REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

CASE NO: C 512/12

In the matter between:

MICHAEL PETER WILKIN **APPLICANT**

and

WARWICK INVEST (PTY) LTD **RESPONDENT**

Heard: 27 February 2013
Judgment delivered: 30 April 2013

JUDGMENT

VAN NIEKERK J

[1] The applicant was employed by the respondent until 31 March 2012, when his employment was terminated for reasons that the respondent contends related to its operational requirements. The applicant disputes the fairness of his dismissal, and claims that his dismissal was substantively and procedurally

unfair, and that the reason for dismissal was automatically unfair since he had been dismissed to compel him to accept a demand in relation to a matter of mutual interest (see s 187 (1) (c) of the LRA) and that in any event, there was no sufficient substantive reason to justify his dismissal, which was preceded by a procedure that was unfair.

[2] When the matter was called, the parties agreed that it be determined by way of a stated case. The evidence that they have agreed as undisputed is that contained in the applicant's bundle of documents, the respondent's bundle of documents, transcripts of meetings held on 20 January and 16 February 2012, and the common cause facts contained in the pre-trial minute at paragraphs 3 to 31 of the minute. The parties further agreed that it is common cause that the reasons for restructuring were not raised by Slee (the applicant's managing director) in his meeting with the applicant on 25 November 2011, and that the first occasion on which this issue was raised with the applicant was on 28 November 2011. It is further agreed that the rationale for the restructuring embarked on is that set out in paragraphs 53.4 to 53.10 of the pre-trial minute. The parties agreed to file written heads of argument, which they did during the course of March 2013.

[3] The material facts are contained in the documents that constitute the agreed evidence, and I do not intend to repeat them. For present purposes, it is sufficient to record that the applicant was employed by the respondent in August 2007. On 5 October 2011, pursuant to what is termed a restructuring agreement, the applicant held the position of investment manager, a position that he held until his dismissal.

[4] On 19 November 20112, Slee addressed an email to the applicant to which was attached a new employment contract. The contract proposed that the respondent be appointed as 'investment specialist'. Slee subsequently met with the applicant (on 25 November) when the applicant raised two concerns regarding the contract. These related to a change to commission structures (the new contract envisaged that discretionary bonuses would be payable in

place of secured commission) and to the benefit scheme, which the applicant claimed was less favourable than that which then applied.

[5] On 28 November, in response to an email from the applicant in which the respondent's additional concerns relating to the benefit scheme were recorded, Slee noted that the process for making any amendments to the contract required the applicant to make proposals which would be considered by the executive committee on 19 December. On the same date, a second email was addressed by Slee to the applicant in which the applicant was advised that amendments to the new contract would not be considered on an individual basis, that signed contracts were to be submitted by 30 November 2011 failing which it would be assumed that the applicant did not wish to be appointed as an investment specialist and that should the signed contract not be submitted, steps to retrench the applicant would be initiated.

[6] A total of 43 of the 45 employees employed by the respondent accepted the new conditions. The applicant refused to do so, and told Slee as much. On 1 December 2011, the applicant commenced a retrenchment process, and granted the applicant 'leave of absence' for the duration of the process.

[7] On 8 December 2011 a formal s 189 (3) notice was served. What followed was an exchange of correspondence between the parties' legal representatives, and meeting on 20 January. By the beginning of February, the respondent had made it clear that it was not willing to negotiate a contract on individual basis with the applicant, and a deadline was fixed by which the applicant was expected to sign the contract. A further meeting was held on 16 February 2011. The impasse that had been reached persisted – the applicant refused to accept the new conditions and the respondent took the view that his former position had become redundant and that any alternative positions were linked to the new conditions that had been rejected. In regard to severance pay, the respondent took the view that it was not obliged to pay any, since the applicant had rejected an offer of reasonable alternative employment.

[8] On 22 February 2012 the applicant was advised that his employment would terminate with effect from 31 March.

[9] I turn first to the claim of dismissal effected for a reason that is automatically unfair. The applicant bases his claim on s 187 (1) c) of the LRA, which provides that a dismissal is automatically unfair if the reason for dismissal is to compel the employee to accept a demand in respect of any mater of mutual interest between the employer and employee. This provision has been interpreted by the LAC and the Supreme Court of Appeal to confer limited protection – it applies if and only if the employer uses dismissal as a weapon to secure agreement to new terms and conditions of employment where the employer's purpose is to effect a dismissal that is reversible on accession by the employee to the employer's demand. In *National Union of Metalworkers v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA), the court noted that it was only those dismissals '*that are truly designed to make employees change their minds in a dispute with an employer on matters of mutual interest'* that are prohibited as automatically unfair. If the dismissal lacks the proscribed statutory purpose, it is not automatically unfair, and the enquiry is whether the employer has established that the dismissal was a fair dismissal based on its operational requirements (see paragraph 60 of the judgment).

[10] In his article *Bargaining over Business Imperatives: The Music of the Spheres after Fry's Metals* (2006) 27 ILJ 704, Clive Thompson summarises the conclusions that might be reached post-*Fry's Metals*. He notes that in relation to changes to conditions of employment sought by an employer, if the bargaining process fails to deliver the necessary change, an employer may terminate the services of those who will not accept the new employment regime and turn to the open market to recruit those who will (at 705). Any dismissal in those circumstances, however, falls to be adjudicated i.e. the employer must establish that operational requirements justify the dismissal of those who oppose workplace change (at 706). This is not an uncontroversial outcome – indeed, there is an amendment to s 187 (1) currently before parliament that may have the effect of reversing the current position but for

the present, the law is that as expounded by the LAC and SCA in *Fry's Metals*, and stands to be applied as such.

[11] To the extent that the applicant seeks to categorise the dispute as one concerning the respondent's right unilaterally to implement a change to the applicant's conditions of employment, this is misconceived. The issue is whether the purpose of the dismissal was to compel the applicant to accept the respondent's demands in the sense that the dismissal was conditional, to be reversed on acceptance.

[12] In the present instance, on the facts disclosed by the stated case before me, the applicant's dismissal was unconditional and irreversible. He was not dismissed for the purpose of compelling him to accept a demand made of him by the respondent, at least not in the sense that his dismissal would be retracted in the event that he capitulated to the respondent's demands. On the contrary, when the applicant's dismissal was effected it was intended to be final. In these circumstances, s 187 (1) (c) finds no application and the applicant's claim of an automatically unfair dismissal must fail.

[13] I turn next to the issue of substantive fairness, and in particular whether the respondent's operational requirements justified the applicant's dismissal. The applicant submits that the true reason for his retrenchment was his refusal to accept the new conditions of employment and that the respondent had no valid and legitimate reason related to its operational requirements that served to justify the applicant's dismissal.

[14] However, as I have noted above, it is not inherently unfair for an employer to seek to change terms and conditions of employment where there is a legitimate commercial rationale for doing so (See *WL Ochse Webb & Pretorius v Vermeulen* (1997) 18 ILJ 361 (LAC) where a constructive dismissal on account of the introduction of new terms and conditions of employment was held to be fair, on account of the employer's operational requirements). Further, where the employee resists the change sought by the employer, as the facts of *Fry's Metals* and *Mazista Tiles* illustrate, it is not

inherently illegitimate or unfair for an employer to resort to the retrenchment of those who refuse to accept new terms. Indeed, the LAC has held that it is not unfair for an employer to retrench employees simply to become more profitable. As the LAC said:

> 'In a case where a dismissal for operational requirements is directly linked to the employee's rejection of the proposals to changing terms and conditions of service, the continuing existence of the employees' jobs is irrelevant to the determination of whether there was a fair reason for the dismissal because such dismissal would have been necessary by virtue of the changing business requirements and not that the jobs themselves were redundant. As it was stated in Algorax an employer who requires to effect changes to terms and conditions of service due to operational needs of the business may dismiss the employees who reject such terms and replace them with new employees who are prepared to work in accordance with the needs of the business provided the requirements of s 189 are met.'

(*Mazista Tiles (Pty) Ltd v NUM & others* [2005] 3 BLLR 219 (LAC) at para [54] of the judgment).

[15] The respondent's case (captured by the s 189 (3) notice and the correspondence between the parties during December 2011 and January 2012) is that the company was not sufficiently profitable, and that existing levels of return might incline the respondent's shareholders to invest elsewhere, thus occasioning the respondent's closure. The particular problem identified by the respondent was the high cost of remuneration; the introduction of a performance-based remuneration system was considered a means to the end of improved levels of profitability. What the new contract sought to do was to introduce a system of reward for bringing in new business, and to reward performance by the payment of bonuses. Revenue under the new contract would thus be proportionate to the income generated by the employee.

[16] On the face of it, the respondent's need to improve levels of profitability is a legitimate operational requirement; in essence, what it sought to do by

introducing the new terms of employment was to align remuneration structures with a new business model designed to generate growth and thereby income. Given the limitations on this court's rights of intervention, (see *SATAWU v Old Mutual Life Assurance Company South Africa* [2005] 4 BLLR 378 (LC)), it is not for the court to say whether any other strategy or measure may have been the best means to achieve the respondent's ends. There is certainly no evidence to suggest that the decision to introduce a revised remuneration structure was for an illegitimate, arbitrary or capricious reason, or that it was not a commercially rational objective. In these circumstances, in my view, the applicant's retrenchment was substantively fair.

[17] In relation to procedure, the applicant contends that the respondent failed to engage in a meaningful joint consensus-seeking process as required. After issuing the required notice of invitation to consult, the employer's specific obligations under s 189 are to permit the other consulting party an opportunity to make representations, to consider and respond to them and state any reasons for disagreement, and to respond in writing to any written representation.

[18] The issue then is whether there was a consultation process aimed at achieving a solution to the respondent's operational requirements, with retrenchment as a possibility should the parties fail to reach consensus on the solution.

[19] It is not disputed that when the respondent presented the new employment contract to the applicant on 19 November 2011, there was and had not been any discussion regarding the restructuring of the company, the redundancy of the applicant's position and the rationale for the creation of the new post of investment specialist. When Slee met with the applicant on 25 November 2011, it is common cause that there was no mention of restructuring or retrenchment. The first indication of the latter was on 28 November, when the prospect of retrenchment in the event that the applicant refused to accept the new terms was mooted. The meetings that took place between the applicant

and the respondent on 20 January 2012 and 16 February 2012 were conducted on this basis. The minutes of those meetings reflect that the applicant was given the fullest opportunity to make representations regarding the applicant's position and that by the end of the meeting of 16 February, the parties had reached impasse. The minutes also reflect that the respondent was fully aware that he was facing retrenchment. In these circumstances, I am satisfied that the applicant's dismissal was procedurally fair.

[20] For the above reasons, in my view, the applicant was fairly dismissed.

[21] In relation to costs, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. The court has often been reluctant to penalise individual employees who approach the court to enforce what they perceive as their rights, and the court is mindful that persons such as the applicant may be discouraged from seeking to enforce their rights where orders for costs were automatically to follow the result. In the present instance, I accept that the applicant was genuinely aggrieved by the respondent's attempt unilaterally to amend his conditions of employment to what he perceived to be his prejudice.

I make the following order:

1. The claim is dismissed.
2. There is no order as to costs.

Andrè van Niekerk

Judge of the Labour Court

Appearances

For the applicant: Adv. M Garces instructed by Turner and Associates

For the respondent: Mr S Snyman, Snyman Attorneys, Johannesburg