Sneller Verbatim/DM

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J4766/99

DATE: 2001-06-13

In the matter between

E M MAY Applicant

and

MANNESMAN DEMAG Respondent

J U D G M E N T

Delivered on 13 June 2001

REVELAS J;

1.The applicant, Mrs Elizabeth Mathlgomang May, was employed by the respondent, Mannesman Demag, for a period of three years as a cleaner. Her duties included cleaning the 13th and the 14th floors of the respondents business premises, serving tea and performing various orhter ancillary duties. She earned R793,80 per week.

2.On 12 April 1999 the applicant went on maternity leave and returned on 1 September 1999. She was supposed to return on 12 August but due to the illness of her baby, her leave was extended, but on the agreement that it would be on a "no work no pay" basis.

3.

4.On her return she was called into a meeting with Mrs F C Christoph, the respondent's human resources official. The applicant was informed that her retrenchment would be discussed and some time later a meeting was held. In this meeting, which was also attended by the applicant's

supervisor and who in fact gave no input into the meeting, the applicant was informed that she was to be retrenched. According to the applicant the meeting was five minutes in duration. Mrs Christoph claimed that it was longer and lasted a half an hour.

5.It was undisputed that during the applicant's maternity leave, a restructuring exercise took place at the respondent's company causing some 20 employees to leave the respondent's head office. The applicant, according to Mrs Christoph, was the cleaner with the shortest service record and therefore she was the one out of the three cleaners that was chosen for retrenchment. In other words her position had become redundant.

6.Mrs Christoph felt that a proper consultation took place with the applicant which is disputed by the applicant. What is common cause, is that during this meeting the applicant signed an agreement which was brought to the meeting and prepared in advance by Mrs Christoph. The applicant signed this agreement. The relevant portion of the agreement states:

"2. SETTLEMENT

2.1 This settlement is entered into in full and final settlement of all claims of any nature whatsoever arising from the termination of the employment of the employee with the company;

2.2 It is further agreed that the procedural requirement in terms of section 189 of the Labour Relations Act and all procedural requirements pertaining to operations defining termination (sic) have been fully complied with.

3. PAYMENT

3.1 The employee accepts the following in full and final settlement :-

Payment in lieu of the four weeks notice pay;

All outstanding leave and bonus pay;

Severance pay for one week for every year of service;

An *ex gratia* payment of R1 000,00.

3.2 The employee will not be required to work through her notice period."

7.The applicant, shortly after having signed this agreement, went home because of the emotional state she was in. This fact was common cause.

8.Clearly, there was no consultation whatsoever as envisaged by section 189 of the Labour Relations Act 66 of 1995 ("the Act"). None of the sections were complied with. The applicant was faced with a *fait accompli.* The respondent contends that the dismissal was not procedurally unfair since the agreement which was signed, justified the absence of the process envisaged by Section 189 of the act.

9.Mrs Christoph testified that the applicant knew full well what she was signing. The applicant said that she was coerced into signing the agreement. This Mrs Christoph disputes. What is however common cause, is that the applicant was at best induced into signing the agreement by virtue of the fact that she would receive the *ex gratia* payment of R1 000,00 referred to in paragraph 2.1.4 of the agreement, if she signed the agreement which purports to be voluntary retrenchment agreement. Mrs Christoph confirmed that had she not signed the agreement and a normal retrenchment process would have followed, she would have not received this amount.

10.The question I thus have to decide is whether the agreement justifies the absence of a procedure in terms of section 189 of the Act and whether the dismissal, despite the agreement, was nonetheless unfair, procedurally.

11.Insofar as the facts of this matter is concerned, it is important to note that the applicant is not conversant with the labour law. Neither was Mrs Christoph, if regard is had to the manner in which she dealt with the matter.

12.In my view it was unfair to present the applicant with a *fait accompli* and

such an agreement. It is also questionable, whether an employee who is unrepresented at a meeting, could be required to sign away-so to speak his or her rights conferred by the Labour Relations Act.

13.In *Baudach v United Tobacco Company 2000 (4) SA 436 (A)* this point was illustrated. The appellant in that matter was informed that his post as manager had become redundant. He was offered a settlement package and told that should he not accept it the usual retrenchment procedures will apply. As the package was financially more attractive than retrenchment, the appellant accepted it. He subsequently brought an application in the Industrial Court alleging that the dismissal was both substantively and procedurally unfair. The respondent contended that the matter had been settled by agreement between the parties and the appellant was thereby barred from bringing the application. It was common cause that the appellant's position had not become redundant and had been filled by others after his employment had been terminated. The Supreme Court of Appeals found that the respondent could not raise the settlement agreement as a defence. The court accepted the appellant's submission that he had accepted an offer of settlement on the respondent's intentional misrepresentation that the post had become redundant. This entitled him to resile from the agreement, and to have the amount he had already received taken into account in the calculation of compensation. It was held that the respondent's intentional misrepresentation clearly induced the applicant to accept the settlement offer and was *per se* an unfair labour practice. The appellant thus succeeded in his appeal and the respondent was ordered to pay compensation.

14.In this matter there was no evidence of intentional misrepresentation on the part of the respondent. However, there was a factor which had induced the applicant to sign in circumstances where she would not have

signed otherwise. In this regard it is also important to refer to the matter of *Becker v Nationwide Airlines (Pty) Ltd [1998] 2 139*, where Landman J held that where an agreement such as the one *in casu* is reached as a form of settling a retrenchment, the agreement must be preceded by consultation. In this matter, there was no consultation during which the parties participated in a process which could have resulted in a final agreement. In this regard there is also the useful article **"Out of Court Settlement of Labour Disputes"** by Adolph Landman and Sandro Milo. *Comtemporary Labour Law, Volume 10, No 6 (January 2001)* which deals fully with the law on such agreements.

15. What also further distinguishes this matter from the *Baudach* matter, is the fact that the applicant was presented with a *fait accompli.* Mrs Christoph said quite clearly that further consultations as envisaged by the Act (Section 189) would not have made any difference as a decision had already been taken.

16. In such circumstances one can accept that the applicant was induced into signing the agreement against her better judgment and that the dismissal was therefore procedurally unfair.

17. The next question to decide is whether there is any merit in the applicants legal representative's contention that the dismissal was also substantively unfair due to the suffering of the applicant. Unfortunately, compensation for the suffering of dismissal employees, as damage is unfortunately not competent.

18. The commercial rationale or the reason which formed the basis of the retrenchment advanced by the respondent was undisputed. Therefore the reason to retrench the applicant was not an unfair one.

19. The applicant was one of several employees who had been retrenched in a retrenchment excercise. There was no evidence presented on behalf of the

applicant to justify a decision that this matter was also substantively unfair. Factually that was simply not the case.

20.The applicant has asked to be reinstated.

21.In terms of section 193 of the Act, if a dismissal was only procedurally unfair, the employee is not entitled to reinstatement, but only to compensation limited to a period of 12 months' remuneration.

22.In the circumstances I make the following order:

1. The respondent is to pay the applicant compensation equal to 12 months remuneration calculated at the rate of R793,80 per week.

2.The respondent is to pay the applicants costs.

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