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EMPLOYMENT

Can you dismiss an employee who refuses to adhere to the alternative plan implemented to avoid mass retrenchment?

6 August 2018 *4 min read*

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ISSUE

Is it fair to dismiss an employee for refusing to comply with the recovery plan that was implemented to avoid mass retrenchment?

SUMMARY

The failure of an employee to comply with a recovery plan, which constitutes a reasonable alternative to retrenchment, is grounds justifying an employee's dismissal.

COURT'S DECISION

In the case of *National Security Commercial & General Workers Union obo Members v Alpen Foods Co South Africa (Pty) Ltd*, the applicant employees, Wayne Andrews and Nkosikho Ntshaka ("the employees") were employed by the respondent employer, Alpen Foods ("the employer") as a Reliever Operator and Digestor Operator respectively. On 19 October 2017, the employees were dismissed. The employees approached the Commission for Conciliation, Mediation and Arbitrator ("CCMA") to challenge the substantive and procedural fairness of their dismissals, and sought reinstatement.

The employer had already been suffering losses prior to June 2017. On 29 May 2017, due to operational requirements, the employer issued a notice of proposed retrenchments. The notice indicated that certain positions would be declared redundant by no later than 20 June 2017. The employer had conducted consultation processes with the assistance of the CCMA. At the fourth consultation process, the managing director of the employer proposed a recovery plan that would entail a different way of running the factory, with a different shift system being implemented ("the recovery plan"). The recovery plan was to remove the cash component of working overtime, and replace it with paid time off in lieu. On 21 July 2017, the recovery plan was presented to the union and employees, with all members accepting the recovery plan.

On 31 July 2017, the employer sent a letter to the union indicating that 21 of the union's members were rejecting the recovery plan, meaning that the employer would have to continue with the retrenchment. The employer's letter to the union highlighted the cases of *Media Workers Association of SA v Independent Newspapers (Pty) Ltd* (2000) 23 ILJ 918 (LC), and *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC). In *Independent Newspapers*, the Labour Court confirmed that employers are entitled to unilaterally change the employees' conditions of service in order to save jobs. In *Algorax*, the Labour Appeal Court held that the employer has an obligation not to dismiss employees due to operational requirements if there was a reasonable alternative.

On 4 August 2017, the employer sent another letter to the union, indicating that the refusal to comply with the recovery plan would entail disciplinary action. Despite the letter sent to the union, the employees refused to work on weekends. The employees received final written warnings for being absent over the weekends. After the employees were absent again, they were called to a disciplinary hearing, found guilty and dismissed. On 1 November 2017, the employer received a letter from the union terminating the verbal agreement accepting the recovery plan. The employer, however, continued with the recovery plan.

The Commissioner held that the recovery plan was a viable alternative to the retrenchments. Further, the employees defied a known rule, with that rule being of serious importance, due to its purpose of saving jobs. The Commissioner noted that the employees were afforded the opportunity to defend their matter at the disciplinary hearing. The Commissioner thus concluded that the dismissal of the employees was substantively and procedurally fair.

IMPORTANCE OF THIS CASE

In some cases an employer may be entitled to change employees' terms and conditions of service in order to save jobs. Employees who refuse to accept / comply with the change of their conditions of service in order to avoid retrenchment may be fairly dismissed.

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