

SOUTH AFRICA / JUDGMENT

SACU obo Danster v Bidvest Facilities Management (Pty) Ltd (JS 1069/2020) [2022] ZALCJHB 251 (9 September 2022) [2022] ZALCJHB 251

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 1069/2020

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JS 1069/2020

In

the matter between:

SACU
obo ANTOINETTE
DANSTER
Applicant
and
BIDVEST
FACILITIES MANAGEMENT (PTY) LTD
Respondent

Heard: 29 - 30 August
2022

Delivered: 09
September 2022

(This
judgment was handed down electronically by circulation to the
parties' legal representatives, by email, publication
on the
Labour Court's website and released to SAFLII. The date on
which the judgment is delivered is deemed to be 09 September
2022.

JUDGMENT

VAN NIEKERK, J

Introduction

- [1] The applicant has referred a dispute to this court in terms of Rule 6, in which she disputes the fairness of her retrenchment by the respondent during September 2020. The applicant does not dispute the commercial rationale for her retrenchment, nor does she dispute the fairness of the consultation process that preceded the termination of her employment. The only issue in dispute relates to the fairness of the selection criteria adopted by the respondent, and their application.

Material facts

- [2] The applicant was employed by the respondent as a parking administrator. She was engaged at the head office of Standard Bank, where the respondent is contracted to provide parking-related services to the bank in terms of fixed-term service level agreements. During September 2020, the bank approached the respondent regarding the terms on which it was prepared to renew the service agreement between them for a further 12 months. The proposal contemplated a reduction of the services to be rendered, largely on account of the consequences of the Covid pandemic and in particular, the large number of bank employees working from home. Mr van der Walt, the respondent's executive manager, testified that at the time, only 5% of the bank's staff were working from the head office, with the result that the demand for parking and the management of parking facilities had decreased considerably. Van der Walt testified further that the bank's demands had the result that the respondent was required to revisit the services that it provided to achieve and implement a required reduction in costs.
- [3] On 7 August 2020, the respondent sent out a communication to trade unions representing its employees, notifying them that it intended to commence with a retrenchment process, and proposing a meeting to be held on 17 August
2020. A meeting was held on that date, during which the respondent explained the rationale for the section 189 (3) notice, alternatives that had been considered, the number of employees affected, the proposed selection criteria, the timing of the dismissals, the proposed severance pay and the prospects of future employment.
- [4] On 9 September 2020, the respondent engaged with the applicant and other affected employees advising them of the intention to consult with employees on a possible termination of employment on the basis of operational requirements. The next day, 10 September 2020, the respondent provided the relevant unions with information regarding voluntary separation packages and further confirmed that the selection criteria to be employed would be LIFO and skills retention.

- [5] A further meeting was held with the applicant and other affected employees on 11 September 2020, during which the respondent explained the need for the proposed retrenchments and the process that would be followed. In particular, the respondent discussed the applicant's position, and the fact that of the six parking administrators employed on the Standard Bank contract, this number would be reduced to four. It is not disputed that of the six parking administrators, two were engaged on other sites (one in Rosebank, the other in the West Rand, and thus unaffected by the proposed retrenchment) and that only two of the four posts at the bank's head office were affected by the proposed reduction.
- [6] The next consultation was held on 18 September 2020 when selection criteria were discussed, as well as those employees who had applied for voluntary severance packages, and those who had accepted alternative employment. On the same date, the respondent notified the applicant of two vacancies at its head office and requested a response by 21 September 2020. It is not disputed that the applicant did not respond to the notice.
- [7] On 21 September 2020, the respondent issued a termination notice to the applicant advising her of the termination of the services.
- [8] After the applicant's termination of employment, the union raised the issue of the applicant's selection for retrenchment and sought the respondent's intervention. That correspondence resulted in the production of a schedule which was described by Mr. Malibongwe Qolo, the respondent's employee relations manager, as a 'working document' that was not disclosed during the consultation process, but which informed that process. The schedule comprised of an assessment of each of the parking administrators. The author of the document was described as the affected employees' line manager, who was not called to give evidence.
- [9] The schedule rates each employee under the headings experience and qualifications, competency, efficiency, key skills, and what is described as 'continued service delivery'. In respect of the applicant, the schedule records in respect of experience and qualifications that 'Antoinette has the required Experience but not the correct level of qualifications as her excel skills is not up to standard. Her ability to type an email without errors, proper grammar and not coming across rude is lacking. Antoinette is not interested in working on the Visitor parking application which is based on SharePoint and linked to PowerApps and PowerBI'. In relation to competency, the schedule records that 'Antoinette is component (sic) to work however her lack of excel skills hinders her to do proper administrative audits and reports'. With regard to efficiency, the schedule records that 'Antoinette is efficient however her lack of attention to detail often cause for her work loaded on the databases to be incorrect (sic)' and 'Antoinette is often perceived as rude and unprofessional.' In regard to service delivery, the schedule records that the applicant's delivery is not always 'on par', and that she 'will disappear for hours in a day from her desk without informing me (supervisor) or any of the staff where she goes...'

- [10] Qolo testified that the schedule was prepared by the line manager on the basis of what he described as ‘the understanding of what was happening in the domain’. Qolo himself had no direct knowledge of what the applicant (or indeed, any of the other affected employees), did on a day-to-day basis. His concern was to ensure the implementation of objective criteria having regard to the new contract and to ensure that employees engaged on the contract would be ‘fit for purpose’.
- [11] Van der Walt testified that the selection had been done in consultation with the line managers concerned, and also representatives of the bank. The respondent was concerned to identify the employees best placed to ‘take the business forward’ for the next 12 months. He sought to distinguish the factors applied from those that related to either performance or capacity, and emphasized that the respondent was required to adopt a ‘forward-looking view’. Van der Walt also sought to address specific short-comings on the applicant’s part, in particular, her lack of familiarity with a Cloud-based system that the bank required the parking administrators to utilise.
- [12] As I have indicated, the applicant does not challenge the commercial rationality of the respondent’s decision to retrench, nor does she contest the fairness of the consultation process that was adopted. The sole issue in dispute is the fairness of the selection criteria adopted and their application. The respondent applied the principle of last in, first out (LIFO) in the affected sites and in the affected occupations on those sites, subject to the right to retain special skills. There was some dispute as to whether these criteria had been agreed but it seems to me having regard to the evidence of Van der Walt and the correspondence confirming the content of the consultation meetings that as early as date, the union accepted these criteria.
- [13] In cross-examination, the applicant’s representative put to her that she had not been considered for either the Rosebank position or that on the West Rand, thus raising the issue of bumping. However, any obligation to bump employees with less service engaged on other sites was never pleaded, nor was the proposition put to either of the respondent’s witnesses. In these circumstances, it is not open to the applicant to allege that the respondent acted unfairly by failing to relocate the applicant. The applicant’s primary contention is that her longer period of service entitled her to be retained over those parking administrators engaged at the bank’s head office who had lesser service. In regard to her competence, the applicant testified that she was proficient in the relevant operating system, including the Cloud-based system about which Van der Walt had testified.

Applicable principles

- [14] Section 189 (7) requires that the employer must select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or if no criteria has been agreed, criteria that are fair and objective. The LRA thus precludes an employer from applying capricious or entirely subjective criteria, but the threshold of fairness and objectivity does recognise criteria that might potentially trump length of

service such as merit, performance and work records. In doing so, the court has sought to balance the competing interests of the employees right to security of employment, and the employer's right to be able to respond to changes in the working environment and new demands made on the business.

[15] In NUM & others v Anglo American Research Laboratories (Pty) Ltd

[2005] 2 BLLR (LC), the court was concerned with a dispute concerning the application of agreed selection criteria. The employer had retained employees with shorter periods of service on the basis that they possessed skills that the applicant employees, who had been selected for retrenchment, did not. The court accepted that the employees retained and had skills which the applicants lacked, and held that although it was possible that a degree of subjectivity had crept into the test applied, one largely based on past performance, the data and time frames employed were sufficiently reliable to serve as a fair measure of the employee's skills. The court thus accepted the employer's contention that it was necessary to retain available skills and that the selection criteria had been fairly applied.

[16] In National Union of Metalworkers of SA v Columbus Stainless (Pty) Ltd (unreported, JS 529/2014, 30 March 2016) the court said the following:

Following the influential article by Prof Alan Rycroft 'Corporate restructuring and 'applying for your own Job' (2002) 23 ILJ 678, the courts have held that criteria need to be clear and transparent and selection criteria and the application should ensure that the dismissal does not cross the line between a no-fault dismissal and one based on performance. John Grogan (see Dismissal at

245) has summarised the position as follows:

In summary, criteria for selection can be divided into those that are potentially fair, and those that are unacceptable in principle. Potentially fair criteria include length of service, balanced by the need to maintain history skills. In addition, criteria such as performance (with individual or group performance), conduct, experience, skill, adaptability, attitude, potential and the like

- or a matrix or 'mix' of such criteria - are acceptable. When these criteria are adopted, however, the employer is required to ensure that a 'rating' system is used which can be applied fairly, consistently and objectively.

[15] The court went on to observe that in order to remove any element of personal feeling and opinion from the assessments, the respondent had appointed a panel of supervisors, each of whom knew the employee from the relevant work area and was able to assess the employee against the stated requirements. The assessment was moderated by an area manager. As a further measure to avoid employees being prejudiced by any subjective assessment, the score had been discussed with employees who were affected, and any employee dissatisfied with his or her rating was afforded the right of appeal.

- [16] What emerges from these cases is that it is legitimate for any employer to apply LIFO subject to special skills, and that a range of factors may be taken into account in determining, on a case-by-case basis, whether the special skills exception trumps length of service. These factors extend, as Grogan observes, to those that border on the subjective and include attitude, adaptability, potential and the like. But what is significant is a requirement that an affected employee be consulted on the specific factors to be applied, and that he or she be given an opportunity to respond to any assessment made by the employer.

Analysis

- [17] As I have indicated, the agreed selection criteria in the present instance were LIFO, to be applied in the event that the number of candidates exceeded the number of available positions, subject to skills retention.
- [18] It is common cause that the applicant had longer service than either of the retained employees. The only issue for determination then is whether in seeking to retain skills, the respondent acted unfairly by retaining the two employees it did, both of whom had less service than the applicant. Put another way, the question is whether the limitation of LIFO by the agreed skills retention exception was fairly applied.
- [19] I did not understand the applicant's representative to submit that the applicant had been selected for retrenchment on the basis of some ulterior motive, or as a device to dismiss the applicant on grounds other than the respondent's operational requirements. This was never established during the cross-examination of the respondent's witnesses, or by the applicant in her evidence-in-chief. The applicant's case would appear to be that the applicant ought to have been retained on the basis of her length of service and her skills, and in doing so, made much of the applicant's qualifications. These are largely certificates of completion of IT and business-related courses, some of them acquired more than 15 years prior to the present dispute. To the extent that the applicant's representative sought to equate qualification with skill, this not a valid equation. To the extent that the applicant sought to base her case primarily on her qualifications, she has misconceived the nature of the inquiry. The respondent was fully entitled to regard qualification as a single factor amongst many in the process of selection for retrenchment.
- [20] The authorities require an element of fair procedure to be read into the application of selection criteria, particularly with those that border on the subjective. On the respondent's own version, neither the applicant nor her representative were afforded an opportunity directly to engage on the basis on which the applicant had been selected, i.e., the schedule compiled by the applicant's supervisor. Although the respondent's witnesses sought to investigate the schedule to the status of a background document which informed the consultations that took place, it should be recalled that by early September 2020, the applicant had already been selected for retrenchment and that by 11 September, she was told why she had

been selected, albeit in terms that lacked the specificity reflected in the schedule. In my view, it was incumbent on the respondent, in the circumstances, to afford the applicant and/or her representative the opportunity to challenge the conclusions drawn in the schedule, which unquestionably formed the basis for the applicant's selection for retrenchment. That failure to afford the applicant this opportunity renders her dismissal unfair.

[21] In relation to remedy, the respondent's witnesses led evidence that its engagement at the bank was on a contract-to-contract basis, and that attendance at the bank's head office had not escalated to a point where it was likely that the bank would contemplate increasing the number of two positions for parking administrators. Further, the respondent's shortcoming is conceptually procedural in nature, it having failed to consult with the applicant or her representative on the factors to be taken into account when applying the skills retention exception to LIFO, and it having failed to afford the applicant an opportunity to respond to its assessment of her skills. For these reasons, an award of compensation is appropriate. In my view, a sum equivalent to six months' remuneration is just and equitable.

[22] Finally, the applicant is represented by a trade union. For the purposes of section 162, the requirements of the law and fairness are best met by each party bearing its own costs.

Order

1. The respondent is ordered to pay the applicant compensation consequent on an unfair dismissal in a sum equivalent to 6 (six) months remuneration, to be calculated at the rate of remuneration paid to the applicant at the time of her dismissal.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Union official

For the respondents: Ms S Lancaster, Lancaster

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