EMPLOYMENT
RETRENCHMENT ALERT **SERIES**

The Employment Practice is doing a series of Alerts focused on Retrenchment, against the backdrop of the tough economic climate.

IN THIS ISSUE

RETRENCHMENTS AND THE DUTY TO CONSULT

Section 189 of the Labour Relations Act, No 66 of 1995 (LRA) regulates retrenchments. It applies if an employer contemplates dismissing one or more of its employees for reasons based on its operational requirements.

Section 189 contains detail relating to the duty to consult. More specifically, it prescribes when consultation must start, who the employer needs to consult with as well as the topics for consultation.

The parties (the employer and consulting party) must engage in a meaningful joint consensus seeking process and attempt to reach consensus on:

- appropriate measures to avoid the dismissals;
- minimising the number of dismissals;
- changing the timing of the dismissals; and
- mitigating the adverse effects of the dismissals.

The consulting parties must also attempt to reach consensus on the selection criteria as well as the severance pay for dismissed employees.

Even though the LRA prescribes all of the factors listed above, it does not specifically state what is meant by "consultation" or by "a meaningful joint consensus seeking process". Accordingly, case law needs to be considered.

In *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA 1995 (3) SA 22 (A)*, the court held that consultation provides an opportunity to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment (or softening its effect) and to discuss and consider alternative measures. It is, however, important to note that the duty to consult does not require an employer to bargain with its employees or the union consulting on their behalf. The ultimate decision to retrench is one which falls squarely within the competence and responsibility of management.

Accordingly, consultation should entail a joint problem-solving exercise to achieve consensus where possible, bearing in mind that problem solving is something distinct from bargaining. Our courts have held that there is a distinct and substantial difference between consultation and bargaining.

- To consult means to take counsel, or seek information or advice, from someone and does not imply any kind of agreement as an end result.
- Bargain on the other hand means to "haggle and wrangle" so as to arrive at some agreement.

This principle was also applied in the matter of *Karachi v Porter Motor Group (2000) 21 ILJ 2043 (LC)*, in which the Labour Court held that consultations about retrenchment are not the same as negotiations in collective bargaining, during which the parties wrangle with each other to secure the best deal for their respective constituencies, often by bluffing and trying to outwit or out-manoeuvre each other. Essentially, an approach must be adopted so that the needs of all parties can be explored.

The Labour Appeal Court has held in the matter of *Broll Property Group (Pty) Ltd v Du Pont & others (2006) 27 ILJ 269 (LAC)* that "poorly handled consultations" could lead to a retrenchment lapsing from procedural unfairness to substantive unfairness as well.

In light of the above, it is important that employers comply with their duty to consult, while simultaneously maintaining the distinction between consultation and bargaining as the ultimate decision to retrench remains management's prerogative.

Anli Bezuidenhout

RETRENCHMENT: WHEN IS THE DUTY TO CONSULT TRIGGERED?

Section 189 of the Labour Relations Act, No 66 of 1995 (LRA) applies when an employer contemplates dismissing one or more of its employees for reasons based on its operational requirements ie the employer's economic, technological, structural or similar needs.

An employer is under an obligation to consult with employees who may be retrenched prior to retrenchment. The crucial question that arises is, when is the duty to consult triggered?

The LRA refers to the time when the employer "contemplates" retrenching employees. However, it does not define the meaning of "contemplates". To better understand this, one needs to consider the purpose of the consultation process.

The consultation process is intended to afford employees who may be affected by proposed retrenchments the opportunity to:

- understand the reason(s) for the proposed retrenchments;
- make representations on possible ways to avoid retrenchments and if they cannot be avoided; and
- limit the number and impact of retrenchments.

The process is one of joint problem solving in an attempt to reach agreement. Given this purpose the consultation process must logically start before a final decision is taken to retrench employees. Employees who may be affected by retrenchments must be afforded an opportunity to give their input and make counter-proposals in an effort to influence the decision making process.

The exact moment when an employer can be considered to "contemplate" retrenchment and accordingly, when the duty to consult is triggered, was considered by the Appellate Division in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* 1995 (3) SA 22 (A). The Court considered two possible approaches to the timing of the consultation process.

- The first in which the employer is obliged to starting consulting once the possible need for retrenchment is identified and before a final decision to retrench is taken.
- The second in which the employee need only be afforded an opportunity to comment or express an opinion on a decision already taken.

The Court confirmed the first approach and found that the duty to consult arises "*when an employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable.*"

The Labour Appeal Court (LAC) took the matter a step further in the case of *Imperial Transport Services (Pty) Ltd v Stirling* (1999) 3 BLLR 201 (LAC). The LAC distinguished between:

- the situation in which retrenchments are brought about by internal factors that are within the control of the employer, such as the introduction of new machinery; and
- retrenchments which are as a result of factors outside of the employer's control, such as a downturn in the economy.

The LAC found that where the reason for possible retrenchments is within the control of the employer fairness demands that the employed should, before implementing the changes, ask whether jobs may be affected by the changes and if jobs will be affected, the employer has a duty to consult with affected employees before the changes are implemented.

It is clear from the Court decisions that an employer has a duty to consult with employees who may be affected by possible retrenchments before a final decision is taken by an employer to implement changes that may result in retrenchment. Naturally, an employer may have considered possible changes, how these may impact employees, possible retrenchments, and possible alternatives to retrenchments before being under a duty to start consulting with its employees. However, it cannot take a final decision which affects employees continued employment before consulting with the affected employees and affording them the opportunity to give their input and make proposals which may impact the decision making process. In the circumstances, it is critical that for example, a board of directors does not take a final decision to retrench employees before initiating the consultation process, consulting with and securing the input of employees who may be affected by the proposed changes.

If an employer fails to start the consultation when it contemplates dismissing employees and before a final decision to retrench is taken, this will affect the fairness of the retrenchments.

Gillian Lumb

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

The main keynote speakers are Professor Alain Supiot, Doctor in Law at the Collège de France in Paris and Professor Sir Bob Hepple, Emeritus Master of Clare College at the University of Cambridge.

VIEW FULL PROGRAMME HERE > DOWNLOAD

CLICK HERE FOR MORE INFORMATION.

CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2015 in Band 4: Employment.

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@dlacdh.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Khanyisile Khanyile
Associate
T +27 (0)11 562 1586
E khanyisile.khanyile@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG
1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN
11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

cliffedekkerhofmeyr.com

DLA CLIFFE DEKKER HOFMEYR