IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No:

C163/2000

In the matter between:

ROGER HENDRICKS Applicant

and

SOUTH AFRICAN AIRWAYS

Respondent

JUDGMENT

WAGLAY J:

[1] The Applicant commenced employment with the Respondent in February 1994 as a flight attendant. He was promoted to the position of onboard manager in 1997. In 1998, the title of the position changed to 'crew service manager' ("CSM") and the position became land based.

This position was a low-level management position. The Applicant was at all times based in Cape Town.

[2] Around the middle of 1998, one Coleman Andrews was brought into the Respondent with a view of alleviating the financial and structural difficulties being experienced throughout the organization. Under his leadership, a strategy was devised aimed at the more efficient utilization of resources and staff. This was termed "the strategy for winning". The senior management of the Respondent undertook various "roadshows" throughout the country in order to convey the need for restructuring to the employees.

[3] As an illustration of good faith to the various representative trade unions operating within the Respondent, senior management determined that any

job losses arising from the said restructuring would be approached from a "top-down" basis- i.e. managers were to be culled before the lower echelons of labour within the organization.

[4] The various trade unions operating within the Respondent do not have access to management levels. As a result, managers, including the Applicant in this matter, did not enjoy representation in the consultation process leading up to the retrenchments, nor were they represented by a workplace forum or any other similar structure.

[5] The applicant was one of 22 CSM's within the Respondent's organization. The respondent held two meetings with these CSMS to discuss the restructuring of the organization. These meetings took place in Johannesburg on 5 and 12 February 1999.

[6] In the course of the meetings, it emerged that the proposed restructuring would result in the redundancy of the 22 positions and the creation of 16 "In flight Service Managers" positions ("IFSM"), 14 of which were to be located in Johannesburg and 2 in Cape Town. The 16 IFSM posts would be filled by CSM's, who were obliged to apply for the positions.

[7] On 19 February 1999, the CSM's were informed of the outcome of their applications for the new positions. The Applicant was informed that his application had been unsuccessful orally and in writing. This initiated a so-called redeployment period of two weeks, during which time the Applicant and Respondent were to "actively seek alternative employment within the organization". The date of the termination of the Applicant's employment was accordingly suspended pending the outcome of his search for alternative employment with and within the Respondent. The Applicant was on 19 February also placed on special leave and informed of the severance benefits due to him. If no alternative employment was secured Applicant's employment was to terminate on 31 March 1999.

[8] Despite the contents of the letter informing the Applicant of his termination date, the Applicant's redeployment period was extended to 15 April 1999. It appears from a letter to the Applicant of the same date that his services were to terminate on 15 April 1999 unless he had found alternative employment within the Respondent by then.

[9] However, by virtue of what appears to have been an administrative error on the part of the Respondent, the Applicant continued to be paid his full salary to the end of October 1999.

[10] From 15 April 1999, however despite being advised that his employment had been terminated (but receiving his full salary) Applicant continued in his effort to find alternative employment within the Respondent's organization. This effort culminated in Linda Gantsho ("Gantsho"), the Senior Manager: Planning, offering the Applicant the job of flight attendant, commencing on 1 June 1999. This position entailed a drastic cut in salary and status, as well as relocation to Johannesburg.

[11] According to Applicant when he reported for duty to take up this position he found that no arrangements had been made for him to commence in that position. His calls to Gantsho he said were not returned. Gantsho's evidence on the other hand was that she believed that the Applicant had already commenced employment in the position she had offered him.

[12] In early August 1999, the Applicant flew to London for a two-week holiday, using a 'rebate' ticket supplied by the Respondent. It was as at this time

that it came to Gantsho's attention that the Applicant had "not taken up the position" as a flight attendant, but was still drawing his full salary for his previous position as CSM.

[13] On the afternoon of 3 August 1999 Gantsho sent a telegram to Applicant's residential address requiring him to report for duty within 48 hours, failing which his services with the Respondent would be terminated.

[14] On receiving the news of the telegram the Applicant returned to Cape Town, cutting short his holiday in London. He arrived in Cape Town on Sunday, 8 August 1999.

[15] Applicant states that he reported for duty on his arrival but there was no one present in a position of authority to whom he could report. In the week following his arrival or on 11 August 1999, the Applicant telephoned Gantsho and their conversation ended with the Applicant being given an extension of four days to report for duty.

[16] Also on 11 August 1999 Applicant's Attorneys wrote a letter informing the Respondent that the Applicant would be prepared to accept the

position of flight attendant on a temporary basis on the understanding that his terms and conditions of employment would continue unaltered from those enjoyed as a CSM.

[17] On 16 August 1999 Gantsho sent an e-mail to the Applicant which recorded the following:

"Our telephonic conversation Wednesday 11 August refers: You indicated that you reported for duty on 7 August 1999 yet on further investigations I established that you only reported for duty on 11 August. My discussion with you was therefore based on your misrepresentation. Accordingly we have proceeded to terminate your services with effect from 7 August 1999.

…"

[18] In response to the above e-mail Applicants attorneys wrote to the Respondent curiously requesting clarity on whether the Applicant was dismissed and if so for what reason. To this letter Respondent on 18 August 1999 replied stating that the Applicant's services were terminated

on “7 August 1999 due to operational requirements” and that since the Applicant had failed to accept the alternative employment which was offered to him applicant was not entitled to any severance benefits.

[19] On the pleadings it is common cause that the Applicant was dismissed on 7 August 1999 and that at the time of his dismissal, according to the Respondent,Applicant was a “redundant crew manager”. There is no allegation on the pleadings that the Applicant was dismissed more than once and since only employees can be dismissed it must be that the Applicant, despite being advised that his services were terminated in April 1999, continued to be employed by the Respondent until the date of his dismissal on 7 August 1999. In effect, however, the reasons for Applicant’s dismissal must primarily be sought from the events prior to 19 February, when his dismissal for operational reasons was suspended pending his “redeployment period”. In other words, willingly or unwillingly, the effect of Respondent’s actions operated to extend the Applicant’s special leave/redeployment period until 7 August 1999 when he was finally dismissed.

[20] The Applicant contends that his dismissal was both substantively and procedurally unfair and seeks reinstatement.

[21] Considering firstlly the procedural requirements for effecting dismissals based on operational requirements, these are set out in s189 of the Labour Relations Act 66 of 1995 ("the LRA").

[22] s189(3) of the LRA (as it then stood) provided that:

" (3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to-

(a) the reasons for the proposed *dismissals*

(b) the alternatives that the employer considered before proposing the *dismissals* and the reasons for rejecting each of those alternatives;

(c) the number of *employees* likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which *employees* to dismiss;

(e) the time when, or the period during which the *dismissals* are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the *employees* likely

to be dismissed; and

(h) the possibility of the future re-employment of the *employees* who are dismissed."

[23] The above information must be provided before the decision to retrench an employee is taken, in order to give affected employee(s) a chance to meaningfully contribute to the process.

[24] It is clear that the requirements of s189 (3) were not met in the present matter. Virtually no written information was given to the CSM's prior to the decision to retrench was taken. Although various slides were shown during the meetings held on 5 and 12 February the information set out therein was not handed to the employees and did not come close to satisfying the requirements of s189(3).

[25] On the Respondent's version, there were two consultation meetings with affected employees. The Respondent has not established that the CSM's would have known that retrenchments were imminent after the first meeting on 5 February, as it is not clear which slides were shown at this

meeting. The duration of the first meeting was a maximum of 20 minutes - it is therefore possible that, as Applicant testified, he only found out that retrenchments were imminent at the second meeting on 12 February, at which meeting the CSM's were told that their positions had been made redundant and that they had to apply for the new IFSM positions. Even if the CSM's were informed that they faced possible retrenchment at this first meeting it would have made no difference as the information that the CSM post were made redundant was presented as a fait accompli, and not in the spirit of consultation as contemplated by the LRA.

[26] The Respondent's witnesses admitted that a more robust approach was taken by it in relation to the CSMs, the rationale being that, as managerial employees they would be more aware of the structural changes envisaged. While I accept that in the case of managerial employees, the requirement as set out in s189 of the LRA need not be as assiduously observed as in the case of lower-level employees [see Peach & Hatting Heritage (Pty) Ltd v Neethling (2001) 22 *ILJ* 1349 (LAC)] this proposition cannot extend in their application to the current situation, where the CSMs were low-level managerial employees who enjoyed no substantial

influence in the structural decision-making machinery of the Respondent. The CSMs were further unrepresented by a trade union or any other body. The "top down" approach of tackling retrenchment of managerial staff before that of unionized workforce further rendered the position of the Applicant and other CSMs vulnerable.

[27] As stated earlier the CSMs were presented at the meeting in February with a fait accompli - a firm decision had already been taken that 6 CSMs will not be accommodated in the newly created posts of IFSM. The overall impression created by the evidence led was that the employees (CSMs) each acting in their individual capacities could do nothing to sway this firm stance taken by the Respondent. The only real opportunity given to the CSMs to contribute to the decision-making process was an open-ended offer to approach senior

management with any questions at and after the conclusion of the 5 February meeting. Such an approach fails to take into account the natural shock and distress that must have been felt by the CSMs. The CSMs were not represented by any body or person, and were unempowered in the sense of having no collective voice with which to challenge the firm proposals put forward by the Respondent. Even if I accept that the

consultation process began on 5 February the decision as to who to retrench was taken swiftly and in the absence of the necessary joint consensus-seeking process as required by the LRA [see Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 *ILJ* 89 (LAC)].

[28] According to the Respondents the whole process was completed within two weeks. Viewed in isolation a swift process is not sufficient to warrant an inference of unfairness. However, given the paucity of opportunities to contribute to the process, the fact that a total of two consultation meetings were held - with Applicant being requested to fly to Johannesburg to that meetings - and the complete failure of the Respondent to provide any of the written information required by the LRA, the only conclusion that can be drawn is that the Respondent failed to follow a fair procedure in effecting the retrenchment as required by the LRA.

[29] In addition, the Respondents' failure to consider the Applicant for alternative positions within the organization, despite their availability,

or to assist the Applicant by supplying him with details of suitable vacancies, adds to the general unfairness of the process adopted by the

Respondent.

[30] In the letter informing the Applicant that he had not been successful in his application for the new position of IFSM, the Respondent stated that, during the Applicant's redeployment period "South African Airways and the employee will actively seek alternative employment within the organization, which if successful, will avoid retrenchment".

[31] From the evidence presented, in April/May 1999 Respondent sought to fill six IFSM positions, in addition, the death of one of the IFSM's created a further vacancy. The Respondent failed to inform the Applicant that these positions were available, despite its clear undertaking to assist the Applicant in finding alternatives in order to avoid the dismissal which dismissal only took effect in August 1999. Notwithstanding Respondent's failure to advise the Applicant of these vacancies, the Applicant did apply for some of them but was unsuccessful in securing the position. From the Respondent's evidence it emerged that the Applicant would simply not have been considered for these vacancies for reasons relating to his apparent unsuitability therefore. Apart from the impact of this on substantive fairness, which I shall deal with later, the Respondent's breach of its own undertaking to assist the Applicant during the period from 19

February 1999 must be seen to add to the general unfairness of the process adopted by it.

[32] Further, the CSMs affected were not informed of their right to appeal against the decision to retrench them. This right of appeal was, however, advertised to lower levels of labour within the Respondent's organization.

[33] A final respect in which Applicant's dismissal can be found to be procedurally unfair relates to the duty of the employer to allow employees an opportunity to make representation where selection criteria based on merit are utilized as was done in this matter – see in this respect De Vries v Lanzerac (1993) 14 *ILJ* 1460 (LAC). In the present matter the selection criteria were based on the competence or suitability of the employees to fit into the IFSM position. However, the affected employees and the Applicant in particular were not given an opportunity to make representations regarding the results of the psychometric testing utilized to determine their competence and suitability.

[34] In the circumstances the dismissal of the Applicant was procedurally unfair.

[35] Turning to the issue of substantive fairness, in the supplementary pre-trial minute, the Applicant conceded that he did not dispute that in general there was a need to retrench. However, the Applicant continued to dispute that there was a need to retrench him. The Respondent was thus relieved of the burden of proving that the decision to retrench was commercially rational and justifiable.

[36] The remaining leg of the enquiry into substantive fairness pertains to the method employed by the Respondent in selecting the Applicant as a retrenchee. In this regard, the supplementary pre-trial minute on the one hand records that the Applicant does not dispute the selection criteria used by the Respondent nor that “someone else should have been selected for retrenchment instead of him” but disputes that there was a need to retrench him.

[37] I accept and Respondent has likewise based its case on the grounds that Applicant challenges his selection as a retrenchee and that he asserts that he should have been selected for the IFSM position in the place of one of his competitors.

[38] s189(7) of the LRA provides that:

" (7) The employer must select the *employees* to be dismissed according to section criteria-

(a) that have been agreed to by the consulting parties: or

(b) if no criteria have been agreed, criteria that are fair and objective."

[39] There has been no evidence that selection criteria were in this case agreed to by the parties or that the failure to agree on such criteria was occasioned due to some action or omission on the part of the applicant. It is therefore incumbent on the Respondent to prove that the selection criteria it used were fair and objective.

[40] The Respondent used selection criteria it termed "best competency fit", in terms of which the applicants for the newly created IFSM positions were graded and ranked according to their perceived competence and suitability for the positions.

[41] The criteria that informed the Respondent's decision as to who succeeded in the "best competency fit" test for the positions in question were:

(a) Curriculum Vitae;

(b) The Thomas Profile;

(c) Past Performance.

[42] From the Respondent's evidence it emerged that a large degree of reliance was placed on the psychometric test known as the Thomas Profile – this involved a written, multiple choice test which took the employee about 10 to 15 minutes to complete.

[43] The Respondent called an expert witness, one Schutte, to explain how the Thomas Profile operated. From his evidence it emerged that it was the best practice to combine the written, multiple choice test with an interview. In fact, this was clearly indicated on the results of the various tests conducted. The Respondent failed to carry out interviews with the CSMs in question in casu.

[44] It further emerged that a "job compatibility report" was an essential component of the process. No such job compatibility report was present at the time of drawing up employee profiles. Schutte also stated that the Thomas Profile "makes up only 25% of the decision making process." The evidence of the Respondent's other witnesses, however, indicates that far greater reliance was placed on the Thomas Profile. The decision-makers saw the Thomas Profile as the vital "objective" element of the selection

process.

[45] The further elements of the selection criteria appear to have been the preference of a single decision-maker, that of Oakley-Brown. Kekane the relevant Vice President of the Respondent conceded that he did not interfere or second-guess the decision of Oakley-Brown as to whom he (Oakley-Brown) wanted working in his team.

[46] The Respondent has therefore failed to show that the selection criteria used in selecting Applicant for retrenchment were fair and objective. The Thomas Profile was not utilized in accordance with best practice, as no interview was conducted and its significance was over estimated in the process. The remaining criteria relied upon were based on a discretion and that of one person – Oakley-Brown. For these reasons alone, the Applicant's dismissal can be said to be substantively unfair.

[47] In addition to the above, it is noted that the selection criteria employed by the Respondent introduced a strong element of "merit" into what remains a no-fault dismissal. The Respondent's witnesses alluded at times to the fact that the Applicant was not considered suitable for the new position of IFSM (which was substantially the same as the position of CSM). This is borne out by the fact that the Applicant was not seriously

considered suitable for any of the IFSM positions that arose subsequent to the decision that found him unsuitable to take up one of 16 IFSM positions prior to 19 February 1999. The fact the selection criteria employed had strong traces of “incompetence/incapacity” about them, adds further credence to the finding that the Respondent has failed to show that the Applicant was selected according to fair and objective criteria for reasons related to the operational requirements of the business.

[48] This then brings me to the relief I should grant. In National Union of Mineworkers of SA v Henred Freuhauf Trailers (Pty) Ltd 1995 (4) SA 456 (A) the Appellate Division held in interpreting the 1956 Labour Relations Act that:

“ Where an employee has been unfairly dismissed he suffers a wrong. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the status quo ante. It follows that it is incumbent on the Court when deciding what remedy is appropriate to consider whether, in the light of all the proved circumstances, there is a reason to refuse reinstatement.” At 462 I-3A.

[49] In the National Construction Building and Allied Workers Union v M F

Woodcraft (Pty) Ltd (1997) 18 *ILJ* 165 (LAC), the Court cited with approval the above dictum and concluded that the correct approach was to consider, once there is an unfair dismissal whether there is a valid reason to refuse reinstatement.

[50] s193(2) of the LRA has now codified the law by conferring a right on unfairly dismissed employees to be reinstated or re-employed, unless the dismissed employee does not wish to return to the employer, or where the "commissioner or the Labour Court" is satisfied that the resumption of the employment relationship would be intolerable or impractical.

[51] In the case of a dismissal based on operational requirements, s193 (3) grants the Labour Court an additional power to make "any order that it considers appropriate in the circumstance". However this is an additional power and does not detract from the right of the unfairly dismissed employee to be reinstated.

[52] The question to be determined is therefore whether the Respondent has advanced a tenable reason as to why the Applicant cannot be reinstated, in the sense that a continued (or resumed) relationship between the

Applicant and the Respondent would be intolerable or impractical.

[53] In this regard, the Respondent has advanced a number of reasons as to why a continued employment relationship would be intolerable or impracticable. These include;

(a) The Applicant's dishonest advancement of his case;

(b) The Applicant could have no honest belief that he was entitled to his salary from April onwards;

(c) The Applicant never had any intention of taking up the position of flight attendant offered to him as set out in his pleadings;

(d) The Applicant is distrustful and has conspiratorial delusions about the Respondent.

[54] Respondent further advanced the argument that, from the Respondent's point of view:

(a) The Applicant's reinstatement would put him in a position where he continues to work with those who have serious difficulties with him;

(b) Respondent regards the Applicant as having been opportunistic and deceitful in the advancing of his case.

[55] The above submissions have varying degrees of relevance and

veracity:

(i) Paragraph 17 of Applicant's Statement of Case states that the Applicant would have reported for duty but the fact that he did not know where to report. Under cross-examination, the Applicant conceded that it was never his intention to take up the position as flight attendant. This is not however, in itself sufficient to suggest that the Applicant has advanced his case in a dishonest manner.

(ii) The Applicant received his full CSM salary from the date of being put on special leave (19 February) up until the end of October. This was despite the fact that his termination date would be 31 March (initially) and then 15 April 1999. It is evident that the payment of the Applicant's salary arose as a result of an administrative error. The Respondent had indicated in writing to the Applicant as to when his employment would terminate, but he continued to be paid long after this date. The Applicant testified that he contacted the salary department to clear the matter, but that the salary department staff could not help him as they had not received instructions from senior management to stop the payments. The Applicant thereafter simply sat back and happily accepted the salary payments month after month. This I believe has a deleterious impact on the trust relationship between the Applicant and the

Respondent. (The fact that Applicant's dismissal has only said to take place in August is irrelevant for the purposes hereof).

(iii) On the whole, the Applicant consistently expressed his desire for reinstatement. The Respondent, however, led a number of witnesses who indicated that it would not be possible for them to work with the Applicant should he be reinstated. When confronted with this testimony Applicant reacted by implying that the evidence of the Respondent's witnesses might have been tailored to suit its case. While the Applicant's attitude in this respect – that Respondent presented untruths to this Court - is by no means conclusive proof that a continued relationship with the Respondent is impossible, it does lend weight to this proposition.

(iv) When an unfair dismissals has taken place, the question of doing justice to the dismissed employee is crucial but this not mean that the reasons advanced by the Respondent against such relief is of no significance. In this matter several of Respondent's witness testified that they would have serious difficulties in working with the Applicant should he be reinstated. The length of time since the Applicant ceased working for the Respondent is a further consideration, albeit of very little value, that should be taken into account militating against reinstatement.

[56] The above factors viewed together, lead to the overall conclusion that there are cogent and sound indication that a continued working

relationship between the Applicant and the Respondent would be both intolerable and impractical.

[57] I am however satisfied that this is a matter in which compensation for the unfair dismissal should be awarded and that the compensation should be equal to the salary Applicant would have earned over a 12 month period at the rate of the last salary he earned in Respondent's employ. i.e. the Applicant should be compensated in the sum of R155 000,00.

[58] With regard to costs I see no reason in law or equity why costs should not follow the result.

[59] In the result I make the following order:

(1) The dismissal of the Applicant was substantively and procedurally unfair;

(2) Respondent must pay compensation to the Applicant in the sum of R155 000-00.

(3) Respondent must pay the costs of this action.

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WAGLAY J

Date of Judgment: 21 October 2002

For the Applicant: Adv L. Bozalek instructed by Cheadle, Thompson & Haysom Inc.

the Respondent: Adv S.C. Kirk-Cohen instructed by Hofmeyr Herbstein & Gihwala Inc.