Arbitration Award

Case Number: ***WECT13083-21***
Commissioner: ***Piet van Staden***
Date of Award: ***9-May-2022***

In the **ARBITRATION** between

Cecelia Bessick

(Union/Applicant)

and

Baroque Medical PTY (Ltd)

(Respondent)

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. Arbitration proceedings were scheduled for 29 April 2022 and the proceedings were held at the offices of the Commission in Cape Town. Both parties were represented by attorneys. The applicant was represented by Mr Brunsdon while the respondent was represented by Mr Crawford. The evidence of the employer's only witness was taken down virtually as she was in Mauritius at the time of these proceedings. The proceedings were digitally recorded.

ISSUE TO BE DETERMINED

2. I must determine whether the applicant was unfairly retrenched and if she is entitled to severance pay. Procedural fairness was not challenged. As regards substantive fairness, the only challenge was that the employer did not adequately consider alternatives to retrenchment.

BACKGROUND TO THE DISPUTE

3. The facts in this matter are relatively simple. The employer imposed a compulsory Covid-19 vaccination policy for its staff and the applicant refused to comply with that policy. As a result, she was retrenched, as were three other colleagues who also elected not to abide by the compulsory vaccination policy. It was not disputed that the applicant was, at the time of her retrenchment, some 18 months away from her compulsory retirement. She confirmed during the arbitration proceedings that she is 64 years old. It was also not disputed that at the time of her retrenchment, the applicant had served the employer for 22 years. She served as an invoicing clerk and her monthly salary amounted to R29 938 per month (cost to company). At the time of the applicant's retrenchment, the employer carried 107 staff members.

4. The employer supplies medical devices to various medical disciplines in the medical industry. The respondent is classified as an essential service.

5. At the commencement of the proceedings I raised the issue of jurisdiction with the parties and they both consented to the jurisdiction of the Commission. An agreement to that effect was signed before the matter continued.

THE CASE FOR THE EMPLOYER

Ms Du Toit

6. She serves as the Legal Adviser. On 22 July 2021 the entire staff complement of the employer was advised of the vaccination policy. Before the policy was adopted there had been various deliberations between the Board and the employer's Covid-19 Committee. The basis for the policy was to ensure that staff members were not infected by the virus and also to sustain the operations of the respondent by attempting to prevent the transmission from unvaccinated and non-vaccinated staff. The attempt was also to prevent absenteeism as a result of the virus.

7. Ms Du Toit noted that emails were sent to the eight categories within the employer. According to a timeline submitted in the employer bundle, consultations commenced on 7 July 2021. This was preceded with email correspondence to various departments and age categories regarding vaccinations. The dates were not specified. On 14 July 2021 the employer commenced having individual meetings with those who objected to or delayed with the vaccination. There were also meetings on 16 July 2021 and the policy was circulated on 22 July 2021. On 30 July 2021 the applicant was contacted for an update on her position and the document confirmed that she objected to being vaccinated. Consultations with the applicant were then held on 2 September 2021, 6 September 2021 and 8 September 2021. The latter date was also the day that the applicant received her notice of termination.

8. Ms Du Toit stated that employees were advised that they could vaccinate at Clicks and one-on-one meetings were held with those who objected. The Covid Committee consisted of herself, the HR Manager, to other functionaries as well as the CEO.

9. According to Ms Du Toit the applicant did not raise any concerns between the period 7 to 30 July 2021. The first time that the employer became aware of her objections was on 30 July 2021 when she referred an email to the employer where she recorded that she was not willing to be vaccinated because of medical, personal and religious reasons. The applicant also recorded that an employee can decline to get vaccinated on the grounds of bodily integrity in terms of Section 12 (2). The email from the applicant followed a reminder from the employer, dated 29 July 2021 wherein she was advised that she was supposed to have furnished confirmation of her registration for the vaccination within one week of the date of the imposition of the new policy. That date was specified as 29 July 2021.

10. Ms Du Toit stated that the employer was shocked when it received the applicant's response and on 25 August 2021 the applicant was sent a letter wherein reference was made to the vaccination policy. The document recorded that the policy is an operational requirement and a health and safety resolution adopted by the Board and Executive Management of the employer. The policy requires staff to be vaccinated.

11. The letter also referred to consultations held on 7 July 2021 and the calls for individuals who had concerns or objections to the vaccination to submit such concerns and to attend individual consultations. The letter mentioned that the policy is non-negotiable. It also recorded that the employer recognised the right of refusal to be vaccinated as enshrined in the Constitution but recorded that the employer had similar rights which were also enshrined in the Constitution. This included the right to determine the best policies of the business as well as the fact that all rights listed in the Bill of Rights were subjected to legitimate curtailment in terms of laws of general application. It was recorded that the government policy of rolling out and requiring vaccination is a law of general application. It is on this basis that the employer implemented the compulsory vaccination policy.

12. The document referred to the applicant's email of 30 July 2021. It recognised the right to refuse the vaccination but recorded that it is the consequences of that refusal that is important. The letter records that it appeared as if the applicant's refusal constituted an outright refusal based on the provisions of the Bill of Rights as set out in the Constitution.

13. As regards the objection to medical, personal and religious reasons, the employer recorded that it was unclear precisely what the applicant meant by it. The employer also recorded that bodily integrity does not concern vaccinations but conceded that the applicant had the right to refuse the vaccination.

14. The employer recorded that the applicant's reference to the right to freedom of religion was unconvincing. It recorded that it was not aware of what religious requirement prevented the applicant from obtaining the vaccination. The letter also recorded that if the applicant sought to rely on the comments by the former Chief Justice, it held the view that these were not compelling statements and did not justify a refusal.

15. Whilst the applicant mentioned "*belief and opinion*" in terms of section 13 of the Constitution, the employer contended that she failed to articulate in respect of what belief she was being discriminated against. The employer recorded that the right to belief and opinion cannot be expressed in a vacuum and the applicant was not being persecuted for her belief or opinion. She was required, on rational and scientific basis, to protect herself, her colleagues and patients and clients against infection.

16. The employer also recorded that the applicant's reference to an immediate allergic reaction was unsubstantiated and was rejected.

17. The letter concluded by affording the applicant 72 hours to confirm that she will obtain the vaccine failing which the process is set out in Section 189 of the LRA would be invoked. No response was received from the applicant.

18. On 6 September 2021 the applicant was handed a notice in terms of Section 189 of the LRA. The letter commenced by stating it is an operational requirement of the employer that all employees be vaccinated against Covid-19. The letter recorded that it was not the purpose to debate the various reasons provided by employees as to why they refuse to be vaccinated. The letter mentioned certain of the reasons advanced by those who objected to the vaccination and then dealt with those objections. It is not necessary to record.

19. The letter recorded that the Government and the Department of Health promoted vaccination. In addition both employers and employees are subject to the LRA, which is a law of general application, consistent with not only Section 36 of the Constitution. The letter continued to record that it is an operational requirement that dictated that an employer may insist that its employees must be vaccinated. This was of particular importance in the medical field where the protection of co-workers, customers and patients are paramount.

20. The letter recorded that the mandatory vaccination policy had been comprehensively communicated and consultations have been held with those who have objected. Arguments have been considered arising from the objections and although none of the reasons provided were compelling, it had to be noted that objecting employees were not being required to be vaccinated in order to retain their employment because of reasons pertaining to including, but not limited, their freedoms of expression, psychological and bodily integrity, religion, belief and opinion, but simply because they are unwilling to abide by the employer's operational requirements.

21. The alternative that the employer had considered was to allow employees to object and not be vaccinated. The employer advised that this alternative had been rejected because it cannot be countenanced and it will mean that there are two sets of rules for employees and that a variety of objections will require impractical monitoring. The alternative of repeated Covid testing has also been considered but the employer maintained that this was too high a risk and was also impractical. Ms Du Toit also mentioned that the employer did consider working from home but this would not be possible.

22. The letter then recorded that no severance pay was proposed and this was based on Section 41 of the Basic Conditions of Employment Act. Ms Du Toit noted that whatever alternative position could be considered for the applicant, the requirement remained that all employees at to be vaccinated.

23. Commenting on the duties of the applicant, Ms Du Toit noted that the applicant served as an invoicing clerk. She would interact with her colleagues daily and in the Cape Town office there were seven staff members. Apart from administrative staff, there were also sales staff and the latter would engage with third parties like hospitals, medical practices/practitioners and related health service providers. While the applicant would not have interaction with third parties, the other staff members with whom she would have daily contact to interact with third parties as detailed herein. She also had contact with drivers who delivered equipment from other institutions. There were also occasions where a member of the administrative staff or sales staff would, in the case of an emergency, delivered equipment to clients, as described, of the employer

24. The attitude of the employer's clients was that anyone entering the premises had to be vaccinated. This was conveyed to the employer by the hospitals, specialists and allied professionals that made use of the employer's services.

25. Part of the employer bundle consisted of a Covid-19 Risk Assessment document and the purpose thereof was to mitigate any possible risk of infection, transmission or cross-contamination of the Coronavirus between employees within the business. The document detailed steps to be taken to perform the assessment and certain responsibilities were allocated to the Management Team, the Covid-19 Task Team and all employees. It also detailed the risk assessment grading and it referred to resources which could be utilised. These included the World Health organisation, the Department of Labour, the National Institute of Communicable Diseases, the Department of Health and the Centre for Disease Control and Prevention.

26. This lead to the imposition of the vaccine policy. The policy recorded that as an essential services provider, its employees have a higher exposure to the virus due to the nature of the work. It also recorded that during outbreaks of a vaccine preventable disease, for which there is a safe and effective vaccine, institutions have a responsibility to provide promote immunisation to staff for the purpose of protecting them from infection and disease. In addition the employer carries the further responsibility to protect those employees who are vaccinated against the risk of infection from individuals who are not vaccinated.

27. The document confirmed that the primary aim of the vaccination program was to protect those who are most at risk of illness or death from Covid-19. To enhance the safety health and well-being of its employees, the employer was introducing a process of risk assessment to support employees who were required to have the vaccination.

28. The document recorded that the employees are at an increased risk of becoming infected by being exposed to the clinical environment, infectious colleagues in the workplace as well as exposure to those outside the workplace. Age and comorbidities also add to the risk of infection and it is recorded that the employer had several employees were older than 60 and it had a few employees who suffered from comorbidities.

29. The document also record that the employer has taken cognizance of the provisions set out in Sections 8 and 9 of the Occupational Health and Safety Act pertaining to the employer having to provide a working environment that is safe and without risk to the health of its employees. Having considered that and the operational requirements of the workplace, the employer has decided to implement a mandatory vaccination policy for all its employees. The document then specifies the roll out for the vaccination and consultations that would be held with all staff members to explain the mandatory vaccination policy. This would allow the opportunity for concerns and questions to be raised and addressed.

30. The document also recognises the right of refusal and noted that it is important that this is appropriately addressed and documented. Employees should be counselled regarding the right of refusal and employees who decline the vaccination should be asked to confirm that there have been offered the vaccination but have declined based on their respective, reasons.

31. The document further records that due to the nature of the business and the open plan office set-up across the branches, the risk of transmission is high. Office staff members are required to engage with sales staff on a regular basis and are exposed to healthcare professionals and patients on a daily basis, thereby increasing the risk of transmission to office staff. The document also recorded that employees will receive a paid time off for vaccination and sick leave would be provided should there be any side effects from the vaccine.

32. Where an employee is refusing the vaccine, the grounds for refusal shall be considered and the employee shall be consulted in relation to the grounds raised and the options available to the employee and the employer. If the employer is unable to reasonably accommodate the employee who has refused to be vaccinated, the employee's contract may be terminated in line with the LRA.

THE CASE FOR THE EMPLOYEE

33. The applicant recorded that she was approached by the employer regarding the compulsory vaccination in June 2021. She noted that this was done via a Teams meeting. Around 21 July 2021 there was another letter and on 25 August 2021 she received the Section 189 letter, advising her of the mandatory vaccination policy. In that letter the applicant was given 72 hours to confirm that she would obtain the vaccine failing which the process as set out in Section 189 of the LRA would be invoked.

34. The applicant received a notice of termination on 8 September 2021 and she confirmed that she received all statutory monies due to her save for the retrenchment pay. She received her final payments at the end of October 2021.

35. The applicant confirmed her email of 30 July 2021 wherein she recorded that she objected on the basis of medical, personal and religious reasons. As far as the objection on medical grounds was concerned, the applicant recorded that she has a blood disorder and she was concerned that if she took the vaccination, it might trigger something. She also relayed to the proceedings that her General Practitioner advised her that it was not a good idea at this stage.

36. The applicant confirmed that she did not submit any medical proof or evidence of her condition. She stated that she thought that it was self-explanatory as there were a few people at the office who knew about her condition. One of those was the spouse of the CEO.

37. As regards her objection on personal grounds, the applicant stated that she did not know the vaccination and maintained that it had not been tested for very long, compared to vaccinations for other medical conditions. She noted that it is not known what the ingredients are in the vaccination.

38. As far as religious grounds are concerned, the applicant stated that she was a Christian and she referred to the statement by the former Chief Justice. She noted that she did not believe in vaccination and she did not feel the need to inoculate herself. She stated that she agreed with the sentiments regarding the creation of a new world order and she maintained that this was slowly kicking in. She also equated that with the 666 phenomenon and she noted that she did not wish to participate.

39. Referring to the Section 189 consultation process, the applicant stated that they were told that they had to be vaccinated and if they elected not to do so, their services would be terminated. She stated that no alternative position was offered to her. She jokingly mentioned that she could be put in the garage or the office of the CEO, which apparently stood vacant for periods of time. She conceded, though, that it might not be possible in respect of the latter because it would create seating problems for the CEO when he visited the office. Mr Brunsdon enquired from the applicant as to the frequency of the CEO's visit to the

office and my assessment was that she could not really give a definitive indication as to the frequency. She initially indicated that it was every third month and he would be at the office for approximately a week and thereafter she indicated that it might not be every third month but that it would depend on the work.

40. The applicant noted that she could have been accommodated by the employer as regards an alternative. She noted that she could have worked from home and could have done some invoicing and other functions at a reduced salary because she only had 18 months left before she would have to retire.

ASSESSMENT OF THE EVIDENCE AND ARGUMENT

41. In a recent CCMA Award, **Hospersa obo Meintjies** v **Huis Ravenzicht** [WECT 387-22, issued on 19 April 2022, par 47 (See also **Dreyer v Duncan Korabie Attorneys** WECT 13114-21, issued on 7 February 2022)] the Commissioner detailed the requirements for implementing a mandatory vaccination policy: (considering the Consolidated Direction of June 2021 read with the Guidelines)

    - *Conduct a risk assessment of the workplace;*
    - *Develop (or amend) a plan outlining taking into account employees constitutional right to bodily integrity and freedom of religion belief and opinion;*
    - *Implement protective measures in the workplace;*
    - *Identify measures regarding vaccination of employees;*
    - *Consult with the Union/health and safety committee/employees on the plan;*
    - *Notify all employees of the plan and the manner in which it intends to implement it;*
    - *Educate employees on the dangers of Covid-19 and measures to prevent spread, as well as vaccinations available, their benefits and possible side effects;*
    - *Give employees paid time off to be vaccinated;*
    - *Inform employees that they have the right to refuse on medical and constitutional grounds;*
    - *If an employee refuses, ask for the reasons and counsel the employee;*
    - *If the refusal is based on medical grounds, refer to a medical practitioner; and*
    - *If necessary take steps to reasonably accommodate the employee as far as is reasonably practicable."*

42. Apart from the fact that the applicant did not present any evidence to suggest that the employer had not complied with the above requirements, I am of the view that what is contained in the employer's policy meets with the requirements set out in the above award.

43. Section 189 of the LRA reads as follows:
    "1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-"

44. The LRA defines "***operational requirements***" to mean requirements based on the **economic, technological, structural or similar needs of an employer** [S 213] (My emphasis and underlining).

45. Typically, "***operational requirements***" involve "*measures adopted by the employer to cut costs or improve profit or in order to restructure its business or alter the manner in which its employees work, to meet an operational imperative*". [**First National Bank, A Division of First Rand Bank Ltd v Commission for Conciliation, Mediation & Arbitration and others** [2017] 11 BLLR 1117 (LC)] In **Johnson & Johnson (Pty) Ltd v CWIU** [1998] 12 BLLR 1209 (LAC) the Labour Appeal Court noted that, "*in today's world, [operational requirements] do [not] always flow from the local needs of an employer" but may also arise from the impact of global developments on the profitability of the parent company of a South African subsidiary."*

46. The issue of "***similar needs of the employer***" has also received its share of attention. In **SATAWU v Khulani Fidelity Security Services (Pty) Ltd** (2011) 32 ILJ 130 (LAC) the Labour Appeal Court found that an agreement requiring certain employees to undergo polygraph tests *"was designed for operational reasons, namely to ensure that only people of proven integrity could be maintained in these positions".* Passing such tests therefore constituted an operational requirement in respect of the affected employees. See also [2011] JOL 27346 (LAC) at p 11:

> *"To sum up therefore, there was an agreement. That agreement was designed for operational reasons, namely, to ensure that only people of proven integrity could be maintained in these position. That was the purpose of the agreement with respondent's client. It was the reason why consultations took place with the first appellant. The position was also known to all the workers employed therein; that is, failure of the test gave rise to termination from that post for the reasons I have mentioned, being operational reasons."*

47. In **Tiger Food Brands Ltd v Levy NO** (2007) 28 ILJ 1827 (LC) the expression "*similar needs of an employer*" was considered. In a situation where measures taken by a company to reduce losses were met with threats of violence by unidentified employees, it was held that the **necessity to restore stability was a need "*similar*" to an economic need which, on the facts, could justify dismissal on the basis of operational requirements rather than misconduct.** If the employer can prove that misconduct by employees affects the economic viability of a business or prevents an employer from turning its business around, the employer may dismiss such employees on the basis of its operational requirements [paragraphs 38 to 40]. See also Fawu **obo Kapesi v Premier Foods Ltd** (2010) 9 BLLR 903 (LC) par 66. In that case the Court confirmed that "*an employer cannot as a matter of principle or as a matter of expedience resort to section 189 procedures in misconduct cases*", but added that "*as long as the employer can prove that the **dominant purpose of the retrenchment route** is the **economic viability** of the enterprise, the employer may well be entitled to go the section 189 route*" (My emphasis and underlining).

48. In **SA Commercial Catering & Allied Workers Union & others v Pep Stores** (1998) ILJ 1226 (LC) the Labour Court accepted as a valid operational requirement warranting retrenchment the fact that a retail store was suffering massive stock losses due to pilferage and that the employees appeared unable to protect the goods in their custody. The court accepted that the company had shown good cause to shut down two branches because they were not profitable and that the reason for that was the unexplained

stock losses (shrinkage). The court accepted that was a sufficient reason to close the branches for operational requirements.

49. The Code of Good Practice: Dismissal for Operational Requirement points out, in item 12, that it is difficult to define all the circumstances of this form of dismissal while admitting it is a "*no fault*" dismissal, that is, that the dismissal is by no reason of the action or attributes of the employees concerned. **An employer's *"similar needs"* must be determined with reference to the circumstances of each case.** It has been suggested that there are no clear and absolute dividing line between an employer's economic needs and similar needs there may be, and often are, considerable overlaps (My emphasis and underlining).

50. In a LLM dissertation titled **FAULTLESS DISMISSAL: ASSESSING THE SUBSTANTIVE FAIRNESS IN DISMISSAL FOR OPERATIONAL REQUIREMENTS** (Paul Sakwe Masumbe, UWC, submitted on 13 May 2013) Mr Masumbe records (pages 59 to 64):

> *However, over the years the courts have succeeded in categorising some of the 'similar needs' of the employer. Even as more needs emerge and the dividing lines between the three major aspects of dismissal blurs in the wake of unexpected business situations, 'similar needs' will include, but not be limited to the following situations:*
>
> *a) Special operational needs of the business.*
>
> *b) The employee's action or presence affects the business negatively.*
>
> *c) The employee's conduct or action has led to a breakdown of the trust relationship.*
>
> *d) The enterprise business requirements are such that changes must be made to the employee's terms and conditions of employment.* [See Basson A, Christianson M, Garbers C et al Essential Labour Law 2ed (2002) 226.] Each of the above situations is discussed in the dissertation.

51. Mr Masumbe also pointed out that the three categories of dismissal, misconduct, incapacity and operational requirements seem at first glance to be easy to apply, but in practice they are often highly ambiguous. This difficulty has been recognised by the courts. He referred to **SABC v CCMA & Others** [(2006) 6 BLLR 587 (LC) para 22] where the Court commented on the emerging blurring lines in the various forms of dismissal as follows:

> "*The notional line between the various circumstances that could give rise to a fair dismissal (misconduct, poor performance, incapacity and operational requirement) is not always easy to draw.*

Often the same conduct may give rise to more than one appropriate categorisation. Employers may often, not unreasonably err in their attempts to categorise the circumstances giving rise to a potential dismissal. ***The failure to correctly categorise should not however detract from the appropriate inquiry in each case, namely to assess first, whether there was a substantively fair reason for dismissal and second, whether an appropriate and fair procedure was followed by the employer."*** (My emphasis and underlining)

52. In **Baise v Mianzo Asset Management (Pty) Ltd** [(CA8/2017) [2019] ZALAC 42] it was held:

The irretrievable breakdown in the working relationship between the two key actors in the business, called on occasion "incompatibility" – perhaps an extravagant and possibly technically incorrect use of that concept as usually invoked in Labour litigation –is a common cause fact, and in any event, is an objectively demonstrable fact. ***It is perfectly legitimate to construe such occurrence as precipitating an operational need to resolve it by the departure of one or other of the keymen.*** (Par 46) (My emphasis and underlining)

53. And:

"Precisely how to conceptualise the idea of 'incompatibility' and how it relates to, or is distinct from, 'incapacity' and has or has not any bearing on 'operational requirements' as defined in the LRA, is a question which remains open for a resolution, but is unnecessary to resolve in this matter. The term seems to have used in this case interchangeably with 'irretrievable breakdown'. ***This is a good illustration why too much effort to label occurrences is unwise; a proper description of the happening or the condition is often quite enough".*** [n10] (My emphasis and underlining).

54. On the facts, I am satisfied that the employer has made out a case for the retrenchment process that it embarked upon. The rationale for the decision to impose a mandatory vaccination policy is clear. The employer supplies medical products to a number of medical disciplines and it engages with hospitals, medical and related practitioners. To safeguard its own employees and ensure that the operations of the employer is not severely affected by absences (and even deaths) as a result of staff contracting the Covid-19 virus and that those entities and individuals that had contact with staff members of the employer are adequately protected, it embarked on a risk assessment of its position and emanating from that it became apparent that a mandatory vaccination policy had to be imposed. The necessity to vaccinate, in my view, speaks for itself.

55. The risk assessment and subsequent imposition of the mandatory policy as well as the policy itself, was not challenged in any manner by the applicant. The employer's evidence on that aspect remains

unchallenged and in the absence of any challenge thereto, is accepted. I am satisfied that the employer has shown that the imposition of a mandatory vaccination policy is a justifiable operational requirement.

Section 189

56. It is trite that when employees are to be retrenched, Section 189 has to be followed. The relevant portions of Section 189 states:
*"(1) When an employer **contemplates** dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult"* (my emphasis and underlining)

57. Section 189 (2) and (3) requires that:
"(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-
(a) appropriate measures-
(I) to avoid the dismissals;
(ii) to minimise the number of dismissals;
(iii) to change the timing of the dismissals; and
(iv) to mitigate the adverse effects of the dismissals;
(b) the method for selecting the employees to be dismissed; and
(c) the severance pay for dismissed employees."

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-
(a) the reasons for the proposed dismissals;
(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
(c) the number of employees likely to be affected and the job categories in which they are employed;
(d) the proposed method for selecting which employees to dismiss;
(e) the time when, or the period during which, the dismissals are likely to take effect;
(f) the severance pay proposed;
(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
(h) the possibility of the future re-employment of the employees who are dismissed;
(i) the number of employees employed by the employer; and
(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months."

58. It has been held that none of the requirements of Section 189 can be treated in isolation and must be viewed as a whole. While Section 189 (3) follows on Section 189 (2), it would be reasonable to require the employer to take the obligatory steps of Section 189 (3) before embarking on the consultation process. See **Neuwenhuis v Group Five Roads & others** [2000] 12 BLLR 1467 (LC).
59. The onus is on the employer to follow a fair procedure. See **NUMSA v Ascoreg** (1999) 20 ILJ 2649 (LC). As recorded, the procedure that was followed in the present matter, was not challenged.

60. Notice in terms of section 189 (3) must be given **a reasonable time before the commencement of consultations**. See **NEHAWU v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic** [2005] 1 BLLR 10 (LC) paragraphs 69 to 73.9 (my emphasis and underlining).

61. In general an employer is not entitled to make assumptions about any knowledge that an employee may have. See **Somers v Friedrich-Naumann-Stiftung** [2000] 3 BLLR 356 (LC). In **Burger v Alert Engine Parts (Pty)** Ltd [1999] 1 BLLR 18 (LC) it was held that it is *"not sufficient for the respondent to contend that the applicant was in any event privy to this information by virtue of the fact that he was a section*

head. ***Once he had been identified as a candidate for retrenchment, the applicant was, like any other employee, entitled to be consulted with, to have all relevant information disclosed to him, to be allowed an opportunity to make representations and be informed in writing why his representations were not accepted by the respondent"*** (par 21) (My emphasis and underlining)

62. In **Johnson & Johnson v CWIU & Others** 1999 20 ILJ 89 (LAC), the LAC characterised the employer's obligations under section 189 as follows: The employer must initiate the consultation process when it contemplates dismissals for operational reasons. It must disclose relevant information to the other consulting party; allow the other consulting party an opportunity to make representations about any matter on which they are consulting; consider these representations and, if it does not agree with them, give reasons.

63. In **Enterprise Food (Pty) Ltd v Allen & Others** [2004] 7 BLLR 659 (LAC) it transpired that management only consulted after it had taken a final decision to close one of its plants. The Court held that **even if there was a business rationale the employer had to consult before the final decision was taken**. (My emphasis and underlining)

64. The above sentiments were endorsed in a judgment of the Constitutional Court **[National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another** [2020 ZACC 23, handed down on 27 October 2020] where the Court held:

"[40] Retrenchments should not be resorted to until 'certain procedural requirements intended to minimise the impact on employees' have been complied with. When employers contemplate dismissing their employees for operational requirements, they are required to consult in terms of section 189(1) of the LRA. The nature of such a consultation process, including "its objective and agenda", is prescribed by section 189(2) of the LRA. This consultation 'requires engagement by all the consulting parties with the purpose of reaching consensus'. It is important to note that the approach to this consultation must not merely be a checklist approach – that is, it must not be purely formalistic. There is both a procedural and substantive aspect to this consultation process. This has been clarified by the Labour Appeal Court in Afrox where the Court stated:

"It is implicit in the terms of section 189 (2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; to select a fair and objective method for the dismissals and to provide appropriate severance pay for dismissed employees."[1]

Business rationale

65. I am satisfied that there was a business rationale. The basis thereof is discussed above.

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[1] *Afrox* above n 20 at para 36.

The procedure followed

66. The procedural fairness of the dismissal was not challenged.

Was the dismissal fair?

67. The applicant essentially objected to the vaccination on the basis of medical, personal and religious reasons. The issue of bodily integrity was also covered by Mr Crawford, in cross-examination and she conceded that her bodily integrity was not affected as she could decline the vaccination requirement.

68. The employer recorded that the version of the applicant, as regards her medical condition, was never raised, despite being invited to disclose the details, until the arbitration proceedings. The applicant acknowledged that. What the applicant put forward on this issue does not carry much weight. Her evidence was that she was concerned that the vaccine might trigger something. It was put to the applicant that it was also possible that the vaccine might not trigger anything. She could not say. On her own evidence, even her medical practitioner did not reject the vaccine but merely suggested that she did not take it "*at this stage*". No evidence was led on why this advice was given, apart from the fact that this evidence was hearsay. Ultimately, there is not any medical basis on which the applicant relied for her objection and she did not provide any medical evidence of any possible adverse effects that the vaccine would have. Her objection on medical grounds has no basis.

69. It was also put to the applicant that, as regards her statement that she did not know what the ingredients of the vaccine, she could have found out what they were. Her response was that this was correct but that she was not interested.

70. As far as the objection on personal grounds is concerned, the applicant stated that the vaccine had, to paraphrase, been rushed, compared to vaccine for other diseases like Tuberculosis. He contention was that in the case of the latter, extensive research was done before the vaccine was introduced.

71. Opposed thereto, is the argument that the Covid-19 vaccine, although it might not have been tested as thoroughly as the applicant would require, did go through thorough testing a trials. This was a worldwide disease and the amount of money and time spent on searching for a vaccine, is a matter of public record. In addition, the vaccine has been endorsed not only by the South African authorities but also by those who are in control of the approval of medication and vaccines in other countries. It was contended by the

employer that her objection on personal ground were her opinion. I am unable to conclude that her objection on this ground has any merit.

72. In cross-examination the applicant was asked whether her concerns for a new world order and the 666 phenomenon were the basis of her religious objection. Her response was that she believed that she should not put anything in her body that she was not familiar with. As regards the issue of 666 and the new world order, the applicant noted that her son has done some research and he conveyed that to her.

Alternatives considered by the employer

73. The only challenge raised by the applicant was that the employer did not adequately consider alternatives. The evidence of Ms Du Toit was that whatever alternative position the employer could have considered the applicant for, the requirement was that all staff members had to vaccinate. She did mention that the employer considered the option to allow the applicant to work from home but that this was not practical because her day to day functions and access to the computer system necessitated her presence at the office. The applicant also did not challenge this contention by the employer.

74. I am of the view that the employer was justified in introducing a policy of mandatory vaccination. The applicant was aware of this requirement but elected not to comply therewith. That choice was hers and her employer respected her election. The nub, however, lay in the consequences of exercising her choice which resulted in her not being able to continue for operational reasons to carry out her duties for the reasons as detailed by the employer. On the facts I am unable to conclude that the employer had committed any wrongdoing in its decision to terminate the applicant's services by reason of operational requirements. Her dismissal was substantively fair.

Is the applicant entitled to severance pay?

75. In **Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union** [2013] 12 BLLR 1194 (LAC) the Court held:

"[15] This Court has previously examined the scope of section 41(2) read together section 41(4) of the BCEA in a typically learned and comprehensive judgment by Zondo JP (as he then was) in Irvin and Johnson Ltd v CCMA (2006) 27 ILJ 935 (LAC) , [2006] 7 BLLR 613 (LAC) . Zondo JP sought to answer what he considered to be the fundamental question that arises in the interpretation of section 41(4) namely: "What is the mischief that section 41(4) of the BCEA seeks to address or, put differently, what is the purpose of section 41(4)?" In answering this question, Zondo JP found that, where an employer arranged alternative employment for an employee and the employee rejected the alternative

employment for no sound reason, but simply in order to take the severance pay, severance pay should not be paid to such employee. The justification for this conclusion was as follows:

> *'The purpose (of this section) was to discourage employees from unreasonably rejecting offers of alternative employment arranged by their employers simply because they might prefer cash in their pockets in the form of severance pay (at para 41).'*

Zondo JP went on to say that the BCEA had also sought to promote employment and therefore to incentivise employers to take the necessary steps to provide alternative employment for all employees facing dismissal for operational requirements.

[16] In a further analysis of the scope of the section, Zondo JP held that there was no basis by which an employee could obtain both severance pay and alternative employment. There was however a case where the employee would get neither severance pay nor alternative employment:

> ***'Where he has himself to blame because he has acted unreasonably in refusing the offer of alternative employment.*** *When he refused the offer of alternative employment but cannot be said to have acted unreasonably in doing so, he would still get his severance pay' (at para 45)."*

76. In **Freshmark (Pty) Ltd v CCMA & others** [2003] 6 BLLR 521 (LAC) the Labour Appeal Court held (Zondo JP) that an offer by an employer to an employee of his or her position on different terms constitutes an offer of alternative employment. It is the employment which is required to be alternative, not the position [par 22 & 24]. In the present matter the different condition was the vaccination requirement, which given the operations of the employer, became an operational requirement.

77. The applicant had the election to vaccinate and retain her employment. On the facts, her refusal to vaccinate has no merit and her refusal was unreasonable. It would be grossly unfair to expect the employer to pay any severance pay in the circumstances.

AWARD

78. The termination of the applicant's services on the basis of operational requirements was substantively and procedurally fair.

79. The decision of the applicant not to adhere to the employer's mandatory vaccination policy was unreasonable. She is not entitled to any severance pay.

Signature: _____

Commissioner: ***Piet van Staden***

Sector: ***Health (private)***