

SOUTH AFRICA / JUDGMENT

Groom v Daimler Fleet Management SA (Pty) Ltd (JS166/16) [2024] ZALCJHB 296 (10 July 2024) [2024] ZALCJHB 296

COURT

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

JS166/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS 166/16

In

the matter between:

P H
GROOM
Applicant
and
DAIMLER
FLEET MANAGEMENT SA (PTY) LTD
(In
Liquidation)
Respondent

Heard:

21-25 August
2023; 19-21 February 2024; Final closing arguments: 20
March and (as
agreed but not complied with 7 July 2024)

Delivered:

This judgment was delivered electronically to the parties by email.
The date and time for hand-down
is deemed to be 10 July 2024.

JUDGMENT**WHITCHER J****Introduction**

[1] The respondent, a subsidiary of Mercedes Benz South Africa Ltd (MBSA), operated a fleet management business in terms of which it offered full maintenance leases as well as rental solutions to its customers. The other subsidiary in the corporate Group is Mercedes Benz Financial Services SA.

[2] In September 2015, the respondent commenced a mass retrenchment exercise geared to closing down its business. The stated rationale

was that its Telkom contract had constituted its main source of business over the previous 15 years and it had lost that contract.

The respondent was liquidated on 15 December 2016.

[3] The retrenchment exercise included individual consultations with the employees, including Mr Groom. The respondent was represented in those consultations by two HR Managers, namely Ms Meadows and Mr McMaster.

[4] In terms of the s189 notice, employees who were “compulsory retrenched” were to be paid one month’s notice pay, severance pay “as per retrenchment regulations based on years of service”, accumulated leave pay, a pro-rate 13th cheque and a pro-rata bonus @ 100% depending on their date of termination.

[5] Mr Groom spent his entire working life at MBSA and the respondent, totalling 35 years. He commenced his employment with MBSA as an apprentice in 1981 and was moved to the respondent in 2005 where he worked his way up to the position of Client Life Cycle Manager. Evidence indicates he was a loyal, hardworking employee in those 35 years, with an unblemished performance and disciplinary record.

[6] On 8 December 2015, however, he was retrenched with immediate effect and with nothing to show for those 35 years: no statutory severance pay and no severance benefits stipulated in the s189(3) notice.

[7] An important additional feature of this case, according to Mr Groom, is that on 8 December 2015 he had been one week away from turning 55 on 16 December 2015.

[8] Rule A3.5.0 of the Mercedes Benz South Africa Pension Fund of which he was a member reads as follows:

Obligatory early retirement

A Member whose normal retirement age is sixty five years, who is within ten years of his normal retirement date and had been required by the employer to retire early from service (for reasons other than ill-health) shall be paid a retirement pension.

The Member shall be granted additional pensionable service from his early retirement date until his normal retirement date, subject to a maximum of 8 years.

Any additional pensionable service granted to members in terms of rule A3.5.2 shall be subject to the approval of the Actuary.

The pension shall be

- (i) in respect of a member who has attained age 57 at the date of retirement, the pension specified in the summary of benefits, or (ii) in respect of a member who has not attained age of 57 at the date of retirement, the pension specified in the summary of benefits, reduced by one-quarter of one per cent for each complete month by which he is younger than age 57.

The additional costs, if any, of this pension will be borne by the employer.

[9] In the course of the trial the parties referred to it as “compulsory” early retirement.

[10] Basically, if the respondent had as an alternative to retrenchment retired Mr Groom on or after 16 December 2015, he would have been entitled to inter alia, “additional pensionable service from his early retirement date until his normal retirement date, subject to a maximum of 8 years” and other additional benefits.

[11] On 6 November 2015, Mr Groom was presented with such an offer. He was presented with a document titled ‘Notice of Termination of Employment in terms of s189 of the LRA’, and which reads as follows:

This agreement sets out the material terms and conditions for the termination of the employment relationship between the parties

....

Your effective date of termination is 31 December 2015

.....

In terms of the Company retrenchment regulations you are entitled to the following payments on termination of your employment:

DFM shall pay to the Employee the sum of.....which is made up as follows:

Severance pay

Full (13th cheque)

Full management bonus @100% achievement

Accumulated leave

Notice pay (in lieu of notice)

Payment of any amount due to you shall be subject to any deduction required in terms of the Income Tax Act and as directed by SARS.

You may purchase your current primary lease vehicle at inventory value.

Early retirement

You may remain a member of your current medical aid scheme and will contribute at the lowest/ current contribution rate on the Contribution Table.

You may purchase 1 (one) used vehicle per calendar year at the Daimler Fleet Management Auction and 2 (two) new cars per calendar year at employee price. On your death your family may only purchase one more new unit, thereafter this benefit ceases.

You will have free funeral cover of ...per qualifying beneficiary. You will not pay further premiums from the date of retirement to date of death, but will have cover of ... for yourself, your spouse and children over the age of six. This cover applies to the spouse and children registered at the time of your retirement. Cover ceases for children when they reach twenty one years of age.

An additional once off amount of ... will be paid out to your spouse on your death to cover the funeral expenses.[1]

[12] However, on 20 November 2015, the respondent withdrew the offer, and, as indicated, retrenched Mr Groom effective from 8 December 2015 with no severance or any other benefit.

[13] Mr Groom alleged in his statement of claim that his retrenchment was substantively and procedurally unfair and, as per his statement of claim, he seeks relief of 12 months compensation and “further and/or alternative relief” plus costs.

[14] According to the pre-trial minute, the issues to be determined are, inter alia:

(i) Whether his retrenchment formed part of a large scale retrenchment as contemplated in s189A(1)(a) of the LRA and whether the Court is precluded in terms of s189A from adjudicating a dispute about the procedural fairness of his dismissal.

(ii) Whether the respondent failed to consult him with regard to appropriate measures to avoid dismissal, or to change the timing of the dismissal, and to mitigate the adverse effects of the dismissal.

(iii) Whether the respondent failed to disclose all relevant information;

(iv) Whether the respondent had a need to retrench him (on 8 December 2015, or at all).

(v) Whether there were alternatives to his retrenchment, and whether same included “compulsory early retirement, alternative employment.

(vi) Whether the respondent made offers of suitable alternative employment to avoid his dismissal.

(vii) Whether his failure to respond to the offers of alternative employment on 7 December 2015 amounted to a rejection of the offers.

(viii) Whether he failed to respond to the offer of alternative employment, alternatively unreasonably refused to accept offers of suitable alternative employment.

[15] It is practical at this point to resolve two of the issues. The first is that this Court shall not adjudicate upon the procedural fairness of Mr Groom's retrenchment. The retrenchment formed part of a large scale retrenchment as contemplated in s189A(1)(a) of the LRA and the Constitutional Court judgment in *Regenesys Management (Pty) Ltd v Illunga & Others* [2024] (ZACC 8) essentially confirmed that the procedural fairness of the consultation process may only be prosecuted under an application brought under s189A(13) of the LRA. In any event, Mr Groom was consulted throughout the process. His complaints really

concern the substantive fairness of decisions made by the respondent in the course of the consultation process.

[16] The second point is that in the course of his first individual consultation meeting Mr Groom conceded the business efficacy of the respondent's decision to embark on a mass retrenchment exercise and close the business.

[17] I turn now to the facts of the case on the remaining issues, which come down to whether there was a need to retrench Mr Groom and thus whether his dismissal was substantively unfair and whether s41(4) of the Basic Conditions of Employment Act, 1997 had lawful application to his retrenchment.

[18] Most of the facts can be gleaned from email exchanges and transcripts of the individual consultation meetings admitted into evidence via the parties' witnesses. What I set out below are summarised versions of the facts set out in the emails and transcripts. The time line of the events is important.

The Facts

20 September 2015

[19] On 14 September 2015, the respondent invited employees to individual consultations on 20 September with financial advisers. Much was made of the fact that Mr Groom did not attend these consultations. Mr Groom, however, told Meadows and McMaster that he had understood the invitation had been directed at those employees interested in voluntary retrenchment or voluntary early retirement, which he was not interested in. If anything, he potentially qualified for compulsory early retirement on account of the fact that he would turn 55 years on 16 December 2015.

[20] The emailed invitation is consistent with his understanding. Moreover, as it turned out, he needed a quotation prepared by an actuary of ABSA/the Pension Fund before he could seek any financial advice.

13 October 2015: Mr Groom's first individual consultation meeting.

[21] While Mr Groom in prior correspondence to management had questioned everything about the retrenchment exercise, he accepted in this meeting that a commercial rationale existed for same and that there was no reason to keep the business alive.

[22] The focus of the meeting turned to his options in the face of compulsory retrenchment.

[23] Mr Groom informed the meeting that he had taken the initiative and had applied for two positions at MBSA (Area Sales Manager and Governance Area Sales Manager) but had received no feedback. He opined that the respondent should and was not assisting him in this endeavour given MBSA was part of the Group.

[24] Meadows indicated that all the respondent could do to is request the relevant HR department to give affected employees (like Mr Groom) priority consideration, which she claimed they had done. She indicated that both posts identified by Mr Groom had not as

yet been filled and undertook to follow up on his applications.

[25] Importantly she indicated in this meeting (or a later meeting) that she understood why Mr Groom had applied for those specific jobs and alluded to his job history in the Group.

[26] As to Mr Groom's other potential interest, that of compulsory early retirement, he was told to source all information on the ABSA website, but management agreed to provide him with a compulsory early retirement proposal by 16 October 2015.

[27] Management agreed that, as in the case of other employees, they would provide the assistance of a financial expert to advise Mr Groom, when required.

[28] A further important feature of the minutes is that management confirmed that the 31st December 2015 was the "target date" to finalise matters.

19 October 2015

[29] A breakdown of Mr Groom's severance package was emailed to him.

[30] He was again told to access all relevant information about compulsory early retirement online via the ABSA website.

[31] It needs to be pointed out here that it soon became common cause that the process was not that simple in that a "quotation" had be prepared by an actuary on request from the Pension Fund, "there are a lot of technicalities in terms of the quotation" and the entire process takes some time.[2]

6 November 2015: consultation meeting

[32] Mr Groom was presented with the ‘Notice of Termination of Employment in terms of s 189 of the LRA’ described earlier on.

[33] Mr Groom informed the meeting that he would only be in a position to make an informed decision on the offer once he received a full breakdown of figures and benefits in respect of both the early retirement (the quotation) and severance package.

[34] Mr Groom informed the meeting that he had attended an interview for one of the positions referred to earlier on.

6 November 2015: Email from Meadows

[35] In the email, Meadows stated:

[Mr Groom] requested for his compulsory pension fund quotation before he can make an informed decision...we have requested his early retirement quotation through Dr Panther. Due to the change in time-line, we need the actuaries to do the calculation. As soon as we have received the quotation we will provide [Mr Groom] with his compulsory early retirement quotation.

[36] Dr Panther was from HR: MBSA and Chairman of the MBSA Pension Fund.

[37] Meadows reiterated that the 31st December 2015 will be Mr Groom’s “official end date”.

13 November 2015

[38] Mr Groom reminded Ms Meadows about his request for the compulsory early retirement quotation.

16 November 2015

[39] Mr Groom received a communication from MBSA that he had qualified for a second interview to take place on 27 November in respect of one of the positions he had applied for, that of Sales Executive Truck and Buses.

17 November 2015

[40] A letter from Mr Groom’s (erstwhile) attorneys was dispatched to the respondent.

[41] It stated that in order for them to advise Mr Groom, they require copies of all retrenchment policies and minutes of the consultation meetings.

[42] They further asked the respondent to provide them with its written responses to Mr Groom’s written submissions, “seeing that [Mr Groom] has informed us that he has not received any written response to his written submissions to date.”

[43] The letter further instructed:

At this stage we request the employer’s written undertaking that, until all requested documentation and information have been provided, no further steps, including dismissing our client, will be affected.

We request this written undertaking, to be provided by no later than the close of business on 19 November 2015, failing which our client will be forced to approach the appropriate legal forum and apply for urgent relief to protect his rights. We will be forced, by the employer's failure....to apply for a punitive cost order against the employer.

18 November 2015

[44] Mr Groom received the compulsory early retirement quotation from Dr Panther and Meadows.

[45] He also received an updated severance package quotation. The earlier one given to him had reflected payments up to 31 October, while the updated one reflected payments up to 31 December.

[46] Mr Groom was further informed that all pension related matters must be directed to Dr Panther.

20 November 2015: 11:05am

[47] On the midmorning, Mr Groom wrote to Meadows and Dr Panther that: "His representative and (himself) are preparing some questions that (they) would like responses to. As soon as these are available (he) would forward them."

20 November 2015: 16:12

[48] Only a few hours later, the respondent sent the following letter to Mr Groom.

Retraction of notice of termination[3]

Your email dated 20 November refers.

We note that to date you have not signed your termination letter[4] and have indicated that you do not intend to do so. It is in this light that we wish to advise that this letter is now retracted as well as the contents thereof. This decision is in pursuance of your email referred to above in that it appears that you have further queries in relation to your retrenchment. In the interest of fairness we are obliged to have regard to your further queries.

It is in this regard that we are awaiting your questions and will consider same.

22 November 2015

[49] Mr Groom sent the questions to Meadows.[5] He inter alia questioned the respondent's use of base pay in their calculations, he asked about 13th cheque payments, his car allowance and about various benefits attached or otherwise to the compulsory early retirement.

[50] He also "required" additional payments such as payments for long service, refunds for lease car mileage not used up, further 13th cheques, bonuses and profit share until he reached the age of 65.

25 November 2015

[51] The respondent did not respond to Mr Groom's questions.

[52] Instead, it sent the following letter to Mr Groom:

Our letter to you dated 20 November refers wherein the company had retracted the notice of termination and agreed to further consideration on the issues as contemplated in section 189 of the [LRA].

In an endeavour to seek alternatives to dismissal based on operational requirements and in terms of the company's commitment to retain employees, two positions have been identified as suitable employment for you.

The first is the position of Contracts Origination Administrator at level 6. This position will be without any changes to your current salary. The position is based at MB Financial Services in Pretoria.

The second position is Team Manager: Fleet Services in East London at level 5. The position will be without any changes to your current salary and benefits.

Since the company does not foresee that you will be dismissed, Rule A3.5.0 of the MBSA Pension Fund will no longer apply.

[53] No job profile/description or any other explanatory notes about the jobs were included in the letter. Mr Groom was advised that questions about the jobs would not be responded to. A meeting would be arranged to discuss same.

3 December 2015: meeting to discuss job offer

[54] Mr Groom asked the respondent to "put back on the table" the offer to early retire him on 31 December coupled with severance pay [offer made on 6 November 2015]. He said he was prepared to accept it if his queries about it were just answered. In his view, he had raised valid questions and it had been unfair to withdraw the offer without first discussing it with him. He pointed out that in their letter of 20 November, the respondent had said they are awaiting his questions and will consider same, but had not. He said if the respondent had just answered his queries he would probably have been on his way.

[55] He explained that he went to his lawyer because by 17 November he had not received the information he had asked for and time was running out. The retirement quotation and the updated severance quotation were received only on 18 November which was after his lawyers' letter and then he had questions about the calculations and various benefits, which questions were sent on 22 November.

[56] Mr Groom informed the meeting (as he had done on a previous occasion) that he had contacted ABSA about the quotation, but was told to contact his HR.

- [57] McMaster and Meadows were not prepared to entertain Mr Groom's request to put back on the table the offer made on 6 November. The only purpose of the meeting was to discuss the job offers.
- [58] McMaster informed the meeting that on receipt of the lawyer's letter, they retracted the offer of 6 November and "looked for" suitable alternatives to dismissal and "found" the two posts and in light of that: "We also said we will not respond to [Mr Groom's] questions..."
- [59] Mr Groom pointed out that no job profiles or JD's were given to him before the meeting and still now at the meeting. He had to go out and ascertain what the jobs entailed by phoning the present incumbents and respective departments.
- [60] Regarding the Contracts Origination Administrator position, he was not prepared to accept it because it was a lower position. He had also made enquiries about it and was concerned that he was not suited to it. It was essentially a financial position for which he did not have the skills or qualification. His history was technical and customer care. He stated: "I am not a financial

fundi, so for me to take a job that is financially challenging...there is huge amounts of money involved, there are big decisions to be made to pay so...basically, the line stops with you...the job is financial and I am not a financially qualified person."

- [61] Meadows in response essentially conceded his fears. She said and I quote:

"...the responsibility of the job is critical to the financial services business. Even though it is called an administrator or contracts...the

financial responsibility here that this person holds in an administrator role is really to ensure that we pay our dealerships,

we actually pay out billions to our dealerships on a monthly basis and one of the tasks that this person will be responsible for is to ensure that we pay the correct amounts over to our dealers, so this person actually instructs payment for a dealership, so it is a huge responsibility. The risk in this position is that there as well, being a financial and in the Credit Risk and Operations Division. If we make one mistake on any one of these contracts, I am just emphasizing on this because I want Mr Groom to understand that we did not just do it for the sake of doing it, but here is a real job that the company is putting on offer to him, one contract, if you really have a mistake or it does not go well can cost the company up to R500 000 and that it just on the (indistinct) that excludes other things like buses and trucks and everything as well... because of the risks in this position there is extensive audits that also happen in this division because of the pay outs that we make to our dealerships and there is a lot of legislative requirements that we need to be aware of in terms of the security aspects with regard to also the financial services board requirements, the (indistinct) and FICA requirements. The position is not just contract administration, it is also looking after our finance and insurance profile."

- [62] As to the East London job, Mr Groom said he was willing to take the job even though it was a lower position but on certain conditions. The conditions included that the respondent pay the transfer and other additional costs related to a purchase of a house similar in size to his present house, the respondent pay his wife a salary until she finds another job in East London and his son's student accommodation in Pretoria.
- [63] McMaster pointed out that the respondent has a relocation policy which in their view was more than reasonable, and only that would apply.
- [64] Significantly, Mr Groom reminded the meeting about the jobs he had applied for at MBSA at level 5. He again asked about these positions.
- [65] He opined that the respondent's sudden job offer [of completely different jobs] was a strategy to "put [him] in a corner." He asked when had the two jobs suddenly become available.
- [66] Significantly, Meadows confirmed earlier statements made to Groom that, in respect of available jobs within the Group, affected employees (that is, employees affected by the retrenchment process in the respondent) were expected to apply for those jobs like any ordinary job applicant and go through the respective company's recruitment process. The only assistance the respondent offered was a request to the relevant HR department to give "priority consideration" to affected employees. Meadows stated: "we [HR]...informed them [HR] about the DFM affected employees...so everybody needed to go through the applications for these specific ones."
- [67] The minutes of the meeting concluded with key action points:

Management was to furnish [Mr Groom] with a full job description of the level 6 position on offer. Management also had to consider Mr Groom's proposals regarding the [East London] position and respond on 4 December 2015. Mr Groom was to then respond by 7 December 2015.

5 December at 11:10am

- [68] Meadows sent the following email to Mr Groom:

Herewith responses to your representations you made in the facilitated meeting on Thursday [3 December]

Ultimately, Mr Groom wants obligatory retirement but the company rejects this because he was offered reasonable alternative employment.

Re jobs with MBSA- he applied for – he was given an opportunity to apply for them.

7 December 2015: meeting with Mr Koller: CEO of the respondent

[69] Mr Groom sent an email to Mr Koller confirming that when he attempted to speak to him about his situation, Mr Koller told him he was dismissed on 3 December 2015. He received no response and thus no denial of his assertion that the respondent had taken a decision on 3 December to dismiss him.

8 December 2015: meeting

[70] Mr Groom was handed a dismissal notice. The respondent stated therein that:

(i) Mr Groom's employment is terminated due to operational requirements.

(ii) The dismissal is with immediate effect (that is, effective from 8 December 2015).

(iii) The dismissal is with no statutory severance pay [or any of the other severance benefits listed in the s189(3) notice] because he had rejected the two offers of alternative employment, namely the Contracts Origination Administrator at level 6 at MB Financial Services in Pretoria and the Team Manager: Fleet Services level 5 position in East London.

(iv) In terms of the minutes of the meeting held on 3 December, he had been required to respond to the offers by the close of business on 7 December 2015.

(v) He failed to respond as indicated and thereby rejected the offers.

[71] Mr Groom told the meeting that a lot was discussed in the meeting of 3 December and he was not given a copy of the minutes. As a result he had missed or had not "grasped" that he had to respond to the job offers by 7 December. He had laboured under the impression that the matter would be finalised in a further consultation meeting because the facilitator had discussed availability dates.

[72] There was no response to this explanation from management and Mr Groom was not called upon to categorically indicate his response to the job offer at the meeting or later.

Further facts that emerged during the testimony of witnesses

[73] McMaster and Meadows explained that they withdrew the offer made on 6 November 2015 because Mr Groom "had questions" – "he had the opportunity to accept the offer but he wanted additional information"; they became "frustrated" with Mr Groom; and "there was a view that he was being obstructive."

[74] Meadows and McMaster confirmed that affected employees had been expected to apply for any available jobs in the Group because it was the "prerogative" of the relevant company to make their own recruitment choice. All they did in the

background

was merely advise the HR of MBSA and Financial Services to favourably consider the affected employees

- [75] Mr Groom denied that he had rejected the East London job and repeated the explanation he had offered the respondent on 8 December, which is that he had not appreciated that he had had to respond to offer by 7 December.

Analysis and findings

- [76] I agree with Mr Groom that his dismissal was substantively unfair and no lawful reason existed to deny him the severance package stipulated in the respondent's s189(3) notice.
- [77] The evidence, to me, demonstrates that the late offer of essentially a finance at MB Financial Services SA and a job in East London which required a complex relocation was nothing but a stratagem to "corner" and outsmart an employee who, in the respondent's view, had become tiresome.
- [78] When Mr Groom early in the process pleaded for assistance in securing one of the two jobs he had applied for and which in his view suited his skills and work experience in the group, the respondent had essentially fobbed him off with the excuse that they had no power over the available jobs in the Group. All they could do was request the relevant HR department to give his applications favourable consideration. This begs the questions: how then did the respondent secure the two jobs to simply hand to Mr Groom in the absence of any recruitment process and why were the jobs Mr Groom had applied for not rather offered to him.
- [79] Mr Groom in fact alluded to these contentions and questions in the meeting of 3 December, but was offered no real answer.
- [80] If the respondent had genuinely wished to offer suitable alternative employment, why did they not investigate the possibility of offering Mr Groom the jobs he had taken the trouble to apply for and which on the evidence had still been available when they decided to "look for suitable alternatives to dismissal" on 17 November[6] and when they served him with the letter of 25 November.
- [81] None of the jobs Mr Groom had applied for required a complex and expensive relocation to East London or financial qualifications and skills he feared he did not have.
- [82] At all relevant meetings, including the meeting to discuss the respondent's job offer, Mr Groom pertinently reminded the respondent about the jobs he had applied for.
- [83] Further, Meadows essentially conceded that Mr Groom was not suitably qualified for the position at MB Financial Services and Mr Groom clearly articulated to the meetings his fears about the job, which appeared rational.
- [84] For all these reasons, this court cannot conclude that Mr Groom unreasonably refused to accept the respondent's offer of alternative employment and that s 41(4) of the Basic Conditions of Employment Act, 1997 had lawful application in his retrenchment.

[85] But more decisively, evidence established Mr Groom's pleaded claim that there was no reason to retrench him and that his dismissal was substantively unfair.

[86] I say this because, irrespective of the reasonableness or otherwise of the East London job offer, the respondent did not establish that Mr Groom had categorically rejected this offer. The respondent relied on the fact that he did not respond to the job offer by 7 December to claim he had rejected the offer. This in the face of his explanation that he had not appreciated that he had had to respond by 7 December and thus an indirect request for a further opportunity to consider the job offer. At trial Mr Groom denied he had actually rejected the job offer before they dismissed him and the minutes of the meetings indicates that he accepted the

job in principle but wanted to negotiate the relocation conditions.

[87] All this means is that when the respondent dismissed Mr Groom there still existed the possibility of alternative employment in the form of the East London job.

[88] Moreover, Mr Koller did not deny that the respondent had made a decision on 3 December 2015 to dismiss Mr Groom, which was before the deadline of 7 December 2015.

[89] Alternative employment also existed in respect of the two jobs Mr Groom had applied for. As already stated, if the respondent had the ability to offer him the finance job and the East London job, why not the two jobs Mr Groom had applied for. As already found, there was no evidence that these two jobs were no longer on 17 and 25 November and 3 and 8 December 2015. And, as stated previously,

Mr Groom at all critical times reminded the respondent about the jobs he had applied for. Nothing in the respondent's response to him indicated that he was not suitably qualified for these jobs and/or they were no longer available when they took a decision to dismiss him.

[90] Finally, if one considers the sequence of events up to 3 December, a further viable alternative to retrenchment had existed, namely the option of compulsory early retirement. On 3 December, Mr Groom begged for the option to be placed back on the table and indicated that he was prepared to accept it if the respondent merely answered the questions he had posed. Not one respondent witness testified that the questions posed by Mr Groom were unanswerable or so outrageous they warranted no response. The stance they took was simply because they found frustrating a person who, facing one of the most important decisions in his life, had questions about that decision.

[91] I bear in mind here that management had set the 31st December as the deadline by which retrenchment matters had to be resolved. They lost their patience on 17 November 2015.

[92] For all these reasons, Mr Groom was dismissed in circumstances where viable alternatives to dismissal was available. It follows that there was no need to retrench Mr Groom when the respondent did so and accordingly his dismissal was substantively unfair.

Relief

[93] Obviously, Mr Groom could not plead for reinstatement. It was not feasible so he was constrained to plead for monetary relief. And, in the absence of any pleading or legal basis for relief concerning his pension, no relief in that regards may be awarded.

[94] Mr Groom testified at length about the stress and financial hardship he found himself in unemployed at the age of 55 years old and having to support his family on the limited resources provided by an early retirement with penalties and without the benefit of Rule A3.5.0 of the Mercedes Benz South Africa Pension Fund. Besides the loss of severance pay, he estimated that he lost out on approximately R2million as a result of losing the benefit of Rule A3.5.o of the Pension Fund.

[95] In my view the maximum compensation permitted by s 194(1) of the Labour Relations Act, 1995 plus the severance package served on Mr Groom on 18 November 2015 plus costs is the appropriate relief in this case.

[96] In the result, I make the following order:

(i) The dismissal of the applicant was substantively unfair.

(ii) Section 41(4) of the Basic Conditions of Employment Act, 1998 had no lawful application in the applicant's retrenchment.

(iii) The respondent is directed to pay to the applicant the equivalent of 12 months' remuneration calculated at the applicant's rate of remuneration on 8 December 2015.

(iv) The respondent is directed to pay to the applicant the severance package stipulated in the applicant's s189(3) notice.

(v) The respondent is directed to pay the applicant's costs, including the cost of counsel.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

C Bekker, instructed by Du Toit Attorneys

For the Respondent:

P Kirsten, instructed by Adams & Adams

[1] Emphasis added.

[2] See Meadows: consultation meeting of 3 December 2015.

[3] This refers to the offer made on 6 November 2015, discussed earlier on.

[4] Ibid.

[5] See: A161 where McMaster acknowledged receipt of the questions.

[6] See the recorded statement by McMaster in the meeting of 3 December.

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