IN THE LABOUR COURT OF SOUTH AFRICA

CASENUMBER:C273/97 In the

matter between:

HEATHER EYRE ***Applicant***

and

J HOUGH t/a MILLER EYRE TRAVEL ***Respondent***

_____ J U D

G M E N T

_____BASSON

, J:

1 The applicant, Ms H Eyre, referred the dispute about her alleged unfair dismissal by the respondent, Mr J Hough trading as Miller Eyre Travel, to the Labour Court for adjudication in terms of Section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995 ("the Act").

2 The Applicant alleged that her dismissal for operational requirements, that is, retrenchment, on 30 September 1997 (becoming operative at the end of October 1997) was both substantively and procedurally unfair.

3 It is trite that dismissals based on operational requirements must be preceded by exhaustive consultations as the retrenchee is not losing his or her job through any fault of his or her own but due to a decision taken by the employer, based on an economic retionale.

4 These principles of fairness have been codified in terms of section 189 of the Act which require that, when an employer **contemplates** dismissing one or more employees for reasons based on the employer's operational requirements, the employer must **consult** the employee likely to be affected by the proposed dismissal (there are no other worker representatives who act on the employee's behalf *in casu.*

5 Section 189(2) of the Act reads as follows:

"The consulting parties must attempt to reach consensus on –

(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 affects of the dismissals;

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

(c) the severance pay for dismissed employees.

6 Section 189(3) of the Act reads as follows:

'The employer **must disclose in writing** to the other consulting party **all relevant information** including but not limited to the **reasons** for the proposed dismissals, the **alternatives** that the employer **considered** before proposing the dismissals and the reasons for **rejecting** each of the alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method of selecting which employees to dismiss;

(e) the time when **or the period during which the dismissals are likely to take effect;**

(f) the severance pay **proposed**

(g) any **assistance** that the employer proposes to offer the employees likely to be dismissed;
(h) the possibility of future re-employment of the employees who are dismissed" (my underlining)

7 I agree with applicant's counsel, *Mr Rautenbach,* that the Act foresees a linear process in terms of which the employer must disclose in the required writing relevant information in order to make the consultative process meaningful. It is on such basis that the consulting parties must attempt to reach consensus on the matters set out in sub-section (2) of section 189 of the Act (quoted above).

8 The main operational requirement *in casu* (as testified to by Mr Hough, himself, the only witness on behalf of the respondent) was that he had taken over the business, a travel agency, on 1 August 1997 and that he had planned to become personally involved in the management thereof. Mr Hough was further of the opinion that the business was in need of streamlining or, as he put it, it needed to be made more lean in view of the low monthly profits.

9 Mr Hough accordingly gave an instruction to a labour consultant to draw up a report to advise him on these matters. Mr hough consulted with the labour consultant and informed him of his intention to take over as manager of the business.

10 The Applicant was employed as the travel office manager at the business and she had worked for the business for the last six years, although not always in this capacity. The business also employed two senior travel consultants and other administrative staff.

11 The one senior travel consultant, Ms D Thomas, was employed a mere two months before the date of the dismissal of the applicant.

12 Mr Hough duly received back the report from the labour consultant on 22 September 1997.

13 However, Mr hough only decided to make the results of the report known on 29 September 1997, when he called in all of his other employees, informing them that the company will indeed be restructured. Thereafter Mr Hough also called in the applicant. On the Respondent's version, Mr Hough wanted to give her the report and thereafter ask her to make suggestions.

14 The applicant denies that she was given the opportunity to make suggestions.

15 On 30 September 1997 the Applicant was handed a dismissal letter.

16 Even on the respondent's version, the respondent failed to disclose in writing or otherwise one of the important alternatives that the Respondent considered before proposing the dismissal and the reason for rejecting this alternative.

17 The respondent also failed to disclose the time when or the period during which the dismissal was likely to take effect as well as the severance pay proposed.

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19 *Mr Rautenbach* argued that section 189(3) of the Act did not comprise a check list that the employer has to comply with,

failing which the dismissal would be procedurally unfair and proper relief would follow.

20 I agree that there may be cases where the employer can readily explain why it did not comply with this legal duty, even though it appears that section 189(3) of the Act places a statutory obligation on an employer who initiates such consultation process.

21 The alternative that Mr Hough that alleged to have considered was to employ the applicant in the position of Ms Thomas, the travel consultant (referred to at paragraph [] above). He considered this against the background, of course, of the applicant having six years' experience in the business, compared to Ms Thomas who was only working for this specific business for two months.

22 Mr Hough also said that he decided against implementing this alternative for the reason, *inter alia*, that the applicant had previously apparently rejected a demotion.

23 It is unfair for the employer not to have disclosed this alternative to the applicant. In fact, under these circumstances I am not even persuaded that the employer indeed would have considered implementing such alternative.

24 This unfairness, is, of course, compounded by the fact that the employer failed to disclose also, in writing or otherwise, the timing of the dismissal as well as the severance pay proposed.

25 The severance pay eventually given to the applicant, the respondent now conceded, was only one week's pay for one year

of completed service, whereas she was entitled to six weeks' of retrenchment pay in terms of the provisions of the Act. Section 196 reads as follows:

"An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service for that employer."

26 Further, Section 196(10) of the Act reads as follows:

"If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may enquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount."

27 In view of the Respondent's admission that he owed the employee six weeks' of severance pay, I accordingly make an order in terms of section 196(10) of the Act, ordering the respondent to pay the five weeks' retrenchment pay that was not paid out to the applicant in terms of these provisions of the Act . It is common cause that such amount is to R6 845,75.

28 In taking an overall *conspectus* of the respondent's commitment to consultations as is required in terms of the Act 9see the provisions of section 189(2) and (3) quoted at paragraph [] above), the following relevant facts present themselves.

29 First, Mr Hough stated quite categorically in giving evidence that he need not consult on the reason for the proposed dismissal.

30 The reason or the economic rationale, in the present case was the decision of the respondent (Mr Hough) to take up the managerial tasks that had previously been undertaken by the applicant.

31 The provisions of section 189(3)(a) of the Act (quoted above at paragraph []) call on the employer to disclose in writing the reasons for the proposed dismissals, it can only mean that the reason can also be consulted on in an endeavour to be fair towards the employee who stands to lose his or her own job due to the implementation of that economic decision. The absolute refusal to do so, therefore, reflects on the Respondent's commitment to consultations, as is required in terms of the Act.

32 Mr Hough also gave evidence to the effect that he relied very heavily on the advice given by his labour consultant (the letter in this regard is attached at pages 46 and 47 of the Bundle of documents before Court).

33

34 Although Mr Hough said that there were also telephonic conversation in which consultations were emphasised, the letter does not make this clear.

35 The said letter first states that the other employees "[T]he first three categories mentioned above ...need to be informed of the changing to their reporting lines and changes proposed in the report ...that is the structural changes”

The labour consultant then proceeded to write as follows: "The travel office manager need to be informed as follows. Her position has become redundant due to the re-organising of the staffing structure and that you as owner has taken over all the managerial functions, that you regret to inform her that her services will be terminated because of operational

requirements. Her position is unfortunately the only post that is adversely affected by the change and to mitigate the adverse affects of the dismissal she will be granted the following severance benefits ..."

These severance benefits appear to be a month's pay in lieu of notice, vacation credit, one week's remuneration for each completed year of service, which as is indicated above, she did not receive for five of the years that she worked and a payment of a *pro rata* part of the discretionary bonus normally paid in December. This was also not paid out to the Applicant.

36 the consultant then advised Mr Hough to tell the applicant the following:

"No alternative position could be offered to her because no managerial position is required any more and that the proposed date of termination is 30 September 1997.You will assist in giving her references for future employment and the possibility of future re-employment."

37 The consultant did, however, call on Mr Hough to consult as follows:

"You have to give her the opportunity, during the consultation process, to make representations about any matter on which you are consulting. You have to consider and respond to the representations made by her and if you do not agree with them, you must state your reasons for disagreeing."

38 Even though the instructions are, indeed, contained at the end of the letter, the tone of the letter that proceeds this is such that it did not bode well for exhaustive consultations on all of those subjects referred to in section 189(2) and(3) of the Act (discussed at paragraph [] above).

39 This was conceded by the applicant who was the only witness on her own behalf. The report itself, is couched in the form of recommendations.

40 However, it must be noted that the recommendations was directed at the owner of the business, Mr Hough, and at the stage when he gave the report to his staff (on 29 September 1997) he had already made the decision to implement. Mr Hough was clearly acting on the instructions of his labour consultant (set out above at paragraph[]) in first meeting with the other members of staff (as proposed in the said letter) and then meeting also with the applicant to inform her (as the letter stated) of her redundancy and retrenchment.

41 The report also closes with the words:
"Steps will have to be taken to retrench the incumbent of the post travel office manager because the redundancy of the functions of the specific job due to re-organisation of the travel agency."

42 At the very least it would therefore appear that the applicant was confronted with a *fait accompli* in regard to the decision to restructure. It was clear that the decision that Mr Hough will take over all the managerial tasks was taken. Even if it was said that the applicant could make “suggestions” (in Mr Hough's words) this invitation was very vague. Mr Hough did not tell the applicant about what she could make “suggestions”.

43 This is not the type of conduct that one would expect of an employer who is truly committed to a process of consultations.

44 To compound matters, as it is pointed out above (at paragraph[] and []) crucial information was not disclosed to the employee concerned especially in regard to the alternatives, including the very important alternative of offering her the senior consultant position.

45 A further factor which likewise reflects badly on the respondent's commitment to exhaustive consultations is the fact that the letter of dismissal was pre-prepared.

46 Mr Hough testified that, after he had completed his meeting with the applicant on 29 September 1997, he had prepared the dismissal letter and kept it handy as one of the "alternatives" that he would consider the next morning when she reverted back to him.

47 The terms of the letter is clear in that it specifically addresses the question of alternative employment:

"No alternative position can be offered to you because no other managerial position is required at this stage. I will, however, assist you by giving references for any future employment and will also keep you informed of suitable future re-employment, should the opportunity arise."

48 Not even at this late stage did the respondent see fit to disclose that he had considered the possibility of employing the applicant as a senior travel consultant. Instead, the respondent chose to reject such alternative and dismiss the applicant for reasons unknown to her or, to make matters even worse, for reasons concerning her own possible feelings towards demotion. This was, after all, only speculation on the part of the respondent as Mr Hough could not have known,

without consulting the applicant, what her real feelings in this regard would be when she now faced the reality of a retrenchment dismissal.

49 In view of the above it appears that the respondent did not comply with his duties concerning exhaustive consultations on the matter of retrenchment, especially in regard to appropriate measures to avoid the dismissal, that is, in regard to alternatives that the employer had considered before proposing the dismissals and the reasons for rejecting specific alternatives. The respondent also failed to consult in regard to the timing of the dismissal and the severance pay proposed.

50 In the event, the alleged intransigence of the applicant in not responding to the respondent's overtures in regard to consultations, in my view, cannot excuse the respondents' failure to comply with his linear duties in terms of especially section 189(3) of the Act.

51 The retrenchment dismissal was accordingly unfair.

52 In regard to the possible remedy, it must be noted that the Applicant does not wish to be reinstated in her employ, but claims compensation in the maximum amount permissible in law.

53 In this regard Section 194(1) of the Act reads as follows:
"If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the adjudication calculated at the employee's rate of remuneration on the date of dismissal. Compensation may, however, not be

awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim."

54 There were no indications of an unreasonable period of delay.In the case of **Johnson & Johnson (Pty) Ltd v CWIU** the Labour Appeal Court held that:

"Compensation as it is used in terms of section 194(1) amounts to a **solatium** or punitive damages and is not compensation for losses suffered by the employee."

55 Accordingly, an employee need not prove the extent of her losses or that she took reasonable steps to alleviate those losses.

56 *Mr Kahanovitz*, on behalf of the Applicant, argued that the employee may receive compensation in the amount over and above the 12 month limit contained in section 194(2) of the Act.

57 The Labour Appeal Court in the abovementioned judgment did not express itself on section 194(2) of the Act or on this issue at all. I will therefore consider this argument.

58 Section 194(2) of the Act reads that:

59 "The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason based on the employer's operational requirements must be just and equitable in all the circumstances but not less than the amount specified in sub-section (1) and not more than the equivalent of 12 month's remuneration calculated at the employee's rate of remuneration on the date of dismissal."

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61 In my view, the legislature could not have intended an anomalous position where an employee who is dismissed only because of procedural unfairness can claim more as compensation than an employee who is dismissed unfairly not only because of procedural unfairness but also because of substantive unfairness.

62 The 12 months' cap in section 194(2) of the Act therefore also applies in regard to compensation in the case of procedural unfairness in terms of section 194(1) of the Act. Indeed, there is reference to sub-section (1) in sub-section 194(2). It is clear that, there is an overall cap of 12 months' remuneration in the case of an unfair dismissal which is substantively unfair.

63 In the event, the applicant's claim is capped in the amount of 12 months' compensation, as it is understood in terms of section 194(1) of the Act.

64 12½ months have lapsed since the date of the dismissal and the last day of the hearing (which is today).

65 The applicant can, however, only be awarded a **solatium** in the amounts of 12 months' renumeration, that is, calculated at the employee's rate of remuneration at the date of dismissal for this period of time.

66 This amount comes to R68 458,22.

67 The respondent conceded that should I find that the dismissal was unfair, costs should follow the result. I am of the view that this is a matter where this would be fair in terms of my discretion contained in section 162(1) of the Act.

Accordingly, the respondent is to pay the applicant's costs.

68 In the event the Court makes the following order.

[1] 1. The dismissal of the applicant by the respondent which became operative on 31 October 1997 was unfair.

2. The respondent is to pay the applicant compensation in the amount of R68 458,22 in terms of the provisions of section 194(1) of the Act.

3. The respondent is to pay the applicant and amount of R6 845,75 as retrenchment pay in terms of section 196(10) of the Act.

4. The Respondent is to pay the Applicant's costs.

BASSON J

Date of hearing: 17 November 1998

Date of judgment: *ex tempore* (edited version)

On behalf of applicant: Adv C S Kahanovitz instructed by De Abrem & Cohen

On behalf of respondent: Adv N F Rautenbach instructed by Heunis & Heunis Inc

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