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EMPLOYMENT ALERT

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RETRENCHMENT: IS LIFO THE ONLY WAY TO GO?

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CDH
CLIFFE DEKKER HOFMEYR

IMPORTANT GUIDANCE FROM THE CONSTITUTIONAL COURT ON VALIDITY AND FAIRNESS IN LARGE-SCALE RETRENCHMENTS

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The state of the South African economy has contributed to an increase in retrenchments. There have been a number of important judgments over the last few months relating to retrenchments of which employers should be aware.

One of these is the decision of the Constitutional Court handed down on 22 January 2016 in the case of *Steenkamp and Others v Edcon Ltd* (2016) [ZACC1]. The case deals with a so-called large scale retrenchment. A large-scale retrenchment is regulated in terms of s189A of the Labour Relations Act, No 66 of 1995 (LRA). Section 189A prescribes a minimum consultation period must elapse before notice of termination of employment may be given. If a CCMA facilitator is appointed to assist the parties in the consultation process, the minimum period is 60 days from the date on which the employer issued the employees with notice of possible retrenchment. If a facilitator is not appointed, the duration of the minimum consultation period is somewhat uncertain. The LRA requires that in such an event either party must refer a dispute to the CCMA for conciliation during the consultation process. The crucial legal issue that was addressed in the *Edcon* case is the impact if neither the employer nor the trade union refers a dispute to the CCMA and the employer issues the employees with notice of termination of employment prematurely ie before the expiration of the minimum consultation period.

In the *Edcon* case, the trade union challenged the dismissals as being invalid, as a result of being in breach of the provisions of s189A of the LRA. The employer argued that the dismissals were not invalid, but may have been unfair.

In the majority judgment the Constitutional Court found that the failure to comply with s189A(8) may impact on the procedural fairness of the dismissals, but not their validity.

The distinction between validity and fairness is important, particularly given the consequences. If a dismissal is found to be invalid, the employees may be reinstated with back-pay. If a dismissal is found to be unfair and the unfairness is limited to procedural unfairness, the employees are not entitled to reinstatement, but only compensation.

In the majority judgment the Constitutional Court found that the failure to comply with s189A(8) may impact on the procedural fairness of the dismissals, but not their validity. The court highlighted that the LRA does not provide for invalid dismissals and that the employees should have sought relief in terms of the LRA and not the common law. The relief they could have sought included embarking on strike action, referring a dispute to the Labour Court seeking, for example, an order compelling the employer to comply with a fair procedure, interdicting the employer from dismissing employees prior to complying with a fair procedure, or directing the employer to reinstate employees until it has complied with a fair procedure.

This case gives critical guidance to employers when embarking on a large-scale retrenchment, in particular some of the steps which an employer must adhere to in order to ensure that the retrenchment is procedurally fair.

Gillian Lumb and Zola Mcaciso

RETRENCHMENT: IS LIFO THE ONLY WAY TO GO?

The principle reason for the retrenchments was that Kenco's major sub-contract with Bateman, an industrial engineering firm contracted to the Foskor mine in Phalaborwa, came to an end on 31 March 2011.

Can an employer use selection criteria other than last in first out (LIFO) during the retrenchment process? This was the question the Labour Court recently answered in *NUMSA obo Members v Kenco Engineering CC* (Case No. JS947/11).

Kenco, an engineering firm, retrenched the individual applicants on 29 May 2011. The individual applicants alleged that their retrenchment was substantively unfair and that they were retrenched because of their union membership. The principle reason for the retrenchments was that Kenco's major sub-contract with Bateman, an industrial engineering firm contracted to the Foskor mine in Phalaborwa, came to an end on 31 March 2011. In selecting which employees to retrench, Kenco adopted selection criteria in line with the requirements needed to perform the manufacturing and installation work secured from Gauge, a firm of design engineers, without which Kenco could not have survived. These criteria were based on skills, work performance, attendance records and safety records as Gauge required a skilled workforce consisting of teams where a team member was seldom absent. Had Kenco not used these criteria, Gauge would probably have employed another company to perform the work. In the process of selection, employees were evaluated with reference to the abovementioned criteria.

Mr van Pittius, a business consultant to Kenco at the time of the retrenchment, assisted in advising on the staff capabilities required for the work with Gauge. He indicated that skills were given a weighting of 40% because of the risks of employing unskilled workers and that the evaluation of individuals selected for retrenchment was done by three persons who knew the individuals. If they arrived at a scoring which differed by more than 20%, they would be re-evaluated by the team with a view of reaching an agreement.

The court found that there was a general need to retrench, that there were no viable alternatives to retrenchment and that failing to apply LIFO did not render the chosen criteria unfair.

The court found that there was a general need to retrench, that there were no viable alternatives to retrenchment and that failing to apply LIFO did not render the chosen criteria unfair. However, it held that Kenco led no evidence to show that the applicants had been evaluated and were found wanting in terms of the chosen criteria. No one who conducted the evaluation process led evidence to show that the applicants had been evaluated and that their scores were lower than employees who were retained. Had someone verified Van Pittius' evidence, in particular how the applicants scored compared to other employees that the applicants believed were more suitable for retrenchment, it could have been said that the criteria had been fairly and objectively applied. In light of the above, the court held that the retrenchment was substantively unfair and awarded each individual applicant eight months' remuneration.

This judgment demonstrates that although an employer can use alternative selection criteria to LIFO, in selecting employees for retrenchment an employer must ensure that such criteria is fairly and objectively applied. The employer must be able to prove this fact to avoid the risk of damages or possible reinstatement, as failure to do so affects the substantive fairness of the dismissal.

Mohsina Chenia and Louis Botha

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