

EMPLOYMENT

DISMISSED FOR NOT ACCEPTING AN EMPLOYER'S DEMAND – WHEN IS THIS AUTOMATICALLY UNFAIR?

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The Labour Relations Act, 66 of 1995 (“**LRA**”), which generally protects employees in South Africa against (amongst other things) unfair dismissal, as well as being subjected to unfair labour practices, was amended in January 2015 to clarify an issue around a specifically harmful category of dismissal, namely when an employee may be considered to have been dismissed because of “*a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer.*”

Clarity on this issue is crucial, as any dismissal which takes place for this reason is considered to be automatically unfair in terms of section 187(1)(c) of the LRA, and could entitle the dismissed employees to up to 24 months compensation (double the maximum amount to which an employee who is simply dismissed unfairly may be entitled).

Recent case law from the last quarter of 2019 has tested this scenario, and has started to give further details as to when an employee can avail themselves of the right not to be dismissed for this reason.

In the Labour Appeal Court, the case of *National Union of Metalworkers of SA & others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another* (2019) 40 ILJ 2024 (LAC), (“*Aveng Trident*”) considered whether an employer could propose retrenchments and, as an alternative to dismissal offer employees continued employment on amended terms and conditions of employment. Under a previously adopted approach, employees could then claim that the proposal to change terms and conditions of employment was a “*demand*” in respect of “*a matter of mutual interest*”, and that if the employees refused to agree to the change and were dismissed, they had been automatically unfairly dismissed. However, the LAC in *Aveng Trident* found that, in this case, the employer had dismissed the employees for its operational requirements, and not because they refused a demand by the employer.

Also, in the case of *Jacobson v Vitalab* (2019) 40 ILJ 2363 (LC), the Labour Court found that the “*matter of mutual interest*” has to relate to collective bargaining in relation to the employment relationship, and can only be a ground for automatically unfair dismissal when a group of employees is affected. As such, an individual cannot claim to have been automatically unfairly dismissed if he/she refused to accept a mutual interest demand by the employer, and the employee must resort to the ordinary procedure for claiming unfair dismissal.

After the courts' guidance, it is now much clearer that not every failed negotiation, which leads to an employee being dismissed can result in an automatically unfair dismissal claim, and the scope for such remedy has been narrowed and explained.



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