EMPLOYMENT RETRENCHMENT GUIDELINE

CDH

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RETRENCHMENT: FAQS

CONSULTATION

WHAT ARE THE CATEGORIES OF PEOPLE WITH WHOM AN EMPLOYER MUST CONSULT WHEN CONTEMPLATING DISMISSAL ON THE BASIS OF OPERATIONAL REQUIREMENTS?

In terms of s189(1), an employer must consult with:

- any person an employer is obliged to consult with in terms of a collective agreement;
- if there is no collective agreement, a workplace forum (if in existence) *and* any registered trade union whose members are likely to be affected by the proposed dismissals;
- if there is no workplace forum, any registered trade union whose members are likely to be affected by the proposed dismissals; or
- if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

NOTE: Consultations with trade unions must take place where applicable, regardless of whether it is a majority trade union *(Food And Allied Workers Union and Others v Cape Hospitality Services (Pty) Ltd t/a Savoy Hotel* (C419/2007) [2015] ZALCCT 51).

DOES AN EMPLOYER HAVE TO CONSULT WITH INDIVIDUAL EMPLOYEES IF IT HAS CONSULTED WITH THE EMPLOYEE REPRESENTATIVES?

The duty of an employer to consult with individual employees has been removed in situations where consultation has taken place with the employees' representatives *(Baloyi v M & P Manufacturing* [2001] 4 BLLR 389 (LAC)). Employers will consult directly with individual employees where the body representing them no longer exists.

NOTE: Failure to consult will render a retrenchment procedurally unfair *(Aunde SA (Pty) Ltd v National Union of Metalworkers SA* [2011] 32 ILJ 2617 (LAC)).

LARGE SCALE RETRENCHMENTS

WHEN DOES S189A OF THE LRA APPLY TO A RETRENCHMENT PROCESS?

Section 189A(1) applies to employers that employ 50 or more employees and intend to retrench the following number of employees:

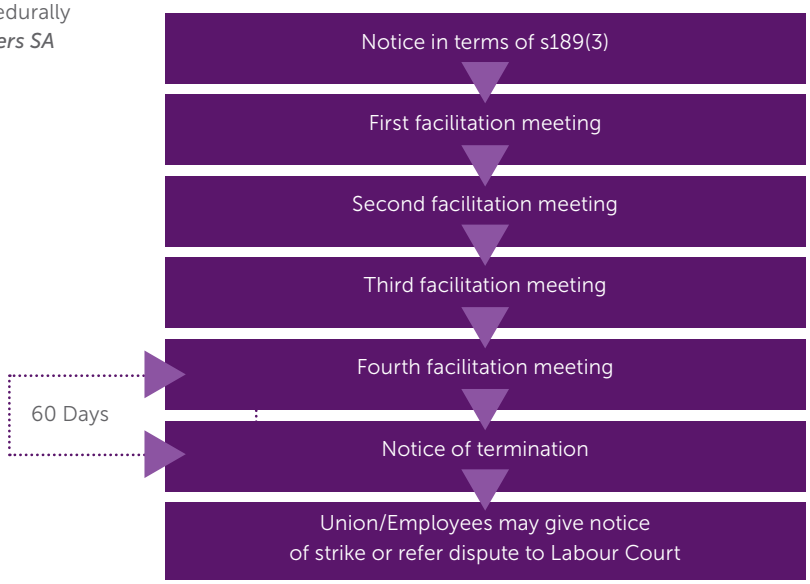
- 10 employees, if the employer employs up to 200 employees;
- 20 employees, if the employer employs more than 200, but not more than 300, employees;
- 30 employees, if the employer employs more than 300, but not more than 400, employees;
- 40 employees, if the employer employs more than 400, but not more than 500, employees;
- 50 employees, if the employer employs more than 500 employees; or
- if the number of employees that the employee intends to retrench, together with the employees that have been retrenched in the 12 months prior to issuing the s189(3) notice, is equal to or greater than the relevant number specified above.

NOTE: The s189(3) notice is a written notice, issued by the employer, that discloses all relevant information and invites the other party to consult with the employer.

WHAT IS THE MAIN PURPOSE OF S189A?

- To facilitate and protect job security.
- To effectively resolve disputes in large scale retrenchments and to provide speedy remedies, especially where procedural defects occur in the retrenchment process.

WHAT IS THE BASIC PROCESS AN EMPLOYER MUST FOLLOW WITH REGARD TO A LARGE SCALE RETRENCHMENT (WITH FACILITATION)?



NOTE: The consultation period must continue for a minimum of 60 days.

FACILITATION VERSUS NON-FACILITATION

HOW CAN THE INTERVENTION OF A FACILITATOR BE SECURED?

There are three ways in which the intervention of a facilitator may be secured:

- the employer may request the appointment of a facilitator by the CCMA in its notice in terms of s189A(3)(a) of the LRA;
- within 15 days of receiving the s189(3) notice, consulting parties representing the majority of the employees whom the employer contemplates dismissing, may request the appointment of a facilitator and notify the CCMA; or
- the parties agree to appoint a facilitator.

NOTE: If the 60 day period lapses before consultations are completed, the employer may not give notice of termination until the consultation process has been exhausted.

WHAT IS THE PRIMARY PURPOSE OF A FACILITATOR?

- Their role is not to actually consult with the employees, but to facilitate consultations. The duty to consult rests primarily with the employer and not the facilitator.
- The facilitator has certain obligations contained in the Facilitation Regulations that have been issued by the Minister in terms of s189A(6) of the LRA. This includes an obligation to hold at least four facilitation meetings.
- The facilitator has a minimum of 60 days, from the date the s189(3) notice is issued, to invite employees to consult so as to promote agreement between them.

WHEN CAN AN EMPLOYER GIVE NOTICE OF TERMINATION?

In terms of s189A(7)(a) of the LRA, an employer can only give a notice of termination once the 60 day period for consultation has lapsed and provided that the consultation process has been exhausted.

WHAT IS THE PROCESS IF NO FACILITATOR HAS BEEN APPOINTED?

- The parties must consult for a minimum period of 60 days before any notice of termination can be issued.
- Prior to issuing any notice of termination, the parties must refer the dispute to the CCMA. This can only be done after a period of 30 days from the date of issuing the s189(3) notice.

HOW CAN EMPLOYEES CHALLENGE THE FAIRNESS OF A RETRENCHMENT PROCESS?

- Employees can challenge the procedural fairness of the retrenchment process by way of an urgent application to the Labour Court (s189A(13)).
- Employees can challenge the substantive fairness of the termination of their employment by referring a dispute to the Labour Court or by engaging in industrial action.

WHEN DO WE START CALCULATING THE 60 DAY CONSULTATION PERIOD?

The 60 day period in any large scale retrenchment commences once a notice in terms of s189(3) has been issued.

WHAT HAPPENS IF THE NOTICE OF TERMINATION IS ISSUED PRIOR TO THE 60 DAY CONSULTATION PERIOD LAPSING?

- Previously, and as held in ***De Beers Group Services (Pty) Limited v National Union of Mineworker***, a dismissal was declared to be invalid if the employer did not comply with the requirements of s189A(8) of the LRA, more particularly, the issuing of a notice of termination prior to the 60 day consultation period ending.
  (In light of the fact that the *De Beers* case is being taken to the Constitutional Court, the law in this regard may change.)
  In the recent LAC judgment of ***Edcon v Karin Steenkamp and Others (JS350/2014)*** [2015] ZALAC JHB ***(Edcon)***, however, the LAC held that the interpretation of s189A(8) in *De Beers* was incorrect and erroneous and that non-compliance with these provisions does not lead to an invalid dismissal.
- The LAC held that it could not have been the intention of the legislature to invalidate or nullify dismissals and reinstate employees, and that the *De Beers* judgment would have the anomalous effect that dismissals would no longer be assessed on fairness but be declared invalid merely because they were premature.
- The LAC further held that s189A(8) contains no express provision requiring any of the parties to refer a dispute to the CCMA in the absence of consensus being reached during the consultation process. The section states that no dispute may be referred to the CCMA before the 30 day consultation period has elapsed. Accordingly, it is not a requirement that a dispute must be referred to the CCMA after expiry of the 30 day period.
- The following status quo remains: an employer can only issue a notice of termination once the periods referred to in s64(1)(a) of the Act have expired. In other words, an employer cannot issue notices of termination until a further period of 30 days from the date on which the dispute is referred to the CCMA or the date on which the dispute is conciliated, which ever occurs first, has lapsed.
- It is, however, important to note that the decision in *Edcon* provides that issuing a notice of termination before this time, does not render the dismissal invalid.

SELECTION CRITERIA

CAN AN EMPLOYER UNILATERALLY CHOOSE A SELECTION CRITERION ON WHICH TO BASE A DISMISSAL FOR OPERATIONAL REQUIREMENTS?

- Section 189(2) requires an employer and the other consulting parties to engage in a meaningful, joint consensus-seeking process and attempt to reach consensus on the method for selecting the employees to be dismissed.
- After the consultation, the employer must consider and respond to the submissions made by the other consulting parties and, as required by s189(3), must state reasons if it disagrees with the representations. This was confirmed by the court in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd (JA31/2002)* [2005] ZALAC 14. If the consulting parties made written submissions then the employer's response to these submissions must also be in writing.
- The essence of sections s189(2) and s189(6) is that an employer cannot decide on the criteria to use, without consulting the other consulting parties.
- To the extent that the consultation on selection criteria does not result in an agreement, it is then open to the employer to unilaterally decide on a selection criteria to be used, provided that the employer will then have to prove that the criteria used was fair and objective.

WHAT SELECTION CRITERIA ARE CONSIDERED TO BE LEGALLY ACCEPTABLE?

- Section 189(7) recognises two types of selection criteria that the employer may use to select the employees to dismiss:
  - one that has been agreed to by the consulting parties; or
  - one that is fair and objective if no selection criterion has been agreed upon.
- The court in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd supra,* held that what s189(7) means is that where the consulting parties have agreed upon selection criteria, the employer is obliged to use such criteria. Where there is no agreed selection criteria, the employer is obliged to use only fair and objective criteria.
- Section 187(7) is consistent with the view that parties are not obliged to agree on the selection criterion and caters for a situation where the parties do not agree on the criteria. In such a case the employer has an obligation to show that the selection criteria adopted were fair and objective.

WHICH SELECTION CRITERIA TO UTILISE?

- The Act only facilitates the consultation process and does not prescribe the selection criteria to be used, instead leaving it to the parties to agree on the selection criteria.
- The generally accepted selection criteria according the CCMA Code of Good Practice on Operational Requirements include the "last in first out" (LIFO), the length of service, skills and qualifications.
- LIFO is the criterion associated with the least risk as long as it is fairly applied.
- In *NUM and Others v Anglo American Research Laboratories (Pty) Ltd [2005] 2 BLLR 148 (LC)* and *Singh & Others v Mondi Paper* [2000] 4 BLLR 446 the LC it was accepted that performance could be used as a criterion for selection provided it was objectively applied.
- In this regard the parties may agree on selection criteria in a collective agreement or during the consultation process. In the absence of such an agreement the employer must apply fair and objective criteria.

WHAT MUST AN EMPLOYER DO TO DETERMINE THE SELECTION CRITERIA FOR RETRENCHMENT?

- To the extent that agreement on selection criteria proves illusive, the employer may have no option but to unilaterally impose selection criteria. However, this option exposes the employer to the risk of the criteria being disputed later.
- The safest approach would be to negotiate the selection criteria with the relevant unions, and conclude a collective agreement recording the criteria. This will make it more difficult for the unions to raise a dispute later, because the selection criteria were mutually negotiated.

WHICH IS THE BEST SELECTION CRITERION?

- This is a difficult question to answer in the abstract, but the LIFO method (last in, first out) is widely recognised as being the most objective criterion to select the employees to be retrenched. It is all the more objective because it tends to retain the most experienced employees, which is a valid goal when considering operational requirements.
- The FIFO (first in, first out) method is dangerous because it has the indirect effect of discriminating on the basis of age.

CAN THE EMPLOYER USE MORE THAN ONE SELECTION CRITERION?

Yes. The employer may opt not to use LIFO, and instead decide on a host of other criteria (for example skills, performance, personal circumstances and family commitments). Again, the safer more conservative approach would be to arrive at these criteria by agreement with the relevant union.

CAN THE EMPLOYER INVITE RETRENCHED EMPLOYEES TO RE-APPLY FOR THEIR JOBS?

Yes. The employer must just be careful to ensure that it follows an objective and fair process by placing the onus on the employees to re-apply for their own positions.

CAN MISCONDUCT BE USED AS A SELECTION CRITERION?

Yes, the Labour Appeal Court in *Food and Allied Workers Union on behalf of Kapesi & Others v Premier Foods t/a Blue Ribbon Salt River* (2012) 33 ILJ 1729 (LAC) found this to be an acceptable method.

However, the employer would do well to remember that dismissals for operational requirements are not fault-based. Since misconduct is fault-based, the employer must not conflate the issues, and must rather keep them separate. Even though prior misconduct is being considered as a factor, the employee is not being dismissed for misconduct, but rather for operational reasons, with their prior misconduct being the determining factor of whether they are dismissed.

VOLUNTARY SEPARATION PACKAGES

WHAT IS A VOLUNTARY SEVERANCE PACKAGE?

A voluntary severance package is a financial incentive that is offered to an employee in lieu of their resignation or retirement.

ARE THERE DIFFERENT TYPES OF VOLUNTARY SEVERANCE PACKAGES?

Where a voluntary severance results in termination of employment, minimum severance benefits imposed by law cannot be contracted out of, however, additional benefits (in consequence of the voluntary nature of the termination) may take a variety of forms, such as:

- a voluntary severance package;
- a retirement package; or
- a redeployment package.

IS THERE A DUTY UPON THE EMPLOYER TO CONSULT WITH EMPLOYEES WHEN OFFERING ANY OF THESE PACKAGES AS A PRECURSOR TO DISMISSALS FOR OPERATIONAL REQUIREMENTS?

The offering of a voluntary severance package as a precursor to retrenchment does not relieve the employer of its obligations in terms of s189 of the LRA to consult with an employee on the matter.

WHEN IS AN EMPLOYER OBLIGED TO CONSULT WITH EMPLOYEES?

In terms of s189 of the LRA, an employer is obliged to consult with employees when it contemplates dismissal for operational reasons. This is a factual question.

CAN AN EMPLOYER OFFER VOLUNTARY SEVERANCE PACKAGES OUTSIDE OF THE S189 PROCESS, THEREBY NEGATING ITS OBLIGATION TO CONSULT?

The only time an employer may offer any of the above packages, outside of the s189 process, is when it can be shown that when such offer was made, the employer was not contemplating retrenchments.

WHEN WOULD IT BE PERMISSIBLE FOR AN EMPLOYER TO OFFER THE ABOVE PACKAGES TO EMPLOYEES, WITHOUT FOLLOWING THE S189 CONSULTATION PROCESS?

The only circumstances that would enable a departure from this process are:

- if the offering of such alternative packages would avoid the possibility of retrenchments altogether at a later stage; and
- if the employer did not contemplate that the refusal of the offer could precipitate retrenchments.

However, even in these circumstances, it is advisable to consult with the employees as the offering of voluntary severance packages, early retirement or redeployment may amount to a change in terms and conditions of employment.

VACANCIES-BUMPING

DOES AN EMPLOYER HAVE A DUTY TO FIND ALTERNATIVE EMPLOYMENT FOR ITS EMPLOYEES PRIOR TO RETRENCHMENT?

Yes. The employer is under an obligation to search for alternatives, but no absolute obligation rests on it to find (or create) alternatives.

WHAT DOES THIS DUTY ENTAIL?

An employer must:

- identify alternative options to retrenchment;
- apply objective selection criteria when deciding who to retrench;
- consider 'bumping' long-serving employees into positions where they are capable of rendering services; and
- consult on all these issues before dismissal with a view to reaching a consensus.

WHAT CAN HAPPEN IF THE EMPLOYER DOES NOT 'BUMP' EXISTING EMPLOYEES INTO OTHER POSITIONS AS PART OF THE RETRENCHMENT PROCESS?

The court may find that fair selection criteria were not applied and that the retrenchment process was procedurally unfair. (See for example *CWIU & Others v Latex Surgical Products (Pty) Ltd [2006] 2 BLLR 142 (LAC)* and *Food and Allied Workers Union on behalf of Kapesi & Others v Premier Foods t/a Blue Ribbon Salt River* [2012] 33 ILJ 1729 (LAC)).

WHAT ARE THE BASIC PRINCIPLES WITH REGARD TO 'BUMPING'?

In *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC), the court set out the principles as follows:

- 'Bumping' is based on the LIFO (last in first out) principle, which is a fair selection criterion to apply, as it rewards employees who have served the employer for a longer period of time.
- Depending on the circumstances of a case, bumping can take the form of vertical displacement or horizontal displacement.
- Vertical 'bumping' means that the employee is transferred to a position with a less favourable status, conditions of service and pay.
- Horizontal 'bumping' means that the employee is transferred to a position of similar status, conditions of service and pay.
- An employer should first attempt to 'bump' employees horizontally before bumping them vertically.
- Vertical 'bumping' should only take place where there is no suitable candidate to 'bump' horizontally (into another position).
- In the case of large-scale bumping, also called 'domino bumping', which could cause vast dislocation, inconvenience and disruption, the consultation process must be fair towards employees while minimising the disruption to the employer.
- A balance must be achieved between the competing interests of the employees and the employer.

(These principles were also more recently applied in *Oosthuizen v Telkom SA Ltd* [2007] 11 BLLR 1013 (LAC) and *Super Group Supply Chain Partners v Dlamini and Another* 3 BLLR 255 (LAC)).

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