

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No. D1052/2019

In the matter between:-

LUKE GUJADHUR

APPLICANT

and

**ADCORP BLU, A DIVISION OF
ADCORP WORKFORCE SOLUTIONS (PTY) LTD**

RESPONDENT

Heard: 29 April 2022

Delivered: 20 May 2022

JUDGMENT

MHLANGA AJ

Introduction

[1] This case pertains to a dismissal of the Applicant by the Respondent on grounds of operational requirements.

Facts

[2] The Applicant was employed by the Respondent as an Accounts Manager in November 2017.

[3] On the 12th of October 2018 the Applicant, together with Vernon Narainsamy ("Vernon"), were issued with notices in terms of section 189(3) of the Labour Relations Act ("the Act").

[4] The reason for the dismissal or the contemplated dismissal was the restructuring of the Respondent's business. According to Mr Joss who was the General Manager for BLU KwaZulu-Natal at the time of the contemplated dismissal the structure of the Respondent was such that there was duplication of positions and functions amongst the Respondent holding company, ADCORP BLU, and its two subsidiaries, BLU On Demand and BLU Hospitality. ADCORP BLU was primarily a business that dealt with the supply of blue-collar labour. BLU On Demand on the other hand dealt with the supply of small head-count labour whereas BLU Hospitality focused on providing labour to the hospitality industry.

[5] As a consequence of this multiplicity of function and the duplicate structure between the holding company and its subsidiaries, it was decided that the business that is performed at BLU On Demand and BLU Hospitality should be integrated back to the main company, ADCORP BLU. The rationale behind this was that supplying small head-count labour and supplying labour to the hospitality industry was not different to supplying blue-collar labour, at least at the level of the functions and systems that are involved.

[6] It was Mr Joss's evidence that the decision was not informed by any profit losses but it was to streamline the business and to save costs by returning the small operations back to ADCORP BLU which was, in any event, a full service offering business.

[7] It was for this reason that the restructuring was decided and the section 189 notices issued to affected employees, such as the Applicant.

[8] Subsequent to issuing section 189 notices to the Applicant and Vernon, consultations were held directly with the Applicant in person, virtually via skype and in writing where the Applicant was, *inter alia*, invited to make suggestions on any alternatives short of dismissal.

[9] These consultations were primarily led by Mr Ndawo who was the Respondent's Human Resource Executive who was duly assisted at various intervals by Judy Rossouw and Jacqueline Le Roux.

[10] The Applicant, while representing himself during the consultations, emailed to the Respondent all the questions and proposals he had in terms of options to avoid dismissal. Similarly, the Respondent responded to the questions and proposals raised by the Applicant in writing.

[11] Some of the proposals from the Applicant was to have the date of his dismissal change so that he could be able to claim from his insurance policy. He also asked to be placed anywhere and in any position within the ADCORP BLU business. At some stage he indicated that he would be taking a Voluntary Severance Package which he later retracted.

[12] The Applicant's proposals could not be accommodated as changing his date of retrenchment to enable him to claim from his insurance could potentially amount to fraud and no vacant positions were available within ADCORP BLU to place the Applicant.

[13] Before finalisation of the consultation process the Applicant became a member of a Union, and consultations between the Respondent and the Applicant occurred with his Union as well. Those consultations with the Union culminated in the Union explicitly indicating to the Respondent that it will make no further submissions on the options to avoid possible retrenchment of the affected employee and declaring that the consultations have been exhausted.¹

The Vacant Position

[14] Towards the latter stages of the section 189 process one position of Accounts Manager became available. Both the Applicant and Vernon who were affected by the retrenchment were given an opportunity to compete for this position.

¹ Page 39, bundle A (email dated 3rd December 2018).

[15] After the interview process, the Applicant was unsuccessful as the position was given to Vernon who at the time had about seventeen (17) years of service compared to the Applicant who had just over one (1) years' service with the Respondent.

[16] I must hasten to point out that there is no issue with regards to how the Applicant was scored during the interviews. The dispute is however surrounding a question of whether the Applicant was the only Accounts Manager and thus was almost an automatic fit for the position as opposed to Vernon who was the Operations Manager. I will revert to this point later in this judgment.

[17] Subsequent to Vernon's success in the interviews for the only available Accounts Manager position, a termination letter was issued to the Applicant on the 12th of December 2018 with his last day of work being the 21st of December 2018.²

Applicant's Challenge to his Dismissal

[18] The Applicant challenges his dismissal on both procedure and substance.

[19] On procedure; the Applicant's case is that the consultation leading to his dismissal was not meaningful in that his proposal to be placed in any other position of the Respondent to avoid him losing his employment was not acceded to. Under cross examination however, the Applicant admitted that there were no positions that were vacant to which he could have been placed to avoid retrenching him. Despite this concession, he remained adamant that it was possible to have him placed anywhere even in a lower position despite him failing to identify even that lower position.

[20] On substance; the Applicant's case is that he was told that the reasons for his retrenchment was that the company was not making enough profit yet he was aware that the company had made profit in the past financial year and had surpassed its

² Page 15 and 16 of bundle B.

profit target at the time of the section 189 process. The Applicant was adamant that during the consultations, he was informed that the underlying reason to the restructuring was loss of profit which he knew was not correct and he challenged the company on that reasoning.

[21] When confronted on this challenge under cross examination, the Applicant admitted that there is no reference to the company not making profit in the section 189 notice which was given to him on the 12th of October 2018 in particular paragraph 1 thereof where the reasons for the restructuring are expressly recorded. The Applicant conceded that the reason for dismissal as recorded in paragraph 1 of the section 189 notice was to achieve business efficiency and operational optimisation, review of operational structure and determine opportunities to re-design the structure to achieve desired efficiency gains, strategic re-alignment with focus to restructure the BLU On Demand business unit, that the current business structure and operating model was not viable to deliver to the market as a separate focus/business structure in industrial.³

[22] Intertwined with his substantive challenge to the dismissal, the Applicant argued that Vernon was introduced to him as the Operations Manager, his business card described him as the Operations Manager and so was the signature at the bottom of his emails. For this reason, Vernon ought not to have been considered for the one available Accounts Manager position as he was not an Accounts Manager but an Operations Manager. The Applicant argues that he was the only Accounts Manager and ought to have been appointed to this position and not Vernon.

Analysis

[23] There is enough evidence, including documentary, that the section 189 consultation process was earnestly pursued by the Respondent. The Applicant was given sufficient opportunity to engage in this consultation both in person and *via* his Union immediately when he became a member of a Union. This consultation, as

³ Page 4 of bundle A

mentioned above, occurred physically, virtually *via* skype and in writing by way of exchange of questions and proposals which were responded to in writing.

[24] There is no ground to suggest that the procedure followed by the Respondent was unfair. The suggestion that the engagements were not meaningful simply because the Respondent could not accept the Applicant's proposal to be accommodated in any other position is without any merit. The Applicant admitted that there was no position that was available at the time of his dismissal to which he could have been accommodated. To expect the Respondent to create a position that otherwise does not exist for purposes of accommodating an employee who is affected by retrenchment is to stretch the procedural fairness requirements on retrenchments too thin.

[25] On substance, Mr Joss was very clear on the reasons for embarking on the restructuring of the Respondent's operations. This reason is consistent with what is contained in the section 189 notice which I have referred to above. It is not obvious where the Applicant got an impression that the reason for the retrenchment had anything to do with lost profits. If anything, the reason for the retrenchment had everything to do with saving on expenditure rather than losses in profit.

[26] In any event, Mr Joss was not challenged in anyway whatsoever in his evidence that there was a lot of duplication on the structure between the main ADCORP BLU business, BLU On Demand as well as BLU Hospitality. He was similarly not challenged that a need existed to re-align these businesses such that ADCORP BLU performs the functions that were performed at BLU On Demand and BLU Hospitality.

[27] The Respondent's rationale to restructure its operations, to me, appear to be compelling and a sound business decision. It is for this reason that I find that the Respondent pursued the section 189 process for fair, valid and business-like reasons.

[28] I am left to decide the last leg of Applicant's attack pertaining to Vernon being the Operations Manager and not the Accounts Manager. To determine this question I need to look no further than page 86 of bundle A which is a letter of appointment for

Vernon Narainsamy to the position of Accounts Manager: BLU On Demand dated 3rd October 2017. The letter is signed by Judy Rossouw the Operations Executive and accepted by Vernon on the 2nd of November 2017. No other documents were produced to suggest that Vernon occupied any other position between November 2017 and October 2018 when the section 189 process commenced.

[29] No evidence was placed before me indicating the business card that described Vernon as the Operations Manager nor was there any records of his email signature describing him as such placed on record. It is not clear to me why the Applicant did not find it necessary to place that evidence before the Court if his case depended on Vernon being the Operations Manager.

[30] Accordingly, I accept the Respondent's version that Vernon was the Accounts Manager at the time of the section 189 process. That is the position he was appointed to in November 2017.

[31] Accordingly, I find that the dismissal of the Applicant complied with the provisions of section 189 of the Act and thus was procedurally and substantively fair.

Order

[32] The application is dismissed.

MHLANGA AJ
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Miss T. Pillay
Instructed by: Pratica Ramdhani Inc.

For the Respondent: Miss A. Dippenaar
from Kirchmanns Inc.