

# EMPLOYMENT RETRENCHMENT ALERT SERIES

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

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### IS THERE A DUTY TO RE-EMPLOY A RETRENCHED EMPLOYEE?

Retrenching an employee is a 'no fault' dismissal based on an employer's operational requirements. This type of dismissal is unfair if it is not in line with fair procedure. In terms of s189(3) of the Labour Relations Act, No 66 of 1995 (LRA), where circumstances arise which may result in the possible retrenchment of employees within a company, the employer must notify the affected employees in writing, inviting the employees to consult and disclosing all relevant information pertaining to the intended retrenchment.

# IS THERE A DUTY TO RE-EMPLOY A RETRENCHED EMPLOYEE?

Section 189(3)(h) of the LRA specifically requires an employer in a retrenchment exercise to disclose and consult on the possibility of future re-employment.

*There is no duty on an employer to re-employ a retrenched employee nor is there a duty to enter into an agreement that provides for preferential re-employment.*



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Section 189(3)(h) of the LRA specifically requires an employer in a retrenchment exercise to disclose and consult on the possibility of future re-employment. This process requires a joint and meaningful consensus seeking exercise, as was set out in *SASBO v Standard Bank of SA* [2011] JOL 26928 (LC). A failure to disclose and consult on the possibility of re-employment may result in the consultation process falling foul of s189. Accordingly, the retrenchment may be considered procedurally unfair.

An employer must not only ensure that the correct process is followed, but also that the process is a genuine attempt to reach an amicable solution and avoid the harsh consequences of retrenchment.

There are two possible scenarios when discussing re-employment:

- an agreement regarding re-employment is reached; or
- no such agreement is reached.

If such an agreement is reached and the employer fails to adhere to the terms of the agreement, such failure will be an unfair labour practice in terms of s186(2) of the LRA and may amount to a substantively unfair dismissal in terms of s188 of the LRA.

In summary, there is no duty on an employer to re-employ a retrenched employee nor is there a duty to enter into an agreement that provides for preferential re-employment. The employer is, however, obliged to discuss the possibility of re-employment during the consultation process. Employers should ensure that employees are not presented with a *fait accompli* as the consultation process must involve a bona fide attempt to reach joint and meaningful consensus, notwithstanding any limitations within the employer's retrenchment policy.

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*Lauren Salt and Kate Anderson*

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