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EMPLOYMENT

Automatically unfair dismissals versus legitimate dismissals for operational requirements: the importance of the 'true reasons' for the dismissal

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By: Jacques van Wyk, Director, Andre van Heerden, Senior Associate and, Unathi Jukuda, Candidate Attorney

ISSUE

Whether, in dismissing employees, the employer was exercising its right to dismiss the employee's for operational requirements or, whether it was actually dismissing the employees in order to compel them to accept a demand of mutual interest (in this instance, a change to the terms and conditions of their employment)?

SUMMARY

Where the reason for a dismissal is to compel an employee to accept a demand of mutual interest it will be automatically unfair. However, in the context of a retrenchment exercise where an alternative position has been *offered* to employees as a legitimate means of avoiding retrenchment, the dismissal of employees who refuse to accept such offer can be fair.

COURT'S DECISION

In the case of *National Union of Metalworkers of South Africa obo members (NUMSA) and Aveng Trident Steel* the Labour Court had to consider the above issue. Aveng Trident Steel ("the **Employer**") operates in the steel industry. In mid-2014 the Employer experienced financial difficulty triggered by a decline in sales and increase in costs. The Employer decided that it could not continue with its existing business model and would have to restructure its operations in order to survive. It proposed a turnaround strategy which involved reviewing its organisational structures and redefining some of its job descriptions. The Employer's rationale, so it claimed, was to save jobs and avoid dismissals.

Various consultations between the Employer and the employees' trade union, NUMSA, took place. As a measure to save jobs the Employer proposed that employees be offered voluntary separation packages and employees employed on limited duration contracts would have their contracts terminated. While some employees accepted voluntary separation packages a number of other employees agreed to continue consulting the Employer.

In mid-2014 an interim agreement was also reached with these employees in terms of which they would work in the restructured positions pending the finalisation of the consultation process. Once the consultation process was concluded, without consensus having been reached, the Employer gave notice to these employees that they faced retrenchment.

As a means of avoiding retrenchment these employees were offered posts in the new structure. Some employees accepted this offer but a number did not. Those who did not were retrenched.

The retrenched employees, referred an automatically unfair dismissal dispute to the Labour Court. They alleged that the *true reason* for their dismissal was their refusal to accept a demand made by the Employer to agree to different terms and

conditions of employment. The Employer argued that the employees were dismissed for operational requirements. Only the Employer led evidence at the Labour Court.

In deciding the matter the Labour Court had regard to 187(1)(c) of the Labour Relations Act 66 of 1995 ("**LRA**"), which provides that a dismissal is automatically unfair if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.

The Labour Court, in holding that the dominant, or true, reason for the dismissal was the Employer's operational requirements, found the employees' dismissals to be fair. The Labour Court found that the redesigned job descriptions, on the uncontested evidence, were introduced and proposed in order to save jobs. This was not a situation where the Employer was 'flexing its muscles' in the context of collective bargaining.

The Labour Court held further that in the context of a retrenchment consultation it is perfectly reasonable for an employer to suggest a change to the terms and conditions of employment if such a change would resolve the financial difficulties faced by the employer and save jobs. Of central importance is the purpose of the change.

IMPORTANCE OF THIS CASE

Where there is a genuine operational need an employer can propose an alternative post to avoid having to retrench employees even if the terms and conditions of employment of that post are different to the original posts held by the affected employees. Employees who decline to accept such an offer may then face the prospects of retrenchment.



Andre van Heerden

Director

View Profile



Jacques van Wyk

Director

View Profile