Retrenchments: selection criteria must be fair and objective!

Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema & Others (Labour Appeal Court JA49/07, 2 September 2009 per Zondo JP, Jappie JA and Leeuw JA concurred) was an appeal from the labour court in which the labour court concluded that the dismissal of the respondents ('the employees') was both substantively and procedurally unfair and ordered their reinstatement retrospectively to date of dismissal. The employees in this application were all members of UPUSA.

It was common cause that the appellant ('the employer') had dismissed the employees for operational requirements during September 2005. During July 2005 the employer sent a notice of intention to rationalize operations to all trade unions operating within the employer. During the consultation meetings that followed, the employer decided to use age and FIFO as selection criteria, although FIFO would only be applied in one section of the employer. At a meeting held on 17 August 2005 UPASA indicated that it would not continue meeting until the employer provided financial statements as requested, where after UPASA then left the meeting. NUMSA also called upon the employer to provide the financial documents. UPUSA did not attend the last meeting on 29 August 2005 as this date was arranged at the meeting of the 17th after UPUSA had already left that meeting. The employer failed to inform UPUSA of the meeting of the 29th and the fact that the financial statements would be available at this meeting. The LAC held that whether or not the dismissal was procedurally fair or not depended upon whether UPUSA was entitled or justified in walking out of the meeting of the 17th. It was common cause that although the employer knew that UPUSA indicated that it wanted to see the financial documents before it could continue to participate in the consultation process, and despite knowing that the documents would be available at the meeting of the 29th, the employer failed to inform UPUSA of this fact or to provide the financial statements to UPUSA. UPUSA was entitled to take the stance it did in that it would not participate in further consultations until the employer furnished the financial documents. Once the financial statements were available the employer had a duty to inform UPUSA of this fact. Its failure to do so, and in dismissing UPUSA's members, without proper consultation, infringed UPUSA's right in terms of s 189 of the LRA. The labour court's finding in this respect was thus correct.

As to substantive fairness the LAC held that since UPUSA had not agreed to FIFO as a selection criterion, the employer could only use FIFO if FIFO was a fair and objective criterion.

The court held, based on examples that it referred to, that FIFO could not be said to be a fair and objective criterion as it was easily open to abuse. The LAC further held that FIFO was a very strange way to "reward" those employees who had shown loyalty to the employer over many years. As such the dismissal of the employees was substantively unfair as well. As to the labour court's order of reinstatement the LAC held that once the employees were back at work the employer might be justified in embarking upon a retrenchment exercise afresh, if a need therefore still existed, which might then result in other employees being dismissed. This was necessary in order to secure the reversal of the injustice which occurred when long serving employees were selected for retrenchment. The employer also pointed out that since the labour court handed down its judgment there had been a change of ownership of the business.

The LAC held that when it had to decide an appeal it was required to decide the matter in the same way as the labour court ought to have decided it at the time it did and on the basis of what was before the labour court at the time. Generally, in appeal proceedings the LAC could not take into account events that occurred after the labour court had given its judgment.

In the result, the appeal was dismissed, with costs.

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