Worklaw subscriber webinar: Retrenchment guidelines

Outline

October 2024

The *Retrenchment Guidelines* on Worklaw contain detailed guidance on every stage of the retrenchment process, and also include –

- a retrenchment procedure checklist;
- a draft notice to consult;
- a draft retrenchment agreement
- draft notices of termination & certificates of service.

All of these can be downloaded by Worklaw subscribers and adapted to suit specific circumstances. They provide detailed instructions on how to do this.

1. **What constitutes a fair reason to retrench?**

   Dismissal for "*operational requirements*" – defined in s213 to mean an employer's "*economic, technological, structural or similar needs*".

   Economic – eg a drop in demand for products

   Technological – eg new technology requiring fewer employees

   Structural – eg a merger or restructuring requiring fewer employees

   So a fairly broad range of issues can therefore justify retrenchment.

   SACCAWU & Others v Woolworths (CC) ConCourt said the LRA requires retrenchments to be "*operationally justifiable on rational grounds*." For cases on how this has been applied, see examples below.

   Recent case law

   NUFBWSAW v Coca Cola Beverages SA (LAC)

   Rejection of offers of alternative positions does not necessarily make it an automatically unfair dismissal under s.187(1)(c) which says a dismissal is automatically unfair if its reason is "*a refusal to accept an employer's demand in respect of a mutual interest matter*".

   In this case the employer offered alternative posts at lower wages – rejected. LAC said to fall under s187(1)(c), the refusal to accept the demand must have been the main/ dominant cause of the dismissal. Said not so in this case.

   Coca Cola Beverages v Competition Commission (CC)

   Merger approved by the Competition Commission on various conditions in 2016, including no retrenchments "*as a result*" of the merger. Retrenchments followed in 2018 when Coca Cola faced economic challenges. CC applied "*causation*" or '*but*

for' test – ie would retrenchments have occurred if the merger had not taken place? CC said 'yes' – so Coca Cola had not breached the merger conditions.

Seokwane v Bidvest Cleaning Services (LC)

Can't use 'retirement' for an employee who has reached the normal retirement age, if the real reason for termination was a retrenchment. Employer needed to reduce staff and told employee she was being retired. Unfair – 12 months' compensation.

Umicore Catalyst SA v Numsa (LAC)

The employer used behavioural assessments and a questionnaire as part of the selection criteria, which also included performance appraisals, disciplinary and attendance records. Its justification for using the assessments was that the employees to be retained would be required to work independently and, on occasion, without supervision. The questions related to assessing (1) a strong analytical mind; (2) multi-tasking/coordination of own work; (3) good communication skills and handling 'difficult' colleagues; (4) initiative / innovation; (5) enthusiasm and determination to achieve objectives; and (6) attendance and unexpected absences.

Both the LC and the LAC found that the criteria were subjective and unfair. The LAC recognised that the *Code of Good Practice: Dismissals based on Operational Requirements* provides that selection criteria that are generally accepted to be fair include **length of service**, **skills** and **qualifications**. Whilst generally the test for fair and objective criteria will be satisfied by the use of the "last in first out" (LIFO) principle, there may be instances where the LIFO or other criteria need to be adapted. Exceptions may also include "*the retention of employees based on criteria which are fundamental to the successful operation of the business,*" although these exceptions should be treated with caution.

Whilst this judgment opens to door to alternatives to LIFO such as skills, qualifications or other criteria which may be fundamental to the successful operation of the business, they must be shown to be 'fair and objective', including in how they were applied. The LAC's judgment is firm on excluding subjective elements such as assessing personality characteristics, including initiative, enthusiasm and determination, and that an employer may not address poor performance through retrenchment.

General Food Industries Ltd v Fawu (LAC)

The LAC in this case accepted that a company is entitled, through economic restructuring, to make a profitable centre becomes even more profitable. This includes the need for flexibility in the employees' terms and conditions of employment in order to be competitive. The company in this case outsourced aspects of its business to remain competitive, as its competitors had done, and retrenched staff. The LAC found this to be fair.

2. **Who do you need to consult with?**

As soon as "an employer contemplates retrenchment", the employer must in terms of s189(1) of the LRA consult -

- any party that has a **collective agreement** with the employer requiring it to consult; failing which -
- a **workplace forum** established under the LRA, if one exists, AND any **registered trade union** whose members are likely to be affected; failing which-
- the **employees** likely to be affected, or their representatives nominated by them.

Note: the above are written in cascading order of priority. eg if an employer has a collective agreement with a union that requires consultation, there is no need to consult further with a workplace forum or employees likely to be affected.

AMCU & Others v Royal Bafokeng Platinum & Others (CC) – ConCourt said the consultation process section 189 prescribes is procedurally fair, accords with international standards, and is not unconstitutional. That s23(1)(d) provides for the extension of collective agreements with a majority union to cover all employees within a bargaining unit, is also not unconstitutional.

S23(1)(d) applies even if the minority of employees belong to other unions.

But we recommend, even when an employer has a collective agreement requiring consultation with a majority union, that any registered trade union whose members are likely to be affected should also be consulted, on the understanding that the employer's fall back position, if consensus is not achieved, is to agree with the majority union.

3. The notice to consult

What must it contain?

Section 189(3) is explicit: it sets out specific information – in sub-paragraphs (a) to (j) – that must be disclosed in writing.

And how accurate must your 'notice to consult' be?

Solidarity obo Member v Die Humansdorpse Landbou Kooperasie (LC)

In a section 189(3) notice, the number of employees likely to be affected refers to the employees the employer contemplates dismissing. The LRA does not intend two different categories of employees, namely those who must receive the notice and must be consulted, and the other category being those the employer actually contemplates dismissing who must also be consulted.

In this case the numbers affected whether s189A applied or not.

4. What do you need to consult about?

Section 189(2) is explicit: the employer must engage in a "*meaningful joint consensus-seeking process*" with the consulting parties and attempt to reach consensus on-

- appropriate measures-
  - to avoid the dismissals;
  - to minimise the number of dismissals;
  - to change the timing of the dismissals; and
  - to mitigate the adverse effects of the dismissals;
- the method for selecting the employees to be dismissed; and
- the severance pay for dismissed employees.

Section 189(6)(b) says if representations are made in writing, the employer must respond in writing.

Does the employer need to raise 'bumping' as an option?

Fischer Tube Technik v Bayene & Another (LAC)

Bumping forms an integral part of applying LIFO in retrenchment. An employer applying LIFO must raise and discuss the question of bumping with parties during the consultation process. In the absence of any agreement on the issue, the employer must be in a position to justify its decision not to bump, or to bump either horizontally or vertically within a defined selection pool.

Bumping can take 2 forms. **Horizontal bumping** occurs when a redundant employee displaces another employee with shorter service at a similar level. **Vertical bumping** occurs when a redundant employee replaces another employee with shorter service in a lower position within the organisation. Horizontal bumping assumes similar status, conditions of service and pay, while vertical bumping assumes a diminution in status, conditions of service and pay.

5. Can you retrench to reach employment equity sector targets?

Debate on this issue was effectively ended by the publication of the revised *Employment Equity Sector Targets* in Feb 24. Whilst they are still in draft form and have yet to be finalised, clause 4.7 clearly states that "*no employment termination of any kind may be effected as a consequence of affirmative action*."

Clause 4 was included in the gazette as part of a settlement reached between Solidarity and Government over a dispute lodged with the ILO over the previous draft version of the sector targets.

6. If no agreement is reached, when can the employer proceed unilaterally?

Section 189(7) provides that if selection criteria have not been agreed during the consultation process, the employer must use "*fair and objective*" criteria. No minimum time period is provided under s189 for when the consultation process can be regarded as having been exhausted, and this will be determined in each case by the facts of that case.

In *Numsa & Others v Feltex Automotive Trim (LC)* the Labour Court said **t**he test for whether there has been genuine consultation prior to retrenchment, is whether the employees and the union "*have been given a fair opportunity to suggest ways in which job losses might be avoided or the effects of retrenchment ameliorated*."

There is case law to support the view that a consensus-seeking process entailing a dual participatory role, and if an employee walks away from the consultation process the blame for the absence of further discussions lies at the employee's door. A subsequent dismissal for operational reasons will not be procedurally unfair. See *Greyvenstein v Flaming Silver Trading (LC)*

The LAC in the case of *Johnson & Johnson v CWIU (LAC)* went as far as finding that because the trade union was unreasonably obstinate in refusing to discuss selection criteria in a retrenchment exercise, the employees were not entitled to compensation for the procedural unfairness that had taken place.

For larger retrenchments covered by section 189A, minimum consultation periods do apply:

- If a facilitator is appointed, s189A(7) provides a minimum consultation period of 60 days from the date of the s189(3) consultation notice, before notice of retrenchment can be given. Para 6 of the *s189A Facilitation Regulations* adds the extra requirement of 4 facilitation meetings having been held.
- If a facilitator is not appointed, an employer is also effectively precluded by section 189A(8) from giving notice of retrenchment for a minimum period of 60 days. [This is calculated by a dispute not being able to be referred to the CCMA for 30 days from the date of the s189(3) consultation notice, plus notice of retrenchment not being able to be given within 30 days of a dispute having been referred to the CCMA.]

7. Processing retrenchment disputes through the LRA

As stated above, section 189 provides for the required pre-retrenchment consultation. If no agreement is reached and the employer proceeds unilaterally, employees/their union are free to lodge a dispute with the CCMA for conciliation.

If the dispute remains unresolved, the employees/union can elect whether to refer the dispute for adjudication (or take protected strike action in the case of a s198A retrernchment). For adjudication, if only an individual employee was consulted or retrenched, or if the employer employs less than 10 employees, that dispute can be referred to arbitration. Otherwise that dispute must be referred to the Labour Court.

For larger retrenchments covered by section 189A, either party or by agreement both parties can decide whether to appoint a CCMA facilitator to assist with the consultation process. If this is not successful, employees/ the union can then elect to exercise the dispute options referred to above.

Different channels to challenge procedural and substantive fairness in s189A retrenchments:

See *Regenesys Management v Ilunga & Others (CC)*

S189A(13) provides an expedited process to challenge procedural fairness in the LC, and as a result s189A(18) precludes employees from attempting to challenge procedural fairness at a later stage , when disputing substantive fairness under s191(5)(b)(ii). But the LC retains jurisdiction to deal with procedural fairness under that section in retrenchment disputes not covered by s189A (ie the 'smaller' ones)

Does a dispute need to be referred to concilation after a s189A facilitation?

Yes. See *Numsa v SAA Technical (LAC)* Even though the gazetted *s189A Facilitation Regulations* are framed on the assumption that a party may emerge from a s189A facilitation process and straightaway refer a dispute to the Labour Court, the LAC ruled against previous LC decisions and found that s191 requires all retrenchment disputes to be referred to conciliation before being referred to the LC, even those that have been through a facilitation process under s189A. LC said facilitation (pre dismissal – to avoid retrenchment) is in any event a different process to conciliation (post dismissal – to try to agree on fairness of the retrenchments).

Are there any questions?