**REPORTABLE**

**IN THE LABOUR COURT OF SOUTH AFRICA**
**HELD AT JOHANNESBURG**

**CASE NO: J 2868/99**

In the matter between:

**FRANCIS HEDLEY** Applicant

and

**PAPERGRAPHICS LIMITED** Respondent

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**JUDGMENT**

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**BASSON, J:**

[1] The applicant, Mr F Hedley ("Hedley"), was retrenched by the respondent, Papergraphics Limited, on 27 January 1999.

[2] The applicant seeks an order declaring the said retrenchment unfair, both substantively and procedurally, and awarding him compensation equivalent to twelve months' remuneration.

[3] It is important to discuss in some detail the background to the dispute.

[4] The applicant assisted the respondent in the establishment of their so-called Formula 1 paper brand in South Africa on a independent contractor basis as from about August 1996. It appeared that he was successful in doing so although some of the respondent's witnesses were at pains to point out that other favourable conditions were the real cause and not the applicant's own contribution as such. It was nevertheless conceded that the applicant did an enormous amount of groundwork.

[5] Be that as it may, the applicant accepted an offer of employment on 5 December 1997 as the Formula 1 sales director of the respondent, starting as from January 1998.

[6] In terms of the said employment contract the applicant earned a monthly salary of R 15 900 (inclusive of allowances) plus fixed bonuses or commission based on sales figures (exhibit C60 to C62 at especially paragraph 4). It appeared that the applicant had previously earned a much higher amount (perhaps even in the

region of R 400 000) as the respondent's independent contractor but that for reasons such as the security of earning a fixed salary, he accepted employment on the basis set out above.

[7] The applicant originally reported to Mr M Lloyd ("Lloyd") the then joint managing director of the respondent who resided in the United Kingdom where the parent company of the respondent is situated. It appeared that the working relationship between the applicant and Lloyd was good.

[8] The other joint managing director or owner or the respondent, Mr J Selby ("Selby"), was also situated in the United Kingdom but did not come to South Africa to involve himself in the respondent's business here. Nevertheless, he played an important role in the applicant's dismissal as it will become clear later.

[9] There was also another sales manager appointed for the so-called Large Format division, Ms S Young ("Young"), who worked together with the applicant in the South African office at Midrand. Although these were two separate divisions (selling different brands of paper), the employees of both divisions worked together in an open plan office.

[10] During March 1998 the respondent appointed a new sales director, Mr G Neilly ("Neilly"), who was situated in the United Kingdom but who was responsible for the sales operations of the respondent in South Africa. The applicant reported directly to Neilly as from March 1998. Initially the relationship between the applicant and Neilly was satisfactory.

[11] The respondent's representative, Mr Landman, contended that the applicant had always advocated a very specific business model. This model was allegedly devised to promote sales in order to boost the applicant's chances of getting the commission which in terms of his employment contract was due to him on the basis of meeting certain sales figures. In the event, so it was argued, the applicant, also looking after his own interests, was not so much concerned with the costs that it was necessary to incur in order to obtain the said sales figures. In this regard the applicant's allegedly over-optimistic forecasts of sales; his insistence that he could do better if the respondent appointed more sales personnel to the Formula 1 division; and the alleged problem of overstocking were identified as indications of his business model.

[12] The respondent, so it was contended, had a more conservative outlook and wished to keep costs down. Accordingly, the requests of the applicant to appoint extra sales personnel to his division were refused. This was, it was stated, the conflicting business model that was proposed by the respondent's directors to whom the applicant reported. I will return to these issues below.

[13] A problem had arisen in early 1998 (before Neilly's appointment) with one of the respondent's key accounts,

Incredible Connection, which the applicant had originally won.

[14] Incredible Connection had taken over Computer Superstores. The respondent had in the past sold "branded" stock to Computer Superstores which contained the logo of that store. Because of the fact that the stock was thus "branded" the respondent initially refused to take back the stock. However, Incredible Connection adopted the attitude that, if the respondent did not take the stock back, the respondent would not receive any further orders from them.

[15] The applicant was originally mandated by the respondent to make an offer to take back 30 % of the stock which was later upped to 50% but the offer was turned down and the Incredible Connection account was suspended.

[16] What happened next appeared to have caused a rift in the relationship between the applicant and Neilly. The applicant was of the view that he had built up a good relationship with the buyer of Incredible Connection ("Walker") and that he knew what to do in order to get the account back.

[17] However, Neilly, accusing the applicant of keeping him in the dark about this problem, contacted the client's managing director ("Delport"). Neilly stated that Delport had allegedly told him on the telephone in April 1998 that he had "misgivings" about the applicant. Due to these "misgivings" about the applicant's competence to run the account, Delport allegedly stated that he wanted another sales person to handle the account. Neilly added that the applicant was accused also of being "abusive" and of "over-stocking" the client. Neilly regarded these as "exceptionally serious complaints" against the applicant by a key client of the respondent.

[18] The applicant denied the accusations and countered that Neilly had gone behind his back to sideline him, that his actions were "ill-judged" and that he was "out of his depth". Neilly stated that the applicant reacted negatively because of the "risk of him being exposed" in regard to his "management skills". He added that he was of the view that the applicant "had got away with an awful lot" when Lloyd was his manager as Lloyd had a different management style to that of Neilly. The applicant disagreed and stated that Lloyd had a firm grip on things.

[19] During May 1998 Neilly came to South Africa and met Delport, asking the applicant not to attend the meeting. Neilly also indicated that the sales representative who worked in the applicant's division, Mr W Taljaard ("Taljaard"), was to take over the account.

[20] Neilly offered to take back 100 % of the disputed stock (an offer which the applicant was never mandated to

make) and it appeared that the account may have been won back. The applicant claimed to have been responsible for this breakthrough (as Neilly was unaware of the fact that the account was re-won when he was giving evidence) but it appeared to have lasted only for about two months when the account was lost (apparently after the stores in question "voted" on the issue) and was never re-won again.

[21] Neilly further stated that it was difficult to get to know the applicant in such a short a space of time as he had never met him before in his life. He indicated that he did not have the opportunity to get to know the applicant as the applicant had to attend to a meeting with his wife and her cousin when Neilly proposed a dinner meeting and that they thus "missed the opportunity to understand each other better".

[22] It was put to Neilly that this period of time was far too short to have come to any conclusion about the applicant's alleged incompetence and he answered, revealingly, that in the "short space of time" the problem with regard to the applicant's performance merely "registered with myself". However, importantly, Neilly "shared his concerns in this regard to both Selby and Lloyd" already in May 1999, that is, after returning from his first visit to South Africa.

[23] In fact, Neilly stressed in giving evidence that he was "concerned with the performance of (Hedley) at an early stage" and added that this was related to "how he did his job" and that "he was not performing as he should have done".

[24] It was then asked of Neilly in cross-examination whether the respondent had an "performance correcting" system and he answered: "In the United Kingdom, yes".

[25] It was then put to Neilly that he did know what steps had to be taken to correct performance problems, that is, to consult with the employee concerned and to tell him or her what management's concerns were and then to do whatever is needed to correct the problem.

[26] Neilly answered that he did spend some time with the applicant prior to his meeting with Delport. However, it was clear, in my view, that the short space of time was not untilised to consult with the applicant about his perceived performance deficiencies. In fact, no such consultations ever took place despite Neilly's evidence that the alleged performance problem was detected at a very early stage. I will return to this matter below.

[27] Neilly added that, although he had "concerns with (Hedley's) management style", he had made "no definite conclusions at the time and wanted to think more". Neilly stated that "at that stage I had no cause or reason to want to dismiss the man".

[28] The applicant testified that he was "demoralised" by what had happened and it was argued that he was also angry that this potentially lucrative account had been assigned to Taljaard (given the possible commission the applicant could have earned from the account).

[29] It was clear that the relationship had soured between the applicant and Neilly, the one blaming the other for the "catastrophe" of losing a key account. Young testified that the applicant's views in regard to Neilly had "changed dramatically" after the visit. The applicant was accused by Young of calling Neilly a "twit" and, on the other hand, the applicant accused Neilly of being "rude and dictatorial" towards him.

[30] Despite the fall-out the relationship continued on more or less an even keel until November 1998 when Neilly instructed the applicant to prepare the sales forecast for 1999.

[31] It was argued by the respondent that the applicant, in terms of his alleged business model postulated above (at paragraph [11]), proffered a "wildly over optimistic" forecast, also in the previous year, that is, for 1998.

[32] It was pointed out that Lloyd (representing the board) had reduced the applicant's previous forecast for 1998 from R 4.4 million to R 3 million and that he had refused the applicant's request to enlarge the sales force of the Formula 1 division. The sales for 1998 in Formula 1 eventually reached about R 2.7 million, thereby creating a shortfall between the applicant's forecast and the actual sales obtained of about 37.68 %.

[33] The applicant explained that his original forecast was based on an enlarged sales force and added that the lower figure that was eventually obtained for 1998 was also due to the loss of the key Incredible Connection account (*supra* at paragraph [20]).

[34] The applicant also pointed out that a new sales representative, Ms J Bouwer ("Bouwer"), was indeed appointed in 1998 with the concurrence of Lloyd, albeit not in the "retail" market of the Formula 1 business (where he allegedly needed more staff) but in the "dealer" market (where Lloyd wanted to explore new business opportunities).

[35] The applicant further maintained that there were differences between the retail business in South Africa and the United Kingdom and indicated that the directors in the United Kingdom, especially Neilly, "could not really understand" his sales forecast. Neilly countered that the previous forecast for 1998 "sowed the seeds of doubt" as to the "reliability" of any future forecasts by the applicant.

[36] The sales forecast of the applicant for 1999 (faxed to Neilly on 19 November 1998 - exhibit C26) and

reflecting a forecast of sales amounting to R 5.1 million was even more comprehensively criticised by Neilly when he gave evidence as well as in the respondent's argument. Neilly admitted, however, that the forecast (exhibit C27) did explain the figures but added that it "did not justify it and gave me cause for concern" (in that it was allegedly too high).

[37] It was argued by the respondent that the figures simply did not add up and that the forecast was not feasible and allegedly driven by the applicant's own interests in boosting sales figures (in keeping with his alleged business model - see *supra* at paragraph [11]).

[38] Neilly pointed out that "exact" sales forecasts were of crucial importance to the business as overstocking could result if forecasts were too optimistic. He described the applicant's forecast as "unrealistic" and that "it could not possibly happen". He added that he had a concern for "the judgment behind the figures".

[39] On 15 December 1998 a South African management meeting took place in Pretoria. It was attended by Lloyd (who was on the verge of leaving the business), Young, a certain "Schoof", Lloyd's wife and the applicant. Neilly was not present. Amongst the presentations they were looking at were stock versus cost of sales; stock orders and the role of the exchange rate; operating expenses; and ways to increase the repatriation of funds to the United Kingdom.

[40] A further meeting was then held in the United Kingdom on 21 December 1998 between the applicant, Neilly, Selby and Ms M Watson ("Watson" - the marketing manager). This meeting was to have a far-reaching effect on the applicant's relationship with the respondent-company.

[41] Neilly stated that he had called the meeting out of "great concern" with the applicant's sales forecast for 1999 and that the "main purpose of the meeting was to understand the numbers he had put up". They expected him to "justify" the figures.

[42] The applicant denied this and stated that he was to go on holiday to the United Kingdom over the Christmas period, paying his own way, and that he himself had asked for a meeting to see "what their business plan was". He took along the revised update of his forecast (discussed at the previous meeting in South Africa).

[43] Neilly stated that the applicant had come "ill prepared". According to Neilly, they then proceeded "to talk his sales forecast down". It was explained to the applicant that he could not have the extra manpower resources that he had requested as they could not afford it. The applicant was further instructed to remove two accounts from his forecast with the result that the forecast was lowered to R 4,02 million. The applicant was then also

instructed to implement a geographical split between Taljaard and Bouwer (the two sales representatives of the Formula 1 division) and to transfer Bouwer to the "retail" market. The applicant did not agree with this geographical split but he nevertheless undertook to do so.

[44] Neilly also accused the applicant of not reporting weekly by e-mail as he was required to do. He stated in his evidence that "this hardly ever happened". The accusation was also made that the respondent's competitor, Ultrajet, was making inroads into their market. Neilly admitted that he "accused (Hedley) of letting this happen", that is, "that he lost the business to Ultrajet" (this serious accusation was repeated at the "retrenchment consultations" on 24 and 25 January 1999 - see the discussion below at paragraphs [95] to [108]).

[45] Neilly also brought up the "disaster" of losing the Incredible Connection account in this regard (see the discussion above at paragraphs [13] to [29]).

[46] The applicant referred to the "dictatorial" style of Neilly at this meeting, "straight out of a "Gestapo textbook" and that he "was facing a firing squad" where "(Neilly) interrogated me".

[47] The respondent countered that it was a "firm meeting" of "straight talking" in terms of which "the applicant's performance was examined and subjected to criticism". The tone of the meeting was also referred to by Neilly who referred to the applicant's "aggressive attitude" and that "he wanted to do it his way".

[48] Neilly stated that the applicant was "absolutely ridiculous" in that he merely wanted to discuss issues surrounding certain T-shirts that he had brought along and that he "had lost the plot" and did not appreciate that this was a meeting of "senior management". Watson had allegedly told Neilly that the meeting had made her "squirm".

[49] In fact, Neilly stated categorically that the applicant "did not understand what was expected from him". Neilly then made the important observation in his evidence that the respondent's owner, Selby, had "doubted (the applicant's) ability to get these figures correct". In fact, Neilly stated categorically that Selby had "serious reservations about the applicant's competence" after this meeting was over.

[50] In my view, it was clear that this was an acrimonious meeting. I believe therefore that the applicant's evidence that this was definitely not a meeting where management had asked "how can we help you?" must be accepted.

[51] Neilly stated later that "we gave him all the support we could and in the end we lost patience". I find this

difficult to accept, given the acrimonious and accusatory tone of this meeting. I will return to this issue below.

[52] The applicant returned from his holiday in the United Kingdom on 4 January 1999. Young stated that the applicant had told them that Neilly "was out to get him". Young alleged that the applicant was "totally out of control".

[53] On 7 January 1999 the applicant faxed Neilly the "final sales" spreadsheet (exhibit B66) and also explained that Ultrajet was making the inroads into their market because Ultrajet was better resourced in manpower terms. Neilly criticised the applicant for taking so long and stated that "this should have taken priority". He indicated that the applicant had "agreed to do it".

[54] There was an exchange of faxes in terms of which Neilly requested the sales forecast for 1999 (exhibits B69 to B72). Neilly testified that he was "frustrated" at getting nowhere and that he "was running out of patience".

[55] Neilly added that he had "doubts about (Hedley's) ability for some time". Neilly even appeared to accuse the applicant of a measure of insubordination: He had asked for the forecast "but it never got an awful lot better"; "we should not have had to put that effort behind getting it"; and that he had to "nag" to get the amended forecast. Neilly also appeared to accuse the applicant of a measure of dishonesty in that he was allegedly "keeping the forecast close to his chest", and that "the figures were so far from the truth, it was unbelievable".

[56] The applicant accused Neilly of becoming "abusive and aggressive" in telephone conversations during this period. Neilly explained that he had merely been "extremely firm" whilst his "patience was running out".

[57] In the same vein, Neilly complained that he "never got fed the information" in the required weekly and monthly reports from the applicant and "that it was difficult to get an overall view of the business". Other concerns with the applicant's performance was that he allegedly "allocated few accounts to himself" and Neilly also criticised his "time management". The applicant was also castigated for the fact "that he did not take criticism well".

[58] Neilly stated that on 14 January 1999 he decided to go to South Africa. He had discussed the issue with Selby. It was their view that there was "not a satisfactory relationship" between them and the applicant and that they "wanted to find the way forward".

[59] It is of crucial importance to note that (as Mr Short also argued on behalf of the applicant), at this stage, there was not the slightest hint of a possible retrenchment of the applicant. Moreover, the problems that the

respondent experienced with the applicant were clearly of a solely performance related nature. It was only after Young had obtained legal advice (on 21 January 1999) that a "retrenchment" letter was prepared. I will return to this matter below.

[60] Neilly then phoned the applicant on the very same day (14 January 1999) but "kept it very short" and "gave no detail". The applicant stated that Neilly had told him that he must "either resign or be dismissed" and that he would "stay for as long as it takes to settle the matter". This was vehemently denied by Neilly.

[61] Neilly did admit that he had stated during the telephone call that the applicant can "guess" why he was coming to South Africa on 24 and 25 January 1999 "because you are an intelligent man". Neilly also admitted that he added: "We are possibly going to part company and were going to meet to discuss it". Neilly stated that he had said this because of "the seriousness of the situation".

[62] The applicant maintained that Neilly had made it clear that he had been dismissed. Young stated that the applicant had told her directly after the telephone call that he had been "fired". Young stated that the applicant then told her what was reflected in his contemporaneous notes (exhibit C44) which supported his version. Young stated that she then asked him to keep it quiet so as not to upset the staff.

[63] Young contacted Selby and Neilly on 14 January 1999 to say that the applicant had stated that he was "dismissed" during the said telephone call from Neilly on that day. She alleged that they replied that the applicant was not dismissed. Young added that she called a meeting with the staff after the applicant had alleged that he was fired on 14 January 1999 to assure them that he had not been dismissed.

[64] I reiterate that not a single word about "retrenchment" was mentioned at this time. At least this much was common cause.

[65] The question then immediately arises: At what stage had it become necessary for the respondent to "retrench" the applicant? The respondent's delay in this regard casted serious doubt as to the (objectively reasonable) necessity for the "retrenchment" of the applicant. Why did this need only arise as late as 21 January 1999 when the letter was written about a "contemplated" retrenchment? In this regard, one may also refer to Neilly's important admission (discussed below at paragraph [78]), that is, that the applicant would "probably not" have been "retrenched" if the applicant had not made the allegations that he was dismissed by Neilly on 14 January 1999.

[66] A very important step was then taken by Neilly on 19 January 1999 when he set up a future meeting with the

"Formula 1 management members South Africa" (exhibit C35). It was clear from the agenda that this meeting would deal essentially with a complete review of the Formula 1 business, that is, the area of responsibility of the applicant.

[67] What was very strange indeed was the fact that this agenda was not sent to the applicant, the manager of this division, but only to the other relevant members of his staff, that is, Taljaard and Bouwer. In fact, it was clear that the applicant was deliberately excluded and he testified that he only came to learn of the proposed meeting subsequently and by chance. Even stranger was the fact that this letter was sent to Young who had nothing at all to do with Formula 1 matters as at 19 January 1999.

[68] Neilly further stated that the date of the meeting had not been decided at the time. However, this evidence was contradicted by Young who stated that the meeting was, indeed, scheduled for 27 January 1999. Neilly also later appeared to admit this when confronted with the documentary evidence. The meeting did, in fact, take place at 10:30 on that day, that is, only after the applicant's dismissal at 9:00 on the same morning.

[69] Neilly explained that the applicant's name had not been mentioned because "I was concerned about his attitude". He added that he "did not know (Hedley's) frame of mind". Neilly stated that both he and Selby decided not to include the applicant in the agenda at that time. He stressed that Selby agreed with what Neilly was doing. Neilly further explained his own state of mind: "It was easy to evaluate what future there was with (Hedley) and the company together", meaning, of course, that there was little future in it.

[70] Neilly also tried to explain the reason why Young had been invited to the said meeting. He stated

that it was done purely as a matter of "courtesy" and so as to not appear "impolite" as she was in charge of the office arrangements and that this was merely done "for her information".

[71] Again, Young contradicted Neilly's evidence and stated that "the meeting was called to see what we were going to do" and that the purpose of the meeting was "to move forward". She also stated that Neilly "asked people to prepare" for this meeting. Young further admitted that she "would have been an integral part" of the meeting.

[72] This, of course, proved to be true, because (as Neilly had to admit) the applicant's management functions were, indeed, transferred to Young at this very meeting on 27 January 1999, that is, after the applicant's dismissal earlier on the very same day (see below at paragraph [98]). This can surely be no mere coincidence. Young also stated categorically that "the duties of (Hedley) were distributed to the other members of staff" at

this meeting and that "the managerial functions were distributed to myself".

[73] The question immediately arises as to why Neilly did not want to admit that the meeting was scheduled already on 19 January 1999 for 27 January 1999 and why he did not want to admit that Young was invited for the very reason of the restructuring of the business after the dismissal of the applicant?

[74] The answer is, in my opinion, obvious. Neilly wanted to get away from the impression that the agenda for the restructuring meeting had been finalised before the applicant's "retrenchment" process had even been considered and that the very person who was to take over his functions as manager of Formula 1 (after his dismissal) had also already been invited.

[75] Moreover, this was done despite the fact that this meeting was for "Formula 1 management matters" and Young who was at the time the sales manager of the other division, that is, Large Format, simply had no business to attend a Formula 1 management meeting. Unless, of course, the decision that Young was to take over the applicant's management functions (after his dismissal) was already taken as early as 19 November 1999.

[76] The fact that Young was invited, coupled with the fact the Neilly gave a contradictory and unsatisfactory explanation for her presence, casted doubts on his *bona fides* when Neilly embarked on a "retrenchment" exercise on 25 to 27 January 1999 to allegedly "assist" the applicant. In fact, it showed, in my view, that the said "retrenchment" was already a *fait accompli*. The applicant stated categorically that he viewed the "retrenchment" exercise as a "strategy" in the light of the above facts when these facts came to his knowledge just before the said retrenchment "consultations" began. I will return to this issue below.

[77] It must also be remembered that, as at 19 January 1999, the applicant had not been told of his intended "retrenchment" and that, in fact, this was mooted behind the scenes only after this date. Young had namely phoned Selby because she was concerned that the applicant was telling people that he was dismissed in terms of Neilly's telephone call on 14 January 1999 (*supra* at paragraph [63]). Young then took steps to "correct the dismissal allegations"(according to Neilly) in Young's dealings with the respondent's legal advisers on 21 January 1999 (see the discussion below at paragraphs [81] to [83]).

[78] Furthermore, in a very revealing admission, Neilly stated that, if the applicant had not made the allegations about his dismissal on 14 January 1999, he would "probably not" have been "retrenched" at all. Neilly repeated this statement in re-examination: "The (retrenchment) letter came about as a result of the dismissal allegation". He added that the "retrenchment was a direct result of the views of Selby and Young as to how we should handle the situation". At the same time, Neilly admitted that he himself had supplied the information contained in the

said retrenchment letter.

[79] This, of course, placed a very serious question mark over the "objective" economic rationale that was being proffered for the "retrenchment". Was it really necessary to dismiss the applicant to "save costs" (in the form of the applicant's salary)? Was it not merely an operational response to get rid of an allegedly seriously incompetent employee? Or was it a cynical damage control exercise which only became necessary after the applicant had made allegations that he had been dismissed by Neilly, already on 14 January 1999? In my view, this crucial evidence showed *mala fides* on Neilly's part and that, in effect, the "retrenchment" exercise was but a sham. I shall return to this issue below.

[80] Neilly further admitted that "Selby got advice as to what we should do" and that Neilly had also received legal advice before coming out to South Africa. He added that they regarded the applicant as a "loose cannon". The applicant stated that he was of the view that Neilly was professionally advised to do "all that was legally necessary to get away with the strategy rather than to provide sound business reasons".

[81] Young stated that she took legal advice only on 21 January 1999 about the applicant's allegation that Neilly had dismissed him on 14 January 1999. She stated that she asked for advice as to "what would be the best financial way of leaving the company - should (Hedley) be retrenched or fired?"

[82] The legal adviser had allegedly asked her: "Why not just fire Hedley?" but she alleged that she had wanted to do it in an "amicable" way. It was namely only on 21 January 1999 that Selby asked Young to seek advice on his behalf, that is, to find out "what was financially feasible - to retrench or fire"? The respondent's lawyer then drafted the "retrenchment letter" dated 21 January 1999. Young also got further legal advice on the afternoon of the first "consultation" meeting on 25 January 1999 before the second "consultation" meeting on 26 January 1999. Her attendance at the meetings was allegedly "just to take minutes".

[83] The applicant did not know that Young went to see the labour consultant. Young then allegedly told the applicant that there was going to be an "amicable retrenchment".

[84] The important fact remains that, in terms of this letter, dated 21 January 1999 and received by the applicant on 22 January 1999, the applicant was, for the very first time, informed of a "contemplated" retrenchment (exhibit C36).

[85] The applicant maintained under cross-examination that he regarded this letter as "a sham and a legal strategy" and that he was of the opinion that Neilly "had already made up his mind". The applicant stated clearly

that he made this deduction because "they already put up a meeting excluding me" (see the discussion about the meeting set up for 27 January 1999 already on 19 January 1999 - *supra* at paragraphs [66] to [76]). The applicant added that he "did not believe there was a chance to save my job". The applicant stressed that "he was out of his depth" after receiving the letter.

[86] Neilly's state of mind in approaching these "consultations" can further be gleaned from the fact that he admitted that he had also made arrangements to have meetings with clients in the Formula 1 division when he was in South Africa during January 1999 (to conduct the "consultations" with the applicant).

[87] However, the applicant who was then, of course, still the sales manager of the Formula 1 division, was "not consulted on this" because: "I was concerned with his fairly aggressive attitude at the meeting in December" (in the United Kingdom on 21 December 1998 - discussed above at paragraph [47]).

[88] Again, it was very strange to exclude the applicant from meetings with his very own clients before the "retrenchment" process to dismiss him had even started.

[89] This fact also casted further doubt on Neilly's insistence that his purpose in coming to South Africa was to "help" the applicant and to "make things better" and "take him forward with the business". Why then, it may be asked, was the manager of Formula 1 excluded beforehand from meetings with his own clients and from the meeting with Formula 1 management on 27 January 1999 to decide the future direction of this business? Clearly, these facts made nonsense of Neilly's professed intentions.

[90] Further, Neilly brought with him to South Africa a blank cheque signed by the two relevant directors in the United Kingdom. Eventually, the applicant was paid R 31 000, that is, his outstanding pay, in terms of this pre-prepared cheque.

[91] Neilly stated that this was done "if we get to the stage where the further working together was not possible". Neilly also stated that he was told by Selby that "if it is required he should take the cheque along as he did not want (Hedley) to be out of pocket". Mr Short argued on behalf of the applicant that this was a "concession" in terms of which it was the professed intention of the respondent that the only way in which the respondent could effect a dismissal was by giving the applicant some funds.

[92] At the very least, the fact that the cheque was pre-prepared was yet a further indication of the state of mind of Neilly and Selby (identified above), that is, that there was very little prospect of the applicant remaining in the respondent's employment. It is also a further inference or probability against the respondent's case that it was

not decided beforehand to dismiss the applicant. The applicant himself spoke of an "intention to get rid of me" and referred to the pre-prepared cheque in this regard.

[93] In discussing the contents of the "retrenchment" letter of 21 January 1999 in his evidence, Neilly pointed to the "huge" shortfall in sales against the applicant's forecast of 37.68% as well as the fact that two "key" accounts of the respondent were lost. Neilly also stated that he was of the view that the applicant's sales functions could be "assumed by other members of his team" and mentioned Taljaard and Bouwer in this regard. This was also confirmed in terms of the written organogram (exhibit C55) which was handed in only very late after all the respondent's witnesses had testified (in fact, during the testimony of the applicant's very last witness).

[94] Neilly stressed that he was of the view that the "way in which the business was being managed" by the applicant was "not the appropriate way" and that the applicant showed "a total lack of management skills or attributes" in managing people. In fact, Neilly made his state of mind in approaching these "retrenchment consultations" abundantly clear: "I had lost confidence in (Hedley's) ability to manage the team and the business and stressed that to Selby".

[95] Neilly accused the applicant of not contributing to the first meeting that took place on 25 January 1999: "The man would not listen to me. It was impossible". However, the meeting lasted a mere 18 minutes and the applicant's evidence that the "retrenchment letter" was merely read out and that Neilly then requested the parties to meet the next day to discuss the contents of the letter was not meaningfully challenged.

[96] The meeting of 26 January 1999 lasted about 40 minutes. The applicant referred to this as "the second sham meeting". In a letter dated 26 January 1999 (exhibit B80 to B81 - see the discussion below at paragraph [103]) the applicant also referred to this meeting as "a stratagem to get rid of me without delay or expense" and "I believe that the company is acting in bad faith in wishing to 'retrench' me".

[97] The applicant was dismissed at the next meeting on 27 January 1999, scheduled for 9:00 and which lasted for about 3 minutes. The eventual decision to dismiss was taken in telephonic discussions with Lloyd and Selby in London. This was Neilly's evidence: "three people dismissed him".

[98] Later on that very same morning (at 10:30) the scheduled meeting (discussed above at paragraphs [66] to [76]) was held with the said other members of staff and the applicant's functions were transferred to Young, Bouwer and Taljaard.

[99] The only meeting of any real significance (and duration) was accordingly the meeting of 26 January 1999.

[100] At the meeting, Neilly, by his own admission, refused to give the applicant information as to "how the duties were to be divided or rescheduled" after his dismissal. Young confirmed that the applicant wanted information on "the duplication of the functions". However, she appeared to contradict Neilly (and the minutes) when she stated that Neilly had said he had "no idea" who would perform the duties.

[101] Neilly appeared to say that he "did not have the information". When confronted with the minutes of the meeting, he changed his evidence to the fact that he "had ideas" but could not share the ideas as he "first had to discuss it with the other employees". In his evidence Neilly also stated that he knew that the new position was going to be a combined position: not only one person would take over from the applicant. This was also clear from the minutes (the veracity of which was not placed in dispute by the respondent).

[102] According to the minutes of the meeting of 26 January 1999 (exhibits B82 to B87), the following were recorded:

e applicant) require quantify what financial savings would be incurred by the contemplated course of action and in what way operational deficiencies would be improved. GN (Neilly) explained that in terms of the financial savings that PG (the respondent) would occur (*sic*), it should be very obvious to FH if we do take this coarse (*sic*) of action the savings would be FH involvement in the business and furthermore, PG would not have some of the duplication and overlapping. GN continued that some of the duties of JB (Bouwer) and WT (Taljaard)'s are doing now are the same that FH are currently doing. FH said that GN explanation is very vague and he would require more. GN agreed that he will supply FH with all that information. GN continued that it is primarily a financial reason which is driving PG down this road due to lack of sales.

FH requested a reply on the operational deficiencies. GN replied that it is still uncertain exactly what they would be and cannot detail them down to FH at this stage for exactly the reason that GN had to talk to other members of staff. GN's view on this is that we could make more efficiencies in the way we handled the Formula 1 sales particularly in the Johannesburg area and would also mean savings in time and better customer coverage and so on. Again further thoughts on that and what the companies (*sic*) **ideas are will have to stay in abeyance until we had a chance to talk to the other members of staff.**

FH suggested that GN has an idea but has not yet been able to quantify the idea. GN explained that **the company has a very clear idea** and if the company goes forward with those proposed ideas there will be substantial **savings to be made both financially and in the time management** of the business" (at B84 *in fine* to B85 - emphasis supplied).

[103] The applicant in his letter about this meeting of 26 January 1999 (exhibit B80 to B81 - *supra* at paragraph

[96]) also stated that he required "full disclosure of exactly which of my current duties and responsibilities will be assumed by other employees and precisely who these people are. Similarly I require full disclosure of the perceived duplication and overlap". He continued in this vein: "I require that you quantify exactly what financial savings would be incurred by the contemplated course of action, and in what way the operational deficiencies would be improved". He added that "(w)ithout this information I am not in a position to consult in a meaningful way regarding my proposed retrenchment".

[104] In the memorandum sent by Neilly and dated 26 January 1999 this request of the applicant was rejected as follows: "It is our view that you already have all the necessary information at your disposal to have come to our meeting this morning prepared with proposals from our side. Unfortunately, no proposals were put forward by you".

[105] Neilly insisted that the applicant had all the information that he needed. Neilly added that he was up against a "brick wall" and that the applicant failed to "offer a solution, thoughts, ideas or suggestions".

[106] The applicant's lawyers answered Neilly's communication in a letter of 26 January 1999 (exhibit B89 to B90): "You have not disclosed the information requested by Mr Hedley in your meeting with him earlier today and, consequently, he is not in a position to participate meaningfully in the consultation process which you have indicated". The letter continues: "In any event, you have not provided any sufficiently detailed information to persuade Mr Hedley that there is in fact a genuine need on your company's behalf to retrench him".

[107] The applicant stated that he had also wanted information in regard to the "business decision, the commercial rationale for taking it". The applicant added that he needed "concrete" information.

[108] The respondent's legal representative contended that the applicant did not ask for a "business plan" as such and the applicant countered that he had wanted a "financial forecast" from Neilly because he "had to guess at the overheads" and that Neilly was "unwilling to provide me with the necessary figures". Neilly also did not tell the applicant "what level of staffing he required".

[109] In my view, there was no reason why Neilly could not have shared this information with the applicant before talking to the rest of the staff (presumably at the pre-arranged meeting that was always to exclude the applicant). This was especially so because Neilly made the important admission that he did have a "clear idea" about this issue but simply refused to tell the applicant what it was. It was therefore not impossible to provide the applicant with this information even before talking to other members of staff.

[110] Further, this was relevant information within the domain of the respondent that it simply did not want to share. The applicant had no real inkling what the respondent's "clear idea" in reorganising was. In the event, this information was necessary for meaningful "consultations" and also affected the question of selection criteria, all of which are guidelines for fairness as are required in terms of section 189 of the LRA (discussed below at paragraphs [128] to [132]).

[111] This intransigent attitude was, in my view, yet another indication that Neilly was merely going through the formalities and was not of a state of mind to "assist" the applicant as he had tried to convince the Court. It also further strengthened the inference that the "consultations" were conducted against the background of a *fait accompli*. In fact, the applicant said just that in this regard: "Neilly presented it as a *fait accompli*". He added: "The experience was extremely unpleasant".

[112] Furthermore, it was clear from the minutes that the applicant's alleged lack of performance was a major topic during the "consultations" on 26 January 1999. The applicant stated categorically that to have introduced "poor performance was wrong and it was done in bad faith".

[113] In this regard the respondent's memorandum dated 26 January 1999 (referred to above at paragraph [104] - exhibit B88) listed the following bullet points in regard to the meeting of the same date:

* Lack of performance is the cause.
* Sales forecast for 1999 only revised because you were told to.
* Action plan for restructuring of the Formula 1 team - nothing has been received.
* Drop in Sales against Forecast for 1998 = 37.68%
* Whether or not by your own omission this business is not happening.
* The company believes it can cope with the existing staff - no replacement required.
* Does not make business sense when the head of the department is not contributing.
* You are not managing the business.
* No effort has been given to selling or promoting the many products currently overstocked in our warehouse in SA. In some cases year's supply (stock on hand) based on current usage. This is very damaging to the 'cash flow' of the business and should have been a key initiative for you to take".

[114] The "retrenchment" consultations were thus infused and even dominated by purely performance complaints, as indeed had the proceedings before Court. In fact, it was clear that poor performance was a *causa causans* for the dismissal, or put differently, the reason why the applicant was eventually "selected" for "retrenchment" was because of his perceived poor performance.

[115] This was also made abundantly clear by the respondent's own witnesses, especially Neilly and Young (see

paragraphs [145] to [147] below for a discussion of Young's evidence).

[116] Neilly consistently referred to the role that lack of performance played in the dismissal and identified in this regard, *inter alia*, the loss of a "major" account; the "poor" sales forecasts; as well as the fact that "(Hedley) was not contributing in the way he should be" and was not "managing on the company's behalf". Neilly also admitted to his "lack of confidence as to what was happening in management and the lack of sales and customers". In fact, this was a continuing theme in Neilly's dealings with the applicant since their very first meeting in May 1998 (*supra* at paragraphs [17] to [27]) as well as in their subsequent meeting in the United Kingdom (*supra* at paragraphs [40] to [49]).

[117] When he was asked directly whether the applicant was dismissed for performance, Neilly answered: "It was for the lack of performance of Formula 1: a chicken and egg situation".

[118] However, the crucial consideration is that this was not a situation where the respondent had already introduced a fair procedure to assist the applicant in addressing the perceived serious deficiencies in his own performance. It was, after all, only the respondent's own performance that was attacked and not that of the other members of the Formula 1 team.

[119] Mr Short on behalf of the applicant argued that the "Code of Good Practice: Dismissal" contained in schedule 8 to the LRA required "performance management steps" to be taken before it would be legitimate and fair to dismiss an employee for alleged incapacity. I agree with this contention.

[120] These procedural guidelines for dismissals in the case of "Incapacity: Poor work performance" (contained in item 8 of schedule 8 of the LRA) place an obligation on an employer that wishes to dismiss an employee for perceived poor work performance or incompetence to act in an essentially fair manner.

[121] In the event, before an employer can legitimately dismiss an employee for unsatisfactory performance, the employer has to, *inter alia*, give the employee appropriate "evaluation, instruction, training, guidance or counselling". It is only when the employee continues to perform unsatisfactory, after a reasonable period of time for improvement, that the employer may take steps to dismiss him or her. The procedure leading up to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

[122] However, there was simply no counselling or guidance afforded to the applicant *in casu*. The respondent made it abundantly clear that it had very serious reservations about the applicant's performance capacity and also

stated that it appeared that the applicant did not know what was expected from him (see Neilly's evidence discussed at especially paragraphs [23] to [27] and [48] to [49] above).

[123] Moreover, the respondent simply failed to justify this omission on any basis - not even on an economic rationale. The respondent was simply not "advised" to do so. Neilly stated that he was "advised" that "performance management" was "not relevant". What he did **not** say was that such corrective steps were ever undertaken. In fact, Young admitted that, to her knowledge, no corrective steps had been undertaken with regard to the applicant's perceived poor performance. This must be true, in the light of the accusatory attitude adopted at meetings such as the meeting on 21 December 1998 with the senior management (discussed *supra* at paragraphs [50] to [51]).

[124] In the event, I reiterate that Neilly's protestations that he wanted to "assist" the applicant stands to be rejected (see also the discussion above at paragraphs [26] and [51]). In fact, the applicant stated that "at no stage did they say that they wished me to stay on" and this was borne out by the minutes of the relevant meetings. Neilly even tried to indicate that, due to the expense "in time and money" to come to South Africa from the United Kingdom, lengthy consultations were not advisable. In the same vein, when it was put to Neilly that the applicant would say that the respondent was not interested to spend time with him or guide him, Neilly answered : "I was twelve hours away".

[125] The applicant confirmed in his evidence that no steps were ever undertaken to assist him due to alleged lack of performance during his career with the respondent (and also that no "warnings" were ever issued).

[126] The question arises: why was this not done, especially as this was what was required in the case of allegedly serious performance deficiency? I reiterate that the respondent failed completely to explain this omission and did not even try to put forward an economic rationale for the failure.

[127] In the event, the respondent cannot now claim that the applicant's perceived performance incapacity was a legitimate reason to dismiss the applicant (based on the cost saving that not paying his salary would bring about). In other words, the respondent cannot legitimately or fairly use the applicant's alleged poor performance as the basis for the, essentially, "no fault" dismissal, without having acted in accordance with the guidelines contained in schedule 8 to the LRA for dismissals on the basis of poor performance to be fair.

[128] Furthermore, in evaluating the "retrenchment" process itself, it is clear that it fell far short of the requirements contained in section 189 of the LRA. Although these are not to be treated as a checklist but as guidelines for fair conduct, it is clear that the aim is that of a joint problem solving exercise in order to assist a

retrenchee who is in danger of losing his or her employment through no fault of the employee concerned but as a result of an economic rationale. In the event, it is trite that these consultations must be exhaustive in order to obtain the required result.

[129] Section 189 of the LRA calls upon the employer to strive to reach consensus with the retrenchee on issues such as avoiding the dismissal; changing the timing of the dismissal; and mitigating the adverse effects of the dismissal.

[130] Another issue on which the consulting parties must try to reach agreement is that of selection criteria. It is interesting that the retrenchment letter (*supra* at paragraph [84]) stated that this matter was "not relevant" *in casu*. This was, of course, correct because the applicant had not been "selected" on a "no fault" basis but on the basis of his perceived "poor performance". In the discussion above, it has been pointed out that, to have thus infused the "retrenchment" process with performance issues without having first applied the guidelines that require counselling in this regard, in itself made this process unfair.

[131] In my view (and this was also argued by the applicant), an employer will frustrate the achievement of joint consensus by failing to fulfill its obligations under section 189(1), (3), (5), (6) and (7) of the LRA. This includes the obligation to disclose to the employee party all relevant information in writing; allowing the other consulting party an opportunity during consultations to make representations on any matter; and the duty on the employer party to consider those representations and to respond thereto.

[132] It is clear that the intransigent attitude of the respondent *in casu* to refuse to supply the applicant with relevant information (discussed *supra* at paragraphs [100] to [113]) made the "retrenchment" process unfair in terms of the requirements of section 189(3) of the LRA. Moreover, the conclusion that the applicant was confronted with a *fait accompli* made nonsense of any possibility of a consensus seeking exercise to seek alternatives to the dismissal. In fact, proper consultations are impossible against the backdrop of a *fait accompli*. Clearly, therefore, the "retrenchment" dismissal, in so far as it purported to be one, was procedurally unfair and fundamentally so.

[133] The dismissal was, of course, also substantively unfair.

[134] As it was pointed out above, the applicant was, in effect, dismissed for poor performance before the necessary steps had been taken. As the applicant was not given counselling and the opportunity for correcting the alleged deficiencies, his perceived poor performance simply did not at that stage constitute a fair and valid reason to dismiss him.

[135] If this was a retrenchment dismissal, as it was purported to be, the dismissal was also substantively unfair because there was no legitimate basis to select the applicant for "retrenchment" on the grounds of his perceived poor performance. Further, no alternatives to dismissal had been considered, given the fact that the retrenchment took place against the backdrop of a *fait accompli*.

[136] I reiterate that this is the position despite the fact that the respondent could show (and the applicant agreed) that there would be a cost saving in the form of his salary and that this constituted an "economic rationale" for the respondent that wanted to cut costs or operating expenses in the Formula 1 division due to the discrepancy of 37.68% between forecasts and sales caused by, *inter alia*, the loss of two key accounts. It has, of course, to be remembered that actual sales, in fact, increased by 24% during 1998.

[137] The respondent further stated that Taljaard and Bouwer could take over the applicant's sales' functions and Young his managerial functions. The applicant contested this and stated that, although Young, Taljaard and Bouwer "could have been trained" to do his job this "would take time" and could "not be done overnight". Neilly appeared to acknowledge this when he stated that "it was hoped that (Taljaard) would develop". The applicant also hinted that the business "went downhill" after his dismissal. Van Niekerk (who testified on behalf of the applicant - see paragraph [152] below) appeared to support this evidence but this was never properly put to the respondent's witnesses.

[138] The respondent further argued that the fact that the applicant was never replaced showed that this was not a dismissal for poor performance but that the applicant's post had become redundant. I do not agree with this contention. The applicant's functions had clearly not become redundant but had to be transferred to other employees. This showed, in my view, that the applicant himself was the problem and not the alleged "redundancy" of the job that he was performing. Moreover, I reiterate, for the reasons set out above, that the applicant's poor performance was the focus of the dismissal proceedings as it had been, indeed, in the proceedings before Court.

[139] In the event, even if I accept that the respondent would have been able to cut its operating expenses by dismissing the applicant and transferring his functions to other employees, the respondent has still failed to prove that the applicant's dismissal was fair, both substantively and procedurally, for the reasons set out fully above.

[140] The applicant was namely confronted with a *fait accompli* and it was, in effect, a dismissal for poor performance under the guise of a retrenchment.

[141] I also reiterate that the fact that the applicant was confronted with a *fait accompli* as well as the fact that the respondent, in effect, set out to dismiss the applicant for poor performance and thereby sidestepped the provisions of the LRA in this regard, pointed, in my view, to *mala fides* on the part of the respondent.

[142] After all, in terms of section 188(1)(a) and (b) of the LRA the overall *onus* lies on the respondent-employer to prove on a balance of probabilities that the dismissal was fair, both substantively and procedurally.

[143] In other words, the respondent has simply failed to show that the applicant-employee was dismissed fairly.

[144] One of the main reasons for this failure was, of course, the inferences that could be drawn from the evidence, especially the setting-up of meetings even before the dismissal that excluded the applicant from his own business, raising a clear probability that the applicant was confronted with a *fait accompli.* Further, the focus, also in the evidence before Court, on the alleged performance related incompetencies raised the very real probability that the applicant was, in effect, dismissed for poor performance and not on the basis of a costs saving rationale (see the discussion at especially paragraphs [116] to [119] above).

[145] For the sake of completeness, I will also refer to Young's evidence in this regard. Young went even further than Neilly in criticising the applicant's performance.

[146] Young alleged that the applicant was "racist" and that he "often used profane language". She also stated that the respondent's clients complained that they "hardly ever saw" the applicant and that he would phone them up "and swear at them". Young even accused the applicant of lying to the respondent about visiting clients and of giving through "incorrect information". Young further accused the applicant of trying to steal files from the respondent on the Saturday after his dismissal. Young accused the applicant of "talking to competitors" and "discussing confidential information", even "entertaining a lady from Ultrajet at his home". Young admitted that she was insinuating that the applicant had divulged information to Ultrajet and that she had even discussed this with Lloyd.

[147] Young's serious allegations were denied in the applicant's evidence in chief and were not put to him in any meaningful way during cross-examination. This was despite the fact that most of the cross-examination dealt with the applicant's alleged performance deficiencies. Further, although Young had alleged that Taljaard had come to her with "concerns and complaints" about the applicant, Taljaard, who worked directly under the applicant as sales representative, appeared to contradict her and stated that his relationship with the applicant "was that of a very good understanding of each other" and that "nobody had a problem relationship wise". In the same vein, Taljaard could recall only "one instance" where the applicant had used profane language. Taljaard

also stated that the applicant was "lacking a bit" performance wise but that he was "pretty good" and "good at figures".

[148] All in all, it appeared as if Young went all out to paint the applicant in the worst possible light. Clearly, there existed a very bad relationship between Young and the applicant. In fact, the applicant stated in cross-examination: "We did not like each other". Bouwer referred to the "hate relationship" between the applicant and Young. Young even accused the applicant of "wanting the position I had" and stated categorically that a "state of war" prevailed.

[149] An offer of reinstatement was made in a lawyer's letter to the applicant dated 8 February 1999 (exhibit B99 to B100).

[150] Neilly made his attitude clear. "I felt that there was little to be gained from it" and added: "I did not see much future in it for (Hedley) and the company" but "that it was not my decision". Neilly also conceded that there could "probably not" have been "any future relationship" between the applicant and the respondent.

[151] This evidence, in my view, supported an inference that not much could be gained by the reinstatement of the applicant. Young somewhat contradicted Neilly's pessimism and stated that they felt that there was a "personal problem" between Neilly and the applicant and "wanted to give him another chance". Therefore, they decided to "get Neilly out and get the applicant to participate". Young stated that she had told Selby: "It is only a matter of time before (Hedley) hangs himself". However, the retrenchment letter stated clearly that Young would be the person involved in the future "consultations". Given the fact that there was also a very bad relationship between her and the applicant (see the discussion above at paragraphs [147] to [148]) it did, of course, not make a big difference to replace Neilly by Young. Moreover, Neilly was it pains to make it clear that, throughout the process, everything was done with the concurrence of the respondent's owner, Selby (see especially paragraphs [22], [49], [58], [69], [78], [82],[91], [92], [94] and [97] above).

[152] The applicant stated categorically that the said offer was "a short term expedient", "not *bona fide* at all" and "not genuine whatsoever". This was, of course, merely a repetition of his previous evidence that the whole retrenchment exercise was a "stratagem" and "*mala fide*" (*supra* at paragraph [96]). Van Niekerk, who worked in Young's division, gave evidence on behalf of the applicant to the effect that he overheard a telephone call after the applicant's dismissal where Young stated that they will reinstate the applicant; that he will not have the money to repay the amount that he had already received; and that they will then fire him and pay him only one month's salary. Although Van Niekerk appeared to be a truthful witness who even admitted that he did not know to whom Young was talking, this evidence had little value to show Young's state of mind as it was open to

different possible interpretations.

[153] The applicant's lawyer stated the following on his behalf in a letter dated 9 February 1999 (exhibit B101): "Mr Hedley considers your client's offer of conditional reinstatement to be merely a cynical attempt at damage control and it is therefore rejected. Furthermore he will not report for duty on 15 February 1999 as your client through its grossly unfair conduct has rendered any further working relationship intolerable. In any event, our client considers it impossible that your client is at this late stage able to act in good faith or genuinely consider any alternatives to his dismissal".

[154] It is the utmost importance to note that the letter offering reinstatement also, at the same time, still referred to the alleged "shortcomings" of the applicant and listed no less than seven performance related complaints (exhibit B98 to B99). The letter also made it clear that the respondent intended to institute a "further consultation process" as from 15 February 1999.

[155] In my view, the offer of reinstatement on these terms showed that the same was only to continue, that is, performance related issues were raised and, at the same time, it was made clear that "further consultations" were to ensue. In other words, it was to be a retrenchment dismissal coupled with fault. In fact, even to this day, the respondent claimed to have retrenched the applicant although it is, at the same time, focussing on his alleged poor performance.

[156] Moreover, there was clearly still no offer of proper assistance with the perceived performance deficiencies. Neilly was taken out of the process but there was no admission that Neilly had acted unfairly (exhibit B99). The letter stated that an organogram was attached but it had not been attached and only handed in very late in evidence (supra at paragraph [93]). The applicant stated in cross-examination that the "business plan" that he wanted was this very "organogram" but that it was never provided.

[157] In my view, the respondent simply failed to reassure the applicant that he will now be treated in a *bona fide* and fair manner. In my view, the accusation of lack of *bona fides* (the applicant's view) was justified (see the discussion above at paragraphs [96] [152]). The respondent's offer had thus done nothing to quell any reservations in this regard.

[158] The respondent's legal representative referred me to the case of *Mabola v Minaco Store Germiston (Pty) Ltd and Another* [2000] 10 **BLLR** 1191 (LC) *per* Jammy AJ at p 1201 para 42:

"If the applicant **believes** that his reinstatement was *mala fide* in that it was a contrived plot to procure his immediate repeated dismissal on a remedied **procedural** basis, then as was pointed out by Mr Koep, his right to

challenge any subsequent alleged unfair conduct on the part of his employer was preserved" (emphasis supplied).

[159] The respondent argued that the applicant was thus obliged to accept the "unconditional" offer of reinstatement in order that the consultation process could be completed on a basis that was fair to him as well. It was further contended that the applicant would have remedies against unfair dismissal at his disposal if it turned out that the employer still acted unfairly.

[160] In my view, the *Mabola* case can be distinguished on the basis that the employee who did not accept the offer of reinstatement was, at the same time, asking for reinstatement as a remedy. It could thus hardly be argued that the trust relationship had irretrievably broken down if the employee was prepared to be reinstated.

[161] Further, it appears that the Court was merely referring to the "belief" of the employee that he had been treated in a *mala fide* manner. However, if what the Court decided was that there is a hard and fast rule that an employee was always under an obligation to accept an offer of reinstatement, regardless of the circumstances, I am of the view that this issue was clearly decided wrongly.

[162] I am very firmly of the view that the terms of the retrenchment offer must be scrutinised in order to establish whether the offer of reinstatement will, indeed, cure or remedy the defects in the dismissal. I am also very firmly of the view that, if it can be shown on a objective basis that an employer was *mala fide* when it dismissed or retrenched the employee and that, as a result, the trust relationship had broken down, there can, in fairness to the employee, not be an blanket obligation to accept an offer of reinstatement in order to continue with the process of dismissal.

[163] As a general rule, an employer should first establish its *bona fides* in regard to an offer of reinstatement, that is, it must not be an attempt merely at damage control but a *bona fide* offer to cease with its unfair actions and to offer fair treatment. See in this regard also Rautenbach NF "Remedying Procedural Unfairness: An Employer's Dilemma" (1990) 11 **ILJ** 466 where it was pointed out that the offer must have been genuine and not a sham and that, in order to establish this, the motives of the employer will be open to scrutiny. See further in this regard the judgment of the Labour Court in the matter of *Du Toit v SASKO (Pty)(Ltd)* (1999) 20 **ILJ** 1253 (LC) where the fact that the employer had not genuinely wished to redress the employee's position lead the Court to grant compensation to an employee who had declined an offer of reinstatement. See also in this regard the judgment of the Industrial Court in the matter of *Van Dyk v Markly Investments* (1998) 9 **ILJ** 918 (IC) at 921H-I where it was held that a purported reinstatement must not fall short of a genuine attempt to settle the dispute.

[164] Again, the *bona fides* must objectively be ascertainable before it can reasonably be expected from an employee who had been unfairly treated to allow the employer a second opportunity to dismiss the employee.

[165] Furthermore, if the dismissal preceding an offer of reinstatement was also substantively unfair, I am of the view that there generally is no obligation on the employee to accept such offer. In fact, in the *Mabola* judgment (quoted above at paragraph [158]) as well as in other judgments where employees refused to accept offers of reinstatement and the courts refused to grant them compensation because they had refused, the offer of reinstatement was made to cure or remedy *procedural* defects, and not the *substantive* unfairness of the dismissal (see, *inter alia*, *Burger v Alert Engine Parts (Pty) Ltd* [1999] 1 **BLLR** 18 (LC) at 25C-H; *Fletcher v Elna Sewing Machines Centres (Pty) Ltd* [2000] 3 **BLLR** 280 (LC); *La Vita v Boymans Clothiers (Pty) Ltd* [2000] 10 **BLLR** 1179 (LC) at 1189E-J). The question, in my view, must always be: can reinstatement cure or remedy the fact that the employer had, up until that stage, failed to show that there was a fair reason to dismiss the employee in terms of the *onus* contained in section 188(1)(a) of the LRA?

[166] The fact that the respondent *in casu* was, objectively considered, still only offering a retrenchment process permeated by performance issues and without any intention to follow the procedures for fairness in a dismissal based upon poor performance (in terms of item 8 of schedule 8 to the LRA) satisfies me that the substantive unfairness (identified above at paragraphs [133] and [135]) would not have been cured by reinstatement under the terms of the above offer. In the event, it was, objectively speaking, reasonable for the applicant to refuse the offer of reinstatement *in casu*.

[167] Furthermore, I reiterate that the offer of reinstatement *in casu* would likewise not have cured the procedural defects as it was clear that the applicant would have been subjected to the same (unfair) treatment that had formed the basis of the "consultation" process thus far. In the event, there was, objectively speaking, an inadequate and insufficient offer of reinstatement that would, in all probability, not have had a fair outcome as far as the applicant was concerned. Again, it follows that it was not unreasonable for the applicant to have refused the offer of reinstatement.

[168] In terms of the judgment in *Johnson & Johnson v CWIU* (1999) 12 **BLLR** 1209 (LAC) it was held that "compensation" that is to be awarded for procedural unfairness in terms of section 194(1) of the LRA was in the form of a *solatium* and not compensation "for something lost". In the event, there is no obligation on an employee to take steps to curb his or her losses. By the same token, earnings of an employee after his or her dismissal cannot be offset against the *solatium*. The Court has a discretion, however, to award the full (minimum) amount or nothing at all.

[169] In terms of section 194(2) of the LRA, the Labour Court must award the above amount as a minimum in compensating an employee for substantive unfairness in his or her dismissal. The Labour Court can also award a maximum of 12 months' remuneration (calculated at the employee's rate of remuneration at the date of dismissal) provided that it "must be just and equitable in all the circumstances".

[170] In the present matter, more than 12 months have elapsed between the date of dismissal and the last day of the hearing. That is to say, the minimum amount (where compensation must be equal to the remuneration that an employee would have been paid between the date of dismissal and the last day of the hearing) is the same as the possible maximum amount of compensation.

[171] I regard it as just and equitable in the circumstances of this matter to award an amount of twelve months' remuneration as compensation (the full amount claimed by the applicant). The dismissal of the applicant was both procedurally and substantively unfair, that is, the respondent has failed to show that there was a fair reason for the dismissal and also acted in a procedurally unfair manner. Had the dismissal been only procedurally unfair the applicant would have received a *solatium* of the same amount (as the minimum amount of compensation for substantive unfairness). In the event, the fact that the applicant earned after his dismissal does not, in my view, justify awarding him less than the *solatium* he would have received if the dismissal was only procedurally unfair. In other words, I regard it as just and equitable in these circumstances to award the applicant 12 months' remuneration as compensation despite the fact that he earned after his dismissal. After all, this is also the minimum to which he is entitled.

[172] I also reiterate that the offer of reinstatement was inadequate and would not have resolved the issue of substantive unfairness (for the reasons set out in paragraphs [166] to [167] above). In the event, there is, in my view, no reason not to award the minimum/maximum amount of compensation for the substantively unfair dismissal.

[173] I hasten to add that, even if the dismissal was only procedurally unfair, I would have awarded the same amount as a *solatium* in the light of the severity of the procedural defects. I reiterate that this will be so even taking into account the fact that the applicant had been earning since his dismissal. For the sake of completeness, and as an aside, it appears to me to be the wrong yardstick to determine what an applicant would have received if it was not for the statutory limitation, and then to weigh this up against what the applicant would get, in deciding the question to award all or nothing. The applicant stated that he wanted compensation because he lost "a satisfying career for the rest of my life" and that he had to "start all over again". I regard this as a further legitimate reason for awarding the full *solatium*.

[174] The respondent's legal representative argued that, in deciding whether to award any compensation for procedural unfairness, regard should be had to the *dictum* in the case of *Johnson & Johnson (Pty) Ltd v CWIU* (*supra* at paragraph [168] at 1220C-E) where it was held that the discretion not to award any compensation at all may be exercised in circumstances where the employer has already provided the employee with substantially the same redress or where the employer's ability and willingness to make that redress is frustrated by the employee (see in this regard also the cases quoted in paragraph [165] above). I have already dealt with the respondent's offer for reinstatement (at paragraphs [149] to [156] above). Suffice to say that, had the respondent acted only procedurally unfairly (and I hasten to reiterate that the respondent had also acted substantively unfairly *in casu*), the respondent's offer was inadequate because it failed to redress the procedural unfairness of the dismissal (see the discussion at paragraph [167] above). It follows that the offer of reinstatement could have had no effect on the exercise of my discretion to award the full *solatium*.

[175] Last, I can see no reason, in fairness, why costs should not follow the result *in casu*.

[176] I make the following order:

1. The dismissal of the applicant on 27 January 1999 was unfair.
2. The respondent is to pay the applicant compensation equivalent to twelve months' remuneration, that is, an amount of R 190 800, within 14 days of the date of this order.
3. The respondent is to pay the applicant's costs.

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**BASSON, J**

On behalf of the Applicant: Mr D Short of Sampson Okes Higgins Inc.
On behalf of Respondent: Adv AP Landman instructed by Joubert Attorneys.
Dates of Proceedings: 12 to 15 June 2000; 20 to 23 November 2000.
Date of Judgment: 1 December 2000.