

Sneller Verbatim/ssl

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

BRAAMFONTEIN

CASE NO: J1107/00

2002-02-04

In the matter between

DAVID LONG

Applicant

and

HR CONNECT (PTY) LTD

Respondent

—

J U D G M E N T

Delivered on 4 February 2002

—

REVELAS J:

1. The applicant, Mr David Long, a former employee of the respondent, claims that he was unfairly dismissed by the respondent. The applicant's case is that the dismissal constituted an automatically unfair dismissal in that he was dismissed by the respondent because he refused to accept a unilateral change to his terms and

conditions of employment, being that he would no longer be paid a salary but only commission whereas in the past he had earned a salary over and above commission.

2. The applicant seeks the following relief:

1. 1. Compensation equal to 24 months' remuneration at the rate of R16 000,00 per month, alternatively an amount equal to the remuneration of R16 000,00 per month for the period between 17 September 1999 and the date of this hearing, subject to the maximum of 24 months.

2. The applicant's salary for September 1999.

3. Outstanding commission in the amount of R45 515,80.

4. Reimbursement of expenses in the amount of R2 463,03, and,

5. The applicant's September 1999 expenses in the amount of R1 963,15.

3. The respondent's case is that at the stage when the applicant claimed he was dismissed, i.e. 17 September 1999, he was no longer employed by the respondent as his employment contract had lapsed the previous month and inasmuch as he was still with the respondent in September 1999 he left the respondent's employ of his own free will. The respondent's case is further that it had twice made the applicant a firm written offer of

reinstatement which the applicant unreasonably had rejected.

1. 4. The parties entered into an employment agreement during 1998 after the applicant had responded to an advertisement placed by the respondent which conducts business as a personnel recruitment agency and earns its income from placement in certain industries. After some discussions between the applicant and Ms Anne Fresen of the respondent, it was felt that the applicant was overqualified for the post as advertised and that the respondent should rather employ the applicant.
5. Ms Fresen held 40 per cent of the shares in the respondent who first was a close corporation and then became a company. Ms Fresen's brother owns the remaining 60 per cent of the shares.
6. The respondent is a small business and Ms Fresen wished to expand the business of the respondent and the applicant was greatly skilled in computers. He also had other qualities such as administrative skills which rendered him suitable to become the respondent's general manager which he also did become. According to Ms Fresen the applicant's strong point was his administrative skills. The applicant also wanted to develop the company and become a major shareholder in

it after leaving the corporate world.

7. On 31 August 1998 the parties entered into a fixed term employment agreement which would expire on 31 August 1999, the following year. The agreement also contained a share option agreement and an undertaking that the respondent would convert to a private company with limited liability. In terms of the agreement if the applicant was still an employee on 1 August 1999, that is the following year, he would be given shares in the company subject to certain provisions being that certain financial targets, (that is income earned by the respondent), should be met.
1. 8. Except for two staff members all the other recruitment employees of the respondent, (there were approximately seven including the applicant), were paid salaries over and above a commission, based on certain percentages of the respondent's general income and not on specific placements.
9. The applicant was appointed at a salary of R10 000,00 which in February 1999 was increased to R16 000,00 per month and he earned certain commissions based on certain fixed amounts which would be earned by the respondent.
10. According to the evidence by Ms Fresen supported by the evidence of Mr Barnes, the respondent's logistics

manager, it became apparent during May 1999 that the respondent was no longer doing so well financially and there was also a slump in the recruitment business. It was then decided to restructure the commission structure in terms of which the respondent's employees were remunerated. The applicant was tasked to find a solution for this problem.

11. Consequently, during August 1999 the applicant put forward a revised commission scheme which he reduced to writing and wherein it was stated that the reason for the revision was because the current structure was not yielding performance as it was lacking in incentives and recruitment, the lifeline of the respondent, was not 'focused.'

1. 12. The new commission structure which is a departure of the former structure in terms of which employees were placed in different categories which earned certain percentages according to certain forms of income.

13. It is common cause between the parties that during and prior to August 1999 it became quite clear to the parties that the targets set out in the share option agreement between the applicant and the respondent, would not be met and that the agreement was about to expire at the end of August and that the applicant, as

a result would not be able to receive any shares.

14. According to Ms Fresen (supported by Mr Barnes), the respondent had a financial crisis on its hands. This was not seriously challenged by the applicant. The respondent was not generating sufficient income to pay salaries over and above commission. Crisis meetings were held. Ms Fresen stated that at a meeting attended by her brother and the applicant it was decided that employees would be paid on a commission basis only and that salaries would be done away with. The applicant denies that he ever agreed to such a situation. It is hardly likely that he would have, considering the events followed and Ms Fresen's evidence that the applicant had complained previously that he simply did not earn enough with respondent in terms of commission and salary and had indicated that he may have to leave the respondent. However, I believe Mrs Fresen that there was such a meeting. It is also common cause that the applicant's *curriculum vitae* was advertised.

1. 15. August 31 1999 came and went. The agreement between the parties had lapsed and the parties did not enter into any new written agreement. Ms Fresen testified that she permitted the applicant to stay on because, as she put it, she would never put an employee out on the street. She stated that she and the

applicant had agreed that he could 'stay on' until he had found alternative employment.

16. It was in dispute that the applicant wanted to leave, and on his version, he was still interested in becoming a major shareholder and had hoped that matters would improve at the respondent. It is common cause that the applicant had asked for 'something in writing' after his contract had lapsed. Ms Fresen said that she informed the applicant that a new contract was out of the question because of the respondent's financial position. The applicant denied that this was her response. His evidence was that he waited but nothing in writing 'was forthcoming.'
17. It was argued on behalf of the applicant that there was at the very least a tacit agreement that the contract was extended in its exact terms. In my view this cannot be. The specific targets, and dates for such targets, were not achieved and the share option scheme if it were to be continued, would compel the parties to return back to the drawing board with less optimism due to the financial situation at the time.
1. 18. In annexure A of the agreement however, the remuneration structure was set out. In my view there was no reason why this should not have continued after August 1999. There was no change in his obligations.

The applicant still performed the same duties and at that stage the applicant was not pertinently advised that he would continue his duties at a lower salary.

19. Insofar as his remuneration is concerned, the terms and conditions as contained in the lapsed contract, still applied.
20. The financial crisis in the respondent increased. Ms Fresen stated that it was necessary for a 'draconian' action. On 15 September 1999 she announced that recruitment staff would no longer be paid salaries and only commission of 25 per cent. Two recruitment staff members, Mrs DeSchene and Mrs Duminy, (the latter was the applicant's teammate and "right-hand person") were clearly traumatised by this announcement.
21. They were told either to accept or leave the respondent's employ. An offer of retrenchment was also offered as an option. The applicant was similarly informed of this decision.
22. Mr Barnes testified that he was also told of this new development but that he accepted the situation. He stated that Ms Fresen was a generous employer who would always pay more if there was more income generated. He simply hoped that the current low income period experienced by the respondent would pass and that matters would improve.

1. 23. As to whether the applicant's services were terminated by the respondent or not is the next question. The applicant bears the onus to prove the dismissal. Ms Fresen's version of the termination of the applicant's services is that the applicant left of his own free will because he did not want to accept working without a salary only on the commission that was offered by her and he informed her accordingly. He allegedly stated that he would like to leave as soon as he was paid what she owed him. According to Ms Fresen her response was that she did not owe him any money and that thereafter he chose to leave. She then asked him to hand over the keys of his desk.
24. The applicant's version is that on 15 September he was advised of Ms Fresen's decision regarding salary and commission on a take-it-or-leave-it basis and he was just as shocked at the announcement as the other employees. He took time to consider the position and advised Ms Fresen on 17 September 1999 that he could not accept this change in his remuneration whereupon he was told to empty his desk and hand over his keys. He said that he was also frog marched from the respondent's premises. It is common cause that Ms Fresen gave Mr Barnes an instruction to accompany the applicant to his office which he then did. She also

went to the applicant's office almost immediately thereafter.

1. 25. If the applicant decided to leave of his own free will it is difficult to understand why it was necessary for Mr Barnes to follow the applicant who was after all, the general manager, to his office and to oversee him clearing his desk and to accompany to him to his vehicle upon his departure. The applicant's version is more probable on this aspect. Clearly the applicant's departure was not amicable. The applicant also said that he would have written a resignation letter if he wanted to resign. This scenario is certainly consistent with the way the applicant had done things. He was a meticulous person, even on the version of Ms Fresen, and there was evidence that he reduced "everything to writing".
26. On the other hand, both Mr Barnes and Ms Fresen testified that while the applicant was clearing his desk and Ms Fresen came to the applicant's office and advised him of two big placement contracts which the respondent had secured and which could bring in quite some commission for the applicant, in the region of R70 000,00 during September, but the applicant refused to accept this offer. This scenario is not entirely consistent with one where the employer had just

terminated the employee's services. It appears that Mrs Fesen tried to persuade the applicant to stay. But then on the other hand she could also have been remorseful about dismissing the applicant in an unguarded moment.

1. 27. At the very least there was a constructive dismissal. On all versions, the applicant was faced with a Hobson's choice. Either he accepted the new situation or he could leave, and that was unfair. Both parties would have been angry or upset in the circumstances. I believe that is why the applicant was accompanied to his vehicle under Mr Barnes' supervision. That was also the appropriate way to treat the general manager.
28. The applicant had also instructed attorneys in this matter, who sent two letters on 17 September 1999 to the respondent. It is necessary for purposes of understanding this judgment to quote fully from the relevant parts of these letters. The first letter was faxed to the respondent and placed by the applicant on Ms Fresen's desk. She apparently had not read this letter before the second letter arrived and prior to the services of the applicant were terminated:

"1. On 15 September your Anne Fresen called the staff together and indicated to all recruitment staff that with immediate

effect all recruitment staff would be paid on a commission basis only.

- 2. Our client has not accepted the unilateral and material alteration of the terms and conditions of his employment as a result of which refusal you have indicated to our client that unless he accepts the unilateral alteration, you will proceed to secure his dismissal.**
- 3. Your Anne Fresen has indicated to our client that he has to elect either to accept or reject the unilateral alteration and advise his election today, 17 September 1999.**

We confirm that:

- (a) Our client does not accept the unilateral and material alteration of the terms and conditions of employment.**
- (b) Our client will refer this dispute to the CCMA immediately and simultaneously with this letter you will receive our client's referral, an LRA form 1.11, to the CCMA.**
- (c) Your attention is drawn to our client's insistence that you desist from unilaterally implementing the proposed changes to the terms and conditions of our client's employment.**
- (d) Should you proceed with your stated intention to secure our client's dismissal such dismissal will be regarded by our client as an automatically unfair dismissal and shall be vigorously opposed.**
- (e) Our client requires an unequivocal undertaking in writing from you to restore the *status quo* by no later than the close of**

business today, failing which our instructions are to pursue with vigour the referral of the dispute to the CCMA."

29. Later in the day another fax was sent by the attorneys of record of the applicant to the respondent's Ms Fresen:

"1. You this morning, 17 September 1999, instructed our client to return his keys to the offices and leave immediately.

2. You instructed our client to complete the placement he is currently working on with SPL and if successfully completed you would effect payment to our client of 50 per cent of the commission due in respect of such placement.

Having regard to the foregoing, we now have received instructions to refer the automatically unfair dismissal of our client to the CCMA and we have instructions to proceed to enforce our client's right in this regard with vigour."

30. The attorneys conclude the letter by claiming outstanding commission and the applicant's notice pay.

1. 31. Ms Fresen testified that she did not read either of these two letters until much later. As stated herein before the applicant's services were terminated after the first letter had been faxed and this is supported by the contents of the second fax.

32. Ms Fresen responded to these letters in a rather aggressive letter to the applicant's attorneys. This letter also needs to be quoted in full for an

understanding of this judgment:

"This letter is written without prejudice to our rights and with a view to setting out certain facts and bringing the matter to conclusion:

- 1. David Long has been counselled many times and on an ongoing basis both formally and informally since May 1999 with specific regard to nonperformance and poor performance. He is fully aware of the extensive details of this.**
- 2. As a result of David Long's noncompliance to fulfil a direct and specific instruction given at our strategic planning meeting on 27 August 1999 by both the directors of HR Connect and then failing to correct this, we made an offer to David Long whereby he could have earned a considerable amount of commission. (Possibly in excess of a hundred thousand rand or more over the next two or three months) the details with which he is very familiar and aware of the earning potential. Mr Long rejected (illegible) We also offered to assist him to find a new career. This negotiation has been going on for some time.**
- 3. David Long was twice offered the opportunity to choose a full disciplinary hearing on 15 and 16 September 1999 but instead decided on the current legal action.**
- 4. We did not dismiss David Long, he chose to leave, and it was therefore not possible for us to follow any other procedures.**
- 5. Leave pay, if appropriate after doing the necessary calculations and a certificate of service shall be forwarded in**

due course. Mr Long has never handed his 'blue card' to us.

- 6. Salary due for September will be calculated and forwarded in due course when all expenses can be reconciled. (David Long currently has an executive loan which needs to be offset. This was a special privilege.) It needs to be specifically noted that it was never the intention of Mr Long or HR Connect that he be 'just an employee.' We have a contract indicating that he was to have been a shareholder."**

33. Subsequently and on the advice of her attorney, Ms Fresen made the two offers of reinstatement through her attorney of record which were rejected on the basis that there was no offer of any payment or to restore the *status quo* accompanied these offers.

34. It also argued that in the light of the contents of the letter which was a disingenuous attempt to build up a false case against the applicant, that the applicant's refusal to accept the offer of reinstatement was justified and reasonable.

35. The fact that no payment was offered in addition to the reinstatement does not take the matter any further. It was not the end of the month yet. Ms Fresen said in her first letter that payments would be made as soon as expenses could be reconciled.

1. 36. The contents of the letter calls for some examination. The respondent attempted to persuade me

to rule that the letter was inadmissible as evidence because it was written 'without prejudice.' I admitted the letter as evidence because it was clearly not a letter of compromise but a recording of the respondent's case at that stage.

37. Ms Fresen stated that it was untrue that she had invited the applicant twice to a disciplinary hearing on 15 and 16 September 1999. Initially it seems to me to have been a blatant and calculating lie on her part. However, the applicant in his statement of case pleaded that he was threatened by Ms Fresen with a disciplinary hearing which gives credence to his version that he was dismissed, but on the other hand it diminishes the initial effect of Ms Fresen's letter on this aspect.

38. The letter does not detract from her credibility as I have first indicated when she led evidence and during argument. She had clearly acted in anger. She stated that her anger was triggered off by the fact that the applicant was her friend at one stage and then instructed attorneys.

39. The respondent's attorney argued that the letter must be judged in the light of the fact that Ms Fresen was a layperson and reacted like 'a wounded animal' that was hurt.

1. 40. I am not able to judge the letter in any such a

light. The letter was a very deliberate letter, calculated to represent a situation favouring only the respondent. I cannot question Ms Fresen's evidence that she believed that the applicant's managing of the business was a contributing factor to the financial decline of the respondent. I am unable find that he was entirely to blame for the situation, but he was the general manager.

41. On her own version, Ms Fresen could not afford to pay the applicant his salary and commission for September. Given all these factors and other factors, a simple offer of reinstatement could not rectify the wrong being done to the applicant. Furthermore, I cannot criticise the applicant in view of the misrepresentation of the situation by Ms Fresen in her letter, for rejecting the offer of reinstatement. Ms Fresen had no reason to feel like a wounded animal. The applicant was entitled to instruct attorneys in this matter.

42. I do agree with the respondent's attorney that Ms Fresen's letter, or her so-called 'mistake' seen in the light of the offer of reinstatement does not warrant compensation equal to 24 months' compensation. The applicant's counsel also did not insist on such an amount for compensation.

43. The applicant was treated unfairly but I have to take into account that the applicant found new employment at a higher salary since November 1999. He was thus out of work for two months, for that length of time. Had he accepted the offer of reinstatement, he would have earned a lesser income.

1. 44. The applicant was employed as a manager. The respondent had employed him partly, to improve the income of the respondent and yet the income of the respondent declined over a period of some months. Managerial employees, unlike blue collar employees, are paid to take risks. If matters had been different, the applicant would have owned 50 per cent of the respondent at this point. Even though he was entitled to reject the offer of reinstatement given the circumstances, it may have been wiser for him to return to the company to negotiate some form of financial settlement which he did not do. I make this comment with due regard to the letters addressed to the respondent's attorneys requesting certain payments. The applicant had to litigate to be paid his salary for September.

45. In all the circumstances I make the following order:

1. The termination of the applicant's services constituted an automatically unfair dismissal.

2. The respondent is to pay the applicant compensation in an amount equal to three months' remuneration at a rate of R16 000,00 per month.
3. The respondent shall pay the commission to the applicant for the month of September 1999 as well as disbursements for September 1999 as set out in the pretrial minute.
4. The respondent is to pay the applicant's costs on the scale as between party and party.

—

E. Revelas