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EMPLOYMENT

Does a gross failure in procedure expose an employer to the risk of maximum permissible compensation even if there is a justification for the dismissal?

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ISSUE

If a retrenchment was unavoidable, can the employer skimp on the retrenchment process or would that be viewed as both substantively and procedurally unfair?

SUMMARY

If an employee's dismissal was substantively fair, as the retrenchment was unavoidable, but there was a gross lack of procedural fairness, then the maximum permissible compensation can still be awarded.

COURT'S DECISION

In *Stopforth V SMADA Construction* (JS 872-15), the Labour Court ("LC") had to determine whether a dismissal, based on operational requirements, was substantively and procedurally fair, regard being had to whether the retrenchment was unavoidable. The applicant was employed as the Chief Executive Officer (the CEO) in the respondent's construction division. The CEO was dismissed on the basis of the respondent's operational requirements, and certain deductions were also made from the CEO's final payment for monies owed to the respondent. The CEO referred an unfair dismissal dispute to the bargaining council having jurisdiction, but the dispute remained unresolved after conciliation. The CEO then approached the LC for adjudication, claiming reinstatement or compensation, as well as severance pay and repayment of the monies deducted.

The CEO submitted that his dismissal was both substantively and procedurally unfair, as there existed no fair reason for his dismissal and the respondent failed to consult him adequately or at all. The parties were in dispute over whether the correct severance pay was paid, as there was disagreement as to when the CEO commenced employment, either in 2013 or 2014. The parties were also at odds as to whether deductions for outstanding loan monies could be effected on the CEO's final payment.

The LC noted that the onus falls on the employer to prove that the dismissal was both substantively and procedurally fair. In this instance, the LC held that the respondent had to give a proper explanation for the dismissal and prove that it approached the consultation process with an open mind in order to facilitate proper and bona fide discussions aimed at saving jobs. Secondly, the LC found that an employer is entitled to effect a deduction on an employee's remuneration if the employee consents thereto or the deduction is required in terms of law, collective agreement, court order or arbitration award.

The LC then assessed whether the CEO's retrenchment was unavoidable and found that this issue is to be determined through and during a genuine joint consensus-seeking process prescribed by section 189(2) of the Labour Relations Act 66 of 1995 (as amended) ("the LRA"). During this process the rationale for and alternatives to retrenchment are scrutinised and considered. The failure to hold such proper and genuine consultations may render the dismissal both substantively and procedurally unfair where there exists the real possibility that, had they taken place, the retrenchments could have been avoided. The LC held that the dismissal was substantively fair, as there was no

alternative employment opportunities for the CEO and the employer had dire financial constraints. However, the LC held that the dismissal was procedurally unfair, as the respondent did not consult with the CEO in accordance with section 189(2) of the LRA. The LC agreed that the CEO's dismissal was effected "in a degrading and severely callous manner with the CEO being thrown out of the premises like a delinquent and irresponsible school boy." The LC concluded that having regard to the extent of the procedurally unfair manner in which the dismissal was effected, the CEO was awarded 12 months' salary as just and equitable compensation.

IMPORTANCE OF THIS CASE

Despite a dismissal being substantively fair, the employer must still follow a far procedure before effecting the dismissal. Gross procedural unfairness may result in compensation equal to the compensation typically awarded for substantively unfair dismissals.

NOTICE OF PENDING DECISION

The matter of Assign Services (Pty) Ltd v National Union of Metal Workers of South Africa and Others CCT 194/17 was argued before the Constitutional Court on 22 February 2018. This is the final step in the long history of this matter, which focuses on whether or not Temporary Employment Services' employees could end up being the employees of the TES client or whether they could be jointly employed by the TES and the TES client.

Werksmans will send further updates as and when the CC decision becomes available.



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