 5h45, failing which, they would be dismissed.

43 In their written response, the applicants presented their detailed response to the respondent's demand that they should start work an hour earlier:

> '1. We acknowledge customers' demands for timeous delivery of their orders. Our commitment to that is guaranteed at all times.
>
> 2. There is no refusal to obey lawful instructions here, because there is no agreement around the 05H45 issue the Co[2]. wants to implement.

[2] The company

3. It is not an operational need for transport staff to start work at 05h45, but a calculated strategy by the Co. to strengthen its excuse to dismiss permanent employees [65 Guys have final w.w.'s[3] already.]

4. By the end of Thursday [14.04.05] the Co. will have dismissed about 65 employees, all at once. Surely there is a message in this whole thing. The Co. wants to get rid of all permanent employees in this dept either because it [Dept] has already been or is in the process of being outsourced to Flexistaff Holdings [An agency within the co. premises.]

5. But clocking in at 05H45 – watching trucks being loaded up to 09H00;12H00; or even 15h00 is not compatible with timeous deliveries to customers as is waiting for loaded trucks being 'fixed' every morning before going out on route [almost our entire fleet is depreciated]; invoices; 2 boxes yet to be loaded; Deon to authorised a second V/A[4]; trucks to be crossloaded.

6. Our customers have not adjusted their business and are not receiving times to accommodate our earlier starting time and are not doing so because just because Vector wants them. Receiving rules at chain stores prioritise the warehouse; dairy and bakery before any other deliveries [including perishable suppliers like Vector irrespective of arrival times there.

7. It is also a fact that you can only be first truck at only one customer.

[3] Written warnings

[4] Van assistants

8. Customers actually want their deliveries within 24H00 of the orders being placed and not after a week; complete to specifications; and at convenient times (obviously not during lunch time; or 08H00 at night.]

9. Some of main causes of returns are-

ROADSHOW – Poor routing. [Routes not fixed which gives 'confusing and ineffective' feedback resulting in poorly informed routes] 'Plotting system' looks OK, but is practically unrealistic. Manned by people with no prior experience [delivery – PWV.]

MANNING – 1 driver + 1 V/A [Assigned to a seven ton truck; to Pick 'N Pay's that use scanning; customers accessed by lifts

LOADING – Recent frequent incidences of stock for one customer being loaded separately resulting in multi-trips to them.

Squashing [heavier boxes on top of lighter ones – damages]

NEW STAFF- Co. fired more than half its experienced workforce in favour of casuals. Unfortunately not all of them are fully knowledgeable about the Co.'s operations [jobs, routes etc]

MULTISECTOR- Loading of retail and catering customers into same truck.

RECOMMENDATIONS

ROADSHOW –To be replaced by manual routing; fixed routes with a driver and his truck assigned to it permanently.

MANNING – 2 V/As to every 4 to 7 ton truck…

3 to 4 V/A's to 8 and 9 tons

5 or more V/A's to 10 tons…

LOADING - Complete first customers before loading the next. No heavier boxes on top of lighter ones [No squashin.] If possible put the smaller and lighter boxes at the door.

If fresh is loaded, stack it on both sides of the truck to enable easy access to the stock behind it; stickers facing outwards and numbered according to drops for identity.

NEW STAFF - Co. must hire casuals permanently and ensure that its investment in 'training' them benefits it in return …

MULTISECTOR – Separate retail and catering customers. Load accordingly.'

44 On 13 April 2005 the 65 applicants lodged an appeal against their final written warnings on the following grounds:

'1. No notification of disciplinary hearings was issued to us.

2. No agreement was reached regarding the new starting times [5h45].

3. No disciplinary hearings were conducted, and as a result….

4. We were denied the right to state our case and defend ourselves.

5. We were further denied representation.

6. We never refused to obey any lawful instruction.

7. It is not an operational need for transport staff to start work at 05H45.

The issue of 05H45 was never discussed with us [employees] before….'

45 It is common cause that no appeal hearing was held and that the 65 applicants continued to report to the respondent's premises at 6h45 and not 5h45.

THE URGENT APPLICATION

46 On Friday, 15 April 2005 the respondent served papers on the applicants' representatives giving notice of an urgent application to be argued on Monday, 18 April 2005.

47 On 18 April 2005 the respondent launched an urgent application in this Court. An interim order was issued on the same day directing, *inter alia*, that the applicants comply with their contracts of employment by commencing work at 5h45.

48 On 18 April 2005 the respondent's attorneys sent a letter to FAWU and SAFATU which letter was also address to the applicants referring to the court

order that they should commence work with the respondent at 5h45 with immediate effect. The letter furthermore advised them that should they not commence work from 5h45, on 19 April 2005, they would face dismissal.

THE DISMISSALS

49 On 19 April 2005 the 65 applicants were issued with notices of a disciplinary enquiry to be conducted on 20 April 2005 wherein they were informed of the following charges:

49.1 Contempt of Court Order;

49.2 Breach of individual contracts of employment;

49.3 Contravention of Labour Relations Act; and

49.4 Breach of various collective agreements.

50 The notice requested the 65 applicants to elect 5 representatives to represent them at the enquiry.

51 On 20 April 2005 the disciplinary enquiry was held under the chairpersonship of Hosken. The applicants were represented by Mmesi and four other employees. According to the evidence of Hosken, the representatives read their defence from a document that must have been prepared by a lawyer.

52 According to the transcript of the minutes of the disciplinary enquiry, Mmesi denied all the charges and raised the defences that:

52.1 An improper application had been made to the Labour Court;

52.2 There was no breach of the contracts of employment

52.3 The company is put to proof that there was contravention of the Labour Relations Act

52.4 The employees had resigned from FAWU and SAFATU and had joined SAIWU; the collective agreement was null and void and was no longer binding on them.

52.5 The respondent should have consulted with the applicants individually pending the recognition of SAIWU.

52.6 If the respondent had problems recognising the two trade unions, why was section 24 of the LRA not challenged?

53 According to the transcript of the disciplinary enquiry, at the conclusion of the applicants' representations, Hosken and De Wet went to caucus and on their return, Hosken informed them that they were going to impose the sanction of dismissal. The reasons for such decision being that:

53.1 They have taken advice from the Labour Court and were going to abide by the terms and conditions;

53.2 They were in breach of the court order.

53.3 The respondent had made good faith in consulting with individual employees;

53.4 SAIWU could not be recognised by the company because it only had 25% representativity.

54 On 20 April 2005 the 65 applicants were issued with notices of dismissal which notice set out the findings that the 65 applicants were:

54.1 In breach of their individual contracts of employment in that they refused to commence work at 5h45;

54.2 Participating in unprotected industrial action in that they were refusing to commence work at 5h45 and are demanding that they be retrenched and paid a severance package;

54.3 In breach of the Recognition Agreement and other collective agreements requiring employees to work flexible working hours;

54.4 In contempt of the Court Order obtained in the Labour Court on 18 April 2005.

55 On 20 April 2005 the remainder of the applicants, ten in number, who were not cited as respondents in the urgent application, were issued with final written warnings. (These applicants are referred to as "the additional 10

applicants" and are listed in Annexure "A3" to the respondent's reply to the applicants' Statement of Case.)

56 On the following day, 21 April 2005 they were issued with notices to attend a disciplinary enquiry to answer the charge of:

> 'Failing to follow a reasonable legal instruction in that you are refusing to adhere to the new starting time of 5h45. This new starting time has been forced on the company through business requirements. You are refusing this despite numerous attempts by management to consult and despite the fact that your refusal in the process had been placed you in breach of your individual contracts, various agreements and the LRA.'

57 Their disciplinary enquiry took place on 21 April 2005 and they were dismissed on the same day. The transcript of the disciplinary enquiry states that the additional 10 applicants requested their dismissal because, 'they just want to be part of the other guys". While De Wet confirmed the correctness of the transcript in his evidence, such correctness was disputed by Isaac Letsoalo who gave evidence regarding the procedure that was followed in respect of the 10 applicants. Letsoalo testified that he did not remember the words that were used but they had requested their dismissal forms which they had not received.

58 The difference between the reasons for the dismissal of the 65 applicants and the additional 10 applicants is that the latter were not charged with being in contempt of the Court Order.

A CONSIDERATION OF THE SUBSTANTIVE FAIRNESS OF THE DISMISSALS

59 The applicants contend in their Statement of Case that their dismissal constitutes an automatically unfair dismissal in terms of section 187(1)(c), alternatively, in terms of section 188 of the LRA in that:

59.1 The reason for the dismissal was to compel the applicants to accept the respondent's demand in respect of a matter of mutual interest between the parties.

59.2 The applicants were dismissed for refusing to accept the respondent's persistent and unreasonable demand that they start work from 5h45, contrary to the standard time for work at 6h45.

59.3 The dismissal of the applicants was not carried out for a fair reason but on an arbitrary basis.

60 In its answer to the statement of case the respondent argues that the applicants:

60.1 Breached their individual contracts of employment and wage agreement by refusing to obey the respondent's reasonable and lawful instruction to commence work at 5h45.

60.2 Were in breach of the provisions of clauses 7.4.2, 9.2, 9.3, 10 and Annexure C (dispute procedure) and clause 13 of the Recognition Agreement.

61 In *Fry's Metals (Pty) Ltd v NUMSA & Others* [2003] 2 BLLR 140 (LAC) the court decided that when a dismissal is final and irrevocable, it did not constitute a dismissal for the purpose of compelling an employee to comply with an employer's demand. Therefore, in order for a dismissal to fall within the ambit of section 187(1) (c) its purpose should be to compel the employees to accept a demand in respect of a matter of mutual interest between employer and employee. (paras 27 and 28)

62 If the employees do not agree to the change after their dismissal for compelling them to agree, the dismissal becomes final and it therefore cannot constitute an automatically unfair dismissal but is an ordinary dismissal for operational requirements. (para 29)

63 The distinction between an automatically unfair dismissal ("a lock-out dismissal") and a dismissal based on operational requirements is encapsulated in the following passage at para 31:

> 'The distinction relates to whether the dismissal is effected in order to compel the employees to agree to the employer's demand which would result in the dismissal being withdrawn and the employees being retained if they accept the demand or whether it is effected finally so that, in a case such as this one, the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions that meet the employer's requirements. An ordinary retrenchment, where the employees are being retrenched will not be replaced, is, of course, also a dismissal for operational requirements.'

64 The facts in the *Fry's Metals* case are distinguishable from the facts in *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) in that in the latter case, the dismissal was not final because up until the time of the trial and in evidence, the company's witness testified that the company would withdraw the dismissal if the employees agreed to the company's demand that they work a rotating shift system. (para 53) The court therefore concluded that the dismissal was effected for the purpose of compelling the employees to agree to the employer's demand and fell within the ambit of section 187(1)(c).

65 In my view, documentary and oral evidence point towards the fact that the dismissal of the applicants was final and was not effected to compel the applicants to agree to the earlier starting time of 5h45. The concluding two paragraphs of the notice of dismissal in respect of the 65 applicants spell out the finality of the dismissal unequivocally:

> 'Employees are, in the circumstances, advised that their contracts of employment are summarily terminated. All monies due to employees from the company will be paid to them by the end of this current month, April 2005. The company will assist where possible in expediting any provident / retirement payments due from the NBC.
>
> As repeatedly stated to the employees, the Company can no longer tolerate employees' refusal to work in terms of the Company's operational requirements and the demands of customers. Unprotected industrial action cannot be tolerated.'

66 The finality of the dismissal of the additional 10 applicants is captured in the disciplinary action form under the heading, "remarks in support of action":

> 'Mr Letsoalo's on-going and blatant disobedience is in contravention of the agreements reached after months of consultations and compromises – and despite having been afforded every opportunity to comply with the operational requirements of the business.'

67 The finality of the dismissals is also reflected in the evidence of Deon Esterhuysen who testified that casual employees were employed on 14 April 2005, the day after the 65 applicants were issued with final written warnings and later on permanent employees were employed in the place of the applicants. The employment of permanent employees later on, was given as one of the reasons why the respondent did not want to reinstate the applicants.

68 In these circumstances, the dismissal of the applicants does not fall within the ambit of section 187(1) (c) and does not constitute an automatically unfair dismissal.

69 Since the dismissal is not automatically unfair, in terms of sub-sections 188(1) (a) (i) and (ii) of the LRA, the *onus* is on the respondent to prove that the reason for the dismissals is because of a fair reason related to the applicants' conduct or capacity or based on the respondent's operational requirements. In terms of sub-section 188(1) (b) the respondent has to prove that the dismissal was effected in accordance with a fair procedure. The starting point for such consideration is to establish the reason given by the respondent for the dismissal of the applicants and whether such reason was fair.

70 The notice of the disciplinary enquiry in respect of the 65 applicants reads as follows:

> 'Dear Drivers and Van Assistants
>
> Despite the Court Order obtained on 18 April 2005, you have refused to commence work at 5h45.
>
> You are advised that you are:
>
> - in contempt of Court Order;
> - in breach of individual contracts of employment;
> - in contravention of Labour Relations Act; and

- in breach of various collective agreements.'

71 The reasons for the dismissal of the applicants as described in the notices of dismissal are that they were:

71.1 In breach of their individual contracts of employment in that they refused to commence work at 5h45;

71.2 Participating in unprotected industrial action in that they were refusing to commence work at 5h45 and are demanding that they be retrenched and paid a severance package; and

71.3 In breach of the Recognition Agreement and other collective agreements requiring employees to work flexible working hours.

72 It was only the 65 applicants who were charged with being in contempt of the Court Order obtained in the Labour Court on 18 April 2005.

73 <u>Were the applicants in breach of their individual contracts of employment for their refusal to commence work at 5h45</u>?

73.1 The respondent does not specify which term of the contract of employment the applicants breached. No further light is shed in the respondent's reply to the applicant's statement of case either in that the averment at paragraph 38 is again couched in general terms, namely, that the individual applicants:

> '…were in breach of their individual contracts of employment and wage agreement applicable to them by refusing to obey the Respondent's reasonable and lawful instruction to commence work at 5h45. It is submitted that the conduct of the individual Applicants was unlawful and unreasonable.'

73.2 At paragraph 146 of its reply, the respondent makes the general averment that:

> '…the dismissal of the Applicants is a sole consequence of their unreasonable failure to carry out a reasonable, fair and lawful instruction, namely to work from the new starting time of 5h45 and were dismissed for a fair reason and subsequent to a fair procedure.'

74 Given the above two averments, the breach of the contracts of employment is in respect of the applicants' alleged failure to carry out "a reasonable, fair and lawful instruction". In consequence, the question to be determined is whether the respondent could compel the applicants to change their starting time an hour earlier by simply giving them an instruction, and whether such an instruction would constitute a reasonable, fair and lawful instruction.

75 The starting and knock off times are specified as terms in the individual contracts of employment and letters of appointment under the heading, "hours of work". These working times are described as "the official hours of work".

76 Working hours are regulated in the recognition agreement:

76.1 Clause 5 stipulates that employees shall work a 45 hour week (195 hours per month).

76.2 Clause 6.1 provides that due to the nature of the business, the working of overtime was unavoidable from time to time. Employees could agree to work up to 12 hours overtime a week when necessary and any overtime work thereafter, would be on a voluntary basis.

77 It is the respondent's argument that it was permitted to issue an instruction to the applicants to commence their starting time an hour earlier than their normal starting time and without consultation, because such a change constitutes a flexible work pattern in terms of clause 21 of the recognition agreement which reads:

'21 FLEXIBLE WORK PATTERNS

21.1 It is accepted that due to the changing demands of customers, flexible working patterns (including weekend work) is an operational requirement that has become necessary to enable the company to remain competitive.

21.2 Both parties agree to co-operate in working such flexible work patterns.

21.3 Where a Sunday forms a part of an employee's normal 45-hour were working week, the time worked on the Sunday will be paid at one and

> a half times the employee's normal hourly rate. The employee will then receive an alternative day off in place of the Sunday that he or she worked.'

78 Hosken testified under cross examination that the applicants had been working flexible work patterns because when a client required a delivery early, the applicants would come in early. If the work was not finished on a Friday, then the applicants would work on a Saturday to finish the work. According to Hosken, a pattern was something that continues; it was not a once off thing. A pattern was a development and was permanent. Therefore the change from 6h45 to 5h45 constituted a pattern because it was a continuing behaviour.

79 De Wet testified that it was common practice at the company to change the working hours. The starting time was changed at the Polokwane Depot. However, the starting time had not been changed at the Roodepoort Depot, this being the first time that the respondent wanted to change the starting time.

80 Mmesi testified under cross examination that the applicants had been working flexible working patterns when they worked overtime and over week-ends. This also occurred whenever a customer asked them to work early they would arrive early at work. Flexible working patterns therefore meant to accommodate certain requirements. Therefore, the applicants did not work every Saturday, but they only worked on a Saturday when required to do so.

This flexible work did not affect their original contracts of employment. According to Mmesi if he started work every day at 5h45, it was no longer a flexible work pattern but a change in the conditions of employment.

81 If regard is had to the literal meaning of the word 'pattern', the New Shorter Oxford Dictionary, 1993 Edition, defines a pattern to mean, "an original to be imitated", "a copy of something, "a likeness", "a mould", "a precedent" and "a specimen". The literal meaning of the word does not support the interpretation to mean "a permanent change" as defined by the respondent's witnesses. It is akin to the meaning of a repetition of prior conduct, such as repeating the pattern of working over week-ends or overtime.

82 I therefore agree with the applicants that the change of starting time does not constitute a flexible working pattern but constitutes a permanent change; a permanent change to the term of conditions of employment. The most obvious reason for such a finding is that the starting time is stipulated as a specific term in the contract of employment. A reading of the context of clause 21 reveals that it refers to week-end work and Sunday work, i.e flexible work patterns that do not have permanency, that is why it is defined as flexible and not permanent.

83 It is my view that such a term could only be changed through collective bargaining with the trade unions in that a term of the contract of employment constitutes a dispute of interest and not a dispute of right that would be the subject matter for collective bargaining. A change in the starting time would be

the subject matter for consultation in terms of clause 5.2 of the recognition agreement that explains the issues for consultation:

‘5.2 Consultation

5.2.1 The company and the Union Committee at each site undertake to consult with the view to reaching consensus on all matters concerning the welfare and interests of employees within the branch. The Union Committee at each site shall be entitled during the consultations to make representations and advance alternative proposals. Matters included in the consultation process shall include any of the following:

(a) restructuring of the workplace, including the introduction of new technology and work methods;

(b) changes in the organisation of work;

(c)….

(d)….

(e)….the dismissal of an employee based on operational requirements (retrenchments or redundancies);

(f)….

(g)….

(h) health and safety matters;

5.2.2 The Company shall consider and respond to any representatives or alternative proposals made by the Union Committee at each site. Where

> consensus cannot be reached, management shall provide reasons for disagreeing.'

84 Requiring employees to start work an hour earlier concerns their welfare and interests, such a requirement would constitute part of changes in the organisation of work. In consequence, the introduction of such a change relates to the respondent's operational requirements.

85 In any event, the respondent, through its efforts to consult with the applicants concerning the change in the starting time, had made its position clear that the change in starting time was a matter for consultation. Such conduct negates the respondent's subsequent stance as set out in the notice of the disciplinary enquiry, notice of dismissal and reply that it was within its right to issue an instruction that related to a change to the terms and conditions of employment when consultation with a view to arrive at an agreement was necessary to effect such change. Such a stance is also negated by the respondent's assertions at the trial that an agreement had been reached at the meetings of 4 and 11 March 2005.

86 <u>Did the applicants participate in unprotected industrial action in that they were refusing to commence work at 5h45 and were demanding that they be retrenched and paid a severance package</u>?

87 It is my finding that the applicants did not participate in unprotected industrial action, nor did they demand to be paid a severance package. It is not in dispute that the applicants reported to work at their normal time at 6h45 until their

dismissal. They were not permitted to commence work because of their refusal to start work at 5h45. It was the respondent's initial refusal to accept the applicants' services before their dismissal, that constituted a lock-out because the respondent was willing to accept their services if they accepted the demand to commence work an hour earlier than their normal starting time. The respondent had engaged in an unprotected lock-out, before the final dismissal, in contravention of section 64 of the LRA.

88 The evidence of de Wet lays to rest the respondent's allegation that the applicants demanded to be paid a severance package. There is no evidence that such a demand was made to the respondent orally or in writing. The question of severance pay was based on a hearsay statement from a source who apparently eavesdropped on the meetings of the applicants and who submitted reports to the respondent. The alleged severance pay was based on a rumour that workers were owed money ("a pot of gold" according to de Wet) as a result of past mergers. On the company's version, this seemed to be a long-standing complaint that could not be elevated to a demand during the stand-off concerning the change in starting time.

89 Were the applicants in breach of the Recognition Agreement and other collective agreements requiring employees to work flexible working hours?

I have already expressed the viewpoint above that the applicants were not in breach of the recognition agreement.

90 Were the applicants in contempt of the Court Order obtained in the Labour Court on 18 April 2005?

91 It is common cause that this court issued a *rule nisi* on Monday, 18 April 2005, returnable on 4 May 2005, declaring, *inter alia*, that the applicants (respondents in the order) were on an unprotected strike which was unlawful; directing that they comply with their individual contracts of employment and the Wage and Conditions of Service Agreement, and to commence work with the respondent at 5h45 with immediate effect. The order also prohibited the applicants from approaching or being within 500 meters of the premises, except for a lawful reason.

92 It is common cause that the applicants did not report to work at 5h45. They were therefore in breach of the Order. The question to be determined is whether it was fair to dismiss the applicants because of their non-compliance with the Order.

93 Contempt of court constitutes conduct in relation to the court. It is therefore the Court and not the employer who may impose a sanction in respect thereof after referral by the employer.

94 During the proceedings the respondent introduced oral and documentary evidence for advancing a further reason for the change in the starting time, namely that statistics showed an increase in hijackings late in the afternoon. This reason was not advanced in any serious manner during the pre-dismissal period, demonstrated by the fact that the written statistics produced at the trial

was issued after the date of dismissal in that it included the year of 2005 as the last period.

95 I find that the respondent had not discharged the *onus* stipulated in sub-section 192(2) of the LRA of proving that the dismissal was fair. It has failed to prove the existence of a commercial rationale that justified the introduction of the change in starting time. Even though de Wet testified that the company was losing millions of rands, there was no evidence to support his *ipse dixit*. While an example was used that the respondent had lost the KFC account, de Wet had testified that it was his opinion that this account had been lost because of an inside job by a former employee of the respondent.

96 Despite persistent cross examination, Mmesi was steadfast in his analysis that returns were caused by three problems; poor routing, insufficient manning levels and new employees carrying out who did not understand the procedures. He testified that even if the applicants had commenced work earlier, the problems of returns would not have been solved. This evidence was supported indirectly by de Wet when he testified that the respondent had employed about 30 more employees after the respondents' dismissal.

97 In the premise I find that the reason for the dismissal was because of the respondent's operational requirements. Save for the inchoate consultations that took place, the requirements of sub-section 189A have not been met. In the premise I find that the dismissal of the applicants was substantively unfair.

A CONSIDERATION OF THE PROCEDURAL FAIRNESS OF THE DISMISSALS

98 I furthermore find that the dismissal of the 65 applicants was procedurally unfair because Hosken, the chairperson of the enquiry and de Wet, the respondent's witness, had a caucus after the evidence was led at the disciplinary enquiry to consider the verdict.

99 I find that the dismissal of the 10 remaining applicants was procedurally unfair because their dismissal was a foregone conclusion and the respondent was merely going through the motions of conducting a disciplinary enquiry.

100 In the light of my findings that the dismissal was substantively and procedurally unfair, I have to order reinstatement, unless one of the following circumstances stipulated in subsection 193(2) of the LRA are present[5]:

> '(a) the employee does not wish to be reinstated or re-employed;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure.'

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[5] *See: Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) and *Billiton Aluminium Sa Ltd T/A Hillside Aluminium v Khanyile & Others* (2010) 31 ILJ 273 (CC)

101 In my view, none of the above circumstances are present. I find that the evidence given by the respondent's witnesses that other employees have been employed in the place of the applicants, does not constitute acceptable evidence that the applicants' reinstatement is not reasonably practical.[6]

102 The trial was held more than 5 years after the dismissal of the applicants. The respondent submitted a schedule which set out an explanation for the delays. The applicant conceded that it was responsible for 2 to 3 months of undue delay. I find that the applicants' conduct was the primary cause of the delay.

103 In *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) the Court held that it may use its discretion to limit the retrospectivity of reinstatement so that an employer is not unfairly burdened. In the circumstances, it will be fair and equitable to limit the order of retrospectivity to 6 months from the date of judgment.

ORDER

104 In the premises I make the following order:

(a) The applicants' dismissal by the respondent is hereby declared to have been unfair as contemplated by section 188(1) of the Labour Relations Act 66 of 1995.

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[6] *Edcon Ltd v Pillemer NO & Others* [2010] 1 BLLR 1 (SCA) 9

(b) The respondent is ordered to reinstate the 61 applicants to the positions they held in its employment immediately before their dismissal on 21 April 2005.

(c) The order in (b) above is to operate with retrospective effect to 7 May 2010.

(d) The respondent is ordered to reinstate the additional 9 applicants numbered 65, 66, 67, 69, 70, 71, 72, 73 and 74 to the positions they held in its employment immediately before their dismissal on 20 April 2005.

(e) The order in (d) above is to operate with retrospective effect to 8 May 2010.

(f) The respondent is order to pay to the substituted applicants numbered 4, 70, 68, 55, 48 and 6 the amount of compensation equivalent to 12 months' pay.

(g) No order as to costs.

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Nyman A J

Date of Hearing: 6 to 16 September 2010

Date of Judgment: 20 October 2010

Appearances:

For the Applicants: Ndumiso Voyi of Ndumiso Voyi Inc.

For the Respondent: Mr Farrel of Farrel & Associates