REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1142/10

In the matter between:

Paul E ROGERS **Applicant**

and

EXACTOCRAFT (PTY) LTD **First Respondent**

Heard: **5-6 June; 19-20 June 2013; 5 March 2014**

Delivered: **16 April 2014**

Summary: Dismissal for operational requirements. Premature termination of fixed-term contract entered into post-retirement. Claim for compensation, severance pay and damages. Entitlement to severance pay and application of BCEA s 84(1) considered.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Paul Rogers, worked for the respondent for 21 years. He retired when he reached the compulsory retirement age of 65 on 14

November 2009. The next day he entered into a fixed term contract for two years with the respondent, terminable on three months' notice.

[2] The respondent dismissed the applicant for operational requirements on three months' notice, with effect from 31 August 2010. He claims that the dismissal was not for a fair reason or in accordance with a fair procedure as envisaged in s 189 of the Labour Relations Act.[1] He claims compensation for unfair dismissal in terms of s 194 of the LRA. He also claims severance pay in terms of ss 41 and 84 of the Basic Conditions of Employment Act[2]; and damages for short notice. Although some confusion was initially created in the pleadings and the pre-trial minute, neither party ultimately relied on *Buthelezi v Municipal Demarcation Board*[3] to claim that the applicant was entitled to damages for the unexpired portion of the fixed term contract or that s 189 of the LRA did not apply. Mr *O'Dowd* and Ms *Brummer* both agreed that the fixed term contract in this case was distinguishable from that in *Buthelezi.* In that case, the contract made no provision for early termination; in this case, it did. But both parties agreed that the reason for early termination was operational requirements; that the respondent had to show that it was for a fair reason and in accordance with a fair procedure; and that s 189 of the LRA applied.

Background facts

[3] On the day after his retirement, Mr Rogers entered into a new contract of employment for a fixed term from 15 November 2009 until 14 November 2011. That contract spelled out *inter alia* the applicant's working hours, leave entitlement and the duration of the contract. It also referred under the heading of "Company Policies, Procedures and Rules" to the conditions of service detailed in the contract itself; the conditions of service laid down in the Employer's Policies and Procedures; and the Labour Relations Act, the Basic Conditions of Employment Act; and various other statutes dealing with the employment relationship.

---

[1] Act 66 of 1995 (the LRA).

[2] Act 75 0f 1997 (the BCEA).

[3] (2004) 25 *ILJ* 2317 (LAC).

[4] The contract also provided for the automatic termination of the contract on 14 November 2011 and further for a three month notice period specifying that in the case of "termination for any cause recognised by law as sufficient" the notice period could be waived.

[5] It is common cause that the contract was terminated prematurely. The circumstances were that on 18 May 2010 the respondent handed the applicant a letter headed:

> "Contemplation of potential termination of services based on operational requirements".

[6] The respondent made certain suggestions which were rejected by the employee. The outcome was that his employment was terminated with effect from 31 August 2010.

[7] The applicant maintains that his dismissal was unfair. The respondent argues that it was for a fair reason, namely its precarious financial position; and that it had followed a fair procedure in terms of s 189 of the LRA.

[8] Ms Ingrid Painczyk, the respondent's managing director, testified that the applicant was a highly skilled and valuable employee. That is why the respondent offered him a fixed term contract after his retirement in order to retain his skills. However, the respondent started experiencing financial problems towards the end of 2008 and the beginning of 2009. That led to a retrenchment agreement with NUMSA in March 2009 and the voluntary retrenchment of 11 NUMSA members. The applicant was not a NUMSA member and was not part of the consultation process culminating in this agreement. It also preceded the fixed term contract that the parties entered into on 15 November 2009.

[9] During March and April 2010 the company put up notices on its notice boards informing employees of short time. The applicant testified that he did not read any of them. I find that to be improbable. There was a notice board directly above the tea trolley. It is improbable that he would not have seen these notices. He conceded that he saw some notices relating to birthday cake and fire drills. It is unlikely that he would have been oblivious of any notices regarding the company's financial situation and employees

working short time. He was in any event aware of some employees working short time and of the shift system having been changed. He was placed on short time himself. He could have been under no illusion that the company was doing well financially.

[10] On 18 May 2010 Ms Painzcyk addressed a letter to the applicant. It appears to have been drafted with the provisions of s 189(3) of the LRA in mind, although it does not contain all the information envisaged by that subsection. It is headed, "**CONTEMPLATION OF POTENTIAL TERMINATION OF SERVICES BASED ON OPERATIONAL REQUIREMENTS**". She referred to a downturn in orders and indicated that the company wished to enter into a consultation process with him. She continued:

> "It is important to note that no final decision has been made, but that the initial assessments have indicated that your position, in its current format, may potentially become redundant.
>
> The following issues are therefore relevant to form the basis of our consultation process:
>
> 1. The forecast for 2010/2011 is rather bleak seen in the context of the following:
>
> 1.1 The economic recession in South Africa;
>
> 1.2 Fluctuating exchange rates;
>
> 1.3 The loss of the Yardley contract;
>
> 1.4 The general flow of orders;
>
> 1.5 It appears that retrenchments are inevitable, resulting in a smaller and more manageable structure;
>
> 1.6 All costs and expenditure relevant to such a revised structure need therefore to be carefully assessed;
>
> 1.7 This could mean that alternative contractual options within the company could be considered, if the appropriate skills and operational requirements are met and the needs for these are clearly identified;
>
> 1.8 Possible issues for consideration could include (but will not be limited to):
>
> 1.8.1 re-structuring your contract as an independent contractor; or
>
> 1.8.2 a more flexible employment relationship

1.8.3 any other feasible or viable options that you may wish to put forward for consideration.

2. The consultation process will deal with the following matters and all attempts will be made to reach consensus regarding the following:

a) appropriate measures to:

I. avoid dismissals – i.e. to explore viable alternative proposals

II. change the timing of dismissals

III. mitigate the adverse effects of the dismissals

b) The method for selecting the potentially affected employees;

c) The severance payment as proposed at this stage is based on the statutory guideline of the Basic Conditions of Employment Act 75/1997 [as amended], i.e. one week's remuneration for each completed year of service.

Other issues that will be discussed during the course of the consultation are:

- assistance by the employer to the employee.

You may be represented at the consultation process by a fellow employee. Minutes will be kept of all the discussions and you will be given copies of same.

1) 20 May 2010 at 15h00 – explanation of this letter
2) 24 May 2010 – receiving your input regarding alternative options
3) 24 May 2010 – feedback regarding your proposals
4) 27 May 2010 - making the final decision
5) 31 May 2010 – the implementation of the final decision.

We accept that this matter should receive all our attention. The time frame will of course be flexible if circumstances so dictate."

[11] The parties met on 20 May 2010. On 2 June 2010 Ms Painzcyk presented Rogers with a document in the following terms:

MEMORANDUM OF UNDERSTANDING BETWEEN PAUL ROGERS AND EXACTOCRAFT (PTY) LTD

THIS MEMORANDUM SETS OUT THE DISCUSSION POINTS FOR ACCEPTANCE BY ROGERS OF THE MEETING CONDUCTED ON THURSDAY, 20 MAY 2010:

1. The company indicated the [*sic*] due to the prevailing economic conditions, the status of orders and the consequent drop in production, that it needs to invoke the three (3) months' notice period as indicated in Rogers' limited duration contract.

and

2. The said notice period will commence with effect from 1 June 2010 and will complete on 31 August 2010.

and

3. Short time will continue to apply during the notice period.

and

4. The notice pay will therefore be calculated as follows:

    4.1 three days per week during June

    4.2 four days per week during July

    4.3 five days per week during August

and

5. Rogers will be required to tender his services on this basis during the notice period

and

6. The company undertakes to indicate to Rogers by the beginning of July 2010, if there is any possibility of a continued relationship after 31 August 2010, for example in the capacity as a Consultant

and

7. The company will honour its agreement with Rogers as applicable to the arrangements regarding his motor vehicle.

[12] Rogers did not agree to the proposal and did not sign the "memorandum of understanding". On 21 July 2010 Ms Painczyk presented him with a further proposal in the following terms:

"**RETAINER PROPOSAL**

"I refer to our previous discussions and would like to explore the further option of a retainer / consultancy agreement between Exactocraft and yourself [*sic*] at the conclusion of your notice period at the end of August 2010.

As indicated during many discussions with you, we do find your services, experience, skills and knowledge absolutely invaluable , but due to the current economic and trading conditions, we can no longer afford the cost of your full time employment (which matter was the subject of previous consultation)

Our current thinking, which we would like to discuss with you to gain your input and opinion, is along the following lines:

- For you to attend the Product meeting every Tuesday for 3 hours.
- For you to be available for brainstorming with, and guidance to employees on Thursdays for e.g. $2^{1}/_{2}$ hours and to mentor employees where needed.
- The retainer/consultancy agreement would be for 22 hours every month and would continue for a minimum period of 12 months.
- Based on your current hourly employment rate of R225, we believe that R350.00 per hour is an appropriate rate; our proposal is that hours over and above the 22 proposed, will be paid at a higher rate of R450 per hour.
- The nature of the relationship will be that of an independent contractor and not as an employee. You would accordingly invoice Exactocraft and would need to register as a provisional tax payer. You would obviously also need to be free to consult with other entities.

You are welcome to consult with your attorney regarding this option, but we are not going to conduct our current relationship and this proposal via lawyers. Your personal input and comments in this regard are therefore expected. As mentioned yesterday I would like to discuss this with you briefly at 14h00 today and get your input on this matter next Monday, 26 July 2010."

[13] Rogers had a further meeting with the respondent's Ms Veerle Witdouck on 13 August 2010. They discussed a further proposal, including his continued use of his company car, but could not reach agreement. He was presented with a draft agreement, referred to as a "service provider agreement" dated 19 August 2010, but he did not accept or sign it.

[14] On 30 August 2010 Ms Painzcyk presented Rogers with the following document:

"**RE: RETAINER PROPOSAL**

CONCLUSION OF THE NOTICE PERIOD

DOCUMENTATION

"I refer to our numerous discussions, written communiqués and proposals from Exactocraft with regards to the options which are available at the conclusion of your notice period.

As indicated during many discussions with you and again reiterated in this letter, we do find your services, experience, skills and knowledge absolutely invaluable, but due to the economic and trading conditions, we can no longer afford the cost of your full time employment (which matter was the subject of previous consultation) on a limited duration, post retirement contract.

I want to make the legal position very clear to you:

1. Your employment relationship terminated due to you reaching your retirement age, as per the company's policies and procedures in November 2009.
2. This means that for all intents and purposes, and the application of labour laws and legislation, the employment relationship concluded at that stage.
3. A post-retirement agreement was entered into to retain your skills, with the express provision that either party may give the other 3 months' notice.
4. You have been well aware of the prevailing economic and trading conditions which placed Exactocraft in a precarious position for at least the past 18 months.
5. Your termination clause was thus invoked, in consultation with yourself, based on the fact that the option of continuing on the conditions contained in the post-retirement limited duration contract, were no longer viable from a financial viewpoint.
6. As your relationship with Exactocraft is one of post retirement employment, this is not deemed as a retrenchment. This means the following:
   6.1 there is no severance pay applicable
   6.2 there is also no obligation to explore alternative options within the company , but as you are very well aware during all our discussions, there is no alternative placement available in any event.
7. You have received the company's proposals regarding the car which you are currently utilising and which belongs, at this stage still Exactocraft, and in addition to that retainer proposal for your professional services.

8. You have to date not responded to either of these proposals, which, as indicated in the said documentation are interlinked and dependent on each other.

This letter therefore serves as confirmation that the limited duration contract, as per the notice period agreed upon and discussed during the consultation meetings, terminates with effect from 31 August 2010.

You are kindly reminded to treat this with the urgency it requires, as of 1 September 2010; there will be no contractual relationship between yourself and ExactoCraft. If you however wish to continue with the independent contractor option, which would allow you to also consult to other entities, we require the signed documentation prior to any further professional services could be tendered."

[15] Rogers's employment was terminated with effect from 31 August 2010.

Evaluation / Analysis

[16] I will deal with each of the applicant's claims in turn. I shall also make mention of my previous judgment regarding various points *in limine* raised by the respondent.

Points in limine

[17] The respondent initially raised six points *in limine.* I dealt with those points in an *ex tempore* judgement handed down on 7 September 2011. I need not repeat the reasons for that judgment here. The preliminary points were dismissed with costs. The respondent accepted that ruling and the matter proceeded to trial.

Severance pay

[18] It is trite that an employee who is dismissed for operational requirements is entitled to severance pay as provided for in s 41(2) of theBCEA:

> "An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements ... severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer".

[19] Rogers worked for the respondent for a continuous period of 21 years, from 1988 to 14 November 2009. But then he retired at the agreed retirement age of 65; he was not dismissed for operational requirements at that stage. He then entered into a new contract of employment. He was employed in terms of that contract for less than a year – from 15 November 2009 to 31 August 2010 – when he was dismissed for operational requirements. Therefore, argues the respondent, no severance pay was payable. But Mr *O'Dowd* argued that s 84(1) of the BCEA applied:

> "For the purposes of determining the length of an employee's employment with an employer for any provision of this Act, previous employment with the same employer must be taken into account if the break between the periods of employment is less than one year".

[20] On the plain grammatical reading of that subsection, Mr *O'Dowd* argued, the applicant was entitled to a minimum of 21 weeks' severance pay. The break between his periods of employment was less than one day.

[21] I have been unable to find any binding precedent for a claim such as this one, and neither of the parties referred me to any. The CCMA dealt with a similar situation in *Solomons and Usabco (Pty) Ltd.*[4] In that case, the employee had resigned and was then re-employed on a fixed term contract nine months later. He was then dismissed for operational requirements. Commissioner Bill Maritz pointed out that, under the common law, his contract of employment would have been novated; but he was compelled to apply the provisions of s 84 of the BCEA. He noted:

> "It should be noted that s 84 does not refer to the manner in which the relationship between the parties had been terminated and the fact that he had resigned is therefore irrelevant to the enquiry."

[22] I am inclined to agree. But is the position any different where the employee had retired and he had received all his retirement benefits, such as a provident fund pay-out?

[4] (2002) 23 *ILJ* 786 (CCMA).

[23] The preamble to the BCEA and section 2 sets out as one of its primary objectives to comply with the obligations of the Republic as a member state of the International Labour Organisation. ILO Convention 158[5] provides that a worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:

> "(a) a severance allowance or other separation benefits, the amount of which shall be based *inter alia* on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
>
> (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
>
> (c) a combination of such allowances and benefits".

[24] The national law that regulates severance pay is s 41 of the BCEA, providing for one week's remuneration for each year of continuous service. In this case, Mr Rogers was paid out the "old-age benefits" to which he was entitled when he retired at age 65. Should his prior 21 years of service nevertheless be taken into account as "continuous service" for the purposes of calculating severance pay arising from his dismissal for operational requirements, subsequent to him entering into a fixed term contract the next day, as the proper interpretation of s 84(1)?

[25] Should s 84(1) be interpreted to include a situation such as this one, an anomalous situation arises. Had the applicant simply retired at age 65, there is no dispute that he would not have been entitled to severance pay. Should he then be able to benefit from the fact that he had been re-employed a day later, and dismissed for operational requirements nine months after that?

[26] Unfortunately the Explanatory Memorandum to the BCEA does not address the legislative aim behind the enactment of s 84. ILO Convention 158 does not address this specific conundrum head-on either. The purpose of severance pay has been the subject of some debate. A

[5] Termination of Employment Convention (23 November 1985) article 12.

comprehensive study[6] showed that the origin of mandated severance pay can be traced to three main events: the creation of labour codes; the first events of large scale industrial restructuring starting at the end of the 19th century and pressures of the interwar high unemployment episode; and the expansion of the welfare state after WWII. Despite these common origins, the review of existing severance pay programs showed that countries use widely differentiated designs, or at least parameter values. The paper also examined the economic rationale for severance pay and found partial support for all three hypotheses it advanced: that severance pay serves as a social benefit payment, a human resource management tool, and a job protection mechanism.

[27] In another article, the author[7] considered South African case law (none of which specifically dealt with the application of s 84 in the circumstances of this case) and came to the conclusion that s 41(4) of the BCEA rewards the employer for offering or securing alternative employment for the employee.[8] It promotes sustained employment by giving employers an incentive to procure alternative employment for employees facing dismissal for operational requirements. Absent such an offer, the employer has to pay severance pay – whether it is to "tide the employee over" until he or she finds another job, as some commentators would have it, or to reward the employee for long service, does not really matter.

[28] In the current case, the applicant was offered an alternative, but it cannot be said to have been a reasonable one. At best, the company proposed to enter into an independent contractor relationship with him with a potential income of less than half his remuneration as an employee. But in any event, if he is not entitled to severance pay in terms of s 84 of the BCEA, the question of a reasonable alternative becomes moot.

---

[6] Robert Holzmann, Yann Pouget, Milan Vodopivec and Michael Weber**:** *Severance Pay Programs around the World: History, Rationale, Status, and Reforms* (IZA DP No. 5731, May 2011).

[7] DW de Villiers, "The Entitlement to Severance Pay Revisited" (2010) 22 *SA Merc LJ* 114-126.

[8] Cf *Irvin & Johnson Ltd v CCMA* [2006] 7 BLLR 613 (LAC) para 42.

[29] The principal question remains whether an employee who has retired and then entered into a new contract of employment with the same employer, is nevertheless entitled to severance pay in terms of ss 41 and 84.

[30] In order to give effect to the intention of the legislature, the Court will have to adopt a purposive interpretation. ILO Convention 158 appears to contemplate either a severance benefit in the case of redundancy, or old-age benefits in the case of retirement. The BCEA must be interpreted in that context. It is common cause that the applicant received his retirement benefits, such as his provident fund pay-out, upon retirement. In my view, the legislature could not have contemplated that he should also benefit in the form of severance pay arising from his dismissal for operational requirements in circumstances where he entered into a subsequent and separate fixed-term contract of employment.

[31] In an early and insightful article, Alan Rycroft[9] referred to a CCMA arbitration[10] where the commissioner held that where an employee reaches retirement age and decides to retire on full benefit, but continues to work thereafter, the retirement can be construed as a termination of the employee's contract by effluxion of time and that the retirement does not constitute a dismissal. A decision to allow the employee to enter into a further employment contract therefore starts a new employment relationship. The period of service before retirement, the commissioner found, should not be taken into account when calculating the employee's severance pay in accordance with s 41(2) and s 84 of the BCEA. Prof Rycroft appears to agree with that view. So do I.

[32] As explained in the article by Holzmann and others[11], severance pay is both a form of compensation for a no-fault termination of the contract of employment as well as recognition of the employee's 'investment' in the employer's enterprise. This is captured in an early case which, in justifying severance pay, said the employee had 'sacrificed his best employment

[9] Alan Rycroft, "Severance Pay: The Emerging Legal Issues" (2001) 22 *ILJ* 2131 at 2138.

[10] *Watson and another v Burman Katz Attorneys* (2000) 21 *ILJ* 2337 (CCMA).

[11] *Supra*.

years in building, or contributing to, the business of the company'[12]. Severance pay is for an unexpected termination of one's expectations. In the situation before me, the employee's expectation was for just two years of further employment. In my view, it would be anomalous if a right to severance pay for the 20 years prior to retirement could be created simply by re-employment when there was never a right to severance pay on retirement. In terms of the purposes of severance pay as outlined above, there was no need to compensate the employee on retirement because this was not a dismissal but a termination of the contractual relationship. The employee's investment in the company was taken care of through the provident fund.

[33] The anomaly that arises in this context is analogous to the one catered for in s 187(2)(b) of the LRA. That subsection makes it clear that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age. Unfortunately the legislature has not addressed the anomaly that arises in situations such as this one by explicitly building an exception into s 84(1) of the BCEA.

[34] In my view, though, there is a strong policy argument for a purposive interpretation of s 84. The ability to retain scarce skills after retirement is highly desirable because it allows employers to provide a mentor for new inexperienced employees as well as ensure continuity of productive work. In this case, the employer's Ms Painczyk was adamant that the company wished to retain Mr Rogers's special skills and expertise after retirement – an understandable and laudable position. A literal interpretation of s 84 would discourage employers from re-employing skilled retired employees.

[35] The only other case law I could find that may be relevant – counsel did not refer to any -- is not on point, but does distinguish between different kinds of relationship between an employer and an individual. In *Elston v McEwan NO & others*[13] a computer trainer was employed by a company from 1 June 1995 to 30 April 2007. Her services were rendered in three

[12] *Ellerine Holdings Ltd v Du Randt* (1992) 13 *ILJ* 611 (LAC) 616.

[13] (2009) 30 *ILJ* 2079 (LC).

distinct periods: two years as an employee (the first period); over two years (the second period) when she rendered services through a close corporation which invoiced the company for the work done by her; and six years (the third period) when she was once again employed by the company. When she was retrenched, the company paid her severance pay for the third period only. The first period was not included in the calculation of severance pay because the second period was not considered 'continuous service' for purposes of s 41(2) of the BCEA. The second period was in turn not considered for severance pay because the company took the view that the applicant was not its employee during that period. The Labour Court upheld a finding that the employee was not eligible for severance pay for the first and second periods of service.

[36] In the case before me, Mr Rogers was obviously not eligible for severance pay on retirement – similar to the employee in *Elston* for the second period. This then focuses the right to severance pay on the final period of employment in both cases. I am of the opinion that Rogers entered into a new employment relationship after retirement, and that his employment before retirement cannot be considered for the purposes of calculating severance pay. And his employment post retirement was for less than a year; therefore, he is not entitled to severance pay in terms of s 41 of the BCEA.

Damages

[37] It is common cause that the fixed term contract was terminable on notice (but that it had to be for a fair reason and in compliance with s189 of the LRA). The stipulated notice period was three months. The applicant does not claim damages for the unexpired period of the contract (15 months). But he does claim damages for what he alleges was short notice of two weeks.

[38] The respondent gave the applicant notice of termination on 2 June 2010, effective 31 August 2010. On the face of it, that would only constitute one day's short notice. However, the notice was not handed to the applicant on 2 June. Ms Painzcyk testified that she sent it to the applicant by registered

mail. It appears from the documentary evidence that it was still with the postal services on 12 June 2010. Mr Rogers says he received it some days thereafter. He argues that the notice period was short by two weeks.

[39] Mr *O'Dowd* referred to the unreported judgment of Cheadle AJ in *Lottering and others v Stellenbosch Municipality*[14] where he held:

> "The failure to give proper notice is a breach of contract entitling the employer under the ordinary principles of law relating to breach to either accept the repudiatory breach and terminate the contract summarily or to hold the employee to the contract. But in these circumstances, holding the employee to the contract would mean no more than requiring the employee to work out her notice…"

[40] This principle applies equally to an employer giving notice of termination. If the employee elects to accept the breach (as opposed to holding the employer to the contract) he is entitled to damages for the unexpired portion of the notice period.[15] Those damages equate to the amount that the employee would have and during those two weeks, which amounts to R 20 033, 00.

Compensation

[41] I accept that there was a commercial rationale, i.e. a fair reason to dismiss. The company was in dire straits financially. That led to a retrenchment agreement with the majority trade union, NUMSA, and the retrenchment of a number of other employees, whether voluntarily or at the instance of the employer.

[42] Mr *O'Dowd* criticised the selection of Mr Rogers for retrenchment. There is no need to draw a bright line between substance and procedure in this regard; in my view, the issue of selection criteria can be considered under the rubric of procedural fairness. What the Court ultimately has to decide, is whether the dismissal was fair. In cases of dismissal for operational requirements, some aspects – e.g. whether there was a commercial

[14] Labour Court, Cape Town, case no C 159/2010.

[15] See *Morgan v Central University of Technology, Free State* [2013] 1 BLLR 52 (LC); *NEWU v CCMA & others* [2007] 7 BLLR 623 (LAC), (2007) 28 *ILJ* 1223 (LAC) para [15].

rationale – fit comfortably under the question of a fair reason for dismissal. Others, e.g. whether the employer consulted, clearly go to the question of a fair procedure. The question of whether fair selection criteria were used, has elements of both.

[43] There can be no doubt that the company was under financial strain. It had reached more than one retrenchment agreement with NUMSA. Mr Rogers could not but have noticed that a number of fellow workers had been retrenched. A tool maker in his department was one of those. He was placed on short time. He must have been aware of the memoranda placed on the notice boards. In short, there was a fair reason for retrenchment.

[44] The main line of attack put forward by Mr *O'Dowd* was the selection of the applicant for retrenchment. He argued that it was possible to avoid the dismissal of the applicant by cost-cutting elsewhere. I am not persuaded. The company had already cut costs by retrenching other employees. Mr Rogers was the highest-paid employee in the company. The company simply could not afford to keep him on at his current salary for another 15 months. The question remains whether process was fair, in other words, whether it complied with the provisions of section 189 of the LRA.

[45] It is clear that the respondent was initially advised or formed the view that section 189 was not applicable and that it could simply terminate the fixed term contract on three months' notice. Ms *Brummer* conceded as much. However, when it presented the applicant with the letter of 18 May 2010 it purported to do so in terms of section 189 (3). But even without following a formalistic checklist approach, the notice fell far short of that envisaged by the subsection. Ms Painzcyk conceded that under cross-examination. For example, the notice did not set out –

45.1 the alternatives the respondent considered before proposing the applicant's dismissal and the reasons for rejecting those alternatives;

45.2 the number of employees likely to be affected and the job categories in which they were employed;

45.3 the proposed method for selecting which employees to dismiss;

45.4 the possibility of future re-employment;

45.5 the number of employees employed; or

45.6 the number of employees the respondent had retrenched in the preceding 12 months.

[46] The respondent was willing to renegotiate the terms of the applicant's employment. It was willing to consider an independent contractor relationship as set out in the "service provider agreement". Failing that, however, it is quite clear that Ms Painczyk had formed a fixed view that the company could no longer afford the applicant's services.

[47] The initial notice of 18 May 2010 was followed two days later by the meeting of 20 May 2010. At that meeting Ms Painczyk told the applicant that the company intended invoking the early termination clause in his contract. On 2 June 2010 she prepared the memorandum that the applicant received on about 14 June 2010. It notified in writing of the termination of his employment as of 31 August 2010. It is only later, in July 2010, that the respondent put forward alternative proposals to retain the applicant's services. At that time, the respondent had already unilaterally given notice of the termination of the applicant employment. There was no prospect of meaningful consultation in those circumstances.

[48] However, section 189 envisages a joint consensus seeking exercise. Having been made aware of the company's financial position, the applicant did not come up with any viable proposals to ensure his continued employment either. He could not gainsay Ms Painczyk's evidence that he was, in fact, difficult to get hold of. Even in these trial proceedings he created the impression that he was unwilling to cooperate. In his view, the respondent was duty bound to honour the terms of his contract until it expired. He did very little to explore any alternatives.

[49] I have come to the conclusion that the dismissal was procedurally unfair but that the applicant was at least partly to blame. In my view, he is entitled to compensation; but that compensation should not exceed another three months.

Conclusion

[50] The dismissal of the applicant for operational requirements was for a fair reason but not in accordance with a fair procedure. In my view, the equivalent of three months' remuneration would be fair compensation for that element of unfairness.

[51] On my interpretation of sections 41 and 84 of the BCEA the applicant is not entitled to severance pay.

[52] The applicant is entitled to damages equivalent to two weeks' remuneration for short notice.

[53] With regard to costs, I take into account that there is no longer any employment relationship between the parties and that the applicant has been successful. In law and fairness, the respondent should be held liable for his costs.

Order

[54] The respondent is ordered to pay the applicant the following amounts:

54.1 Compensation of R 136 593, 84, being the equivalent of three months' remuneration;

54.2 R 20 033, 00 as damages for short notice;

54.3 Costs of suit.

_____

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Brendan O'Dowd

Instructed by Bagraims attorneys.

RESPONDENT: Cecilia Brummer

Instructed by Chris Smit attorneys.