

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA6/2018

In the matter between:

EDWARD LEMLEY

Appellant

And

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER COKILE N.O.

Second Respondent

T-SYSTEMS SA (PTY) LIMITED

Third Respondent

Heard: 18 February 2020

Delivered: 04 March 2020

Summary: Dismissal for operational requirement –severance pay – employee who unreasonably refused employer’s offer of alternative employment not entitled to severance pay.

Coram: Waglay JP, Murphy AJA and Savage AJA

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of this Court granted on petition, is against the judgment and order of the Labour Court (Lallie J) on 19 January 2018 in terms of which the review application brought by the appellant, Mr Edward Lemley, was dismissed with no costs order.

[2] The appeal turns on the refusal by the third respondent, T-Systems SA (Pty) Ltd ('the respondent'), to pay the appellant a severance package after he was dismissed for operational reasons on 25 September 2009. On 13 May 2009, in light of his impending dismissal for operational requirements the appellant was made an offer of alternative employment in East London with effect from June 2009. The appellant refused this offer on 25 May 2009, accepting that he gave no reasons to the respondent for doing so. On 29 May 2009, a revised offer was made to him in terms of which the third respondent indicated its willingness to increase the rental subsidy offered him in East London in the amount of R4000 over a period of six months to twelve months. This offer was rejected by the appellant.

[3] In the minutes of a consultation meeting with his union on 11 June 2009, it was recorded that:

'There is no retrenchment on the table, with the plan being to use identified affected staff in alternative positions. Edward in this instance was offered an alternative to relocate, at the same level, but in another locality. Edward

responded that the option is not viable to him due to his age and his family situation. The company's view is that it is a reasonable offer...'

[4] The minute continued that it was:

'...explained that Edward has completed a significant amount of service (around 38 years) with the company and is currently of pensionable age, being 57. The company's offer is for him to take early retirement. If he does that, he will lose out on [the] opportunity to contribute to his pension fund until natural retirement. Based on the combined value of his individual contribution to the pension fund plus the company's contribution (until the age of 63), the company is willing to grant him that amount - as a settlement value, which is not seen as a retrenchment package. The value is approximately R314 000'.

[5] This offer was not accepted and the minute recorded further that when the proposal to move to East London was put to the appellant he called the union to indicate that travelling from Port Elizabeth on a Monday and returning on Friday *'is not what he is looking for in life'*.

[6] In due course, given his refusal to accept the alternative employment offered to him, the appellant was dismissed for operational requirements without payment of a severance package.

[7] Aggrieved the appellant referred a dispute to the first respondent, the Commission for Conciliation Mediation and Arbitration ("CCMA"). On 14 July 2013 the second respondent, a commissioner of the CCMA, found that the appellant had unreasonably refused the offer of an alternative position in East London. The dispute referred was accordingly dismissed.

[8] Dissatisfied with this decision, the appellant took the matter on review to the Labour Court. Lallie J found that *'(t)he applicant's argument that the award is not rationally connected to the evidence tendered at arbitration is unsustainable as the arbitrator dealt with the issues before him, considered evidence and made findings and a final decision based on the evidence'*. The commissioner was found to have *'considered objective facts as well as the applicant's personal circumstances'* and the *'conclusion, based on relevant authority that the applicant was not entitled to severance pay cannot be*

faulted'. It was found impermissible for the appellant to '*augment the reasons for refusing alternative employment on review*' since it was for the review court to determine the reasonableness of the commissioner's arbitration award.

- [9] On appeal, the appellant states that the commissioner erred in not finding that he reasonably refused the alternative position offered to him because his personal circumstances which rendered it impossible to take up the position; and in so doing that the commissioner reached a decision that no reasonable commissioner would have reached on the facts of the case.
- [10] The third respondent opposes the appeal on the basis that the award fell within the bounds of reasonableness required, taking all factors into account in deciding whether the alternative employment offered to the appellant was reasonable. The offer of an alternative to retrenchment made was reasonable, more so when the appellant had conceded in cross-examination that he did not, when alternatives to retrenchment were being considered, communicate the reasons why he could not accept the offer to the third respondent. The appellant was the only person to reject the offer of alternative employment

Evaluation

- [11] Section 41(2) of the Basic Conditions of Employment Act 75 of 1997 requires an employer to pay at least one week's remuneration for each completed year of continuous service to an employee who is dismissed for reasons based on the employer's operational requirements. In terms of s 41(4), an employee who unreasonably refuses to accept the employer's offer of alternative employment is not entitled to severance pay in terms of subsection (2).
- [12] In issue in this appeal is whether the decision reached by the commissioner that the appellant unreasonably refused to accept the employer's offer of alternative employment in East London was one that a reasonable decision-maker could not reach.¹ On the material before the commissioner, it was apparent that the appellant initially refused the offer made without providing

¹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [[2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

any reasons. When a revised offer was made to him days later increasing the period of a rental subsidy offered to him, this too was refused without any reasons. Although on 11 June 2009 it was stated in general terms that the alternative employment offered was not viable due to the appellant's age and his family situation, there is no dispute that the appellant did not inform the third respondent of what the nature of his family constraints were, or whether the third respondent could assist in accommodating the appellant in respect of such constraints. In addition, the appellant rejected a further offer that the third respondent subsidise the shortfall in his pension fund to allow him to take early retirement seeking instead that his full severance benefit be paid to him.

- [13] The import and purpose of s 41(4) is clear: an employee is not entitled to insist on being paid severance pay where he or she unreasonably refuses to accept the employer's offer of alternative employment.² There are compelling reasons why the legislature saw fit to limit the payment of severance pay in this manner. Not only does it incentivise an employer to provide alternative employment, but it also seeks to limit job losses on retrenchment.³
- [14] The finding of the commissioner that there were no sound reasons for the appellant's refusal to accept the alternative employment offered was not one that a reasonable decision-maker could not reach. The appellant took no steps to engage with the third respondent in any meaningful way regarding the difficulties he may have faced in accepting the alternative position offered. Instead, he elected to refuse the offer without advancing reasons and took no steps to discuss or engage on the matter with the third respondent. The revision to the offer made was simply rejected and the offer of a pension fund payment to allow for early retirement was equally not accepted, in circumstances in which the third respondent had taken steps to resolve the issue in a constructive manner. When the issue of his family circumstances was raised on 11 June 2009 no further steps were taken to detail these circumstances or discuss the matter further with the third respondent. The appellant's approach to the offer made was obtuse and unreasonable in the circumstances. His age and years of service do not alter the fact that he

² *Pretorius v Rustenburg Local Municipality & others* (2008) 29 ILJ 1113 (LAC).

³ *Irvin & Johnson Ltd v CCMA & others* (2006) 27 ILJ 935 (LAC).

unreasonably refused the offer of alternative employment made to him. It follows that the Labour Court correctly dismissed the review application.

[15] For all of these reasons, the appeal must fail. Although the third respondent sought its costs, having regard to issues of fairness and equity, I am not persuaded that a costs order is warranted in this matter.

Order

[16] For these reasons, the following order is made:

1. The appeal is dismissed.

SAVAGE AJA

Waglay JP and Murphy AJA agree.

APPEARANCES:

FOR THE APPELLANT:

Adv Marius Grobler

Instructed by Labuschagne Van der Walt
Inc.

FOR THE THIRD RESPONDENT:

Adv Patrick Botha

Instructed by Mohlaba & Moshoana Inc.