IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 53/18

In the matter between:

ZEDA CAR LEASING (PTY) LTD T/A AVIS FLEET **Appellant**

and

SUSAN MARGARET VAN DYK **Respondent**

Heard: **12 November 2019**

Delivered: **11 February 2020**

Summary: Operational requirements- procedural unfairness – employer must follow a fair procedure in dismissing employee for operational requirements – failure to do so exposes the employer to pay a penalty in the form of a *solatium* – the determination of the quantum of compensation requires the court to apply a discretion taking into account the employee's length of service- the anxiety suffered by the employee as a result of the employer's action and the extent of the deviation from the procedure. Labour Court finding that employer failed to agree to selection method, upheld- court nevertheless reducing amount of compensation to 7 months' remuneration and to the extent that Labour Court failed to consider employer's payment above the legally required amount –Appeal partially upheld but costs awarded to employee.

Coram: Sutherland JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] The appellant ("Avis") appeals against the judgment of the Labour Court (Nkutha-Nkontwana J) which held that the dismissal of the respondent (Van Dyk) for operational requirements was for a fair reason but was procedurally unfair and awarded her compensation in the amount of 10 months' remuneration and the costs of the application.

[2] The operational requirements dismissal did not stem from economic issues or technological changes at Avis. Rather, Avis decided to make a structural change to deal primarily with the conflictual relationship which had arisen between Van Dyk and one of her colleagues, Ms Laura Friebe ("Friebe").The change led to Van Dyk's post becoming redundant.

[3] Avis contends that the Labour Court erred in finding that the dismissal was procedurally unfair on grounds of it being presented as a *fait accompli* and Van Dyk not having been afforded an opportunity to engage in a meaningful consultation process. It also contends that the quantum of compensation awarded to Van Dyk was manifestly unreasonable in that the alleged procedural shortcomings (if any) were of a minor nature and were contributed to by the conduct of Van Dyk. It, accordingly, appeals against the finding of procedural unfairness and the award of compensation. There is no appeal against the Labour Court's order of costs.

[4] Van Dyk contends that the appeal should fail because the process followed was a sham and the compensation was reasonable in the circumstances.

[5] Van Dyk has not cross-appealed the Labour Court's finding that the dismissal was for a fair reason and that the structural change to address the conflict was appropriate.

The factual background

[6] Van Dyk commenced employment at Avis on 13 February 2006. She was promoted to the position of General Manager: Gauteng Key Accounts on 01 May 2013. Friebe was the General Manager: New Business Acquisitions in the same department. Both reported to the Business Development Executive of Avis. Friebe managed what was referred to as the "hunters" portfolio –

involving the canvassing and pursuit of new business; while Van Dyk had all the "carers" of existing accounts reporting to her as well as some "hunters".

[7] The Business Development Executive was one of six executive director positions. Van Dyk, therefore, occupied a senior role in the organisation.

[8] Over time a conflictual relationship developed between Van Dyk and Friebe requiring the intervention of Edward Enslin, the erstwhile Business Development Executive. Enslin was subsequently replaced by Mr Albert Geldenhuys ("Geldenhuys") who was made aware of the ongoing discord between the two managers.

[9] When in June 2015, Van Dyk approached Geldenhuys with a complaint against Friebe, he decided to procure the services of an external facilitator, Mr. Bruce Weyers, to undertake a conflict resolution exercise between the two managers. Prior to the facilitation, Geldenhuys had a disagreement with Van Dyk over a trail of emails and lost his temper for which he later apologised.

[10] On 15 July 2015, Weyers facilitated a two-day session between Van Dyk, Friebe and Geldenhuys. At the end of July, Weyers held additional separate sessions with both Van Dyk and Friebe.

[11] On 11 August 2015, Geldenhuys addressed separate letters to Van Dyk and Friebe with identical questions about their relationship. The relevant part of the letter to Van Dyk read:

> '1. As you are aware, over the last while, we have been engaged in certain sessions with a view to addressing the discord and disharmony which exists between yourself and Laura Friebe.
>
> 2. The ongoing disharmony and confrontational relationship which exist between the two of you are manifesting itself in continued unhappiness and impacting negatively on our business considerations and, in consequence thereof (and notwithstanding the recent intervention of an external mediator) continues to cause disruption in the office. This is also impacting on the relationship between the teams in which you are both involved and, as a result of this, it

becomes necessary to take more formal steps and measures to address this unsatisfactory state of affairs.

3. I now require you to provide me with detailed and motivated representations on the following issues:

3.1 Precisely what is the nature, scope and ambit of the disharmony which exists between the two of you and, in your assessment, what is the root cause thereof?

3.2 How, from your perspective, has this unhappy and undesirable state of affairs impacted on your ability to meaningfully work and how is this, if at all in your assessment, impacting negatively on your team and working environment?

3.3 Is this impacting at all on the Company's operational demands and requirements?

3.4 How do you believe that this particular situation may be appropriately addressed?

3.5 Do you believe that there is any scope for an improved relationship between yourself and Laura and, if so, how do you believe that this may be appropriately achieved?"

[12] The letter concluded by stating that based on the responses provided, decisions would be made as to how the matter should be addressed from the company's perspective.

[13] Both Van Dyk and Friebe responded to the questions on 13 and 14 August 2015 respectively.

[14] Van Dyk's responses are lacking in specificity and were somewhat dismissive in tone. She mentioned "certain behaviours" which she believed were "unacceptable and not in line with the Avis prescribed values". She was of the opinion that the discord had no impact on business deliverables or operational requirements, but recommended that the disciplinary code and procedure be followed and added that she and Friebe had held discussions on ways to improve their business relationship.

[15] Friebe, on the other hand, provided a comprehensive and considered account of the relationship. She candidly described a situation in which there was a lack of trust, accountability, mutual respect and poor communication. She complained that she felt undermined, questioned and taken to task whenever she did not adhere to Van Dyk's way of thinking about work issues. She pointed to a specific example of how she had endeavoured to obtain Van Dyk's co-operation on a project but that this was met with distrust and animosity, which she assumed was born of Van Dyk's desire for "full control of every element of the sales process and team environment". In her opinion, the problem did impact on the operational requirements of the company as the managers had not been able to develop an appropriate long-term strategy for the sales team – "instead we are continuously defending wickets and being territorial". As a solution to the problem, she proposed a change in structure in which either she or Van Dyk moved into a different portfolio. She concluded that she had no confidence that Van Dyk would be willing or able to let go of the past and thus that a restructuring of roles was the best way forward.

[16] At a meeting on 8 September 2015, Geldenhuys informed Van Dyk that he was considering implementing certain structural changes. A few days later, on 10 September 2015, a planning process meeting was held where the possibility of the creation of one general manager position was discussed. Both Van Dyk and Friebe were present at the meeting. Geldenhuys put forward his proposals and the various alternatives relating to the proposed restructure of the sales division of the company. On 14 September 2015, Geldenhuys held separate meetings with Van Dyk and Friebe.

[17] On 17 September 2015, Geldenhuys addressed identical letters to Van Dyk and Friebe, which read in relevant part as follows:

> '**RESTRUCTURE OF THE SALES DEPARTMENT**
>
> 1. Over the preceding period we have given much thought to the operating and functional structure of our sales division, in particular, the Hunting and Caring components thereof. We have, in addition, considered the ongoing and sustained difficulties which have been experienced with regard to the lack of cohesion and interpersonal

communications which have arisen and have continued to exist between yourself and Laura which has filtered down to the respective individuals in each one of your teams.

2. The original reservations which I had personally had were, once again, reinforced in the recent facilitation undertaken under the auspices of an external mediator/facilitator and the correspondence received during the course of the past weeks in response to certain queries which I had raised.

3. In light of this, and after consultation with senior members of the Manco, we have come to the determination and conclusion, in principle, that the two positions of General Manager of our Hunting and Caring Portfolios in the "inland regions" be consolidated and integrated to the extent and with the effect that there will be one General Manager position. This individual would be responsible for the supervision, management and control of both of these portfolios of our sales function and both teams would report into the one individual concerned……

5. By virtue of your detailed knowledge of the Company's operational requirements and constraints coupled with the meaningful contribution which you have made to our business it would follow that you, in conjunction with Laura be the only candidates for the function concerned (sic). This role would simply envisage an integration and consolidation of the functions and duties which you have both currently been occupying and undertaking save to the extent that the Hunting and Caring portfolios would now be unified.

6. Naturally, in our ultimate assessment and determination as to the suitable incumbent, we would be required to make an informed and proper decision in the interests of the Company and in fairness to both of you as to who should be appointed. To that end, I require you to

   6.1 advise me as to whether you would be interested in assuming the position of General Manager of the unified Portfolio,

   6.2 if so, submit a detailed application for the position contemplated, and

6.3 to the extent that, invariably, one position would be declared redundant at this preliminary stage (and without prejudice to any rights which you may have) as to whether you would, in the alternative, rather opt for applying for a voluntary severance package which would be calculated and quantified in accordance with the Company's standard severance package payable in instances of redundancy/retrenchment. This, of course, would not imply that the Company has pre-empted the outcome of the process.

7 In your application for the position you may, should you so wish, record any reservations or concerns which you have with regard to my proposal set out above and I assure you that these will be duly considered. I remain of the firm belief, nonetheless, that this is a meaningful and realistic suggestion and, to that end, attach hereto for your perusal and consideration, a draft organogram and Job Model as to how I anticipate and perceive the job and structure to be introduced and ultimately executed. Your contributions in this regard would also be welcome….'

[18] The letter imposed a deadline of 17h00 on 25 September 2015 for the application for the new position or the voluntary severance package.

[19] Friebe applied for the position of General Manager Sales on 22 September 2015. On the same day Geldenhuys phoned Van Dyk and asked whether she was comfortable to give "a number" for a severance package over the phone. She replied that she was not. The next day Geldenhuys again phoned Van Dyk (who was at home ill) and pressed her for an answer.

[20] On 25 September 2015, Van Dyk's attorneys sent a letter to Avis raising concerns about the restructuring process. The attorney expressed the opinion that Avis's conduct constituted an unfair labour practice in so far as it did not comply with the processes and requirements of the Labour Relations Act[1] ("the LRA"). He also questioned whether there was a genuine redundancy and a new position had been legitimately created. He concluded by

[1] Act 66 of 1995.

suggesting that a proper consultation process should be embarked upon and requested documentation for that purpose.

[21] On 1 October 2015, Van Dyk was given a notification purportedly in terms of section 189(3) by way of a letter from Geldenhuys dated 30 September 2015.

[22] The letter set out the history of the matter and the rationale for the proposed restructuring and noted *inter alia* that in a "further consultation" on 21 September 2015 Van Dyk recorded her standpoint that Avis had already predetermined who the successful incumbent would be, stated that she would not be interested in being appointed to the new position and proposed that her appointment be terminated by mutual agreement with a severance package of one month's remuneration for each year of service. Van Dyk claims that her willingness to enter into discussions at this stage about a severance and options of settlement did not relieve Avis of its obligations to act in procedurally fair manner.

[23] In the discussion of alternatives that the company considered before proposing dismissal, Geldenhuys stated in the letter that Van Dyk had rejected making an application for the new position and Avis had accepted her rejection and her refusal to apply for the position. He also recorded that Avis had "considered seeking employment opportunities" for her elsewhere in the company, but, as Van Dyk had preferred not to be office-bound, intimated that this possibility had not been taken further.

[24] Under the heading: "The proposed method for selecting which employees to dismiss", Geldenhuys stated:

> 'Inasmuch as you categorically recorded that you refused to be part of this particular process and, to that end, did not believe in same whilst Laura embraced the process and believed that the ideas were not only well-founded but, in fact, would lend to optimal productivity at this level of engagement, it is indisputable that Laura (should she apply) would be the only meaningful candidate to be appointed in this portfolio.'

[25] During her testimony, Van Dyk maintained that she was in fact interested in the position but had concerns about the process of appointment and the possibility that the selection of Friebe was a *fait accompli*.

[26] The letter of 1 October 2015 concluded with a request for a consultation the following day.

[27] The parties met on 2 October 2015. During the meeting, Van Dyk presented written responses to most of the issues raised in the letter of 30 September 2015 in which she took issue with the need to restructure and the fairness of the process. She maintained that her earlier engagement regarding severance pay was intended to obtain clarity about what was on offer. Most importantly, Van Dyk specifically requested "clarity on the proposed method" by which Avis intended selecting her for dismissal. When asked under cross-examination how he dealt with this request, Geldenhuys said:

> 'I am not sure we explored this answer further in the consultation meeting. I think the issue of severance came up before, before we, I do not think we delved into this in a great amount of detail in this, in this consultation because the, the conversation was ultimately steered towards, the, the, the severance." (sic)'

[28] The minutes of the meeting on 02 October 2015 record Geldenhuys as having said:

> '…The deadline given to [indistinct] please apply for the position and/or the package, by the 25th, did not happen. So you did not formally apply for it and the discussions that I thought we had in terms of wanting to see the value of what this package could be, because I said okay, I will find out if it could be more than two months and closer, or anything towards the one month you asked for at the time, when we received the legal letters that basically said that, I would call it, deselected yourself from that particular process. *And that is the decision as to why you are the one that has to be retrenched*.'

[29] Another meeting took place on 8 October 2015 at which Avis presented a letter including a severance offer to Van Dyk. The letter stated that Avis had consulted with Van Dyk as required in terms of section 189 of the LRA,

various alternatives were considered but had been rejected as inappropriate, the issues raised by Van Dyk had been taken into consideration, both General Manager positions had become redundant and that Van Dyk had declined to apply for the new position within the deadline. The letter recorded that in the circumstances the only outstanding issues were the quantum of severance pay and the termination date. Avis proposed to pay R500 000 severance pay, made up of one week's remuneration per year of service (nine week's pay) and an additional *ex gratia* payment over and above the contractual entitlement. In addition, Van Dyk would receive notice pay for the month of November, payment of any unused annual leave, use of the company car and petrol card (or its monetary value) until the end of November 2015 and be released from the applicable restraint of trade agreement.

[30] Van Dyk agreed to consider the proposal and revert by no later than 12 October 2015. However, before she could do so, Avis later that day (8 October 2015) circulated a notice to all staff titled "Restructure of the Avis Fleet Sales Department" which in relevant part read:

> 'One of our top imperatives for 2016 is "Profitable growth of RSA Corporate Fleet" through provision of customised solutions that change as the needs of our customers change. We believe that this can best be achieved through a coherent structure of hunters and carers, improved knowledge sharing and our ability to innovate and act in a flexible manner.
>
> To achieve this objective, we have taken a decision to consolidate the hunter and carer portfolios in the "Gauteng and Inland regions" under one General Manager. All the current Regional Sales Managers will report into this new General Manager position.
>
> Following this restructuring decision, I am sad to announce that Susan van Dyk will leave our employ with effect from 12 October 2015. Susan re-joined the company in 2006 and since then held various positions, for the last 2 years that of General Manager Key Accounts. Please join me in thanking Susan for her contributions over the last 9 years.'

[31] Van Dyk did not revert to Avis concerning the draft settlement agreement on 12 October 2015. On 13 October 2015, Mr. Willie Van Zijl, Executive: Human

Resources, emailed Van Dyk confirming that in light of her failure to revert on the settlement proposal her employment had been terminated "based on the operational requirements of the Company" with effect from 30 November 2015, with her last working day being 9 October 2015, and her not being required to work the notice period. On 15 October 2015, Van Dyk referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"), claiming that she was unfairly dismissed on 8 October 2015.

The decision of the Labour Court

[32] The matter came before the Labour Court in terms of section 187(1) of the LRA in that Van Dyk alleged that the reason for the dismissal was unfair discrimination or alternatively that the dismissal was unfair in terms of section 189 of the LRA as there was no *bona fide* reason for her dismissal on operational requirements grounds and Avis had not followed a fair procedure.

[33] The Labour Court held that Van Dyk had not discharged her onus to prove that the reason for her dismissal was discrimination as contemplated in section 187(1)(f) of the LRA and thus that the dismissal was automatically unfair. It held also that the manner in which the hunting and caring teams were constituted was the source of the conflictual relationship between the general managers and that the structural solution of combining the positions and declaring one of the posts redundant was the only solution and "a rational commercial or operational decision". Although, it did not explicitly state as much, it, in effect, concluded on this basis that the dismissal was substantively fair. As mentioned at the outset, there is no cross-appeal against these findings.

[34] The Labour Court, however, found that the dismissal was procedurally unfair principally because it was presented as a *fait accompli* before proper consultation on the topics contemplated in section 189 of the LRA. Section 189 provides that when an employer contemplates dismissal on operational requirement grounds, it must engage in a "meaningful joint consensus-seeking process" and attempt to reach consensus on: i) appropriate measures to avoid the dismissals, minimise the number of dismissals, change the timing

of the dismissals and to mitigate the adverse effects; ii) the method for selecting the employees to be dismissed; and iii) severance pay. The consultation must precede a final decision on retrenchment in order not to forestall what might emerge in the consultation process.

[35] The Labour Court held that the decision to merge the two positions and to declare one post redundant was taken without any meaningful consultation about appropriate measures to avoid the dismissal and the method of selecting which employee was to be dismissed. Neither the letter of 17 September 2015 nor any other prior discussion attempted to identify or reach consensus on the method of selection. The requirement of making an application (presumably to be considered on its merits - skills and experience) was imposed by Avis as the method of selection without any consultation or consideration of other methods or criteria of selection. The letter of 17 September 2015 communicated the decision to implement the restructuring in final terms and imposed a deadline compelling the two managers to apply for the consolidated post or a severance package by 25 September 2015. When Van Dyk did not comply with that deadline, she was excluded from consideration. In addition, the Labour Court held that there was no meaningful endeavour on the part of Avis to accommodate Van Dyk in any alternative position. In the premises, the Labour Court concluded that the dismissal was procedurally unfair.

[36] After receiving evidence from both parties about the amount of Van Dyk's salary for the purpose of determining an amount of compensation, the Labour Court accepted that Van Dyk's salary was R1 598 250 per annum. It awarded her compensation in the amount of R1 331 875 being the equivalent of 10 months' remuneration. In awarding that amount, the Labour Court took into account the gravity of the procedural unfairness and that she had been without employment for 10 months, had only secured a job paying less than half her salary at Avis, and had exhausted her provident fund withdrawal benefit to finance the litigation.

[37] Although it referred to the fact that an amount of R500 000 severance pay had been paid into an attorney's trust account for the benefit of Van Dyk, it is not

clear from the judgment if this amount (and the fact that it was significantly in excess of the statutory minimum) was taken into account in determining a just and equitable amount of compensation. Likewise, no reference was made to the fact that Van Dyk was offered an additional amount of notice pay for the seven week period 9 October 2015-30 November 2015 without having to attend work.

The appeal on the merits

[38] Before turning to the merits of the issue of procedural fairness, it may be helpful to comment briefly upon the preferable approach to deal with incompatibility in the workplace. Despite Avis ultimately having framed the problem it faced as an operational requirements issue, it, in truth, was seized with incompatibility in the workplace.

[39] Incompatibility involves the inability on the part of an employee to work in harmony either within the corporate culture of the business or with fellow employees.[2] There has been some difference of opinion in the past about whether incompatibility is an operational requirements or an incapacity issue. The prevailing view is that incompatibility is a species of incapacity because it impacts on work performance. If an employee is unable to maintain an appropriate standard of relationship with his or her peers, subordinates and superiors, as reasonably required by the employer, such failure or inability may constitute a substantively fair reason for dismissal. Procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct allegedly causing the disharmony, to identify the relationship affected by it and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to consider the allegations and proposed action, to reply thereto and if appropriate to remove the cause for disharmony. The employer must then establish whether the employee is responsible for or has contributed substantially to irresolvable

[2] Le Roux and Van Niekerk: *The South African Law of Unfair Dismissal* (Juta 1994) 285.

disharmony to the extent that the relationship of trust and confidence can no longer be maintained.[3]

[40] In the present case, Avis initially approached the difficulty in the sales division as an incompatibility problem, as is evident from the attempted facilitation by Weyers and Geldenhuys' s letter of 11 August 2015 seeking information about the nature and causes of the disharmony and identifying solutions to resolve the problem. However, after receiving responses from both managers, Avis opted to restructure the division and to declare one position redundant. Hence, Avis did not complete a process establishing the cause, or attributing any blame, for the disharmony. Nor did it put forward a proposal to remedy the problem of incompatibility on any basis other than declaring one of the two posts redundant. This solution was discussed first in the meetings of 8 and 10 September and culminated in the critical letter of 17 September 2015. In the result, absent any cross-appeal on the substantive issue, the primary question on appeal is whether the operational requirements dismissal was procedurally fair in terms of section 189 of the LRA.

[41] Despite Avis's submissions to the contrary, it is clear from the letter of 17 September 2015 that Avis contemplated the dismissal of either Van Dyk or Friebe at that date. The letter said as much. In it, Geldenhuys stated that after consultation with senior members of Avis management, it had been decided that the two positions would be consolidated and integrated into one and that Friebe and Van Dyk would be the only candidates for the new position and "to the extent that, invariably, one position would be declared redundant at this preliminary stage" they were invited to indicate whether they would accept a severance package.

[42] Having thus contemplated dismissal, it was incumbent on Avis at that point to engage in a meaningful joint consensus-seeking process to avoid any dismissal etc. and to agree on the method for selecting the employee to be dismissed. As the Labour Court rightly found, it did not do that.

[3] *Wright v St Mary's Hospital* (1992) 13 *ILJ* 987 (IC); *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 *ILJ* 115 (LAC) at 124.

[43] The attitude of Avis that "invariably" one position would be declared redundant suggests that it may have prematurely closed its mind to meaningful engagement about measures to avoid dismissal. It saw dismissal of one of the managers as inevitable, despite the fact that there was no evidence of a reduction in workload or functions, any work performance problems (beyond incompatibility) or a need for financial cut backs in the division. No possibility of restructuring to change lines of accountability or the like appears to have been seriously mooted or considered. Dismissal was thus seen as the only and inevitable option and the manner in which Geldenhuys sought to get Van Dyk to commit telephonically to a severance package on 22 September 2015 and 23 September 2015 while she was ill at home, intimates that he saw her as the likely candidate for dismissal before any consultation process was embarked upon.[4]

[44] Moreover, and most importantly, there was no proper consultation about the method for selecting which employee would take the new position and which would be dismissed. Avis invited the employees to apply for the new post and imposed the deadline of 25 September 2015 without identifying the criteria of selection. The requirement that employees compete for a post is not in itself a method of selecting for dismissal.[5] More is required. The competition for the post must proceed in accordance with identified criteria of selection. A fair selection method must be chosen to decide who is to stay and who is to go. In the present instance, it was not clear which criteria, (such as skills, qualifications, experience, length of service, productivity, seniority, disciplinary record and the like), would be applied and no effort or attempt was made to engage with the employees to identify, agree and rank such criteria.

[45] When Van Dyk (through her attorney) sought to engage on these issues, Avis took the view that she had de-selected herself by not applying in accordance with the unilateral deadline for application. That much is evident in

[4] There appears to have been some consideration of alternatives earlier in the discussions before dismissal was contemplated but the details in that regard are somewhat scanty. No alternatives were presented by Avis at the critical juncture when dismissal was clearly under consideration. At the meeting of 2 October 2015, Van Dyk specifically asked for information on other employment opportunities but nothing was forthcoming.

[5] *SA Breweries (Pty) Ltd v Louw* (2018) 39 *ILJ* 189 (LAC) para 22.

Geldenhuys's letter of 1 October 2015 and his statement at the meeting of 2 October 2015 that Van Dyk had de-selected herself and all that remained was to negotiate a severance package. In the letter he stated categorically that Friebe was the only candidate for the position at that point in time. His approach was unquestionably procedurally unfair. Van Dyk did not refuse to apply for the position but sought more information about the process before applying. She wanted to know what the method of selection would be.

[46] Moreover, the manner in which non-compliance with the deadline was seized upon adds support to Van Dyk's apprehension that her non-selection was a *fait accompli*. Had Avis genuinely intended to afford Van Dyk an opportunity to compete for the post, it would not have rushed the selection and could easily have delayed the process until proper criteria of selection had been canvassed. In his testimony, Geldenhuys admitted that there had been no thought given to selection criteria. The letter of 1 October 2015 and the meeting of the following day left no room at all for any consultation about selection criteria. In her written response to that letter and at the meeting of 2 October 2015, Van Dyk specifically challenged the statement in the letter that Friebe was the only "meaningful" candidate since Van Dyk had de-selected herself (and by implication there was no need for selection criteria) as indicating that her dismissal was a *fait accompli*. Added to that, Avis announced Van Dyk's dismissal in the circular to staff on 8 October 2015, four days prior to the expiry of the agreed period for her to consider the settlement offer.

[47] In the premises, the Labour Court did not err in its conclusion that the dismissal was procedurally unfair.

Compensation and costs

[48] As already mentioned, the Labour Court awarded Van Dyk compensation in the amount of R1 331 875 being the equivalent of 10 months' remuneration based on a salary of R1 598 250 per annum. In awarding that amount, the Labour Court took into account the gravity of the procedural unfairness, the fact that Van Dyk had been without employment for 10 months, had only

secured a job paying less than half her salary at Avis, and had exhausted her provident fund withdrawal benefit to finance the litigation. Avis submits that the award of compensation is unreasonable and requests this court to vary the award and to order payment of a reduced amount.

[49] As the dismissal was found only to be procedurally unfair, compensation is the appropriate remedy in terms of section 193(2)(d) of the LRA. Section 194(1) of the LRA provides the Labour Court (or CCMA commissioner) with a discretion to determine the quantum of compensation. It reads:

> 'The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[50] The requirement that an award of compensation be "just and equitable in all the circumstances" envisages that the Labour Court will be informed about all the circumstances which may bear upon justice and equity.[6] The starting point should be the injustice and harm suffered by the employee and the conduct of the parties. Equity requires proper consideration of the interests of both parties. When the dismissal is unfair only on account of procedural unfairness, the patrimonial loss of the employee is irrelevant. In such instances, the award of compensation is intended to be a *solatium*. In *Johnson & Johnson (Pty) Ltd v CWIU,*[7] Froneman DJP put it as follows:

> 'The compensation for the wrong in failing to give effect to an employee's right to fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a… penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress.'

[6] *Northern Province Local Government Association v CCMA and others* [2001] 5 BLLR 539 (LC) para 57.
[7] [1998] 12 BLLR 1209 (LAC) para 41.

[51] The key factors in the determination of compensation for procedural unfairness, therefore, are: i) the extent of the deviation from a fair procedure; ii) the employee's conduct; iii) the employee's length of service; and iv) the anxiety and hurt caused to the employee as a consequence of the employer not following a fair procedure.[8]

[52] Awards of compensation, like awards of damages in civil matters, are by their nature matters of estimation and discretion, and hence appellate courts should hesitate to interfere with such awards which are necessarily "somewhat rough and ready".[9] An appellate court should not simply substitute its own award for that of the trial court. However, an appellate court will interfere where there has been an irregularity or misdirection such as considering irrelevant facts or ignoring relevant ones; or where the decision was based on totally inadequate facts resulting in there being no sound or reasonable basis for the award. Where there is a substantial variation or a striking disparity between the award made by the trial court and the award that the appeal court considers ought to have been made on its own assessment, the award will be unreasonable and the appeal court is entitled and obliged to interfere.[10]

[53] The Labour Court took account of appropriate and relevant considerations in making its award of compensation. In particular, the procedural unfairness was egregious in that the failure to negotiate a selection method, and the precipitate manner in which Van Dyk was excluded from consideration for continued employment, amounted to harsh injustice to an employee with lengthy service, a history of able performance and a clean disciplinary record. This resulted in a lengthy period of unemployment, an evident loss of career prospects and the financial burden of seeking vindication, which all have caused Van Dyk considerable anxiety.

[54] However, the Labour Court, in our view, erred in not taking into account the fact that Van Dyk received *ex gratia* payments in addition to her statutory and

[8] *Alpha Plant and Services (Pty) Ltd v Simmonds and others* [2001] 3 BLLR 261 (LAC) paras 107-116 and 128; and *Lorentzen v Sanachem (Pty) Ltd* [1998] 8 BLLR 814 (LC) para 32.
[9] Herbstein and Van Winsen: *The Civil Practice of the High Courts of South Africa* (5th Ed) 1255.
[10] *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) 586-587.

contractual entitlements. Sometime after Van Dyk's dismissal, Avis paid R500 000 into an attorney's trust account as severance pay. We were told from the bar that such amount had been paid to her or would be paid immediately. Van Dyk was contractually entitled to one week's severance pay per year of service, but, as stated in the letter of 8 October 2015, Avis was willing to pay an additional amount as an *ex gratia* payment. Accepting that Van Dyk earned R1 598 250 per annum, her weekly remuneration was R30 735. She was thus entitled to R276 615 as nine week's severance pay. She thus received an additional *ex gratia* payment of severance pay in the amount of R223 385. In addition, a letter dated 17 November 2015 addressed by Geldenhuys to Van Dyk's attorney indicates that Van Dyk was paid for seven weeks after the date of her dismissal on 9 October 2015 without having to tender her services. The exact amount of this payment is unknown but would have been in the region of R200 000. Van Dyk was also permitted to use the company car and petrol card for seven weeks after her dismissal. The total value of such additional benefits would have been approximately R450 000, roughly equivalent to three and a half months remuneration. If the award of 10 months' compensation is added to the supplementary *ex gratia* severance benefits van Dyk received on the termination of her employment, she would in effect be paid 13 and a half months' remuneration, which is more than the maximum compensation provided for in section 194(1) of the LRA.

[55] The Labour Court's ignoring of these relevant factors resulted in an unreasonable award of compensation. There is a substantial variation or a striking disparity between the award made by the trial court and the award that this court in its assessment considers ought to have been made. While the procedural unfairness was severe, it was not of an order justifying maximum compensation in view of the relatively generous approach taken by the employer to the severance benefits.[11] In our view, an award of seven months compensation will be just and equitable in all the circumstances. The

[11] There is, of course, a difference between severance benefits and compensation for procedural unfairness. It is nonetheless legitimate to have regard to the amount paid as a severance benefit in determining the justness of compensation *in all the circumstances* awarded in terms of section 194(1) of the LRA.

award of the Labour Court must accordingly be varied to reduce the amount of compensation from R 1 331 875, 30 to R 932 321,73.

[56] Although Avis has had some measure of success on appeal, Van Dyk has substantially succeeded on appeal and should be awarded the costs of the appeal.

The order

[54] In the premises, the following orders are issued:

54.1 The appeal succeeds to the limited extent reflected in this order.

54.2 The Labour Court's order is set aside and substituted as follows:

"1. The dismissal of the applicant was procedurally unfair.

2. The applicant is awarded compensation in the amount of R 932 321,73.

3. The respondent is ordered to pay the costs of the application."

54.3 The appellant is ordered to pay the costs of the appeal.

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JR Murphy

Acting Judge of Appeal

I agree

_____

R Sutherland

Judge of Appeal

I agree

F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: Mr. DO Pretorius

Instructed by Fluxmans Inc

FOR THE RESPONDENTS: Adv T Venter

Instructed by Bouwer Cardona Inc.