Dismissal for operational requirements[1]

Valid and fair reasons

In order to fairly dismiss an employee on the grounds of operational requirements, the employer must show a **commercial rationale** for the retrenchment. Operational requirements are defined as "requirements based on the economic, technological, structural or similar needs of an employer" (see section 213 of the Labour Relations Act (LRA) 66 of 1995). The formal procedural requirements imposed by sections 189 and 189A of the LRA are aimed at engaging both the employer and employee in a meaningful consensus-seeking process. The employer is required to consult on various issues, including the reason for the proposed retrenchment.

In *SACTWU v Discreto (A division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC), the following important principles were emphasised:

- The employer's decision must be rational, which does not necessarily mean that it should be the "best" decision for the circumstances, but that it must be justifiable.
- The employer must consider whatever information transpires in the consultation process before making a final decision.

It is not sufficient to show that the employer acted in good faith. The test of fairness is whether the employer has a genuine operational requirement to retrench. This entails considering the school's reasons for dismissal. It is important for the employer to be rational and take into consideration the employee's submissions in the course of the consultation process.

Dispute resolution

[1] This document should be read together with the document: "An overview of the functioning of independent schools in South Africa".

Dismissal is a last resort. A fair and transparent consultation process will go a long way towards ensuring that the employer can justify that there were no viable alternatives. The retrenchment must not be presented as an accomplished fact (a *fait accompli*). In other words, the decision to retrench cannot be made before a meaningful consultation process has run its course.

An aggrieved employee is entitled to refer an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The duty to consult

A joint problem-solving process

Consultation is a joint consensus-seeking process. It requires the employer to allow the employees or their representatives an opportunity to suggest ways to minimise the effect of the proposed retrenchments. The duty to consult is triggered once retrenchments are contemplated. The procedural fairness of a dismissal based on operational requirements is determined by the employer's compliance with sections 189 and 189A of the LRA. A substantively fair dismissal will have been conducted if the employer consulted in good faith and was able to show a genuine need to retrench.

The consultation process is a two-way street. The employer manages this process and is therefore expected to take on a more proactive role. To allow the employees to fully engage and participate in this joint problem-solving process, the employer is required at the outset to explain the commercial rationale for the proposed dismissals, as well as all relevant information already considered, including alternatives.

The employer must attempt to reach consensus, although there is no actual legal requirement to reach agreement with the employees concerned. However, in determining whether the consultation was meaningful, the courts will consider whether the employer took sufficient time to consult.

The consulting parties

Section 189(1) of the LRA requires the employer to consult any person identified for such purpose in a collective agreement. In the absence of a collective agreement that prescribes consultation with a particular party, the employer is expected to consult the following hierarchy of parties:[2]

- A workplace forum[3] and registered trade union,[4] if the employees likely to be affected by the proposed dismissals are employed in a workplace that has a workplace forum and/or are members of a registered trade union
- If there is no workplace forum, any registered trade union whose members are likely to be affected by the proposed dismissals
- If there is no trade union, the employees likely to be affected by the proposed dismissals, or their representatives nominated for that purpose

An employer is not obliged to consult with the following:

- Any individual, if the employer has consulted with the parties in terms of its collective agreements with recognised unions (*Ketse v Telkom* [2015] 4 BLLR 436 (LC)).
- Unrecognised unions[5] (*National Union of Metalworkers of South Africa v Anglo Gold Ashanti Ltd* [2018] 11 BLLR 1128 (LC))
- Minority unions who are not party to a collective agreement that nominates them as a consulting party (*Association of Mineworkers and Construction Union v Royal Bafokeng Platinum Ltd* [2020] JOL 46587 (CC))

Topics for consultation

[2] The latest regulations published in terms of section 27(2) of the Disaster Management Act must be consulted to determine whether gatherings for this purpose are allowed. The regulations published on 27 April 2020 prohibit gatherings other than those for essential or permitted services during the lockdown. Therefore, the consulting parties will need to make use of electronic means, such as Skype, Hangout, Zoom, Microsoft Teams or WhatsApp, to consult one another. The employer must make the necessary arrangements in this regard.

[3] Only registered unions with majority support in the workplace (50% of the employees, plus one) will be able to demand statutory rights with regard to workplace forum arrangements.

[4] Only registered unions that are sufficiently representative of employees at a particular workplace may demand organisational rights such as access to the workplace. The norm is that the union needs to enjoy at least 30% representation to be regarded as sufficiently representative.

[5] Before a trade union is recognised, it first has to comply with section 21 of the Labour Relations Act (LRA). This section stipulates that the union has to provide the employer with a certificate of registration, inform the employer in writing of the rights they wish to exercise, and identify the workplace in which they wish to operate. Thereafter, the employer will have to establish the representativeness of the union (at least 30% representation is required to be seen as sufficiently representative of the workplace). If the union does not comply with all the requirements of section 21, the employer has no obligation to meet or bargain with them, and a union that is not registered has no rights in the workplace.

The issues that are to be covered during the consultation meeting are set out in section 189(2) of the LRA.

1. Appropriate measures to avoid dismissals

Whilst the employer has the right to decide on the operational requirements of the school, employees may challenge the necessity to retrench. The court requires the decision to retrench, and the implementation of such decision, to be fair. The employees may propose measures that could save their jobs, such as a freeze on new hires, implementing short time, voluntary retirement, and the non-renewal of fixed-term contracts. Retrenchment will have been fair if the employer considered such proposals and could explain why they were not feasible and/or why retrenchment was still inevitable.

2. Appropriate measures to minimise the number of dismissals

If it is established that retrenchments are inevitable, the employer is required to consider proposals for reducing the number of employees to be retrenched. Similar measures as above may be tabled for discussion during the consultation meeting.

3. Appropriate measures to change the timing of dismissals

The employer needs to inform the affected employees of the proposed date of retrenchment. There is no minimum period of consultation for retrenchments under section 189 of the LRA (i.e. small-scale retrenchments). The employer must simply provide sufficient time to allow for an effective consultation period. This means that employees must be afforded enough time to absorb the information, propose alternatives and contribute to the consultation process in a meaningful way.

4. Appropriate measures to mitigate the adverse effects of the dismissals

The employer may wish to consider what measures can be taken to assist employees once retrenchment becomes inevitable. Such measures may include assistance with drafting CVs, reasonable time off to attend interviews, counselling through employee assistance programmes, as well as training. While under no obligation to provide any of these services, the employer should do what is possible to assist employees, particularly where the request for assistance is reasonable.

5. The method of selecting the employees to be dismissed

Section 189(7) of the LRA provides that the employer must select employees to be dismissed according to selection criteria that have been agreed by the consulting parties, or criteria that are fair and objective. According to items 8 and 9 of the Code of Good Practice: Dismissal (schedule 8), fair selection criteria:

- are non-discriminatory;
- consider length of service, as well as skills and qualification;[6]
- are based on the last in, first out principle, provided that this does not result in non-compliance with an affirmative action programme;
- are fundamental to the operation of the business.

6. Severance pay for dismissed employees

The minimum severance pay is stipulated in section 41 of the Basic Conditions of Employment Act (BCEA) 75 of 1997. Employers are required to pay at least one week's remuneration per completed year of continuous service as severance pay. If the employees or representatives make a counterproposal, the employer must consider this and respond. The employer is under no obligation to agree to pay more than the minimum prescribed severance pay, but must consider any counterproposals.

Procedural overview[7]

Procedural pitfalls

The LRA sets out in detail the procedures an employer must follow before retrenching employees. The courts have made it clear that employers need not approach these procedures in a mechanical "checklist" manner, but, instead, must make a genuine attempt to avoid retrenchments. Although employers may have sound operational reasons for retrenching

[6] In *Kenco Engineering CC v National Union of Metalworkers of South Africa* [2019] JOL 43038 (LAC), while the court accepted that skills, work performance, attendance and safety records could be used as criteria, the employer in this case failed to prove that the selection of the individual employees for retrenchment, using those criteria, had been done in a fair and objective manner.

[7] An employer will have to follow the procedure contained in section 189(A) of the LRA if the employer employs more than 50 employees and contemplates retrenching at least:

- 10 employees out of a workforce of up to 200 employees;
- 20 employees out of a workforce of over 200 employees, but fewer than 300 employees;
- 30 employees out of a workforce of over 300 employees, but fewer than 400 employees, etc.

If section 189A applies to your school, please contact your FEDSAS provincial manager for guidance.

employees, they often fall foul of the LRA because they do not properly follow or observe the prescribed procedures. Examples of common employer mistakes are:

- the failure to identify the correct party/parties to consult;
- taking a final decision to retrench even before the consultation process starts;
- the late issuing of the section 189(3) notice; and
- the failure to try to agree on selection criteria.

The section 189(3) letter: Notice of contemplating retrenchment (see annexure A)

In *National Union of Metalworkers of South Africa v General Motors South Africa (Pty) Ltd* [2017] ZALCPE 26, the Labour Court emphasised the importance of issuing a section 189(3) notice. Among others, the court stated the following:

- The purpose of the notice is to enable employees to consult and engage meaningfully in a joint consensus-seeking process.
- Being denied the information required by section 189(3) not only deprives employees of the opportunity to influence important decisions that need to be made, but also violates their right to do so.

The purpose of the section 189(3) notice is to facilitate the consultation process in a meaningful manner. The written notice must be issued to the consulting parties, disclosing sufficient information about what will be discussed. This should be done before the consultation process starts. Apart from inviting the consulting party to the consultation, the notice must state:

- the reasons for the proposed retrenchment;
- the alternatives to retrenchment that the employer considered, and the reasons for eliminating each of those alternatives;
- the number of employees likely to be affected by the proposed retrenchments, and the job categories in which they are employed;
- the proposed method for selecting which employees to retrench;
- the time when, or period during which, the retrenchment is likely to take effect;
- the proposed severance pay;
- any assistance that the employer proposes to offer to the employee likely to be retrenched;
- the possibility of future re-employment, if retrenchment is confirmed;

- the number of employees in the employer's workforce; and
- the number of employees that the employer has retrenched in the preceding 12 months.

An employer must also use the section 189(3) notice to ascertain from the affected employees whether any of them are members of a registered trade union so that the union can be contacted with a view to the consultation meeting.

In the notice, it is crucially important for the employer to present the retrenchments as a mere proposal. In fact, it is best practice for employees to be informed that a final decision to retrench will be made only once the parties have concluded the consultation process. This will encourage employees to participate in a meaningful manner. Employers must also avoid commencing with the consultation process on relatively short notice, as the consulting parties must have sufficient time to prepare.

Note that an employer has to address certain topics during the consultation process. See "The duty to consult" above for the specifics in this regard.

More disclosures during consultations

During the consultation process, the consulting party may ask the employer to disclose more detailed information than what was contained in the section 189(3) notice, such as the employer's audited financial statements. Yet the LRA provides that confidential information need not be disclosed (see section 16(5)(c)), unless such disclosure is necessary to enable effective consultation.

Selection criteria

Part of the consultation process is for the consulting parties to discuss and attempt to agree on the selection criteria that will be applied to determine which employees will eventually be retrenched. In selecting employees to be dismissed for operational requirements, section 189(7) of the LRA requires an employer to apply criteria that have been agreed by the consulting parties, or if no criteria have been agreed, according to criteria that are fair and objective. Most employers tend to use the "last in, first out" (LIFO) principle. This means that employees with the shortest service should be considered for retrenchment first.

Although LIFO is the most commonly used selection criterion, nothing prevents the consulting parties from considering other selection criteria as well, such as employees' disciplinary records and work performance. If the consulting parties cannot agree on selection criteria, an employer may unilaterally impose a set of criteria, but must be in a position to prove their fairness and objectivity.

Severance pay[8]

In terms of section 41 of the BCEA, an employer must pay severance pay to an employee who is dismissed for operational reasons, which pay must be equal to at least one week's remuneration for each completed year of continuous service with the employer. Although the BCEA stipulates the minimum severance pay that becomes due and payable upon retrenchment, employers must also consult their internal policies and procedures, as well as the affected employees' written contracts of employment, to ascertain whether provision has been made for a severance package above the statutory minimum. If so, the employer is obligated to pay such increased package.

Additional payments[9]

Employers must also be mindful of other payments, in addition to severance pay, that become due and payable upon the termination of an employee's employment. These include:

- payout for the number of days' annual leave accrued and not yet taken at the time of the retrenchment;
- payout in lieu of working the prescribed notice period (which will only apply if the employer does not require the employee to work the notice period); and
- pro-rata bonuses (which will only apply if the employee is entitled to some sort of pro-rata bonus upon termination of employment).

[8] Section 42 of the BCEA also requires the employer to issue the employee with a certificate of service upon retrenchment. See the FEDSAS website, www.fedsas.org.za, for a draft certificate of service.

[9] The retrenched employee will be able to claim Unemployment Insurance Fund (UIF) benefits and may qualify for tax rebates. Schools are advised to consult their accountants in this regard.

Remedies and relief

Reinstatement and other usual remedies for unfair dismissal

If employees are unfairly dismissed, they may approach the Commission for Conciliation, Mediation and Arbitration (CCMA), a relevant bargaining council or the Labour Court for relief, depending on the reason for the dismissal. However, arbitrating commissioners and judges are not given free reign as to the remedies they may grant such employees. In terms of section 193 of the LRA, an employee who has been unfairly dismissed may claim:

- reinstatement (with or without backpay);
- re-employment (in which case no backpay will apply); or
- compensation.

Annexure A

NOTICE IN TERMS OF SECTION 189 OF THE LRA, ON THE SCHOOL'S LETTERHEAD

Date

Employee

By hand

Re: Proposed dismissal for operational requirements

The abovementioned matter and our conversation on _____ refer.

Your position at the hostel/school has been identified as one of those that may be affected by the recent changes in the hostel/school's operational needs. The school governance structure (SGS) will follow the procedure as prescribed in section 189 of the Labour Relations Act, which deals with dismissal for operational requirements.

In terms of section 189(3), please note the following information:

(a) The reasons for the proposed dismissals

_____

(b) The alternatives that the employer considered before proposing the dismissals, and the reasons for eliminating each of those alternatives

_____

(c) The number of employees likely to be affected, and the job categories in which they are employed

_____

(d) The proposed method for selecting which employees to dismiss

_____

(e) The time when, or period during which, the dismissals are likely to take effect

_____

(f) The proposed severance pay

One week's remuneration for every completed year of service

(g) Any assistance that the employer proposes to offer to the employees likely to be dismissed

The employer will consider all proposals in this regard.

(h) The possibility of future re-employment of employees who are dismissed

Unfortunately, there is no possibility of re-employment to the position of …….. (specify).

(i) The number of employees employed by the SGS

_____

(j) The number of employees that the employer has dismissed for operational reasons in the preceding 12 months

_____

You are hereby invited to take part in a section 189(2) consultation meeting on _____ (date) at _____ (venue) to discuss the matter. You will also be afforded an opportunity to present alternatives to the SGS.

Yours sincerely

_____ _____

SGS chair **DATE**

I, _____, hereby acknowledge receipt of the section 189(3) notice on _____.

_____

Witness (should employee refuse to sign)

NOTICE OF TERMINATION OF EMPLOYMENT DUE TO RETRENCHMENT, ON THE SCHOOL'S LETTERHEAD

To: ……

(name of employee)

Notice of termination of employment due to retrenchment

All recent consultations in the above regard refer. As you know, the school governance structure and employees discussed potential alternatives to avoid termination of employment, the criteria for selecting employees for retrenchment, severance pay and other benefits.

Regretfully, we hereby confirm that your employment with …… (name of school) will terminate on …… due to retrenchment. This letter serves as your official notice of termination of employment due to retrenchment.

You will not be required to work your notice period, and you will be paid in lieu of notice.

Upon leaving ……. (name of school), you will be paid the following:

Final salary …….

Leave payout ……

Severance pay …….

Other ……

Should a vacancy arise within …….. (insert the period) of the date of this letter for which, given your past experience and the nature of the position, you may be suitable, you will be notified by the school governance structure and may be offered such employment. The terms of the school's retrenchment procedure shall apply in the conveyance and acceptance of such vacancy.

We thank you for your service to the hostel/school.

Yours sincerely

_____

SGS chair