Business transfer dismissal not always automatically unfair

By Fiona Leppan and Stephan Venter

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In the recent case of Willem Hendrik du Plessis v AMIC Trading, the employee referred a matter to the Labour Court seeking an order declaring his dismissal by the employer automatically unfair in terms of s187(1)(g) of the Labour Relations Act (LRA).

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Redgwoods employed the employee previously, however, in 2012, the employer purchased the business of Redgwoods and the employee's employment was subsequently transferred to the employer. The employer's head office was originally based in Modderfontein.

In 2013, a fellow employee informed the employee about an email she discovered, where the HR department of the employer and the employee's directors discussed a strategy to dismiss the employee. The strategy was that the employer would relocate its offices to Durban and the employee would be requested to relocate, and when he refused he would be retrenched.

After the employee became aware of the abovementioned email, he was informed by the employer that its head office was going to relocate to Durban. The employee was requested to move to Durban to work at the new head offices of the employer. The employee, being aware of the email, initially agreed but later changed his mind and then refused. The employer then commenced retrenchment procedures.

An independent company facilitated the retrenchment consultations, during which three offers were made to the employee. One of these offers was that the employee did not have to relocate, but would then be employed as an area manager in Gauteng at a reduced salary. The employee rejected all the offers and he was consequently dismissed.

The employee referred the matter to the Labour Court claiming that his dismissal was automatically unfair because the dismissal was due to the transfer of a business as a going concern.

Previous case law

The Labour Court considered the earlier decision of Van der Velde v Business & Design Software & Another (2006), which can be seen as the locus classicus when considering whether a dismissal is automatically unfair, where it took place due to a transfer of business.

In that decision, the Labour Court highlighted the different factors that need to be considered during this enquiry, namely:

- The employee must prove that he/she was dismissed and that "the underlying transaction is one that falls within the ambit of section 197 of the LRA."
- The employee must further provide compelling evidence that indicates that the dismissal was causally connected to the transfer. When considering this factor, the Court will conduct an objective enquiry.
- Once the employee has successfully discharged the abovementioned evidentiary burden, the onus shifts to the employer to prove that the reason for the dismissal was a reason that is not automatically unfair.
- If the employer argues that the dismissal was based on a fair reason, for example operational requirements, the Court must apply a two-stage test to establish "whether the true reason for the dismissal was the transfer itself, or a reason related to the employer's operational requirements." This test includes:

    - Factual causation test (the "but for" test) – would the dismissal have taken place but for the transfer?
    - Legal causation test – this test must be applied if the factual causation test has been satisfied. With this test, the Court will objectively determine "whether the transfer is the main, dominant, proximate or most likely cause of the dismissal."

- It is insufficient for an employer to claim that the reason for the dismissal was not the transfer itself, if the dismissal was effected in anticipation of a transfer and in response to the requirements of a potential purchaser.
- The court will take an objective stance in determining whether the employer used the dismissal as a means to avoid its obligations under s197. If the employer relied on the dismissal to avoid its s197 obligations, then the dismissal would have been related to the transfer. If not, the dismissal relates to the employer's operational requirements or other fair reason.

Employee unsuccessful

In the present matter, the Labour Court held that the email that the employee became aware of (where his possible dismissal was discussed) was discovered in September 2013, after this, the employer searched for other premises in Johannesburg and even extended its lease in Modderfontein for a further three years. It was only after the terms of the lease became uneconomical that the decision was made to relocate the business to Durban.

Therefore, the Labour Court held that the employer's conduct, after the email, demonstrates that the strategy in the email was not carried through. The Labour Court reached the conclusion that there was no evidence that the employee's dismissal was related to the transfer of the business from Redgwoods to the employer. The Labour Court granted the

employer’s application for absolution from the instance and as a result, the employee was unsuccessful.

This case reaffirms the correct approach to determine whether a dismissal was automatically unfair, if it took place due to a transfer of business in contravention of s187(1)(g) of the LRA. All employers anticipating to be involved in a transfer of business should consider the factors listed in the Van der Velde case, to ensure that their actions are in line with the provisions of the LRA.

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