

EMPLOYMENT

RESTRUCTURING AFTER A TRANSFER

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It is often unclear what the legal position is where an employer, who has entered into a transfer of business in accordance with s197 of the Labour Relations Act, No 66 of 1995 (LRA) and has complied with all its obligations in terms of the transfer, subsequently wishes to embark on a restructuring of the business to respond to the legitimate operational needs of the business.

The employer is often faced with the challenge of implementing changes to the business to ensure its viability while also balancing the interests of employees. The tension between the interests of the employer and employee have often left employers litigating against unfair dismissal claims. It therefore becomes important to explore what the legal position is, as applied by our courts and formulate some mechanism for dealing with these occurrences in the future.

The LRA, in terms of s187(1)(g), renders the dismissal of an employee for any reason associated with a transfer of a business in terms of s197 of the LRA, automatically unfair. The aim of this provision, as explained by the Labour Appeal Court in the case of *SAMWU and others v Rand Airport Management Company (Pty) Ltd and others*, [2005] 3 BLLR 241 (LAC) (SAMWU) is to make it clear that an employer has no right to dismiss an employee because of a transfer contemplated in s197 or 197A of the LRA, or for any reason related to the transfer. Having said this, our law does not prohibit an employer from embarking on a restructuring of its business immediately subsequent to a transfer, where there exists a *bona fide* operational need to do so.

The tension between ss187(1)(g) and 197 of the LRA becomes apparent. There is often a fine line between what constitutes a dismissal for operational requirements pursuant to a s197 transfer of a business, and a dismissal for reasons relating to the transfer. Once again, we look to our courts to design a mechanism for clearing these opacities.

The case of *SA Chemical Workers Union and others v Afrox Limited (Afrox)* (1999) 20 ILJ 1718 (LAC) has been instrumental in drawing the line in the sand between

when a dismissal is a lawful response to an employer's operational requirements and when a dismissal is automatically unfair. This case established a two stage enquiry to assist in ascertaining the true reason for the dismissal of the employees. If the reason for the dismissal relates to the employees' participation in a protected strike, the dismissal is held to be automatically unfair. However, if the employer can show that the dismissal, is related to the *bona fide* operational requirements of the business, such dismissal may not be unlawful.

We apply the test used in *Afrox* to establish the lawfulness of an employer dismissing employees pursuant to a s197 transfer, where an employer contends that such dismissal is for operational reasons.

The first step is in terms of *Afrox* is to determine the reason for the dismissal. If the reason for the dismissal of employees is in any way related to the transfer, such dismissal, as stated in s187(1)(g) of the LRA, will be automatically unfair. This first step is an objective, factual enquiry where the employer's motive, amongst other things, will be part of the number of factors that will be considered in determining the true reason for the dismissal.

Put differently, factual causation requires one to establish whether the dismissal would have occurred if there was no s197 transfer. If the answer is yes then the dismissal is not automatically unfair. If the answer is no, the dismissal is not immediately rendered automatically unfair. The courts will have to establish the next issue, this being the second step in the *Afrox* test. The second step of the *Afrox* test is one of the legal causation. Legal causation requires one to determine whether such transfer, was the main or dominant or most likely cause of the dismissal.



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In the event that the tests of factual and legal causation show that the most probable cause for the dismissal was, in any way related to the transfer, then the dismissal would be automatically unfair.

The Labour Court has held that it would be absurd to suggest that every dismissal that would not have occurred but for a transfer must inevitably be construed as automatically unfair.

Emanating from the above, the principle remains that if a dismissal is causally linked, both legally and factually to a s197 transfer, such dismissal shall be deemed to be automatically unfair. Notwithstanding this, nothing prevents an employer from responding to its legitimate operational needs pursuant to a transfer.

Katlego Letlonkane

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