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# EMPLOYMENT ALERT

## IN THIS ISSUE

### WITH RETRENCHMENTS ON THE RISE CONSIDER THE RETRENCHMENT PROCESS CAREFULLY

On 20 March 2016 Chris Baron, writing in the Sunday Times, stated as follows: "South Africa's premier dispute resolution body, the Commission for Conciliation, Mediation and Arbitration, is bracing itself for a massive increase in the number of referrals as companies retrench, says its new director, Cameron Morajane.

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*During the course of the trial, the employee held that the alternatives provided by the employer were presented so as to compel him to accept a change to his terms and conditions of employment, thus rendering his dismissal automatically unfair.*

On 20 March 2016 Chris Baron, writing in the Sunday Times, stated as follows: "South Africa's premier dispute resolution body, the Commission for Conciliation, Mediation and Arbitration, is bracing itself for a massive increase in the number of referrals as companies retrench, says its new director, Cameron Morajane.

Some 687 cases a day are already being referred to the CCMA, which represents an increase of almost 23% over the past five years.

And the deteriorating economic situation, together with last year's labour law amendments, mean this number will rise sharply..."

As the economic situation potentially deteriorates employers will seek to further streamline their businesses, while employees will attempt to hold employers to strict compliance with the Labour Relations Act.

In undertaking a restructuring exercise employers, as an alternative to terminating permanent employees, look to terminating the employment of fixed term employees. As a further alternative they look towards changing employees' terms and conditions of employment.

Despite it being previously authoritatively decided that fixed term employees' employment may only be terminated if there is an express provision in their contracts of employment allowing this, the issue came before our courts once again in the matter of *Adam Nord v Civicus World*

*Alliance for Citizen Participation Inc.* The relevant clause in this case stated:

"in light of the sometimes uncertain future of grant based funding, the duration of this contract is subject to the availability of dedicated and/or restricted funds that can be used to cover the costs of this position."

The above clause is not a model of clarity. It does not expressly provide that the employer may terminate the employee's employment for operational requirements.

The court, after defining what an operational requirement is, found that the above clause, despite its vagueness, meant that the employee could be retrenched if the employer had no funds. In order to avoid disputes of this nature, it is important that all fixed term contracts include a clause which expressly provides for the termination of employment.

During the course of the trial, the employee held that the alternatives provided by the employer were presented so as to compel him to accept a change to his terms and conditions of employment, thus rendering his dismissal automatically unfair. To

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CONTINUED

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determine whether a dismissal falls within this category, a factual enquiry must be undertaken. The entire structure of consultation in terms of the LRA is geared towards preserving employees' employment. In determining whether the retrenchment is genuine the employer would need to lead sufficient evidence to illustrate that there is a substantive need for the retrenchment. Consequently, if the employer is unable to illustrate that there is a commercial need for the retrenchment, alternative offers of employment which seek to change an

employee's terms and conditions of employment may be regarded as not being made in good faith and simply used to force employees to accept the change.

The termination of fixed term employees and the alternatives to retrenchments dealt with above shows how fraught with difficulty any retrenchment process is. It requires careful planning by employers prior to embarking on such exercises.

*Aadil Patel*

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Answering your pertinent questions around consultations, large-scale retrenchments, facilitation vs non-facilitation, selection criteria, voluntary separation packages and vacancies-bumping.



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