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LARGE SCALE RETRENCHMENTS: INDEPENDENT FACILITATORS AS OPPOSED TO CCMA APPOINTED FACILITATORS? YOU DECIDE

The purpose of s189A of the Labour Relations Act, No 66 of 1995 is to regulate large scale retrenchments. In large scale retrenchments, an employer is obliged to consult with the appropriate consulting parties and engage in a meaningful joint consensus seeking process aimed at reaching agreement on a number of issues including measures to avoid, minimise and mitigate the adverse effects of the anticipated retrenchments, selection criteria and severance pay.



LARGE SCALE RETRENCHMENTS: INDEPENDENT FACILITATORS AS OPPOSED TO CCMA APPOINTED FACILITATORS? YOU DECIDE

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It allows the parties to own the process and structure the timing of the facilitation meetings in order to achieve an expeditious and effective outcome. The purpose of s189A of the Labour Relations Act, No 66 of 1995 (LRA) is to regulate large scale retrenchments. In large scale retrenchments, an employer is obliged to consult with the appropriate consulting parties and engage in a meaningful joint consensus seeking process aimed at reaching agreement on a number of issues including measures to avoid, minimise and mitigate the adverse effects of the anticipated retrenchments, selection criteria and severance pay. This process seeks to enhance the effectiveness of consultation in large scale retrenchments by avoiding unnecessary disputes. Where facilitation is selected in accordance with s189A of the LRA, it follows that facilitation must take place at an early stage to ensure effective and fair process.

The primary role of a facilitator is to manage the consultation process. The duty to consult rests primarily on the employer and not the facilitator. The facilitator has certain obligations which are contained in the Facilitation Regulations, (2002) (the Regulations) that have been issued by the Minister of Labour in terms of \$189A(6) of the LRA. This includes an obligation to hold at least four facilitation meetings, unless consensus is reached at an earlier point in the process.

In the case of Edcon v Steenkamp and Others (2015) 36 ILJ 1469 (LAC), the Labour Appeal Court held that one of the key innovations introduced by s189A of the LRA is that the consultation process can be conducted by an independent facilitator. Although this case went as far as the Constitutional Court this particular point was not challenged.

Section 189A(3) of the LRA provides that the CCMA must appoint a facilitator to assist the parties in two instances, firstly if the employer has requested facilitation in its s189(3) notice or, secondly if the consulting parties representing the majority of the employees who the employer contemplates dismissing have requested facilitation and notified the CCMA accordingly within fifteen (15) days of the issuing the s189(3) notice.

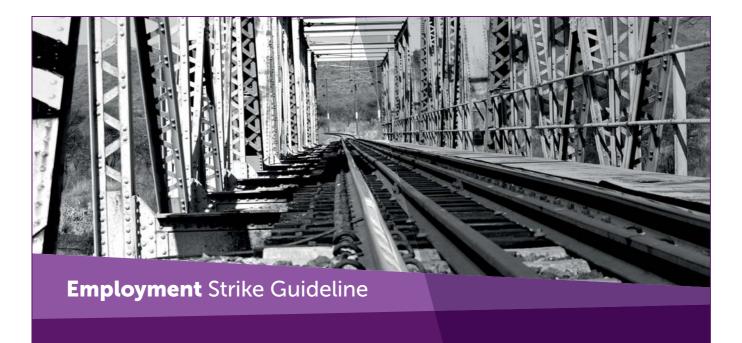
Section 189A(4) of the LRA allows the parties to agree to appoint an independent facilitator. In such cases, the facilitation should be conducted in terms of the Regulations.

The Edcon case recognised that the parties are not obliged to submit to facilitation and may opt not to do so. Facilitation will only be obligatory if the employer or the other consulting parties have requested it, or if there is an agreement to appoint a facilitator in terms of s189A(4) of the LRA.

The appointment of an independent facilitator has advantages, namely the parties can agree to the identity of the facilitator, who is a specialist in this field and would be best suited in the prevailing circumstances. The time frame for the consultation process can be expedited and becomes more flexible as there is no unnecessary delays or restrictions due the strain placed on the resources of the CCMA. It allows the parties to own the process and structure the timing of the facilitation meetings in order to achieve an expeditious and effective outcome.

Fiona Leppan and Nicholas Gangiah





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