IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: JS 27/04

In the matter between:

LOUISE MULLER	1ST APPLICANT
STUART GEORGE SMITH	2ND APPLICANT
AND	
YESHIVA COLLEGE	RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The action brought by the first applicant, Louise Muller, (the applicant) in this matter concerns both the procedural and substantive fairness of her dismissal for operational reasons by the respondent. The second applicant abandoned his claim after reaching a settlement with the respondent.

[2] The two issues for determination relate to, the statutory payment due to the applicant and the substantive fairness of the dismissal of the applicant by the respondent. The respondent conceded at the beginning of the trial that the dismissal of the applicant was procedurally unfair for the reasons which are set out in its heads of argument as follows:

i. *"There were no consultations with the Applicant other than the consultation on 11 November 2003;*

ii. *The Respondent did not further consult with the Applicant on the issue of alternatives, severance pay, timing of retrenchments,*

ways in which to minimize the prejudicial effects of termination of employment, and possibility of future re-employment;

iii. *The Respondent terminated the Applicant's services on 17 November 2003 in terms of a notice dated 14 November 2003 without further consultation or communication with the Applicant;*

iv. *The Respondent conceded that the Applicant was not paid her severance pay, of 5(five) weeks' salary."*

[3] Arising from the above concession, the respondent placed on record at the beginning of the trial the offer it had made to settle the dispute which was made with prejudice to the applicant. The tender is set out in the heads of argument as follows:

"*1.3.1* *Payment of 5 weeks' severance pay to the applicant in the sum of R16 923, 81 (sixteen thousand nine hundred and twenty three Rand eighty one Cents);*

1.3.2 *Payment of an amount of 3 (three) months' salary as compensation for procedural unfairness in the sum of R42 648,00 (forty-two thousand six hundred and fourty eight Rand)."*

[4] The applicant rejected the tender and thus the respondent contended that this evidence be taken into account when determining the appropriate relief and costs at the end of this trial.

Background facts

[5] The applicant was employed by the respondent as head of its biology department and taught grades 10, 11 and 12. The junior biology classes were taught by another teacher. At the time of the dismissal the applicant had

been a teacher with the respondent for a period of five years, earning a monthly salary of R14216, 00.

[6] Mrs Herd, who prior to taking the principal post with the respondent in 2003, had previously served as a teacher with the respondent for a period of 18 (eighteen) years. She testified that soon after her appointment as the principal she was instructed by the board to reduce the costs of running the school as the costs exceeded the income. The respondent relied on donations for its funding. She further testified that towards the end of 2003 and after having been with the school for a year, a decision was taken to restructure the school with a view to reducing the costs. The restructuring entailed reviewing the staffing requirements and the reduction in the number of subjects offered at the school.

[7] In her testimony, Mrs Herd indicated that after identifying that, biology had fewer students both at grades 10 and 11, a decision was taken that there was no need for a biology department. The positions of the applicant and Ms Niedermeyer, the other biology teacher for the junior classes, were rendered redundant.

[8] Following the restructuring the school was able, according to Mrs Herd, to save in the region of R100 000.00 per month. In addition to the applicant seven other teachers were retrenched as result of the restructuring.

[9] On 28th October, 2003 the applicant was issued with a notice in terms of section 189 (3) of the Labor Relations Act 66 of 1995 ("the Act"). Arising from this notice a consultation meeting was held between the parties on the 11 November 2003.

[10] The applicant was issued with a letter on the 17th November, 2003 informing her that:

i. Her employment with the respondent would terminate on the 31st December 2003;

ii. She would be given a month's notice period;

iii. She would be paid discretionary bonus for 2003;

iv. She would receive five weeks severance pay and an *exe gratia* further payment of one month's salary.

[11] The applicant refused to accept the above offer and challenged the dismissal as being unfair.

The appointment of Mr Ableson as a part-time teacher

[12] Mrs Herd testified that because of the increase in the number of students who wished to register for biology in 2004, it was decided to appoint Mr Ableson to teach biology part-time. The reason for the increase in biology student population was according to her due partly to the departure of the applicant.

[13] The increase in the number of biology students meant that Mrs Herd would no longer manage in teaching the subject as was anticipated in the restructuring process, according to her. Because of this it was decided to appoint Mr Ableson to teach on a part-time basis. Mr Ableson who was well known to Mrs Herd, left teaching the previous year to concentrate in writing books and music.

Arguments and submissions by parties

[14] The respondent argued firstly that should the court find in favour of the applicant, it should in considering compensation and costs due to the applicant take into account the offer of settlement it had made to the applicant.

[15] In as far as substantive fairness is concerned the respondent argued that the decision to restructure was not placed in issue by the applicant in evidence. The respondent further argued that the situation as was envisaged with the restructuring did not change with the appointment of Mr Ableson as the department remained with fewer full time teachers.

Leave pay

[16] The applicant claimed that she was entitled to notice pay of three months' salary, but received only a month's notice. With regard to long leave, she had initially claimed 38 days and in her amended papers she claimed 35.92 days.

[17] Mrs Herd testified that teachers enjoyed 12 (twelve) days leave over and above the school holidays, up until 2003 and thereafter a moratorium was placed on long leave. She was however very evasive when confronted during cross examination about the long leave which the applicant contended had accrued to her. She testified that at the time she joined the respondent as a principal she questioned the rational for long leave. She also testified in this respect that the Department of Education had placed a moratorium on leave outside the school holidays. However, during cross examination she conceded that long leave did at some stage exist. The contention of the applicant regarding long leave was supported by Mr Michael Rootstain a former teacher of the respondent who testified on behalf of the applicant. Mrs Herd's evidence was further contradicted by documentary evidence in the form of the letter of 'Tax Directives" sent to the South African Receiver of Revenue and the calculation which was done by the respondent, a copy of which was attached at page 17 to the bundle of documents. The calculation of leave pay in both these documents is reflected

as 35.92 conservative days of leave due to the applicant, amounting to R17021. 29.

[18] It is thus accepted, on the basis of the above discussion, that at the time of the termination of the applicant's dismissal the respondent had a policy which provided for long leave. The applicant has thus accumulated a total of 35.92 days leave which the respondent ought to pay for in terms of its policy.

Notice pay

[19] The parties to an employment contract may in terms of the contract of employment agree on a period longer than that which is provided for in section 37 of the Basic Conditions of Employment 75 of 1997 (the BCEA). Section 37(3), provides that an agreement may not require or permit an employee to give notice longer than that required of the employer.

[20] The evidence of Mrs Herd was again not satisfactory in as far as the issue of the 3 (three) months notice period was concerned. When asked during cross examination whether teachers are required to give three months notice she said something to the following effect: *"It is required but teachers give 1 (one) month's notice."* And when further put to her that the notice period given by teachers was three months she said: "*I cannot answer for what happened before joining,"* referring to what happened before joining the respondent. In other words she could not deny that the policy before she joined the respondent was that the notice period was 3 (three) months as contended by the applicant.

[21] The contention of the applicant that the notice period was 3 (three) months is further supported by the fact that Mr Smith, one of the teacher who were retrenched was paid 3 (three) month's notice pay. In answering the question as to why this was the case Mrs Herd replied as follows:

"Mr Smith got straight 3(three) months because he did not have leave and that he had a family."

Procedural fairness

[22] I have already indicated that the respondent conceded that the procedure followed in the retrenchment of the applicant was unfair.

Substantive fairness

[23] It is commonly accepted by authorities that the issue of whether a dismissal was fair or otherwise turns mainly on whether there was a general need to retrench and whether the employee whose employment was terminated due to operational reasons should have been retrenched. The concept of "operational requirements" is defined in section 213 of the Act to mean "*requirements based on the economic, technological, structural and similar needs of an employer.*" This means that section 213 of the Act does not distinguish between dismissal arising from economic reasons and restructuring based on other business or organisational considerations.

[24] A dismissal for operational reasons is governed by s189 of the Act. Section 189 (1) of the Act requires the employer to consult with the employees or their representatives when it contemplates a dismissal because of operational requirements. Section 189 (2) (a) (i) of the Act requires the employer and the consulting parties to reach consensus on the appropriate measures to avoid and to mitigate the adverse effect of dismissals. The employer is further required by section 189 (3)(b) of the Act to disclose to the other consulting parties the reasons for the proposed dismissal and the alternatives it considered before considering dismissal. Another

requirement is that the employer is obliged to provide reasons for rejecting each of the alternatives proposed by the consulting party.

[25] In the recent unreported case of *Andre Johan Oostehizen v Telkom SA LTD case number P5/04*, the Labour Appeal Court held that implicit in section 189 (2)(a)(i) and (ii) of the Act, is an obligation on the employer not to dismiss an employee for operational requirements if it can be avoided. The Court further endorsed the established principle that the employer should resort to dismissal for operational reasons as the last resort because this is a dismissal due to no fault on the part of the employee. The Court [at para 8] further held that:

> *"In my view an employer has an obligation not to dismiss an employee for operational requirements if the employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid it and employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirements ... A dismissal that could have been avoided but was not avoid is a dismissal."*

[26] The issue that arises from the facts of the current case is whether the reasons advanced by the respondent were genuine and the dismissal was a measure of last resort. In other words the respondent could do nothing to avoid the dismissal of the applicant.

[27] In my view, for the reasons set out below the respondent has failed to prove that the applicant was dismissed as a last resort and was therefore fair in the circumstances.

[28] The letter notifying the applicant of the termination of her employment was handed to her on the last day of the closing of the school day. A month or so later the respondent appointed Mr Ableson on what it claims to be a part-time position. There are issues that have arisen during the testimony of Mrs Herd as to whether indeed Mr Ableson was appointed on a part-time position or something else.

[29] The reason for the restructuring which supposedly brought about the redundancy of the post of the applicant and finally her dismissal was due to the drop in the student numbers who were registered for biology. It is strange that within few weeks the student numbers increased to an extent that an outsider had to be engaged on a part-time basis. There was no evidence indicating that neither the parents nor the students were informed of the dismissal of the applicant. It is for this reason strange, if the version of the applicant is to be believed, that the students or their parents may have suddenly change their minds to register for the biology in such great numbers to require an additional teacher to assist in the biology workload. It would seem to me that the most plausible and reasonable conclusion is that of the applicant that the work load had never decreased between December and January.

[30] The substantive fairness of the dismissal is also placed in issue by the appointment of Mr Ableson. In this regard Mrs Herd had difficulties in answering very basic and simple questions about the position of Mr Ableson. The most important aspect of this issue is lack of satisfactory explanation as to why the post was not offered to the applicant. It was only

later in cross examination that Mrs Herd indicated that she did not offer the applicant the part-time position offered to Mr Ableson because she had heard from others that the applicant had obtained another job. It is common cause that the applicant did secure alternative employment with another college on 28th January 2004, but only to commence on the 1st May 2004.

[31] When asked further during cross examination and at times put to her, Mrs Herd dealt with the issue of the appointment of Mr Ableson as follows:

- When asked bout the salary of Mr Ableson she said that she would have to look it up.
- When asked about the increase that Mr Ableson received which ranged between R18 000.00–R19 000.00, Mrs Herd said that she could not remember but later added that the respondent had been giving between 6-10% increase in that period.
- When put to her that if the increase was between 6 and 10% the salary would have averaged at R14000.00, she refused to respond.
- Mrs Herd could not explain why Mr Ableson was receiving a medical aid if he was a part-time teacher.

[32] I now turn to deal with the contention of the respondent that in considering what would constitute a fair and equitable compensation for the applicant I should take into account that she had declined the offer which had been made with prejudice to settle this matter. In the circumstances of this case I am of the view that the applicant was justified in rejecting the tender of settlement made by the respondent. This must be seen in the context where the concession to procedural fairness was made 4 (four) years since the commencement of this litigation. The explanation proffered by Mrs Herd is

not convincing. She explained that the reason for the tender been made so late is that she was not aware of the pleadings as the matter was handled by the respondent's consultants, Mr Lawrence who could not according to her be called to testify about this issue because he had handed over all the documentation to the attorneys of record of the respondent.

[33] If regard is had to the extent of the failure to comply with the law by the respondent in its termination of the employment of the applicant and the fact that the applicant was unemployed for a period of about 4 (four) months, it is my view that the just and equitable compensation to award to the applicant is 6 (six) months. Regard should also be had to the appointment of Mr Ableson and failure to offer the part-time teaching to the applicant. It is also my view that there is no reason in both law and fairness why the costs should not follow the result.

[34] **The order made as concerning the statutory entitlement of the applicant is as follows**:

i. Three month's notice at R14216.00 – R42 648.00

ii. Severance pay equal to 5 (five) weeks R16 923.81

iii. Accrued leave -35.92 days R17021.29

Total **R76 593.00**

iv. The above amounts are subject to deductions for whatever may have already been paid to the applicant.

[35] **The order made as concerning the unfair dismissal is as follows:**

i. The respondent is ordered to pay the applicant 6 (six) months compensation calculated at the rate of her salary as at the date of her dismissal.

ii. The respondent should pay the costs of the applicant.

Molahlehi J

Date of Hearing : 1st and 2nd November 2007

Date of Judgment : 20th October 2008

Appearances

For the Applicant : Mark Thompson of Thompson Attorneys

For the Respondent: Sean Snyman of Snyman Attorneys