IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J998/98

In the matter between:

FRANCOIS BURGER Applicant

and

ALERT ENGINE PARTS (PTY) LIMITED Respondent

JUDGMENT

POOE AJ

The Parties

[1] The Applicant, Francois Burger, was an employee of the Respondent until 31 March 1998 when his employment was terminated. At the time of his dismissal, he was a warehouse manager and as such a section head at the Johannesburg branch of the Respondent, earning R6 500,00 per month.

[2] The Respondent is Alert Engines Parts (Pty) Limited. The Respondent was at all material times represented by the production divisional manager, D.M. McHolm ("McHolm").

Initially, A.D. Van Hoogstraten, the Respondent's managing director, was cited as a second Respondent in this matter. The Applicant however indicated at the commencement of the matter that he was not persisting with any claims against Van Hoogstraten. The Respondent has its head office at Goodwood in the Cape and branches in Cape Town, Durban, George, Johannesburg, East London, Pietermaritzburg, Pinetown, Plumstead and Port Elizabeth. The present dispute arose out of the retrenchment at the Johannesburg branch.

[3] The Applicant represented himself at the hearing while the Respondent was represented by Mr. C.M. Burton-Durham, the Respondent's Industrial Relations Manager.

Preliminary issues

[4] The Applicant objected to the Respondent being represented by Mr.Burton-Durham on the basis that he was not an employee of the company but a consultant. A letter of appointment confirming that Mr. Burton-Durham was employed by the Respondent was handed in. I was satisfied after hearing both parties and taking into account the letter handed in that Mr. Burton-Durham was an employee of the Respondent and as such was not precluded from representing the company in these proceedings.

The dispute and relief sought

[5] The dispute arises from the Applicant's dismissal on 31 March 1998. The Applicant contends in his papers that his dismissal was an unfair labour practice in terms of the Labour Relations Act, 66 of 1995 ("the Act") and seeks compensation. At the outset of the hearing, however, the Applicant indicated that the dispute concerns an unfair dismissal and not an unfair labour practice. Mr. Burton-Durham indicated that he had no objection to the Applicant's papers being amended to this effect. While the Applicant conceded that his dismissal was for a valid reason relating to the Respondent's operational requirements, he contends that that dismissal was not effected in compliance with the provisions of Section 189 of the Act and was accordingly procedurally unfair. The parties agreed that the Court is

being asked to determine:

whether the dismissal was effected in accordance with the provisions of Section 189 of the Act;
if the said section was not complied with, whether such non-compliance renders the dismissal procedurally unfair;
what compensation, if any, should be awarded in the event that the Applicant's dismissal is found to have been unfair.

Onus in dismissal cases

[6] In terms of Section 192 of the Act, an employee must establish the existence of a dismissal, whereafter the employer must prove that the dismissal was fair. As it was common cause that the Applicant was dismissed, the Respondent correctly agreed to begin to adduce evidence.

Was the dismissal for a valid reason?

[7] The Respondent led evidence to the effect that during 1997 the Johannesburg branch of the Respondent experienced negative trading. The costs of sale were far in excess of the sales being generated at the Johannesburg branch. The position worsened in the second half of 1997. Statistics and graphs were handed in to illustrate what the performance of the Johannesburg branch of the Respondent had been during 1997. The statistics and graphs are at pages 12, 13.1,13.2 and 13.3 of Bundle "A". As a result of this unsatisfactory performance, costs had to be curtailed in order to ensure continued viability of the branch. The position worsened to the extent that the December bonuses were not paid to staff. Head Office intervened and during meetings with management at the Johannesburg branch, set targets which it wanted achieved in order to reverse the negative trading trend. When the target set by head office was not achieved, local management was instructed to embark on a retrenchment exercise. In the end the number of employees went down by 15 or 16.

[8] Sufficient evidence has been placed before this Court to establish *prima facie* that a reason existed for terminating the Applicant's employment and that such reason related to the Respondent's operational requirements. The evidence presented in this regard was not disputed by the Applicant. The background which led to the decision to dismiss the Applicant and others for operational reasons is further elaborated upon later in this judgment. For present purposes, it is sufficient to state that I am satisfied from the evidence before me that the Applicant's dismissal was necessitated by the Respondent's operational needs as defined in Section 213 of the Act.

Were the provisions of Section 189 of the Act complied with?

The law

[9] Section 189 places an obligation on an employer to initiate a consultation process when it contemplates dismissal for operational reasons (Section 189(1)). This section prescribes the topics on which consultation is obligatory. These are appropriate measures to avoid or minimise the dismissals, to change the timing of the dismissals, to mitigate the adverse effects of the dismissals, the method for selecting employees to be dismissed and the severance pay for dismissed employees. The employer must also disclose relevant information to the other consulting party (Section 189(3)); it must allow the other consulting party an opportunity to make representations on any matter which forms the subject of consultation (Section 189(5)); it must consider those representations and if it does not agree with them, must give its reasons (Section 189(6)). This obligation to consult arises when the employer contemplates dismissal for reasons based on operational requirements.

[10] The ultimate purpose of s189 is that the consulting parties must attempt to achieve joint consensus on the issues which form the subject of consultation. In determining whether s189 had been complied with, a mechanical "checklist" approach is not appropriate. The proper approach is to ascertain whether the purpose of this section, namely joint consensus seeking, has been achieved. If the purpose has been achieved, then there has been proper compliance

with the section. Non-compliance will almost invariably result in the dismissal being unfair for failure to follow proper procedure (See **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union**, an unreported decision of the LAC, Case No. PA15/97).

The facts

[11] McHolm, the Respondent's Production Divisional Manager, testified that part of his functions as production divisional manager is to see to it that profitability policies are implemented within branches and divisions of the Respondent. Regular meetings of senior and middle management are held at which the company's performance is discussed. The Applicant attends middle management meetings in his capacity as Section Head. At these meetings statistics and graphs are used to illustrate the levels of profitability being achieved. Part of the information from which the graphs are prepared was collated by the Applicant. In addition, every Monday morning, there is a regular meeting between McHolm and the Applicant during which they discuss weekly productivity statistics and figures.

[12] The performance of the company was for sometime not satisfactory, as can be seen from the graphs which are contained at pages 13 and 13.1 – 13.3 of Bundle "A". During November 1997 Head Office indicated that due to the company's unsatisfactory performance there was a real possibility that some employees might be retrenched. The Applicant, by virtue of his position as a section head, was always aware of these developments.

[13] When it became clear that retrenchments would become a reality, local management asked for an opportunity to explore other means of cutting costs short of retrenchment, such as natural attrition and pushing up sales. Van Hoogstraten gave local management an opportunity until February 1998 to bring the situation under control. He directed that the total remuneration bill was to be brought down to below 10% of sales and indicated that if this was not achieved, retrenchments would proceed.

[14] All Section Heads, including the Applicant, were instructed to take steps towards achieving the target set by Head Office.

[15] By February 1998 the target set by Head Office had not been achieved. The Johannesburg branch had only been able to reduce the remuneration bill to 11.1% and not the 10% required by Head Office. Local management prepared a revised budget on the basis of the results achieved and submitted it to Head Office with a request that it should be accepted. The Applicant was informed that if the revised budget was not accepted by Head Office, his position could become affected by retrenchment. He was advised that should he in the meantime find an alternative position, he would be released. At this stage nothing was said about a severance package because a final decision was still being awaited from Head Office as to whether the revised budget was acceptable.

[16] Following a board meeting in March 1998, local management was informed on or about 2 March 1998 that the revised budget was not acceptable and that a retrenchment exercise would have to be embarked upon in order to cut costs.

[17] Local management had already in December or November 1997 been provided with a list of possible candidates for retrenchment. The Applicant's position and that of two hourly paid employees in his division were among those that had been identified as being likely to be affected. This division had to reduce its monthly costs by approximately R30 000,00. To achieve this, retrenchments were necessary.

[18] The Industrial Relations Manager was on leave and the personnel manager had been retrenched. McHolm was accordingly given the responsibility of consulting with the Applicant. He had already in November 1997 been given responsibility to consult with the employees who were to be retrenched. He arranged a meeting with the Applicant for 16 March 1998.

[19] At the meeting of 16 March 1998 he informed the Applicant that his suspicion that Head

Office would not accept the revised budget had been confirmed and that the retrenchments had to proceed. The Applicant was informed that he was one of the candidates identified for retrenchment. He was informed of the retrenchment package that was being offered and that an attempt would be made by senior management to find him alternative employment outside the company. The Applicant's response to this was that he would appreciate it if such attempt could be made and he would take any position available. The retrenchment package was calculated in accordance with the Main Agreement of the Motor Industry Bargaining Council. He did not comment on the retrenchment package being offered.

The finding

[20] It would appear from the evidence that one meeting was held with the Applicant concerning his retrenchment. This is the meeting of 16 March 1998. At this meeting, the Applicant was informed that he was being retrenched, what severance package he would receive and that an alternative position would be sought for him with the Respondent's opposition. The manner in which these facts were presented to the Applicant, in my view, left very little scope for consultation. The Applicant appears to have been presented with accomplished facts rather than with issues on which he was being invited to consult. It is clear from the evidence that at the time when the so-called consultation took place, a decision had long been made that the Applicant was to be retrenched. A decision had also been made regarding the severance pay. The other issues on which consultation should take place do not appear to have been tabled at all at this meeting. I am not persuaded that the Respondent embarked on a consultation process that was geared towards joint consensus seeking as is required by s189. Before the meeting of 16 March 1998 there had been one other communication with the Applicant. This was the communication in February 1998 when he was warned that if the revised budget submitted to Head Office was not accepted, his position could be affected by retrenchment. This meeting in my view also did not constitute consultation. I must add that it is rather puzzling why a proper consultation process was not embarked upon in February 1998. The writing was clearly on the wall.

[21] The Respondent did not disclose relevant information to the Applicant as is required by Section 189(3). It is not sufficient for the Respondent to contend that the Applicant was in any event privy to this information by virtue of the fact that he was a section head. The decision to retrench the Applicant emanated from the Respondent's Head Office. The Applicant was not party to the decision nor was he privy to the discussions that led thereto. Once he had been identified as a candidate for retrenchment, the Applicant was, like any other employee, entitled to be consulted with, to have all relevant information disclosed to him, to be allowed an opportunity to make representations and be informed in writing why his representations were not accepted by the Respondent. None of this took place.

[22] I cannot on the evidence before me find that the Respondent properly complied with Section 189 when he dismissed the Applicant. There does not appear to have been any hindrance which made it impossible for the Respondent to comply. On the contrary, there was more than sufficient opportunity to comply with Section 189 given that it was apparent as early as November 1997 that some employees, including the Applicant, might have to be retrenched.

[23] The failure by the Respondent to properly comply with Section 189 makes the Applicant's dismissal procedurally unfair.

Relief

[24] The Applicant is seeking neither reinstatement nor re-employment. He seeks compensation.

[25] The Court has a discretion, if it finds that an employee was unfairly dismissed, whether to grant any relief. This discretion is given to the Court by Section 193 of the Act which is to the effect that :

(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court

or the arbitrator may –

(a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

(b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

(c) order the employer to pay compensation to the *employee*.

[26] The Labour Appeal Court in the **Johnson & Johnson** judgment (**supra**) considered amongst other things the implication of Section 193(1) and had the following to say :

[38] The express terms relating to the making of a compensation award in s.193(1) (and s.158(1)(a)(v)) are permissive in nature ("may"). In contrast the exclusion of reinstatement or re-employment as remedies in a procedurally unfair dismissal in s.193(2) is in peremptory terms ("must"). On a literal reading of the section compensation need not necessarily be awarded upon a finding of a procedurally unfair dismissal; another option is to grant no consequential relief.

[39] None of the other provisions of the LRA compels a different reading of s.193(1). Section 158(1)(a)(v) makes it clear that a compensation order is only one of the general kind of 'appropriate' orders that the Labour Court may make. Section 194 deals with *how* compensation must be calculated in different circumstances, not with *when* and *why* compensation must be awarded.

[40] If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an arbitrator appointed under the LRA, thus has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in s.194(1); nothing more, nothing less. The discretion *not* to award compensation in the particular circumstances of a case must, of course, also be exercised judicially.

(At paragraphs 38 - 40)

[27] Dealing with the question of when the Court may exercise its discretion not to award compensation, the Labour Appeal Court stated as follows :

The nature of an employee's right to compensation under s.194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s.194(1)), or where the

employer's ability and willingness to make that redress is frustrated by the conduct of the employee.
(At paragraph 41)

[28] Evidence was led on behalf of the Respondent that a meeting held between the parties on 22 May 1998 the Applicant was informed that, subsequent to his dismissal, an employee who occupied a position on the same grade as the one previously occupied by the Applicant had resigned. The position had been held vacant in order to offer it to the Applicant. This position was indeed offered to the Applicant on the basis that he would be reinstated retrospective to the date of his dismissal. He would be back paid to the date of the termination of his service and his service record and entitlement would remain as if there had been no break in service. The response given on behalf of the Applicant by his representative at the meeting, a Mr. D. Dalton, was that the Applicant would not consider reinstatement owing to the fact that "in his opinion, the matter concerning the redundancy had been badly handled". The Applicant was given until 26 May 1998 to consider his position and to indicate whether he would accept this position. The Applicant did not respond to the offer and the position was then filled by another person.

[29] The Applicant conceded that the position was indeed offered to him but stated that he was not willing to accept this position because of the way in which his retrenchment was handled. He felt that the retrenchment had not been handled in accordance with the provisions of the Act in that there had been no consultation. He furthermore stated that if he accepted the position, there was no assurance that he would not be retrenched again in the future. He feared that if in future he was again retrenched, the Respondent would make sure that the retrenchment was handled properly. He stated that he had a feeling that there had been a breach of trust.

[30] I find the conduct of the Applicant in this matter somehow startling. While it is clear that he was wronged in that he was not properly consulted about his retrenchment, his rejection of alternative employment on same terms and conditions with no loss of benefits and service record is difficult to comprehend. The contention by the Applicant that he feared

that there had been a breach of trust appears to me to be without substance and was not supported by any evidence. The evidence shows that the relationship between the Applicant and the Respondent was, at the time of his dismissal, good. The Applicant appears to have left the Respondent's employ on goods terms and was provided with a good letter of reference. Attempts were going to be made to find alternative employment for him with the Respondent's opposition. He was allowed time off to go for interviews in the period during which his retrenchment was being discussed. These facts do not support the contention that there was a breach of trust which could have made it intolerable for the Applicant to resume employment with the Respondent. It is significant to note that this offer of alternative employment was made only some seven weeks after the Applicant had been retrenched. This offer appears to me to have been a genuine attempt on the part of the Respondent to redress the "wrong" done to the Applicant. There is no evidence which points to the contrary. The Applicant's rejection of this offer was in my view an unreasonable one. The conduct of the Applicant in this case is typical of the situation sketched by the Labour Appeal Court in the **Johnson & Johnson** case, namely one where the employer's ability and willingness to make redress is frustrated by the conduct of the employee. I have to mention that while I have found that the Respondent did not comply with the provisions of Section 189, I do not believe that they did so because they set out to flagrantly disregard the law. They clearly did attempt to comply but got it wrong. I am not persuaded given the circumstances set out herein that it would appropriate to award the Applicant compensation.

Conclusion

[31] I find that the Applicant's dismissal by the Respondent on 31 March 1998 was for a valid reason relating to the Respondent's operational reasons. The dismissal was not effected in compliance with the requirements laid down in Section 189 of the Act and is accordingly procedurally unfair. Given the circumstances outlined above, however, it is not appropriate to award the Applicant any compensation.

[32] The application is accordingly dismissed.

[33] I make no order as to costs.

Pooe AJ

DATE OF HEARING : 28 August 1998
DATE OF JUDGMENT: 23 October 1998

For the Applicant: Mr. F. Burger (Applicant)
For the Respondent: Mr. C. Burton-Durham (Employee of Respondent)