IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: J2659/99

Applicant

and

Respondent

JUDGMENT

Bruinders AJ

On 11 June 1999, respondent retrenched the applicant. At the time, the applicant was the marketing manager. He became marketing manager on 14 September 1998. His appointment was temporary, for a six month period, after which his position was to be reviewed. His appointment was never made permanent. Before becoming marketing manager, applicant was a sales consultant, which was the position respondent first employed him in, on 13 July 1998. He disputes that his retrenchment was procedurally or substantively fair and claims compensation from this Court.

Procedural fairness

Applicant's complaint about the procedural fairness, explored during evidence and elucidated during argument, was that he was not furnished with information about a suitable alternative so that he was prevented from consulting meaningfully over alternative employment.

On 13 April 1999, respondent issued a notice with the heading 'Contemplated Retrenchment' in which it informed applicant that circumstances compelled it to reorganize its marketing department resulting in his position becoming redundant.

Respondent offered him an alternative position as a sales consultant and severance pay equivalent to one week's salary for every year worked. The notice also dealt briefly with the reasons for the retrenchment, its timing, selection criteria, and re-employment. The notice concluded with the suggestion that consultations commence on 16 April 1999.

Thereafter consultations were held on 16 and 22 April 1999, 11 and 19 May 1999 and 11 June 1999. On 14 April 1999, J W Gouws a labour consultant of Gouws and Associates, placed on record that he represented applicant for the purposes of s189(1)(d). I do not have to decide whether labour consultants have the right to represent employees during retrenchment consultations. In this matter, respondent agreed to allow Gouws to represent applicant at the consultations. Of the five consultations held, Gouws attended two. He was not present at the first one because at that time, respondent had not yet agreed to his presence at consultations. He did not attend the consultations of 22 April 1999 and 19 May 1999 because he was not available, despite having agreed to the second of these consultation dates. As it turns out, applicant did not complain during his evidence that Gouws' absence at these consultations rendered them procedurally unfair, nor was this matter pursued with any conviction by counsel.

In a letter dated 19 April 1999, Gouws asked for the following information: whether the reason for the retrenchment was the result of economic circumstances or restructuring and if it was the latter, what the reason for the restructuring was; what alternatives were considered and the reasons for rejecting those alternatives. If the retrenchment was economic in nature, the following information was also requested: a list of appointments made in the preceding six months, an organogram, the financial statements for the 1998/9 financial year, the number of alarms sold in the

previous year, the business plan, the marketing strategy and the number of persons dismissed in the previous year for operational reasons.

At the meeting of 22 April 1999, the information was provided and the questions answered, as is recorded in a summarized minute of the meeting. The minute records that respondent reiterated that the restructuring of the marketing department was the reason for the retrenchment and that, as a result of the restructuring, the position of marketing manager would become redundant. Respondent confirmed that applicant was being offered the position of sales consultant as an alternative to retrenchment which he was requested to consider or make alternative proposals. The minutes of the meetings of the meetings of 22 April 1999 and 11 May 1999 and the transcripts of the meetings of 19 May 1999 and 11 June 1999, as well as the evidence by Lace and the applicant, support my finding that the applicant knew that respondent intended outsourcing its sales function. This it did by terminating the employment contracts of its sales consultants and concluding independent contractor agreements with them. From about October 1999, respondent no longer employed sales consultants.

Despite the fact that the retrenchment was not economic in nature, respondent undertook to provide applicant with an organogram (which was given to him at the meeting of 11 May) but refused to provide him with figures for the number of alarms sold, the financial statements, business plan or marketing strategy, claiming that these constituted confidential information, although it informed applicant that he knew what the marketing strategy was since he was the marketing manager. It must be remembered that Gouws only requested this information if the retrenchment was economic in nature and so there was no need for respondent to provide it.

At the meeting of 11 May 1999, Gouws tabled eighteen questions. They were all

answered by Lace on behalf of respondent. Among the answers were, that respondent had considered but not offered the alternative position of sales manager, held by one Botha, because the latter was employed by respondent before applicant. There is a dispute about this. Both appear to have commenced employment with respondent at the same time. Not much turns on this apparent inaccuracy since applicant never challenged it, nor did he want to be employed in the position of sales manager. It was also at this meeting, in answer to a question by Gouws, that respondent confirmed that it was negotiating the outsourcing of the sales function with sales consultants, which would result in the retrenchment of those who would not agree to becoming independent contractors. By the end of this meeting, the questions asked by Gouws relating to restructuring had been answered by the respondent. It concluded with Gouws undertaking to table a proposal on a voluntary retrenchment package.

At the following meeting on 19 May 1999, applicant insisted that he be presented with respondent's proposal. By that, he could only have meant respondent's response to the proposal in Gouws' letter of 14 May 1999, that he would settle on a voluntary retrenchment package equivalent to six months' salary. He could not have been referring to any other proposals. Respondent had proposed the alternative job of sales consultant from the outset. Applicant never counter proposed another job, since he maintained from the outset that he wanted to remain on at respondent as marketing manager. By letter dated 19 May 1999 to Gouws, respondent rejected the settlement offer of six months' salary and proposed paying him severance pay of one week for every year worked, otherwise it repeated that he could take up the alternative job as a sales consultant.

After obdurately accusing respondent and Lace of intimidation, bullying tactics and

general bad faith, none of which is apparent from the minutes or transcriptions of the meetings, or for that matter the evidence in Court, the applicant finally consented to hearing out Lace on respondent's proposals. Lace repeated that the first alternative offered was the job of sales consultant. The verbatim transcription records applicant's answer as follows: "Meneer, ek kan nie daaroor oordeel of ek dit aanvaar of nie, want die helfte van die inligting wat ons julle gevra het om te antwoord het julle nog nie geantwoord nie. Alleenlik as ek dit ongvang kan ek besluite maak of ek dit aanvaar of nie aanvaar nie." Not only was he wrong - the information had been provided and none was outstanding - but his answer made no sense. When asked what information he was looking for he retorted that the request was on record. The request for information was communicated, was on record and the information was supplied. Yet applicant insisted that respondent had not answered Gouws' question about what alternatives had been considered. Respondent repeated the answer given to Gouws in the meeting of 11 May and offered to give applicant the information again which Lace did. Applicant refused to accept the answer given. He then announced that he did not want to know what alternative vacancies were available but what alternatives were considered by respondent before proposing retrenchment. This simply amounted to repetition of a request already made and answered and, in context, was either nonsensical or made in bad faith.

Lace went on to propose that if applicant did not want the job of sales consultant then in the alternative, it offered a settlement of severance pay equivalent to one month's salary. Applicant was in the respondent's employ for less than one year and respondent was of the view that, if anything, applicant was entitled to severance pay equivalent to no more than one week's salary. In response, applicant insisted that respondent supply him with the outstanding written information and its proposals and insisted that his first and only option was retaining his job as marketing manager. It

is apparent from the minute of the meeting of 11 May 1999 and the correspondence between respondent, Gouws and applicant dated 14, 19, 20 and 21 May 1999, that what respondent had to furnish applicant with was a copy of the minutes of the meeting of 11 May and its response to the settlement proposal. Applicant's insistence on information was made either out of ignorance, a lack of focus or bad-faith, all of which respondent cannot be held responsible for.

In the meeting of 11 June 1999, Gouws recorded that what applicant wanted to know was what alternatives were considered before concluding that the position of marketing manager was redundant. This request was new. It was answered by Wagemaker, who also represented respondent at the meeting and who said that restructuring was more cost-effective than simply not restructuring and becoming " volume oriented". Gouws then returned to a question which had been answered previously, namely that the only alternative position offered to applicant was that of sales consultant. During further discussion, Gouws informed respondent that applicant could not take up the alternative job of sales consultant because he would not report to Botha, the sales manager who had previously reported to him and whom he had disciplined in the past. Applicant asked about other alternatives. There were none. Gouws repeated his admonition to respondent to do its homework and to come up with further alternatives. As with the previous meetings, neither applicant or Gouws suggested any alternatives. Applicant was given a weekend to reconsider his rejection of the sales consultant job offer failing which he would be retrenched. Shortly after the meeting concluded, applicant referred a dispute about his retrenchment to the CCMA.

From the aforegoing it is evident that applicant's retrenchment was not procedurally unfair. He was given the information requested during a number of consultations. His complaint that respondent did not furnish him with information to enable him to

weigh up his options is simply unfounded. The alternative job offer was not acceptable to him, mainly because he wanted to remain on as marketing manager. He was a senior managerial employee who had been the deputy director of the NG Synod and a project manager at Armscor and is a man of strong character with lots of self-esteem. This is apparent from his performance in the witness box and his performance at the consultations as recorded in the minutes and transcripts. Together with the evidence, it suggests that it is unlikely that he was bullied or steam-rollered during the consultations. In the circumstances, his complaint of procedural unfairness is unwarranted, especially when a man of his stature is obstructive, unco-operative and unreasonably impedes the progress of consultations by failing to participate meaningfully in the consultations. [*See, UPUSA v Grinaker Duraset (1998) 19 ILJ 107 (LC) at 121A*]

Substantive fairness

Applicant claims that the retrenchment was substantively unfair because the real reason for the retrenchment was not restructuring of the marketing department but the desire on the part of Becker, respondent's managing director, to get of him. If the retrenchment was a sham, not genuine and a mere ruse to get rid of applicant for another reason, then it would be substantively unfair. [*See, SACT WU v Discreto - A Division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC) at 1230G*]

Applicant wants me to find that the reason for his retrenchment is that Becker did not like a document he produced (although he claimed merely to have been its co-ordinating editor) during January 1999, which he was asked to withdraw. There is no need to describe the document or its contents, except that there was a dispute over whether it was critical of the respondent.

Applicant was first notified of his contemplated retrenchment during April, nearly four months after he released the document. The reason for the retrenchment was the

restructuring of the marketing department, resulting in the elimination of sales consultants who constituted the driving force of the department. The fact is that during October 1999, the sales function was outsourced. The consultants became independent contractors. There is no longer any marketing department. Applicant was not replaced. His position fell away. The sales manager was also retrenched. Despite his reliance on incidents which he claimed suggested to him that there was a personal vendetta against him, all of which was denied by Becker, these facts suggest that applicant's retrenchment was genuine.

In the result, applicant's retrenchment was not procedurally or substantively unfair and his application is dismissed. I make no costs order because respondent gave notice that I should not award costs if I find in its favour.

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T J Bruinders, acting judge of the Labour Court

Date of hearing :05 -07, 9 February 2001

Date of judgment :13 February 2001

For the applicant :Adv. F W Botes

instructed by Van Staden and De Beer Attorneys

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