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Difference between demand and proposal when trying to save jobs

By Tiisetso Rabolao and Julia Olley

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The Labour Appeal Court recently handed down judgment in the case of *National Union of Metalworkers of South Africa and others v Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) and another (2019)*. The LAC confirmed that Aveng did not breach the Labour Relations Act when it terminated employees for refusing to accept its proposal relating to new terms and conditions of employment, due to redundancy.

The steel industry has seen a decline in sales since 2010. By 2014, Aveng, a large steel manufacturer, had realised that in order to survive (and thrive), it needed to consider restructuring. This would lead to redundancy. This situation is one with which many employers are all too familiar.

Retrenchment process

Aveng contemplated that a large-scale retrenchment might ensue. It initiated consultations with unions and affected staff in terms of section 189A of the LRA. The National Union of Metal Workers of South Africa (Numsa) participated in the consultations, as Aveng's majority trade union. Aveng undertook a review of its job descriptions and submitted a written proposal to Numsa, setting out amended job descriptions as an alternative to retrenchment. Numsa refused to accept this proposal and lengthy negotiations ensued. The consultations ended during March 2015, when Aveng informed Numsa that the consultation process had been exhausted. It advised the trade union that it would implement the new structure, set out in its written proposal, with effect from April 2015. None of the employees accepted the new terms and conditions of employment. Aveng then dismissed all of the employees.

In terms of section 187(1)(c) of the LRA, a dismissal is automatically unfair if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer. Did Aveng breach this provision when dismissing its employees?

Question of fairness

Before the Labour Court, Numsa submitted that the dismissals were automatically unfair as the reason for the dismissals was the employees' refusal to accept Aveng's demand. Aveng maintained that the reason for the dismissals was due to its operational requirements. The Labour Court held that the dismissals were for genuine operational requirements aimed at saving jobs, and not due to the employees' refusal to accept Aveng's demand. Employers are permitted to dismiss employees and to employ others in their place who are willing to accept the terms and conditions of employment that are operationally required by the employer. The dismissals were therefore not unfair.

On appeal, Numsa submitted that there is no exception to the rule that a dismissal is automatically unfair if the reason for the dismissal is the employees' refusal to accept an employer's demand. There are only three elements to section 187(1)(c) of the LRA, a demand, a refusal and a dismissal. Numsa submitted that even where a demand is motivated by the genuine operational requirements of the employer, section 187(1)(c) applies, and an employer may not dismiss an employee for refusing the demand.

The LAC found that Numsa's interpretation of section 187(1)(c) could not be sustained for a number of reasons. Firstly, this would create an anomaly, as employers engaging in redundancy consultations are mandated by legislation to consider alternatives to dismissal. On Numsa's argument, employers would be wary of proposing any changes to terms and conditions of employment to address operational requirements. These changes could, if accepted, save jobs, which is the exact intention of the legislature. However, employers would fear facing automatically unfair dismissal claims should the proposal be rejected and redundancies were to ensue.

Test the reasoning

The LAC held that the question to be considered when determining whether an automatically unfair dismissal has occurred is whether the true reason for the dismissal is the refusal to accept the proposed changes to employment. The test is two-fold. Firstly, it must be asked whether the dismissal would have occurred had the employees accepted their employer's demand. If the answer is yes, the dismissal will not be automatically unfair. If the answer is no, this does not immediately result in an automatically unfair dismissal. It must then be determined whether the refusal was the main, dominant, proximate or most likely cause of dismissal.

As Aveng would not have needed to dismiss its employees had they accepted its proposal, the second enquiry had to determine the dispute. The LAC considered the most likely cause of the dismissal. It held that Aveng did not actually make a demand, but instead made a proposal, with the intention to avoid or mitigate the need for dismissals. Whilst there is a fine line between a proposal and a demand, a demand is aimed at securing compliance, whereas a proposal is aimed at a particular result. Aveng's proposal was a method to avoid redundancies. It was not just necessary, but was the only reasonable and sensible means of avoiding dismissals. Aveng did not make a demand to tilt a wage bargain in its favour, but put forward the proposal to ensure Aveng's survival in the midst of adverse economic conditions. The most likely cause of the dismissals was therefore Aveng's operational requirements, and not the refusal of the employees to accept a demand.

Demand vs proposal

This case highlights that employers, during redundancy consultations, may propose changes to terms and conditions of employment with the aim of avoiding redundancies. This is actually in line with one of the fundamental purposes of the LRA, to encourage meaningful engagement surrounding alternatives to redundancy. Whilst employees may not be dismissed for refusing to accept an employer's demand, they may be dismissed for refusing to accept an employer's proposal made in the midst of genuine operational difficulties.

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