REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D598/1999**

DATE 2001/09/28

REVISED ON 2001/11/02

In the matter between:

CLIVE NAICKER Applicant

and

Q DATA CONSULTING Respondent

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PLLAY ON 28 SEPTEMBER 2001

PILLAY J

When Tom Denysschen became the managing director of the respondent he soon realised that the budgeted profit of six million would not materialise. A more realistic forecast was a loss of three million. This meant a nine million turnaround in projections. He immediately set about implementing several cost cutting measures to eliminate luxurious expenditures. Initially the cost cutting measures were aimed at reducing overheads without compromising the services rendered to clients.

Management then implemented a process of diagnosing precisely what the problems were. This involved establishing focus groups or teams to investigate the key functions, namely finance, human resources, technology, administration, new business and the service centre. The investigation was driven by the urgent need to cut costs. It immediately became apparent from the duplication of the service centre in Durban and in Umhlanga that this part of the operations could be rationalised.

The human resources manager of the PQ Africa Group, Mr Gerald Swart, caused a Notice of Intention to Consult about the Rationalisation of the Utilisation of Manpower (B1-2) to be issued to all staff who were potentially affected. The first consultation was scheduled for 26 February 1999, that is, a day after the notice of the consultations had been issued.

The applicant attended the consultation that was held in Durban. A similar consultation was conducted for employees at Umhlanga. Mr Swart informed the employers of the possibility of retrenchment and discussed some alternatives. He invited questions from the employees and encouraged them to contact management, including himself, for further information or discussions.

The first step in the process was to remodel the structure of the service centre. Thereafter all employees in the affected division were invited to apply for any positions. The employees were informed of this approach in general at the first consultation and urged in the notice B1-2 to apply for positions in the new structure. According to the respondent the employees welcomed this approach because of the special nature of its business. The applicant was specifically informed of the proposed new structure by Ms Suzanne Lenferna at a consultation on 4 March 1999. Neither the applicant nor anyone else counter-proposed any other approach.

The procedure adopted by the respondent was unusual. It was a deviation from the application of the Last In First Out (LIFO) principle that is recommended in the Code of Good Practice : Dismissals Based on Operational Requirements. The Code anticipates that there can be exceptions and modification of the application of the LIFO principle.

The respondent is in the information technology industry. Survival means keeping abreast continuously of new technology and software development. It has to be a learning organisation. Employees have to constantly re-skill themselves to remain relevant to the organisation. Characteristically of the industry, junior employees come better equipped with skills in the latest developments than long-serving employees who qualified in the old technology. The application of LIFO in these circumstances would result in the best skills being lost to the organisation.

On the other hand, every employee, long-serving or newly employed, would be able to compete for any position. Therefore a long-serving employee, who has constantly renewed his skills, would not be disadvantaged when competing against a newly qualified recruit. Furthermore, merely because a position had become redundant did not mean that the incumbent would automatically fall to be retrenched. That individual could compete with everyone else for any position in the new structure.

Such an approach for the IT industry is rational from a commercial and socio-economic perspective. The employer retains the most suitable employees for the organisation. The employees who have expended the time and energy to keep abreast of developments are fairly rewarded by being appointed. The wider socio-economic implications of the survival of the industry and the development of human resources that can compete with the best in a global economy can also not be missed. A deviation from the strict application of the LIFO principle must, therefore, be permitted in these circumstances.

The applicant applied for the same position that he held as Call Centre Consultant. Following an interview with Miss Lenferna and Joe Jacobs, a divisional manager, he was found to be less suitable than other candidates for the position because his skills were not updated to the latest windows-based operating systems. Miss Lenferna unhesitatingly conceded his competence in mainframe DOS-based systems. However, those systems were rapidly being phased out. The applicant conceded that he had only a working knowledge of the windows-based programmes. It was not put to Miss Lenferna what windows-based skills he had or that such skills were sufficient to entitle him for reappointment to the position of Call Centre Consultant.

As a Call Centre Consultant he would have been required to provide technical assistance to customers. The probabilities are that more than a superficial knowledge of the systems would have been required. The applicant's submission that he could get assistance from other employees does not assist him. He was not in a managerial position that he could delegate his responsibilities. Besides, it would have been unfair to appoint the applicant merely because of his longer service instead of the candidate who had the required competence.

In an attempt to avoid retrenchments the respondent assisted the affected employees, including the applicant, to find alternative employment. The applicant was assisted in compiling his *curriculum vitae* which was given to an employment agency for circulation amongst thirty other agencies to find a suitable vacancy for him in the industry. A variety of other forms of employment, such as contract work, was also considered for the applicant.

After the first consultation on 26 February 1999 a further five meetings were held with the applicant at the instance of the respondent until he received notice of his retrenchment on 31 March 1999. He was considered for a junior position in the networking division but was found to be unsuitable. After he instituted these proceedings he was offered re-employment in the same position that he had held previously and on substantially similar terms. He did not accept the offer because he believed that it was made in order to subvert the litigation.

The applicant contended that he was retrenched because of his physical condition. He was a double amputee. He testified that Miss Lenferna had been critical of his having taken time off once a month for medical checks. Miss Lenferna refuted this evidence. She testified that she had encouraged him to take time off to have himself checked. The probabilities favour Miss Lenferna's version because the applicant's condition had never been an issue prior to his retrenchment. Miss Lenferna and the applicant had worked together at McCarthy Retail for a long time before joining the respondent. The nature of his duties had never been such that it made his condition an impediment. The applicant also testified with pride that his condition was not obvious. I am satisfied that the applicant's condition was not a reason for his not being appointed to the position of Call Centre Consultant. On his own version he lacked the skills for operating in a windows-based environment and for that reason alone the applicant was not entitled to appointment.

The applicant's further version, as it eventually emerged under cross-examination, was that his relationship with Miss Lenferna had deteriorated since she had started working directly with him. She had taken away his supervisory functions. His retrenchment was motivated by hidden agendas. Initially he testified that the respondent had such an agenda. When it was suggested to

him that this was a serious allegation he changed his version to Miss Lenferna having such an agenda.

This version cannot be true. It is not one that was pleaded. Furthermore, the applicant had not lodged a grievance when the relationship allegedly deteriorated and when she had allegedly referred to him in derogatory terms.

After notice of the restructuring was given on 26 February 1999 he had predicted that he would be one of the retrenchees. However, he did not raise his concerns about Miss Lenferna's hidden agendas and how he suspected it would play itself out in the restructuring process with any other senior manager.

It was suggested in argument that the notice of the applicant's retrenchment was "totally inadequate in relation to its timing". This did not give the applicant "the opportunity to come to terms with the situation to reflect on the matter, seek any advice and prepare for the consultation."

Miss Lenferna testified that she had intended to hand the applicant the notice B1-2 in the afternoon of 25 February 1999. However, the letters were late in being generated. Many of the staff had already left for a meeting in Umhlanga. She was also late for the meeting. When she had handed the letters to other staff members, the applicant and one other employee were not there. She had assumed that they had already left the meeting. The notice was then only given to the applicant the next morning at 08h00. The delay in giving the applicant his letter was not deliberate. Any prejudice that he might have suffered could have been cured by the applicant asking for an extension of time to consider his position. This he did not do.

The applicant confirmed that he had attended the first consultation on 26 February 1999. He testified that Mr Swart had merely read out the notice B1-2 at that consultation. He denied that any announcement was made then to consult with or get more information from Miss Lenferna. He also denied Miss Lenferna's testimony that there had been a queue of people outside her office for the purpose of consultations after that meeting. Miss Lenferna was not challenged on this issue under cross-examination. Be that as it may, even if I were to accept, which I do not,

that the announcement about further information and consultation was not made at the meeting of 26 February 1999, nothing prevented the applicant from approaching any of the management to raise any of his concerns about his position. The applicant did not ask any questions either at the meeting of 26 February 1999. Nor did he approach the management for clarity on any of the matters raised in notice B1-2 or the meeting of 26 February 1999, as many others did.

Mr Swart was not challenged when he testified that he had given his personal telephone numbers for the staff to contact him at any time. The applicant denied Miss Lenferna's evidence that he had been counseled about his lack of skills. The fact that the respondent was unable to produce any documents in support of the counseling, it was submitted, fortified his version.

The respondent had moved offices. Miss Lenferna left the respondent three months after the applicant's retrenchment. The retrenchment occurred more than two years ago. Not much weight can therefore be placed on the respondent not producing all the documents relevant to the dispute. Furthermore, I am not aware that there was any request for disclosure by the applicant in order to prepare for trial.

Further on the issue of documentation it was submitted for the applicant that the respondent was unable to produce a copy of its retrenchment policy and procedure applicable at the time. No request had been made for the discovery of such documentation before trial. The applicant produced document B8 which was a one page extract purporting to be part of the respondent's retrenchment policy and procedure. It was dated 97/06/03. The respondent disputed that it was the procedure applicable at the time of the retrenchment in 1999.

The applicant did not dispute the evidence of the respondent that Mr Denysschen's formal announcement of the investigation by the focus groups per document A50, and the retrenchment policy had been posted on the internet. There was no explanation as to why the applicant did not access these documents. It is reasonable to expect a person who is challenging the fairness of his retrenchment on the basis that it did not comply with the respondent's policy, to check what the company's policy was. This was particularly so in the case of the applicant who was computer literate. Instead, the applicant elected to rely on one page of an outdated document. As the

applicant was not able to prove the authenticity or relevance of document B8, it is not admissible.

Employers are often criticised for presenting their decision to retrench as a *fait accompli*. The fact that a list of potential retrenchees is issued is sometimes tendered as proof of the decision to retrench having been taken before consultation with the work force. In this case the applicant had to accept that the respondent had not decided who would be retrenched until the process of filling the posts in the new structure had been completed. In so far as the process followed by the respondent indemnified it indisputably from presenting the retrenchment as a *fait accompli,* it must be commended. Ironically, in this case the applicant criticised the process because notice B1-2 "did not unequivocally inform the applicant that he was identified as a retrenchee". It was further submitted that it was "impossible to hold any genuine consultation given that, according to the respondent, the decision to retrench was not taken". The submission is sterile. If accepted it would reverse the gains made over the years by employees insisting that consultations precede decision making. It is accordingly rejected as a ground of procedural unfairness.

Finally, on the fairness of the procedure, it was submitted that the applicant was not given adequate notice prior to his retrenchment. The applicant was alerted to the possibility of retrenchments generally by at least 26 February 1999. By 31 March 1999 he was given notice of his dismissal. He was paid for April and released from his duties during the notice period. If the applicant found any of these arrangements unacceptable at the time he should have articulated his concerns. Despite being legally represented then he did not do so. At no stage during the consultations did the applicant ever ask for an extension of time to consider his position. He cannot be heard to complain now.

The applicant led no evidence to dispute the commercial rationale for the restructuring. Nor could it be deduced from his cross-examination of the respondent's witnesses that he contested the need for serious cost-cutting measures. There was, accordingly, no need for the respondent to ritualistically recite through witnesses, such as from the focus groups, the dire financial circumstances in which the respondent found itself. The applicant had also not contested the merits of the new structures, either when he was informed of them during the consultations or in these proceedings. Accordingly, the respondent was not expected to lead evidence about matters

that were not in dispute. The applicant had also not proffered any alternatives, either during the consultations or in these proceedings, that could have reduced expenses. The applicant raised these and other new matters in argument without having canvassed them properly or at all during the evidence. I therefore do not deal with all of them.

The applicant had applied for a position in the network services team as an alternative to retrenchment. He contended that he was found to be unsuitable for the position because of his physical condition. The failure to appoint him to the alternative position was allegedly unfair discrimination. Mr Alan Weyers had interviewed the applicant for the position. It was an entry position at a lower level than the job previously held by the applicant. Mr Weyers found the applicant to be unsuitable, mainly because he did not impress him as being a team player, which was a particularly important requirement for the functioning of the employees in the network services section. It also meant that the applicant would have had to suffer a reduction of income of about R3 000,00. Although the applicant had said that he was prepared to accept a lower salary, Mr Weyers felt that it would become a problem later. The applicant would naturally have aspired to better his earnings and would have been on the lookout for a better paying job. Mr Weyers needed someone who would stay with the team for longer. He was not aware until the applicant had mentioned it that he was a double amputee. This was a further reason for refusing him the position as it also involved working in confined spaces.

>From the respondent’s pleadings it would seem that the primary consideration was the applicant's physical disability that resulted in his non-appointment. Mr Weyers testified that this was not a correct reflection of his reason for refusing to appoint the applicant. However, he also confirmed that it was the only reason he had given the applicant when the latter telephoned him and pressed him for reasons for his non-appointment. He did not mention in that discussion the other criteria that had disqualified the applicant. He testified in court, however, that his physical condition was only one of the factors that disqualified the applicant. Even if it had not been taken into account the other factors were far more compelling reasons for not appointing the applicant.

On the applicant's own version Mr Weyers had become aware of his condition only after the applicant had disclosed it to him. The condition could, therefore, not have been an obvious and

immediate impediment to being appointed. Although it was a consideration, this consideration was not decisive of the issue. A more objectively justifiable basis for refusing the applicant the job was that no employee would be content to be paid R3 000,00 less than what he believed he was worth. His subjective assessment of the personal qualifications of the applicant was also not seriously challenged under cross-examination. The interview had taken place unexpectedly and before the scheduled time. Even though it may be possible to minimize the subjective element during employee selection through a structured interview, it is not possible to eliminate it altogether. The refusal to appoint the applicant to the position in the networking services was, therefore, neither unfair nor discriminatory.

Mr Jacobs offered the applicant re-employment to the same position as Call Centre Consultant which he held prior to his retrenchment. The basic salary was R6 750,00 with benefits, all of which were negotiable. According to Mr Jacobs he had made the offer telephonically on 5 July 1999. The applicant did not seem interested as he wanted a supervisory position. He indicated that he was already being employed in a supervisory position. On the advice of personnel and the legal department, Mr Jacobs despatched a written offer of re-employment document, A49, to the applicant. Before doing so he telephoned the applicant again and ascertained his work address at which the letter was to be delivered.

The applicant denied this version. One of his versions was that Mr Jacobs had telephoned him on 7 July 1999 and had told him that he had a document for him and arrangements were made to get the document to the applicant. Another version was that Mr Jacobs had told him that he had a job for him. To this he had responded that Mr Jacobs should put it in writing.

The fact that the applicant had two versions is in itself damaging to his case. The first version seems to corroborate a part of Mr Jacobs' evidence that he had telephoned the applicant to find out how the document could be delivered to him, although the context in which the call was made differed from the applicant's version. The applicant's versions are improbable because it would mean that the respondent had for no apparent reason backdated the letter A49 to 5 July. Furthermore, A49 sought to confirm a verbal offer. Neither of these issues was challenged immediately or during cross-examination, despite the fact that the applicant was legally

represented at all material times.

The applicant further testified that he had asked Mr Jacobs whether the respondent was prepared to reinstate him. Mr Jacobs undertook to revert to him about that but had allegedly never done so.

The applicant had been suspicious about the job offer. He believed it was a way of subverting the litigation that had already been instituted. Despite his consultation with his attorney about A49 neither he nor his attorney, responded to the letter. Nor did either of them contact Mr Jacobs to ascertain why he had failed to revert to the applicant about his reinstatement proposal.

If the applicant was serious about his employment he would have pursued the discussions with Mr Jacobs, particularly as A49 clearly indicated that the offer was negotiable. As it transpires the applicant had a temporary assignment for three months when the offer was made. He was subsequently employed in a supervisory and later management position by that company. It is not the applicant's case that he refused the alternative employment because he had already found other employment. He was not aware at the time that he would be permanently employed. He was, therefore, allegedly very keen to take up the job offer from Mr Jacobs. His only response when asked why he did not contact Mr Jacobs again when the latter did not revert to him, was that he did not want to. He also confirmed that if he had accepted the job offer and negotiated it up to his previous remuneration level, he would have suffered no loss at all, taking into account his severance package.

The facts of each case must determine whether a retrenchment is procedurally and substantively fair. Section 189 of the Labour Relations Act No 66 of 1995 is not a procedural checklist, compliance with which would indemnify an employer against a complaint of unfairness. [*Johnson and Johnson (Pty) Ltd v CWIU* 1999[20] ILJ 89 LAC at 97B-E]. Nor is compliance with section 189 necessary or sufficient to satisfy the standard of fairness. [*Sikhosana and Others v SASOL Synthetic Fuels* 2000[21] ILJ 649 LC; *Employment and Labour Law* by Brassey, Juta, Vol 388: 41-42.]

By legislating procedures to be followed prior to a dismissal for operational reasons, the

Legislature signals the scope and scale that an engagement about operational requirements might span. Section 189 imposes obligations not only on an employer. All consulting parties have a duty to attempt to reach consensus on, amongst other things, measures to avoid dismissals. (Section 189(2) of the LRA). Consultations about operational requirements could have wide socio-economic impact. Hence the participation of the consulting parties is institutionalised to ensure the best outcome. A consulting party who fails or refuses to engage constructively with the other party has no one but itself to blame if the outcome is unsatisfactory.

By taking a holistic view of the evidence it transpires that the applicant did not engage or challenge the respondent during the consultations. He tacitly acquiesced in the process as it unfolded. He has also not led any evidence or cross-examined the respondent's witnesses in a way that might lead the Court to conclude that his retrenchment could have been avoided.

Most damning for the applicant, however, is his failure to call the respondent's bluff when he suspected that the offer of re-employment was not genuine. The applicant had nothing to lose by rejecting the offer. He was already in employment which, if Mr Jacobs' evidence is to be accepted, had better long-term prospects for him. As it transpires from the applicant's evidence he is now in a better position with his new employer than he might have been as a Call Centre Consultant with the respondent. On the other hand, the prospect of a compensation award must have been attractive to the applicant. Hence his persistence with this claim.

It was conceded by the respondent that it had underpaid the applicant severance pay by calculating the rate at one instead of two weeks per year of service. The error emerged only during the evidence of the respondent's witnesses. It was not specifically pleaded as a cause of action. If it had been, it would have been paid earlier. However, as the applicant had relied on a policy that recorded severance pay being payable at the rate of a week per year of service, I doubt whether the applicant was alive to the fact that he was underpaid his severance pay before the evidence was led. The tender in the circumstances has had no impact on the volume of evidence or pleadings or the duration of the proceedings. In the circumstances the costs are not affected by the tender.

In the circumstances I make an order in the following terms:

The dismissal of the applicant for operational reasons is procedurally and substantively fair.

The applicant's claim for unfair dismissal is dismissed.

The applicant is ordered to pay the respondent's costs.

D. PILLAY, JUDGE

FOR THE APPLICANT: ATTORNEY JAY REDDY

INSTRUCTED BY: JAY REDDY ATTORNEYS

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