"**REPORTABLE**"

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C450/2000

In the matter between:

OCGAWU **First Applicant**

CLIVE JONES **Second Applicant**

and

COUNTY FAIR FOODS (PTY) LTD **Respondent**

JUDGEMENT

GAMBLE, AJ:

Introduction

1. The First Applicant ("the union"), on behalf of the Second Applicant, Clive Jones ("Jones"), referred this matter to this Court for a determination in terms of section 191(5)(b) of the Labour Relations Act, No. 66 of 1995 ("the LRA").

2. Jones contends that his dismissal by the Respondent during February 2000, allegedly for operational reasons, was both substantively and procedurally unfair. Accordingly, he claims reinstatement or compensation in the agreed amount of R43 603,04 in the alternative.

3. The Respondent describes itself as a **"fully integrated"** producer of fresh and frozen chickens throughout South Africa. Its business is located in the Western Cape where it breeds, slaughters and processes its products for distribution throughout the Republic and Namibia.

4. The Respondent has an abattoir at its Hocroft premises near Fisantekraal and a large production plant at Epping where the processing of both fresh and frozen chickens takes place. The Epping facility has two distinct areas of operation, *viz.* the fresh food production plant (at which some 450 people are employed) and the so-called "New Market Cold Store" ("New Market") where 18 people are employed, 11 of whom are weekly wage earners.

5. As I understand the position, New Market is a refrigeration facility at which both frozen and fresh products are stored prior to their distribution.

6. Jones was employed by the Respondent in 1989 as a packer. He was transferred to the fresh foods department at New Market in 1991 where he worked as a so-called "new order make-up" until September 1999. In that capacity he was responsible for the compilation of orders prior to dispatch. Jones was an active union member and chairman of the shop stewards' committee at the Respondent's Epping premises.

7. In September 1999 Jones was promoted to the position of forklift driver and was required to operate his machine in various parts of the cold store where produce was stored and/or loaded on to trucks for delivery to retailers. This promotion involved Jones being trained, and subsequently licensed, as a forklift driver.

8. As of December 1999 the Respondent ran three shifts for the 5 forklift drivers then employed in the

cold store:

8.1 the early shift from 06h30 to 16h15;

8.2 the day shift from 07h30 to 17h15; and

8.3 the late shift from 10h30 to 20h30.

Jones was employed to work the day shift only while his 4 colleagues alternated, on a fortnightly basis, on the early and late shifts. The latter was colloquially referred to as "the staggered shift system".

9. At all material times, the Respondent employed Gerrit Visser ("Visser") as its general manager of the whole of the processing facility at Epping (including the cold store). Charl Coetzee ("Coetzee") was employed as the manager of New Market and, as such, Jones reported to him. Visser is still employed by the Respondent, while Coetzee left the company in December 2000.

The Respondent's Alleged Rationalisation Programme

10. Visser testified on behalf of the Respondent that the poultry market had become very competitive over the last 7 or 8 years due to a number of unavoidable external factors. This resulted in retailers putting pressure on producers to such an extent that the Respondent's wholesale selling price had remained constant over a 4 year period, notwithstanding the fact that up to 100 000 carcasses per day were being processed at the Epping plant.

11. As a result, the Respondent's profitability was monitored on a monthly basis by Visser and certain of his managerial colleagues. The Respondent's overhead costs were being reviewed at every possible

turn and regular adjustments were made to its operations.

12. Early in December 1999, the Respondent dismissed an employee (who was a departmental head in another section of the cold store) for misconduct and promoted one of the forklift drivers on the staggered shift to that position. The Respondent then decided to reduce the number of forklift drivers from 5 to 4 and to do away with the day shift completely. This move obviously had implications for Jones's position.

13. On 9 December 1999 the Respondent issued a document entitled "*Employee Communiqué/Brief*". I should point out that this type of document was the Respondent's customary way of purporting to communicate with its employees and trade unions representing them regarding any manner of items relevant to the employment relationship. Various of these communiqués were placed before me in evidence, dealing with all sorts of issues ranging from the introduction of new machinery and negotiations with trade unions to revised conditions of employment and workplace rules.

14. The communiqué of 9 December 1999 is headed "***Notice of the Company's Intention to Rationalize the New Market Department***". It commences with the following paragraph:

> "We refer the (*sic)* Company's on-going rationalization of the Company's operational and business activities in an ongoing endeavour to try and improve the Company's competitive advantage and market share, overhead cost structure, productivity, operational and business related efficiencies, resource utilization and profitability."

15. I should point out that the majority of the communiqués tendered in evidence before me contained an introductory paragraph which was either identical or strikingly similar to this. Indeed, it would appear as if the communiqués were prepared on a *pro forma* basis because there are a number of identical paragraphs which appear in various of them.

16. The document of 9 December 1999 continues as follows:

16.1 "In furtherance of the Company's on-going rationalization, the Company herewith gives notice of the Company's intention and proposal to rationalize the Company's New Market Department, with the view to re-align the New Market Department's operational activities with the Company's other operational and business related activities, with effect from 01 January 2000."

16.2 "In the light of the successful internal appointment of one of the Company's staggered shift Forklift Drivers to the position of Departmental Head, the Company proposes to reduce the number of Forklift Driver positions from five to four positions in future."

16.3 "The Company further proposes to transfer one of the Company's current day shift Forklift Drivers onto the Company's staggered shift arrangement to fill the vacancy created by the recent Department Head promotion."

16.4 "The Company accordingly invites our employees and their collective bargaining representative, OCGAWU to consult with the Company on the Company's rationalization proposal, as set out here above."

16.5 "Should any of our employees have any queries and/or proposals concerning the contents of the employee communiqué/brief, please do not hesitate to contact your immediate superior in this regard."

16.6 "We trust that our employees will find the above in order and look forward to meaningful consultations in this regard. Thank you."

17. As will become apparent hereunder, the contents of paragraphs to above are repeated with monotonous regularity in practically all of the communiqués relevant to this case and, I might add, to countless others which were referred to in evidence.

18. A copy of this communiqué was exhibited on the company notice board and faxed to the union on the day of issue.

19. Visser testified that Jones was the only forklift driver who worked the day shift. He was unable to explain why the communiqué (see paragraph above) cryptically referred to the proposed transfer of "one" of the day shift drivers, when it was known to all and sundry that Jones was the "one". What makes this reference all the more curious is the fact that, prior to the issue of this communiqué, Coetzee had already spoken to Jones informally about a proposed transfer to the staggered shift. Jones had made it quite clear to Coetzee that he could not work the late shift because of regular church commitments during the evenings.

20. Visser was informed by Coetzee of Jones's refusal to move to the staggered shift. He said in evidence that the only way the company could take the matter further was "to formalize the consultation process by putting it in a communiqué."

21. Since the issue related solely to the potential redundancy of Jones's position, it is not clear why the Respondent sought to deal with the matter in such a public fashion. Moreover, what "meaningful consultation" (see paragraph above) could the remainder of the workforce have participated in?

22. Leon Caesar ("Caesar"), the organizer of the First Applicant who dealt with this matter, testified that he received this communiqué on 10 December 1999. It was not pertinently addressed to the union and he found the terms thereof somewhat equivocal, in particular the reference to "one" of the day shift drivers. He said that since there was no mention of retrenchment in the communiqué, he assumed that if matters went that way the Company would consult the union properly in due course.

23. Sometime during the latter half of December 1999, Caesar spoke to Jones on the telephone about

the communiqué and the latter informed him that he had been in discussion with Coetzee about the import of the document. The issue remained unresolved due to Jones's refusal to change shifts. Caesar indicated that he expected the company would contact him when there was clarity about what it was going to do.

24. Coetzee testified that:

24.1 he had spoken informally to Jones about the proposed change of shifts and that Jones had indicated that he could only work the early and day shifts due to his personal and church commitments in the evenings;

24.2 when it became apparent that Jones would not change shifts, it became necessary "to negotiate or start a process" in terms whereof Jones and the union were informed of the Respondent's intention "so they can come up with maybe a better idea or better proposal";

24.3 the communiqué of 9 December 1999 was then issued as a notice regarding rationalization;

24.4 after the notice went up Jones immediately approached him asking what was going on. Jones also reminded Coetzee of his earlier refusal to work the late shift;

24.5 thereafter he and Jones had various informal discussions during which he attempted to persuade Jones to fall in with the proposed shifts;

24.6 Jones's proposal that he work only the early shift was rejected as being inconvenient to the company as well as the other forklift drivers;

24.7 no solution to the problem was arrived at during these discussions;

24.8 Jones told him that it would be necessary for the Respondent to formally consult his union. Coetzee accepted that this was so and that the informal discussions in December 1999 were no more than an attempt to persuade Jones to change shifts;

24.9 at the time that the change of shifts was mooted, there was no question of a possible retrenchment of Jones;

24.10 Jones was informed for the first time on 31 January 2000 of the decision to retrench him.

25. Under cross-examination by Ms Williams (who appeared on behalf of the Applicants), Coetzee readily accepted that the reduction to four forklift drivers was never intended to result in any job losses ("… no single body in there was supposed to be retrenched, no"). From this evidence it is clear that there could have been no "contemplation of dismissal" (as the phrase is understood in section 189(1) of the LRA) which necessitated compulsory consultation by the Respondent in terms of the statute.

26. But Coetzee's evidence in cross-examination went further and showed that, even at a later stage (when purported consultations had commenced), retrenchment was neither contemplated nor necessary. I shall revert to this aspect in more detail later. However, it is apposite at this stage to refer to the following important passage in the cross-examination:

"And could the same saving then have been effected without retrenching Clive Jones? Other than putting him on the staggered shift, for example training a packer up and doing a straight swop between him and the packer --- When we agreed to give Clive his old job back, we wouldn't have retrenched anybody …

So is it not possible that he [Jones] could have swopped with someone like Ralph Jacobs [an order make-up

worker] for example? --- You mean put Clive back in his old job and swop?

And train that person as a forklift driver. --- It is possible."

The Strike

27. The annual wage negotiations between the union and the Respondent in mid-1999 were unsuccessful and eventually the parties deadlocked. The union gave notice of its intention to embark on a strike some time prior to the communiqué of 9 December 1999.

28. A protected strike by the union's members commenced on 5 January 2000. At that stage the union was substantially represented amongst the Respondent's weekly paid workforce at Epping to the extent of about 67%.

29. Caesar testified that all of the union's members went out on the first day, but shortly after lunch on that day about half of the members returned to work. He said that Jones was a leading figure in the strike.

30. During the course of the strike the Respondent issued a lock-out notice in terms whereof striking workers were apparently given an ultimatum to return to work on the company's terms and conditions by 31 January 2000 or face dismissal.

31. To this end the Respondent issued yet another communiqué on 17 January 2000. As in the past this document was not addressed to the union although it purported to respond to a union letter of 14 January 2000 concerning the strike. In that letter the union had indicated that all the striking workers would return to work unconditionally on 17 January 2000. Apparently the offer was not accompanied by an acceptance of the Respondent's lock-out demands.

32. This communiqué manifests a number of interesting aspects of the Respondent's approach to labour relations:

32.1 The document is headed "***Notice of Company's Intention to Rationalize***".

32.2 It contains the following derisory paragraph:

"The Company is absolutely amazed and not in the least amused with OCGAWU and their members antics and continued attempts to re-engineer and re-draft the country's labour law in accordance with their 'Alice-in-Wonderland'-type collective wishes and ambitions."

32.3 In somewhat patronising terms, it purports to inform the workforce of its understanding of the LRA and of the manner in which striking workers should return to work.

32.4 The following notice is given to striking workers:

"In the light of the relatively small trade union membership support for OCGAWU's 1999/2000 annual substantive issue demands and in furtherance of the Company's operational and business related requirements, the Company herewith also gives notice of the Company's intention and proposal to formally retrench all those employees who have been locked out and who have not yet accepted the Company's lock-out demands by close of business on Friday, 28 January 2000, with effect from 01 February 2000."

32.5 After the customary references to "ongoing rationalization" (in terms similar to paragraph above) the document continues as follows:

"In furtherance of the Company's rationalization efforts and endeavours, the Company further gives notice of the Company's intention and proposal to implement the Company's lock-out demands, with effect on (*sic*) 01 February 2000. Employees, who have not been locked out, but who also refuse to formally accept the

Company's lock-out demands by close of business on Friday, 28 January 2000 and (*sic*) will then be similarly retrenched on 01 February 2000 and will have their services similarly terminated on 29 February 2000.

In the light of the nature and terms of the Company's lock-out, employees, who have been locked out and who are to be retrenched, will obviously not be paid for the period up and until 29 February 2000.

Employees, who have not been locked out and who are to be retrenched, will however be required to work their contractual notice period during February 2000 and be paid for work executed during February 2000."

32.6 The communiqué concludes with the *pro forma* clauses referred to in paragraphs and above.

33. Caesar testified that the union received this document by fax. He said that he found the contents thereof problematic and that the workers were shocked by the company's response.

34. While the contents of this communiqué are not strictly relevant to the matter at hand, I have quoted extensively from it because I believe the fairness and appropriateness of the Respondent's conduct in dismissing Jones must be viewed holistically in the light of the Respondent's application of the principles of the LRA and fair labour practices generally.

35. It would be fair to say that this communiqué (apparently the handiwork of the Respondent's labour consultant, one Van den Berg) either demonstrates a lack of understanding of the provisions of the LRA and the case law, both in regard to strike dismissals and retrenchments, or is a mischievous attempt to harass workers to abandon their legitimate collective action. It is without doubt an unduly heavy-handed and confrontational approach which seeks to discredit the union in the eyes of its members.

36. According to the evidence, the striking workers returned in dribs and drabs with Jones the last to

return on 31 January 2000, he having accepted the company's lock-out terms.

37. During the time that Jones was on strike the Respondent instituted the new four driver system. The other three drivers were not on strike, but Jones's position was temporarily filled by one Alan Estment ("Estment"), a casual employed during the strike. According to Coetzee, the new staggered shift system using only four drivers worked efficiently during the strike.

The Events of 31 January and 1 February 2000

38. When Jones returned to work on 31 January 2000, Coetzee approached him and said that he expected Jones to fall into the new shift system the next day. Jones said that he was not prepared to do so.

39. When asked in his evidence-in-chief what was explained to Jones as the consequence of failing to fall into the new shift system, Coetzee said the following:

"I said well he will be retrenched if he doesn't fall into the shift system the next day. So I arranged for a meeting with Mr Visser because I was – basically I didn't know what to do next because now I needed somebody and so I approached Mr Visser and we arranged a meeting between Clive and myself and Mr Visser and I took him to Mr Visser's office and we had the discussion in his office."

40. Coetzee confirmed this evidence under cross-examination:

"And you can confirm that that is the first time Clive Jones was told he was going to be retrenched if he didn't work the shift. --- I think when he came back from the strike and he said he is not going to work the staggered shift.

Then you told him? --- The first time I told him, ja.

And Mr Visser then, who is the person with the authority, told him in this meeting on the same day? --- Yes."

41. It also appeared from Coetzee's evidence that he felt frustrated by Jones's obstinate refusal to work the staggered shift and that he felt that the time had come to take swift and positive steps to bring matters to a head.

42. Also on 31 January 2000 Caesar faxed a letter to the Respondent. The letter is headed **"Threat to unilaterally change working conditions of Clive Jones and to Retrench him"** and continues as follows:

"The above threats were made to Clive today by your Mr Coetzee. These threats are unlawful and the union urges you to refrain from implementing these unlawful threats and to apologize to Clive for the actions of Mr Coetzee.

The union remains open to be consulted should the company feel there is a need to change Clive's working conditions."

43. It would seem that this letter reached the Respondent after the discussion in the morning with Coetzee, but before Jones met with Visser and Coetzee that afternoon. At the latter meeting Jones indicated that he required the company to consult with his union.

44. Visser told Jones that there were no alternatives that he (Jones) had put forward. Visser then repeated to Jones the rationale for the reduction from five to four forklift drivers. He also told Jones –

"that if he does not accept the staggered shift system the alternative that then remained is retrenchment without any severance pay … Because we'd offered him an alternative position."

45. Visser then offered Jones a week off work (on full pay) “to go home … and think about this”. According to Visser, Jones readily agreed to this. Jones, on the other hand, testified that Visser told him that he was to be suspended until 7 February 2000, being the date of a pre-arranged meeting with the union to discuss organizational rights. It appears that the Respondent wanted also to put the issue of Jones’s retrenchment on the agenda for that meeting. Jones was adamant that he did not agree to the suspension.

46. Mr Janisch (for the Respondent) argued that, where there were contradictions in the evidence of Jones and Visser, the latter’s testimony should be preferred. I agree with Mr Janisch that Visser was a more reliable witness than Jones and that this would be a reason for preferring his evidence. Jones, after all, in evidence contradicted certain of his own earlier contemporaneous notes. There were also discrepancies between his instructions to his attorney (on which she cross-examined) and his later testimony. However, this does not imply that Visser is to be believed at all events.

47. I carefully assessed all of the witnesses in the witness box.

47.1 In my mind, Coetzee was probably the fairest and most reliable witness. He certainly demonstrated a fair measure of empathy for Jones’s predicament;

47.2 Visser has a quiet and more deferential manner, but still gave his evidence in a frank and forthright manner. It should not be forgotten, however, that Visser is the person who made the decision to dismiss Jones and who now has to justify that step;

47.3 Jones is a somewhat long-winded person who spoke in measured and ponderous tones. He was clearly confused about the sequence of certain events and I was left with the impression that he is a person who does not enjoy great mental agility. He came across as basically

honest, but dogmatic and possibly lacking in reliability. His evidence must therefore be approached cautiously;

47.4 Caesar, too, was a fair witness who answered questions directly and was not afraid to make concessions where necessary. There is no reason not to accept his testimony.

48. Notwithstanding my assessment of the witnesses, I am inclined to believe Jones on the issue of the suspension. As will be seen hereunder, this is precisely the terminology which the Respondent used in a communiqué the next day. Visser was unable to explain the use of the word “suspension” therein, other than to say it was used “for want of a better word”. One can only speculate as to what the “better word” should have been, given the very particular import which a suspension has in the labour context.

49. Jones complained that on the day that he returned to work (and he incorrectly insisted that to be 1 February 2000), Coetzee had addressed him in a firm and direct manner. Later that day, he said, Visser had been abusive towards him when they met by saying to him *“Jou kerk se gat!”* when Jones insisted on performing his ecclesiastical duties rather than working the late shift.

50. Both Coetzee and Visser had no recollection of this gratuitous insult, but in a handwritten note dated 1 February 2000, Jones contemporaneously recorded that while he was in Visser’s office on 31 January 2000, “*hy het vir my meer as eenkeer gesê ek moet gaan en my altaar/kerk se gat.”* Given Jones’s dogged determination and inflexible attitude to the proposed changes to the shifts, it seems probable that Visser may have expressed his irritation by responding in this fashion.

51. On 1 February 2000 the Respondent issued its next communiqué. Commencing and concluding with

the by now customary clauses, this document purports, in the first place, to answer the union's letter of the previous day (see paragraph above). It is not clear why the company did not afford the union the simple courtesy of a direct response and why it chose to announce the future of Jones's employment to all and sundry on the shop floor, particularly where the rank and file would have had no individual interest therein.

52. Ms Williams contended that this letter effectively constituted the written termination of Jones's services. The material parts thereof read as follows:

52.1 "We also refer to the Company's various notices in this regard with specific reference of (*sic*) Company's New Market Cold Storage Department and the introduction of a staggered shift practice, with effect from 01 January, 2000, as part and parcel thereof."

52.2 "We refer to the OCGAWU letter dated 31 January 2000, concerning OCGAWU's objection to the Company's alleged unilateral amendment of the terms and conditions of service of Clive Jones, one of the OCGAWU Shop Stewards and his refusal to work in accordance with the Company's new staggered shift practice.

Clive Jones is the only employee in the Company's New Market Colds (*sic*) Storage Department, who has refused to work in accordance with the Company's new staggered shift practice."

52.3 "We in the last instance refer to the provisions of the Labour Relations Act, which allows (*sic*) an employer to retrench employees, who unreasonably refuse to accept an offer of alternative employment with that employer, without the benefit of a severance package."

52.4 "We regret that in the light of the timeous notice of the Company's intention to rationalise the operational activities of the, (*sic*) Clive Jones's refusal to work in accordance with the Company's new

staggered shift system, the Company's operational and business related requirements and in the absence of meaningful, viable and/feasible (*sic*) alternatives to the Company's staggered shift rationalisation measures, the Company has no real alternative but to formally retrench him, with effect from 01 February, 2000 and without the benefit of a severance package."

52.5 "In an (*sic*) good faith endeavour to assist Clive Jones in finalising his decision concerning his compliance with the Company's new staggered shift practice the Company has decided to **suspend** Clive Jones with full pay until the collective consultation meeting between the Company and OCGAWU at 10H00 on Monday, 07 February, 2000, concerning the Company's rationalisation intentions and proposals." (Emphasis added.)

52.6 "The Company will further not **implement** Clive Jones's retrenchment, subject to and conditional on the parties' collective consultation meeting, in accordance with the provisions of the Labour Relations Act concerning the dismissal/ retrenchment of Shop Stewards." (Emphasis added.)

52.7 "Clive Jones's services with the Company are therefore proposed to be formally terminated on 29 February 2000."

52.8 "The Company however remains firmly committed to continue (*sic*) to (*sic*) in good faith consult on the implementation of the Company's proposed rationalisation measures, inclusive of Clive Jones's formal retrenchment, even after the implementation thereof."

53. I have quoted extensively from this communiqué (replete with its spelling, grammatical and typographical errors and excess verbiage) because I am of the opinion that the content and tenor thereof fairly demonstrates, once again, the Respondent's poor understanding of the LRA, its manipulation of the facts, its reliance on unnecessarily repetitive phrases and, finally, the fact that

Jones's retrenchment was a *fait accompli* by 1 February 2000. Any subsequent claim by the company to have consulted in good faith must be assessed against this background.

54. It was disingenuous of the Company to suggest that it was entitled to withhold a severance package because Jones had refused to accept an offer of alternative employment (see para above). The so-called "offer" (i.e. the unilateral change of conditions of employment) was never made in the context of a proposed retrenchment. Certainly Jones was never given the opportunity to consider such an alternative.

55. In the passage from the communiqué cited in paragraph above, the Company stated that the staggered shift system had already been introduced from effect from 1 January 2000. However, in the passage referred to in paragraph above, the Respondent purported to commit itself to *bona fide* consultations on the implementation of its "proposed rationalisation measures". It is not clear how this would ever have been possible in the light of the allegations made in the passage in paragraph above.

56. It appears, too, that the Company wrongly thought that the retrenchment (or dismissal) of a shop steward merited particular treatment under the LRA (see para above).

57. As contemplated in the communiqué of 1 February 2000, Jones was duly suspended on full pay until the following Monday, 7 February 2000. In this regard Jones testified that he viewed his suspension as just that and that the Respondent's conduct was to be regarded as an exercise in discipline. It is fair to conclude therefrom that the Company was attempting to marginalise Jones and to place undue pressure on him. I say this because it is not apparent why it was necessary for Jones to have to consider his fate at home, while he was quite capable of doing so while continuing to work in his old

position. The long and the short of it seems to be that the Company had extended the temporary appointment of Estment and that accordingly there wasn't any work for Jones on the shop floor. To have him around in such circumstances would only have made things more difficult for the Company.

58. Finally, at this point in the chronology it is important to note that Visser's evidence was that no consultations relating to the retrenchment of Jones took place before the meeting in his office on 1 February 2000. That consultation process (such as it may have been) culminated in Jones being informed that "if he does not accept the staggered shift system the alternative that then remained is retrenchment without any severance pay". In my opinion this hardly constitutes the type of joint problem-solving exercise which the provisions of section 189 of the LRA require and which the jurisprudence emanating from this Court has clearly defined.

See for example:

Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC);

Kotze v Rebel Discount Liquor Group (Pty) Ltd (2000) 21 ILJ (LAC);

Alpha Plant & Services (Pty) Ltd v Simmonds & Others [2001] 3 BLLR 261 (LAC).

The consultative process thus embarked upon should endeavour to avoid retrenchment, or at least minimize its effects. Obviously, consultation must be resorted to before the proposed changes are made.

See: Imperial Transport Services (Pty) Ltd v Stirling [1999] 3 BLLR 201 (LAC) at 205B-F.

The Meeting of 7 February 2000

59. The pre-arranged meeting on Monday, 7 February 2000, between the union and the Company took place. It appears as if the original agenda was largely ignored and that the major point of discussion was the retrenchment of Jones. The Company was represented at the meeting by Visser, Coetzee and Van der Berg (the labour consultant). In addition, Caesar and Jones were present.

60. Caesar's evidence was that the meeting commenced with a snide remark made by Van der Berg (and directed at Jones) to the effect that he was surprised to see that Jones was still there - he thought he had already left the Company's employ. This remark was not denied by Visser or Coetzee, neither of whom could recollect it having been said. The Company did not call Van der Berg to gainsay the evidence of Caesar (later corroborated by Jones) and I am accordingly satisfied that Caesar is to be believed on this score.

61. The tone of this remark is consonant with the way in which the Company had treated Jones up to that point and is, once again, probably demonstrative of a decision to retrench already having been taken. At the very least it is indicative of a desire to force Jones out of the Company.

62. Caesar testified that the purported consultation which then took place appeared to be going nowhere and that Jones and the union were being stonewalled by Van der Berg in all respects. Caesar's evidence in this regard was not seriously challenged by Mr Janisch under cross-examination.

63. Caesar said that when he realized that they were not making any headway with management, he asked for a caucus to discuss the matter with Jones. A tactical decision was then made to attempt to save Jones's position at all costs. To this end, when the meeting resumed, Caesar suggested that

Jones would take back his old position and that he would even consider doing so at a lower rate of remuneration. The Company was reluctant to respond immediately and undertook to revert on the proposal. It was anticipated that there would be a further meeting at which the matter would then be discussed.

64. Once again, I am not convinced that the Company's attitude at this meeting constituted the sort of *bona fide* consultation which the Act and the jurisprudence envisages. Jones's alternative offer (really a fall-back position) was made in circumstances in which he realized that it was the only realistic option then open to him.

The Company's response to the alternative proposal

65. More than a week went by before the Company responded to a fairly elementary proposal. In accordance with its, by now customary, procedure it issued a communiqué on 16 February 2000. This document was headed –

"OCGAWU's employee bumping request."

The heading is misleading in two respects:

65.1 Jones was not an employee of OCGAWU;

65.2 there had been no request at the meeting of 7 February 2000 that Jones should bump another employee.

66. The communiqué contains the following allegations:

66.1 "OCGAWU proposed that the Company consider the employment of Clive Jones in his previous Newmarket Order Make-up position, as a viable and feasible alternative to the Company's proposed retrenchment."

66.2 "Employees on a higher job grade and wage rate, with suitable skills and longer service, who have been earmarked for retrenchment, may apply to be demoted to a lower position and wage rate, where the encumbent (*sic*) of that position has shorter service, subject to and conditional on the Company's operational and business related requirements."

66.3 "Where the Company's operational and business related requirements allow for such demotion and bumping of a lower grade and paid employee, the lower grade and paid employee will be retrenched in favour of the higher grade and paid employee."

66.4 "In the light of the above and after careful and due consideration of OCGAWU's request in this regard and the Company's operational and business related requirements, the Company has decided to allow Clive Jones the opportunity to be appointed in his previous position as a Newmarket Order Make-up and at the associated lower job grade and wage rate, with effect from Thursday, 17 February, 2000."

66.5 "Clive Jones is accordingly required to report for work on Thursday, 17 February 2000 to commence to execute his normal duties and responsibilities as a Newmarket Order Make-up."

66.6 "The Company will on a best endeavour basis try to accommodate the Newmarket Order Make-up, with shorter service than Clive Jones and whom Clive Jones will bump, elsewhere in the Company, failing which the Company will have no real alternative in the absence of meaningful, viable and/or feasible alternatives to the contrary, but (*sic*) formally retrench the employee concerned, with effect on 01 March, 2000 and terminate his services on 31 March, 2000."

67. Once again I consider the mischief in this document to be in accordance with the Respondent's assumed position to date thereof. In the light of Coetzee's evidence referred to in paragraph above, the return of Jones to his old job would not have necessitated the bumping of any other employee. The Respondent, however, sought to portray Jones's request in a context which was obviously designed to embarrass him and, more particularly, the union.

68. Caesar's evidence was that the Company was intentionally trying to embarrass the union by telling the rest of the workforce that it (the union) was favouring a shop steward at the expense of another employee. Accordingly, and on the following day, the union wrote to the Company stating *inter alia* the following:

68.1 "Your fax gives the wrong impression that the union wants somebody from New Market Order Make-up to be retrenched to make place for Clive. This is untrue."

68.2 "Clive will accept his old job back at the lower grade and rate, but not at the expense of another employee. We therefore urge you to look again at the situation with the concern in mind and revert back to the union."

68.3 "What about training somebody from New Order Make-up to drive Clive's hyster?"

68.4 "Our above comments are without prejudice to our pursuance of the matter through the CCMA, however, we hope an amicable settlement is possible."

69. I am inclined to agree with Ms Williams's submission that the framing of the bumping request as one made by the union and accepted by the company was an ill-disguised attempt to circumvent further consultation, while creating the appearance of having gone through a formal process. Significantly, in a later communiqué on 28 February 2000 (to which further reference will be made hereunder), the

company purported to portray Jones's later acceptance of the bumping proposal as a "… belated and conditional acceptance of the **Company's employment offer**" (emphasis added).

70. In response to Caesar's request (see para above) that the issue of bumping should be reconsidered, the Company issued a communiqué on 23 February 2000 headed **"Clive Jones' Refusal of the Company's Employment Offer"**. This document was not prefaced with the, by now standard, rationalisation warnings and essentially constituted a direct reply to the union's letter of 17 February 2000. As such, it is once again difficult to understand why this communication had to take the form of a public announcement. In any event, the material aspects of this document read as follows:

70.1 "We refer to the OCGAWU letter, dated 17 February, 2000, concerning OCGAWU's sudden turn-about-face (*sic*) pertaining to the OCGAWU proposal to appoint Clive Jones, An (*sic*) OCGAWU Shop Steward, in his previous position as one of the Company's Newmarket Order Make-Up, as a meaningful, viable and feasible alternative to Clive Jones' retrenchment on 01 February, 2000."

70.2 "We further refer to the Company (*sic*) agreement to the OCGAWU proposal to have Clive Jones appointed to his previous position with effect from Thursday, 17 February, 2000."

70.3 "It would appear that Clive Jones and/or his collective representative, OCGAWU, do not want to accept his appointment to his previous positing, where his appointment would necessitate the retrenchment of the employee currently employed in that position."

70.4 "Clive Jones has accordingly not accepted the Company's offer of employment and has not reported for work on Thursday, 17 February, 2000 or thereafter, with the (*sic*) view to execute the duties and responsibilities associated with his previous position."

70.5 "The Company has undertaken to try and accommodate the employee, who is currently employed in Clive Jones' previous position, elsewhere within the Company, failing which, the Company would have no real alternative, but (*sic*) formally retrench that employee, with effect from 01 March, 2000."

70.6 "In the light of the above and in the absence of any meaningful, viable and/or feasible alternatives to the contrary, the Company has no real alternative, but to confirm Clive Jones' retrenchment with effect on (*sic*) 01 February, 2000."

70.7 "Clive Jones' services with the Company will accordingly be formally terminated on 29 February, 2000."

70.8 "The Company accordingly invites our employees and their collective bargaining representative, OCGAWU, to consult with the Company on the Company's rationalization measures, inclusive of Clive Jones' proposed retrenchment."

71. This response on the part of the Company contains various aspects worthy of comment.

71.1 The accusation is made that the union and Jones had reneged on their earlier proposal that the latter should take up his old position. I consider that this attitude is unreasonable given the fact that the proposal was not predicated on any job loss, but rather a swop of personnel.

71.2 There is criticism that Jones did not want to take up his old position if this resulted in the bumping of another employee. However, it was the Company which introduced the spectre of bumping – something which was obviously anathema to the union and which on the evidence of Coetzee (see para above) was manifestly not necessary nor contemplated – into the consensus-seeking exercise.

71.3 The suggestion that Jones did not accept "the Company's offer of employment" and had failed

to report for work on 17 February 2000, seems to confirm the fact that retrenchment was already a given: otherwise why talk of an "offer of employment" if he was indeed still employed?

71.4 The proposal of bumping the incumbent of Jones's old position is similarly inconsistent with Coetzee's evidence (see para above).

71.5 The reference to the absence of suitable alternatives (see para above) is:

71.5.1 disingenuous in the light of the Company's failure to consult further in response to the union's letter of 17 February 2000 (see para above) and its introduction of the bumping option into the debate;

71.5.2 demonstrative, once again, of a decision already having been taken.

71.6 Having given notice, yet again, of termination of services, it is incomprehensible why the Company's employees were once again invited to consult on "rationalization measures" (see para above). This is but another example of the Company's somewhat cynical approach to the matter and is no more than a charade of purported compliance with the LRA.

72. In response to a question by the Court on this document, Visser suggested that Jones's failure to timeously return to work amounted to a repudiation or abandonment of his contract of employment.

"Was this now the final decision by the company to retrench him? Is that what you're trying to convey to all and sundry who would read this notice on the company notice board? --- Yes, we're trying to convey to them on the 17th, we invited – the 16th February dated communiqué we invited Clive to come back to work.

He didn't do so, so therefore … --- Clive did not come back to work so we accepted that as the final note to the company, and that was merely conveyed."

73. Caesar testified that by this stage of the consultative process the perception was "that at every point the company was closing doors in our face." Nevertheless, he was prepared to "give it another … try", particularly since the Company had stated in the communiqué of 23 February 2000 that they were still open to further proposals.

74. Accordingly, on 24 February 2000, the union wrote to the Company in the following terms:

74.1 "Clive will report for work on 28/02/00. This does not mean that Clive or the union accepts the retrenchment of another employee."

74.2 "We hope that the company manages to place the other employee in another position."

74.3 "I propose a meeting between yourself [i.e. Visser], myself [i.e. Caesar], Clive and the other employee concerned on 29/02/2000 at 14h00."

75. Caesar testified further that the Company did not accede to his request for the meeting on 29 February 2000. In fact, it appears that since the meeting of 7 February 2000, despite repeated offers by the Company of its apparent willingness to consult, and notwithstanding regular requests by the union to meet to resolve issues, the Company contented itself with the issuing of communiqués and failed to facilitate any face-to-face meetings with the union.

76. In accordance with its consistent approach to the process, the Company, after failing to meet as requested, issued a further communiqué on 28 February 2000 similarly headed **"Clive Jones' Refusal of the Company's Employment Offer"**. This notice is significant because it suggests a

move away from a more equitable approach to joint problem-solving and tends towards a legalistic and formalistic approach based on the contractual relationship between the parties. Once again I am obliged to quote extensively from the document:

76.1 "We refer to the OCGAWU letter, dated 24 February, 2000, concerning OCGAWU's notice that OCGAWU and Clive Jones have conditionally accepted the Company's offer of employment and that Clive Jones would be reporting to work on Monday, 28 February, 2000, with the view to execute his previous duties and services as the NMCS Order make up worker."

76.2 "A material term and condition of the Company's offer of employment to Clive Jones was that Clive Jones had to report for work on Thursday, 17 February, 2000, which he has failed and/or refused to do."

76.3 "In the light of the above, the Company's commitment to try to accommodate the current incumbent of Clive Jones' position elsewhere within the Company and the Company's commitment to continue with employee consultations, collective and otherwise, the Company is of the opinion that OCGAWU's original objection to the Company's employment offer, Clive Jones' failure and/or refusal to timeously report for work and Clive Jones' and OCGAWU's current, belated and conditional acceptance of the Company's employment offer, are unreasonable and unacceptable to (*sic*) the extreme."

76.4 "The Company's view is that Clive Jones nor (*sic*) OCGAWU has timeously accepted the Company's offer of employment and the Company cannot be reasonably expected to condone the belated acceptance thereof a calendar week after the event on a conditional basis."

76.5 "The Company's employment offer was not at the time open for a conditional acceptance."

76.6 "Despite the fact that OCGAWU and Clive Jones have ostensibly accepted the Company's employment

offer, OCGAWU is in bad faith still keeping their and Clive Jones' options open by pursuing OCGAWU's CCMA dispute in this regard."

76.7 "In the light of the above and in the absence of any meaningful, viable and/or feasible alternatives to the contrary the Company has no real alternative, **but to once again confirm Clive Jones' retrenchment** with effect on (*sic*) 01 February, 2000." (Emphasis added.)

76.8 "Clive Jones will therefore not be allowed to report for work on Monday, 28 February, 2000 and his services with the Company will be formally terminated on 29 February, 2000."

76.9 "The Company once again invites our employees and their collective bargaining representative, OCGAWU, to consult with the Company on the Company's rationalization measures, inclusive of Clive Jones' retrenchment."

77. It was common cause between the parties that Jones was present at the Company's gates on the morning of 28 February 2000 and was refused access to the premises. He was handed a copy of the communiqué referred to in paragraph above at that time.

78. As stated above, it will be observed that this communiqué purports to address the issue then pending between the parties on the basis of a contractual approach relying on recognized principles of offer and acceptance, waiver and the introduction of additional conditions.

79. In my mind, such a formalistic approach was not warranted in the circumstances of this case. If Jones was still employed at that stage (as the Company seems to allege) there is no question of him being "offered" employment (and it makes little difference, too, whether such offer was accepted "conditionally" or otherwise). Similarly, it is not necessary to consider (as Mr Janisch urged me to)

who was responsible for introducing the bumping issue into the equation, thereby imposing new conditions on either the offer or acceptance.

80. It must be borne in mind that the parties were obliged to achieve consensus in terms of section 189 of the LRA on a number of issues, including avoiding a dismissal or, at least, minimizing the effects thereof. At all times this process was to be conducted in a *bona fide* and fair and reasonable manner. The employer was not permitted to adopt a high-handed approach, as it consistently did in this case.

See: La Vita v Boymans Clothiers (Pty) Ltd [2000] 10 BLLR 1179 (LC) at 1186H.

In resorting to the formalism propounded in the communiqué in question, I consider that the Company was in breach of its statutory obligations under the LRA.

81. The further invitation in that communiqué to Jones to consult (see para above) borders on the absurd. After Jones's retrenchment had been "confirmed" for the umpteenth time, the Company again suggested that the door for consultation was still open despite Jones's "belated and conditional acceptance of the Company's employment offer". The repetitive use of similar phrases and sentences in its communiqués (no doubt the product of modern computer technology using an earlier document as a template) demonstrates more than adequately that the Company was simply paying lip-service to its obligations under the LRA.

82. When he was questioned on this further invitation to consult (see para above), Visser suggested that –

"there is no reason why you cannot talk about the issue, even after the event"

and that "it doesn't harm to discuss the matter" even if a final decision to retrench has been made. I must say that I find such an invitation somewhat cynical on the one hand, and demonstrative of a *fait accompli* in regard to the decision to retrench, on the other hand.

83. Jones was then dismissed on 29 February 2000, but received no severance pay since the Company, apparently relying on section 196(3) of the LRA, maintained that he had refused a reasonable offer of alternate employment.

The CCMA Proceedings

84. The matter was referred to the CCMA for conciliation and on 8 March 2000 a memorandum of agreement was concluded between the union (Caesar) and the Company (Visser) in terms whereof the Company undertook, *inter alia*, "to investigate possible alternative employment for the employee taking into account his wage and skills and, if feasible, will revert to the union on or before 22 March 2000."

85. On 13 March 2000 a union shop steward wrote to Coetzee informing him of a suitable vacancy for Jones in the packing department of the "Frozen Department".

86. On 22 March 2000 the Company informed the CCMA commissioner as follows:

86.1 "The Company has given the possibility of a suitable alternative position for Clive Jones, taking into account his wage rate and skills, due regard and consideration, given the facts, circumstances and equity of the Company's previous job offer to Clive Jones and OCGAWU and Clive Jones's casual, belated and conditional acceptance thereof."

86.2 "We regret to inform you that the Company has decided to confirm the Company's original position

pertaining to the fairness and equity of the formal retrenchment of Clive Jones under the circumstances."

86.3 "The Company accordingly believes that it is not fair, proper, nor appropriate for the Company to make Clive Jones a second job offer, given the facts, circumstances and equity of the case."

87. This letter was signed by Visser on behalf of the Company. However, the use of the, by now familiar, language suggests that this document was also the product of the Company's labour consultant.

88. In my opinion this letter is a further indication of the Company's lack of good faith in negotiating with Jones. The letter makes no mention of the non-availability of a suitable alternative position for Jones, which was the basis of the agreement concluded at the CCMA. I do not consider that the Company was entitled to refuse to re-employ Jones on the basis contended for in its letter of 22 March 2000. The objections raised by the Company in this letter ought, properly, to have been stated at the conciliation on 8 March 2000, in which event it would not have raised Jones's hopes by going through the fruitless exercise of potential re-employment.

The Fairness of the Dismissal

89. It is trite that the employer is statutorily bound to establish the fairness of the dismissal of its employee in terms of section 192(2) of the LRA. In the instant case, the Company has chosen to rely on the provisions of section 189 to justify its action – a so-called no fault dismissal.

90. In considering the fairness of a no fault dismissal the Court should have regard to the totality of the evidential material before it and not approach the matter by slavishly applying some sort of jurisprudential checklist (Johnson & Johnson case, *supra*, at p.1216). The function of the Court is to

approach the matter holistically and to pass judgment on whether the ultimate decision arrived at was genuine and not a sham. This requires an enquiry into whether the legal requirements for a proper consultation process have been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds having regard to what emerged from the consultation process.

SACTWU & Others v Discreto, a division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC) at 1454J-1455C.

91. I am satisfied that the consultation process in the present case was flawed from the outset and amounted to a sham. I have commented above in regard to various of the procedural flaws which I consider bedevilled the process and I do not wish to unnecessarily add to the length of an already bulky judgment. Suffice it to say by way of summary that the following factors adequately demonstrate my view of the case:

91.1 On the Company's version the consultation process only commenced on 31 January 2000 at a time when the new shift system had already been implemented;

91.2 The Company purported to consult on that day with Jones in the absence of his union representative;

91.3 Jones was then and there told that he would be retrenched if he did not fall in with the staggered shift system;

91.4 Jones was then suspended until 7 February 2000 in circumstances where no such action was warranted;

91.5 The Company publicly announced on 1 February 2000 that Jones would be retrenched with effect from that date due to his refusal to work a staggered shift and the absence of meaningful alternatives to a staggered shift system which had already been implemented. Jones's suspension was also mentioned in that announcement;

91.6 At the meeting of 7 February 2000 the Company was not prepared to consider proposals aimed at retaining Jones's position as a fork-lift driver;

91.7 Jones was then obliged to propose a less favourable option in an attempt to save his job;

91.8 The Company thereafter sought to introduce the necessity to bump an employee where this was, on its version, not necessary;

91.9 The Company used the dispute regarding the necessity to bump as an attempt to unfairly discredit Jones when he reused to take back his former position on the basis then stipulated by the Company;

91.10 Despite a request by the union to meet to discuss the issue of bumping (a request made in response to the Company's invitation to consult), the Company failed to meet with Jones and/or the union;

91.11 The Company then adopted an unreasonably formalistic attitude, accusing Jones of failing to accept its offer of employment unconditionally and timeously, where it had imposed the condition and demanded compliance with its demands while the process of consensus-seeking was still on-going;

91.12 The Company throughout the process:

91.12.1 exhibited an attitude of intolerance towards the employee's predicament;

91.12.2 was dismissive of his religious activities;

91.12.3 made inappropriate remarks regarding his continued employment at a time when he had been suspended;

91.12.4 dealt with his retrenchment in a very public fashion (where it was not necessary to do so) and in language which was not conducive to joint problem-solving and which bordered on being confrontational;

91.12.5 appeared, on an objective assessment thereof, to have made up its mind very early on and was not genuinely open to persuasion.

92. In my considered opinion therefore the dismissal was lacking in procedural fairness.

93. I should mention, at this juncture (in the event that it is not already clear from my previous remarks) that I regard the way in which the Company made use of its "communiqué method" of correspondence with the union and, in particular, its employee, as entirely inappropriate. There is of course nothing wrong in putting up on a company notice board, announcements of a generalised nature. However, the communications in this case were of a more personal nature and related to the fate of one employee. The possibility of losing one's job is something which must, of necessity, be a source of great concern (even embarrassment) to the targeted individual. The employee is entitled to be treated with respect in times such as these and to emerge from the process with some semblance

of dignity.

94. In the instant case, the Company has publicly jousted with the individual employee and ultimately, it seems, attempted to heap the blame for his no-fault dismissal on him. Ms Williams urged me to find that this was part of a concerted effort at union-bashing on the part of the Company. While there may be merit in this argument, it is not necessary to decide the point in the light of my findings generally. What is clear, however, is that the Company dealt with the union in disrespectful (and at times contemptuous) tones. This is not the type of response which one would ordinarily expect from a company of this size and reputation. It is certainly not conducive to good labour relations.

95. Mr Janisch argued that whatever procedural problems may have gone before, the Company had discharged its statutory duty by 16 February 2000 when it agreed to let Jones go back to his previous position. It was argued that consensus was achieved by virtue of the Company's communiqué of that date in which Jones's proposal at the meeting of 7 February 2000 was accepted.

96. I disagree with this argument. The purported acceptance by the Company of the employee's proposal is couched in terms not discussed or properly contemplated at the meeting of 7 February. The clear import of the communiqué of 16 February is that Jones's return to his old position is likely to result in the dismissal of another employee. This placed Jones's offer at the meeting of 7 February in a context which warranted (indeed necessitated) further discussion between the parties. The existence of dissension at that stage is demonstrated by the union's immediate response the following day and by Jones's failure to return to work until the issue had been discussed.

97. Mr Janisch also argued that the Company's decision to retrench was only taken on 23 February 2000, at a time when Jones had reneged on the agreement already concluded on 16 February 2000.

This, he said, exempted the Company from any further obligation to consult. Besides the fact that I consider that, on the probabilities, the Company had already reached an immutable decision to retrench by that stage and, further, that there was no consensus which had been reached by the parties, the argument has little merit in the light of the Company's invitation in the communiqué of 23 February 2000 to Jones and the union to consult further (see para above).

98. Has the Company demonstrated that Jones's dismissal was for a fair reason? The approach suggested by Froneman DJP in the Discreto case, *supra*, is instructive in this regard:

"… fairness means that the ultimate decision to retrench must 'properly and genuinely' be justified by operational requirements" (emphasis added).

99. More recently Davis AJA delivered a persuasive *obiter dictum* in the matter of BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 (LAC) at 710, para 19, in which he suggested that the deferential approach propounded by Froneman DJP in the Discreto case was open to some doubt:

"The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test."

100. In assessing whether a dismissal has in fact been effected for an operational reason, the Court should consider too whether the employer has demonstrated genuine operational necessity rather than steps which will merely enhance its financial position.

Insurance and Banking Staff Association and others v SA Mutual Life Assurance Society (2000) 21 ILJ 386 (LC) at 397I-398A.

101. The real reason for the dismissal must be established on an objective assessment of the facts:

"The mere say-so by a role-player that an issue is one of an operational requirement and that the viability of an enterprise is at stake cannot determine the matter."

NUMSA v Fry's Metal (Pty) Ltd (2001) 22 ILJ 701 (LC) at 708.

102. In the present matter the employer's evidence was that the initial threat of retrenchment was used as a mechanism to force the impasse resulting from Jones's refusal to work a different shift (see para above). Coetzee's evidence-in-chief in this regard was as follows:

"… So when Clive came back the next day [i.e. 31 January 2000] … I approached him and asked him that I expect from him to work the shift system from the next day. I just wanted to inform him that now from tomorrow I expect you to fall into the new shift system.

And did he … --- And he said that he is not prepared to do that.

What did you tell him the consequences would be if he didn't fall into the new shift system, as you put it? --- I said well he will be retrenched if he doesn't fall into the shift system the next day …".

103. Visser's evidence-in-chief was in the same vein:

"… The Monday meeting, I explained to him that if he does not accept the staggered shift system the alternative that then remained is retrenchment without any severance pay."

104. Ms Williams did not seriously challenge Visser's evidence on the reason for the change from 5 to 4 fork-lift drivers. It seems to me that the introduction of the staggered shift system was accompanied by a commercial rationale in that there would apparently be a cost-saving to the Company in the vicinity of R25 000 per month.

105. However, Jones's dismissal was not effected for that reason. As of 31 January 2000 the proximate cause (or the "ultimate decision" as Froneman DJP called it) for Jones's dismissal was his refusal to go onto the staggered shift.

106. It may well be that the Company's attempt to coerce Jones into accepting its demand in respect of the staggered shift system amounted to an automatically unfair dismissal in terms of section 187(1)(c) of the LRA.

See: Fry's Metal case, *supra*, at p.706D, para 23.

However, this aspect was not traversed either in the pleadings, the evidence or argument before me, and it would therefore not be appropriate to deal therewith.

107. To the extent that the Company later sought to rely on the events recorded in the communiqué of 23 February 2000 (see para above) as constituting the commercial rationale for the dismissal, it is apparent, once again, that the reason which existed as at 31 January 2000 was relied on:

"The Company has no real alternative, but to confirm Clive Jones' retrenchment with effect on (*sic*) 01 February, 2000."

108. If regard be had to the communiqué of 28 February 2000 (see para above) however, it will be seen that the reason for the dismissal is described therein as:

"Clive Jones' failure and/or refusal to timeously report for work and [his] … current, belated and conditional acceptance of the Company's employment offer …"

This is not a dismissal for operational requirements.

109. In the light of the aforegoing, and particularly in view of Coetzee's evidence (see paras and above), I find that the Company has failed to establish a fair reason for Jones's dismissal.

The Appropriate Remedy

110. In terms of section 193(1) of the LRA the Court has a discretion to order the reinstatement or re-employment of the employee or to grant compensation. Such compensation is capped at 12 months' remuneration by virtue of the provisions of section 194 of the LRA.

111. However, that discretion is to be exercised in conjunction with the peremptory provisions of section 193(2) of the LRA which require the Court to order reinstatement unless the criteria enumerated in that section have been established.

112. The provisions of section 193(2)(a) and (d) of the LRA do not preclude reinstatement in the present case since:

112.1 Jones testified that he wanted his job back; and

112.2 it has been found that the dismissal was both substantively and procedurally unfair.

113. Reinstatement may also be dispensed with as a remedy under section 193(2)(b) if –

"The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."

I consider that if the Company wished to avail itself of this escape-hatch to avoid having Jones back in its employ, it was obliged to adduce evidence in this regard.

Manyaka v Van de Wetering Engineering (Pty) Ltd [1997] 11 BLLR 1458 (LC) at 1465F.

There is no such evidence before the Court. If there was any atmosphere of intolerance which had been occasioned by the dismissal of Jones, I consider that this would have significantly dissipated by now given the lapse of time and, in particular, because Coetzee (who was Jones's immediate superior) has left the Company. There certainly did not appear to me to be any noticeable personal antipathy towards Jones on the part of Visser, based on the latter's demeanour in the witness box.

114. Finally, I am bound to have regard to the provisions of section 193(2)(c) which preclude reinstatement if –

"it is not reasonably practicable for the employer to reinstate or re-employ the employee."

Once again, I consider that the Company has at least an evidential burden in this regard.

See: Manyaka's case, *supra*, at p.1465G.

115. The evidence adduced by Visser on this score was that reinstatement was impossible:

"Because those positions [forklift drivers] are filled with employees working in those positions … They are working staggered shifts at the moment, without a day shift forklift truck driver."

116. Under cross-examination Visser accepted that it would be possible to work out a timetable using four drivers in such a way that Jones would always be able to leave in time to attend church in the evenings. Visser's objection thereto seemed to be predicated on a reluctance to require "the other employees [to] … basically adjust their lives to oblige one individual".

117. I do not consider this to be the type of impracticability contemplated by the LRA, particularly where there was a suggestion put to Visser under cross-examination that the other drivers were amenable to such an arrangement.

118. The fact that the Company has subsequently appointed a person to fill the position held by the dismissed employee should not preclude reinstatement. By way of analogy, this argument would preclude reinstatement in misconduct dismissals – something which runs counter to the concept of dismissal being the primary remedy.

See: Manyaka's case, *supra*, at p.1465 I.

119. Finally, I should observe *en passant* that there was evidence that Jones had previously worked in other positions both in the cold storage and production facility. Given the size of the Company's workforce, it is not unreasonable to expect the Company to be able to reabsorb Jones into its operation.

120. In the circumstances, I am satisfied that reinstatement is the appropriate remedy.

COSTS

121. I am mindful of the fact that the application was brought by the union in its representative capacity on behalf of a member, and that there is an on-going relationship between it and the Company. The Court has a wide discretion in regard to the award of costs (see section 162(1) of the LRA) and I am of the view that there is no reason that the normal rule that costs follow the result should not apply.

122. Not only has the employee's dismissal been found to have been both substantively and procedurally unfair, I consider that my criticism of the Company's conduct throughout the purported retrenchment exercise warrants an adverse costs order.

ORDER

123. In the result, I make the following order:

123.1 The dismissal of the First Applicant by the Respondent, effective as from 29 February 2000, was both substantively and procedurally unfair;

123.2 The First Applicant is to be reinstated with immediate effect in the position that he held on 31 January 2000 on the same terms and conditions of employment that prevailed at the time, with retrospective effect as from the date of dismissal;

123.3 The First Applicant is to repay the value of the retrenchment package received from the Respondent when he receives the back-pay referred to in paragraph 123.2 above, alternatively the Respondent shall be entitled to set-off the value of such package against the back-pay;

123.4 The Respondent is ordered to pay the costs of suit of First and Second Applicants.

P.A.L. GAMBLE
Acting Judge

For the Applicants:	:Ms J.L. Williams Rabkin-Naicker & Williams Attorneys, Claremont
For the Respondent:	:Adv M.W. Janisch instructed by Mr J.P. van Wyk of Cliffe Dekker Fuller Moore Inc, Cape Town
Date of Hearing	: 20 June 2001
Date of Judgement	: 08 October 2001