



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

Case no: C576/12

In the matter between:

JOHANNA BOUWER HEYNS

Applicant

and

CARE CROSS HEALTH PROPRIETARY LIMITED

Respondent

Date heard: 18-21 November 2013

Date delivered: 15 April 2014

Summary: Unfair retrenchment claim

JUDGMENT

Rabkin-Naicker J

- [1] Johanna Bouwer Heyns' (Heyns) employment with the respondent company (the company) ended on the 10 May 2012. She was employed as a General Practitioner Network Administrator on the 1 October 2007. She was subsequently promoted to the position of Client Relationship Manager ("CRM"), a position she held until the termination of her employment. Heyns claimed that she was unfairly retrenched and in the alternative that her

dismissal was automatically unfair. The latter claim was not pursued in these proceedings.

Evidence before court

- [2] The Human Resources Manager of the company Renee Niske (Niske) testified that on 17 February 2012, Heyns was notified in writing that the company intended restructuring the Client Management Division and envisaged retrenching one person. The letter headed "section 189(3) Notice of intention to retrench" cited two reasons for the need to restructure. These were the need to reduce costs due to the loss of customers and the flattening of sales, and the need to up sell into current customers more aggressively. The letter was sent to all three CRMs. She stated that at that stage the company did not know which one of the three would need to go. The letter stated that the newly structured position of CRM would include the requirement of a valid driver's license which Heyns did not have.
- [3] An extensive letter signed by Heyns was written in response to the notification. The statement of case summarises the main points of the letter as follows:
- "...in her correspondence the Applicant requested information and stated, amongst others, that the Respondent's:
- 4.8.1 intended course of action was inconsistent with its recent conduct and discussions that had already taken place within the department;
- 4.8.2 stated course of action was not consistent with the needs and circumstances within the client management division;
- 4.8.3 criteria for the new so called client relationship manager post was inconsistent with the requirements of the post she had fulfilled successfully for a substantial period of time and in particular that the requirement of a driver license was not required nor had it impeded her performance."
- [4] Niske testified that she had drafted a letter in reply dated the 29 February 2012 which read in part as follows:

“No final decision to restructure has been taken by the company; we are currently busy consulting staff on the possible restructuring [process. You are referred to point number .2 in the Section 189(3) whereby the new envisaged structure is contemplated to be implemented as of 17 March 2012.....

The Company has not performed well financially. The foregoing has necessitated management reviewing all aspects of its business in order to improve revenue and to reduce costs. One of these measures is directed at ensuring that we do not carry excess staff numbers and eliminating spare capacity. In assessing our staff requirements under the financial constraints within which we operate, we have reviewed each position in the organization including the position which you currently fulfill. The company is considering whether your position can be viewed as “spare capacity” and would accordingly like to consult with you in that regard. The “spare capacity” is a direct result of the contemplated envisaged restructuring of the “Client Relationship Manager” position....

It has not been an operational requirement previously to have a valid driver's license. In the newly envisaged ‘Client Relationship Manager’ position it is an operational requirement for the employee to be in possession of a valid driver's license. This is not the only requirement. As stated in the Section 189(3) notice under point no.2, the company envisages the new Client Relationship Department to be in operation as of the 17 March 2012. By this date the two employees functioning in this position must have a valid driver's license.”

- [5] Consultation sessions were held on the 17 and 21 February 2012. Niske testified that the minutes of these were taken verbatim. Heyns stated at the first of these meetings that her situation is an automatic disqualification as she does not have a driver's license and that this is unfair labour practice, and that she would get her own legal advice. The minutes of the second meeting record that only Heyns indicated that she did not understand the skillset required of the restructured position. Regarding alternatives to retrenchment, Heyns stated she would like to deal with this in an individual consultation session. As to the selection criteria proposed which was set out in the 189 Notice as “skills, experience, knowledge and qualification” Heyns was the only

one of the three employees who did not state she agreed with these. Niske testified that the company agreed to individually consult with Heyns.

- [6] A further letter was written by Heyns to the company on 9 March 2012 which was written to the Managing Director. The letter included the following:

“As far as the role I have performed is concerned I would again reiterate my request for information as set out in pg2 , par 3 of my earlier letter. Ms Niske concedes that it was never an operational requirement that I require a driver’s license yet provides me with no answer or information in respect of the reasonable request to know:

1. The reasons for the inclusion of this criteria;
2. When the criteria necessary for the post was reconsidered, by whom and the reasons for deciding that it was necessary.

I have expressed concern that since this criterion places me at a disadvantage in this process that I am prepared to undertake the appropriate course and process to procure a license”.

- [7] On the 19 March 2012, in reply Niske wrote as follows:

“It is very much an operational requirement to have a valid driver’s license for the position of ‘Client Relationship Manager’ in the newly envisaged restructured position. The reason being Client Relationship Managers need to be independent in travelling to see their clients locally and elsewhere in South Africa.

Management has considered this to be an operational requirement for the position for the reasons advanced above.

The company welcomes your eagerness to be able to obtain your driver’s license. Please bear in mind that the company foresees the implementation of the newly ‘Client Relationship Manager’ position to be effective as of 19 March 2012, although due to our correspondence and your request for individual correspondence and/or consultation, this date has now moved to 31 March 2012 in order to accommodate your individual request Therefore you must have the valid driver’s license by this date.”

- [8] Following a lengthy further letter signed by Heyns to the company, questioning the rationale of the need to abolish one post, Niske testified that a letter was written to Heyns on the 29 March 2012 which read in part as follows:

“The company takes note of your submissions made in the letter. Currently, the company will not be responding in detail to your submissions made and the company reserves the right to respond to submissions made in your letter in the future and the company’s current failure to respond to your submission is in no way to be construed as agreement with your submissions.

Management has made the decision not to make one ‘Client Relationship Manager’ position redundant and going forward the company will retain all three ‘Client Relationship Managers’ positions.

The position of ‘Client Relationship Manager’ position is still envisaged to be restructured for the same reasons advanced to you in previous correspondence.”.

- [9] Niske testified that the decision was taken not to make one position redundant as part of the consultative process. On the 3 April 2012, Heyns was presented with a new employment contract and told to sign it, as were the other two employees. All three had previously been required to attend an interview. On 4 April 2012 Niske testified that she sent the following email to Heyns:

“You requested to have a copy of your interview results yesterday. As discussed with you, we will provide this to you. I will provide you with one from each panel member.....The interview results will give you some insight into where we have identified your skills gaps.

We did request you and your colleagues to hand in your signed contract, KPA profile and job profile by Thursday to appoint you into your new roles. I further confirm to you, since our meeting yesterday, that the company is willing to assist you in addressing your skills gaps over the next three months by means of external training and/or on the job training so that you can perform your duties. A meeting will be set up with you to discuss the necessary training you will need, and a schedule drawn up for you to receive the training.”

[10] Niske testified that Heyns had concerns re the sales component of the position. She stated that the other two employees had also been offered training and support for upskilling. She informed Heyns that she must sign the contract and KPA's. She received a copy of a letter dated the 10 April 2012 which Heyns had written to the Managing Director which read in part as follows:

"I have now been subsequently informed, in a letter dated 29 March 2012, that the Company has decided to abandon its original intentions of making redundant one Client Relationship Manager's ("CRM") position. However, I have now been informed that in the absence of signing a new employment contract which changes material terms of my employment that I will be retrenched. No meaningful or proper reasons were (sic) given to me for the Company's abrupt decision to abandon the retrenchment process and I have been motivated since the start that the process was uncalled for and unwarranted. No acceptable reasons have been provided justifying the instruction I received from HR today that I must sign before 11 April or the process of retrenchment would continue and I would be retrenched. I see no reason why I should sign a new employment contract."

[11] Niske testified that a meeting was called for the 13 April 2012 attended by herself and a Mr. Grobler of Labournet where Heyns refused to sign the contract. Heyns was then called to a meeting on the 20 April with her line manager and Niske where further attempts were made to resolve the issues. According to Niske the meeting was difficult to conduct and Heyns interrupted her and her line manager numerous times. In an email dated 20 April after the meeting Niske outlined her views regarding what she viewed as aggressive behavior by Heyns. The email also stated the following:

"Basically, we are now at this point:

- We have decided to retain all 3 CRM's
- We are still restructuring the position

- You insist only one KPA has changed
- We explained to you that while one KPA has changed, you are now expected to take sole responsibility in managing your clients all the details of which were explained to you and appear on the Job Profile
- It was again explained that we will set about doing internal and external training according to individual needs in the department
- You raised the point of knowledge transfer. We stated that yes that will occur. You stated that you wanted everything in triplicate and written down. We explained that it is not possible to write down everything in Zaid's head and that you will be given knowledge transfer and will have to take the initiative to take notes during these sessions.

What is of great concern right now is that on the one hand you insist nothing has changed. On the other hand you state that you have had no exposure to some of the KPA's and the requirements thereof. We stated that in the past you have played a supportive role and that now you will be taking independent control of your clients. We have offered to support you by upskilling you, yet you appear resistant. For example, you suggested that instead of getting a drivers license you will have a designated driver. We handed you a written undertaking at your suggestion in the last consultation and today you stated it was not your suggestion, it was merely your "opinion"...

You have also been aware that you have needed to address your driver's license since 17 February 2012. As you mentioned in your interview, you have already applied for your learner's license two to three weeks ago. Please be advised that your position requires you to have a valid driver's license within 3 months from the date of appointment, being 02 April 2012, as per the job profile you received with your contract."

- [12] Heyns was given until Tuesday 24 April 2014 to sign a written undertaking regarding the requirement to travel; agreement to the job description and job profile and the KPAs and how they will be measured.

- [13] Niske testified that she subsequently informed Heyns that Labournet would now be managing the consultations because the process was being clouded by the matter becoming personal. By the 3 May 2012, Heyns was asked to sign a written undertaking to obtain her license by 31 December 2012 and that before that to commit that “you will be able to travel to your clients within normal time frames, not dependent upon the availability of your designated driver. Business travel includes national as well as local travelling.” Heyns did not sign or return any documents to the company. Niske stated that if she had done so she would have retained her job. However, Heyns was given a letter confirming “that the agreed outcome of the consultations is retrenchment” and paid severance monies as well as one month’s salary in lieu of notice.
- [14] Under cross-examination it was put to Niske that it had never been an operational requirement to have a driver’s license and that Heyns had managed without one for 5 years. She stated that it was clear that the company needed more face time with the clients and CRMs needed to travel extensively to upsell and generate more revenue. She insisted that the company had been very accommodating and did not change track on the redundancy because the questions Heyns had raised put it in trouble. She denied the reasons for the alleged restructuring were a fabrication. Under re-examination Niske was asked when the new restructured position became operative She stated that the appointment to the position was on the 2 April 2012.
- [15] The next witness for the company Mr Thomas Walker (Walker) gave evidence on the rationale for the restructuring of the business. As will be apparent in the evaluation of this case it is not necessary to traverse his evidence.
- [16] Heyns testified that she started at the company in October 2007 and was originally a network administrator. Her job was to liaise with GPs and sign them up and do compliance work. After her promotion to CRM her functions involved contract management with a limited number of clients. She had to attend operational and trustee meetings with these clients The operational meetings were on a pre-arranged monthly basis. The trustee meetings were

scheduled quarterly at the beginning of the year. She engaged with the clients fully and she had never had a problem getting a driver and getting to them. If requests from a client came in, a meeting could be set down for the next day. On a monthly basis she went to meetings with clients and on the alternate month they would come to meet with her. They had never been a case where they would telephone and expect her there the next day. She said she had an unblemished record and got bonuses regularly.

- [17] There was no talk of a driver's license when she was appointed. She stated that it was common knowledge in the company that she had a fear of driving and that her family had been killed in a car accident. She believed the retrenchment process was a sham from the start and that her raising questions about the retrenchment led the company to take a different route.
- [18] Regarding the signing of a new contract of employment, she testified that she said she could not sign because there were material differences to the current terms. She stated that Niske had told her that if she didn't sign she would be retrenched. The company had later said she no longer had to sign the employment contract. It was true that severance pay had been discussed at the last meeting with the company. She was feeling hammered at that meeting and she testified that they said if she settled for two weeks I would get a good reference. On 10 May 2012, she was told that if she didn't sign the written undertaking she would be retrenched. She did not agree that the outcome of the consultations was a retrenchment and was unable to say goodbye to any of her colleagues and escorted out of the building. She testified that after the termination of her employment she had not found alternative employment. She had had to sell her flat and cancel retirement annuities she had been paying for 30 years and had lost 200,000 Rand on her retirement annuity with Sanlam. She had worked in an art gallery from time to time earning about 5000 Rand a month. This had been her job for about five months. She stated there was no reason from the start to make one position redundant, knowing that she couldn't drive and putting this in as a requirement, and then forcing her to sign an undertaking which she couldn't

fulfill. She also said that they didn't give her an opportunity to prove she could do the job. She asked the court for monetary compensation.

[19] Heynes was asked under cross-examination whether it was her case that the entire restructuring was fabricated to get rid of her. She stated yes. She conceded that the company was entitled from time to time to reassess the CRM position and to change it if it deems necessary. She further conceded that Walker was entitled to make a decision on a new conspectus of the position. She confirmed that the lengthy letters written to the company were drafted by her attorney. It was put to her that her belligerent attitude was a problem to the company and in the end they conceded on not dropping one position. She agreed they conceded.

[20] Heynes agreed she had undertaken to get the license and that she had never said that the license requirement was a deliberate design to get rid of her. She agreed that the company had given her an additional three months after the end of March to get her license, and then they gave her up until the end of December 2012. She said she would have signed the undertaking if the point of obtaining a driver's license by 31st December was not part of it. It was put to her that in conclusion Mr Walker had testified that all that she needed to do was to sign the three undertakings and that she would still have a job. She said she agreed.

Evaluation

[21] This case has certain unique features because of the fact that Heynes had an attorney advising her (pro bono) throughout the process. As a result of this and for whatever motivation the company did make a number of concessions after it had embarked on a section 189 process. These included the decision not to make a post redundant of the three CRMs. Once the decision was made not to make any posts redundant, objectively speaking the section 189 process came to an end.

- [22] What followed was a lengthy process aimed at convincing Heyns to agree to changes in her conditions of employment. In this process the company also displayed flexibility when it agreed not to make Heyns sign a new contract of employment. Whatever the motive for this was, and whether it was because of the perceived threat of litigation, is not material. The court has to decide whether her dismissal was substantively or procedurally unfair. The employer has a prerogative to reassess the ambit and skills needed in its posts. On the evidence before court, Heyns was prepared to attend courses to improve her skills and was not in a position to challenge the fact that these courses were offered to the other two CRM employees.
- [23] The company clearly had a duty not to change Heynes terms and conditions of employment unilaterally, without consultation. They met this duty. The fact that the company was flexible in the respect of taking on board what they saw as a suggestion that Haynes had made to have her designated driver available at all times (a suggestion that Heynes later called merely an 'opinion') counters Heynes' proposition that there was a plot to get her out of the company. There is merit in Mr Snyman's submissions that Heynes was resistant to changing the way that she had worked. It was clear on her evidence that she did not see the necessity for such change, which she regarded as a sham, despite the fact that she conceded that the company was entitled to relook at functions such as those of the CRMs.
- [24] The issue of the ostensible knowledge of the managers as to the fact that she had a fear of driving because her family had been killed in a motor accident was never put to the company witnesses, nor was it pleaded. In all the circumstances of this case, I do not find that the dismissal of Haynes was substantively or procedurally unfair. There was no unilateral decision to change her terms and conditions of employment but an extended period of consultations ensued. That the termination letter given to her was still drafted in the mode of a 189 process is neither here nor there. She benefited from this by the inclusion of 'severance' payments in her termination package. Heynes conceded she did discuss same. In my judgment, while there can be no doubt that Haynes deserves sympathy for what can be described as a

phobia of driving, the company has proved in these proceedings that she was not unfairly dismissed. I do not consider it apposite to make a costs order in this matter based on the jurisprudence of this court in this respect. I make the following order:

1. The applicant's claim is dismissed.

Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr. Glen Marinus of Werksmans Inc

For the Respondent: Mr. Sean Snyman of Snyman Attorneys