OPERATIONALLY JUSTIFIABLE RETRENCHMENTS

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SACCAWU v Woolworths[1]*:*
The Constitutional Court Rules on Operationally Justifiable Retrenchments and the Reinstatement of Employees

Section 189A(19) of the Labour Relations Act, 1995, as amended (the LRA), which regulates so called large scale retrenchments compelled the Labour Court to find that an employee was dismissed for a fair reason if:

(a) the dismissal was to give effect to a requirement based on the employers economic logical, structural or similar needs;
(b) the dismissal was operationally justifiable on rational grounds;
(c) there was a proper consideration of alternatives; and
(d) the selection criteria were fair and objective.

Although Section 189A(19) was removed from the LRA effective 1 January 2015, the meaning of operational justifiability and alternatives to retrenchments were recently considered by a unanimous decision of the Constitutional Court handed down on 6 November 2018 in South Africa Commercial, Catering and Allied Workers Union (SACCAWU) & Others v Woolworths (Pty) Ltd (as yet unreported case CCT(275/17).

Until 2002, Woolworths' employees worked on a full-time basis (full-timers) working 45 hours per week. In 2002, Woolworths decided that in future it will only employ workers on a flexible basis (flexi-timers) working 40 hours per week. By 2012, Woolworths' workforce consisted of 16 400 flex-timers and only 590 full-timers. Full-timers earned better wages and enjoyed better benefits than flexi-timers. Full-timers and the flexi-timers did the same work.

In 2012, Woolworths decided that its entire workforce should consist of flexi-timers and to convert the full-timers to flexi-timers on the lesser employment conditions applicable to flexi-timers. In order to do this, Woolworths first invited full-timers to voluntarily become flexi-timers. Through a process of voluntary early retirement, voluntary severance or agreement to convert to flexi-timers, Woolworths was left with 177 full-timers. Woolworths then progressed to the second phase of its conversion in accordance with Section 189A of the LRA, during which phase 85 out of 177 full-timers accepted one of the voluntary options and eventually 92 such employees were forcefully retrenched.

When Woolworths consulted with SACCAWU as required by Section 189A of the LRA, SACCAWU initially suggested that full-timers be converted to flexi-timers working 40 hours per week but retaining their existing employment conditions and being paid for working 45 hours per week. Towards the end of the consultation process, SACCAWU varied its stance and proposed that full-timers convert to flexi-timers working 40 hours per week and paid for 40 hours at their full-timer wage rates (an 11% reduction in wages).

When Woolworths gave notice to terminate the 92 remaining full-timers for operational requirements, SACCAWU referred a dispute about procedural fairness (in terms of Section 189A(13)) and a dispute about substantive fairness to the Labour Court for adjudication on behalf of its 44 members.

The Labour Court upheld SACCAWU's challenge that the dismissals were substantively and procedurally unfair and ordered Woolworths to reinstate the 44 dismissed employees retrospectively from the date of their dismissal. On Appeal to the Labour Appeal Court (LAC), the LAC upheld SACCAWU's challenge that the dismissals were substantively unfair but changed the remedy from reinstatement to an award of 12 months' compensation. In the Constitutional Court, SACCAWU sought confirmation that the dismissals were substantively unfair and required a remedy of reinstatement.

The Constitutional Court analysed Woolworths' decision to dismiss against the elements listed (above) in Section 189A(19) of the LRA. The Constitutional Court found that Woolworths gave only one reason for the retrenchments, being that "the company needs to be in a position to employ employees who are able to be used on a flexible basis". SACCAWU accepted the reason for restructuring but proposed that full-timers be converted to flexi-timers on their full-timer employment conditions. The Constitutional Court found that Woolworths had failed to show the retrenchments were operationally justifiable on rational grounds. Woolworths' operational requirements reason that it needed to operate with flexi-timers was achieved when the 44 SACCAWU members agreed to work on the flexible basis, albeit on their full-timer employment conditions.

The Constitutional Court found that Woolworths did not properly explore SACCAWU's alternative to retrenchment and also found that Woolworths did not properly consider alternatives such as natural attrition, wage freezes or ring fencing and, as such, that Woolworths was in breach of Section 189A(19) of the LRA. The Constitutional Court concluded that the dismissal of the 44 SACCAWU members were substantively unfair because Woolworths failed to prove that the retrenchments were operationally justifiable on rational grounds or that it properly considered alternatives to retrenchments in terms of Section 189A(19). Having reached the conclusion that the retrenchments were substantively unfair, the Constitutional Court then embarked upon an analysis of the suitable remedy to award, namely, retrospective reinstatement or compensation (as the LAC had awarded).

The Constitutional Court restated that reinstatement is the primary remedy that the LRA affords employees whose dismissals are found to be substantively unfair, by referring to the Equity Aviation Services (Pty) Ltd v CCMA 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) decision which held that the ordinary meaning of the word "reinstate" is "to put the employee back into the same job or position [that] he or she occupied before the dismissal, on the same terms and conditions."

The Constitutional Court then grappled with whether a retrospective reinstatement of the 44 employees was appropriate, and, if so into which positions? The Constitutional Court observed that reinstating an employee means restoring the employee to the position in which he or she was employed immediately before dismissal. On this basis, the Constitutional Court held that, not only were the dismissals substantively unfair, but that the 44 SACCAWU members should be reinstated into their full-timer positions held immediately before their dismissals in 2012 and that Woolworths and SACCAWU should be encouraged to continue consulting over the conversion from full-timers to flexi-timers.

The decision in SACCAWU v Woolworths sounds a firm warning to employers to properly consider substantive fairness to ensure that retrenchments are operationally justifiable and that there is a full and proper consideration of alternatives to dismissals, and if this is not the case, that the courts will not hesitate to award the primary remedy of reinstatement to any employee who has been unfairly dismissed for operational requirements. ■

[1] *South African Commercial, Catering and Allied Workers Union (SACCAWU) v Woolworths (Pty) Ltd (Cct275/17) [2018] ZACC 44 (6 November 2018)*

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