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# EMPLOYMENT ALERT

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### When are the winds of change justified? Determining dismissals where employees refuse an employer's proposal

With the recent amendments to the Labour Relations Act, No. 66 of 1995 (LRA) there has been much anticipation as to how the application of the newly amended sections would ultimately be interpreted and implemented by the courts.

## When are the winds of change justified? Determining dismissals where employees refuse an employer's proposal

In the case of *National Union of Metalworkers of South Africa (NUMSA) obo members and Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd) (2019) (Aveng)* the courts were tasked with determining the application of the amended provision of s187(1)(c) of the LRA, setting precedential headway on whether an organisational restructure, culminating in amendments to terms and conditions of employment, will always be automatically unfair if dismissals ultimately ensue.

With the recent amendments to the Labour Relations Act, No. 66 of 1995 (LRA) there has been much anticipation as to how the application of the newly amended sections would ultimately be interpreted and implemented by the courts. In the case of *National Union of Metalworkers of South Africa (NUMSA) obo members and Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd) (2019) (Aveng)* the courts were tasked with determining the application of the amended provision of s187(1)(c) of the LRA, setting precedential headway on whether an organisational restructure, culminating in amendments to terms and conditions of employment, will always be automatically unfair if dismissals ultimately ensue.

In the above case, the Labour Appeal Court (LAC) was required to determine the fairness of the dismissal of employees who had been dismissed by Aveng pursuant to a retrenchment process. The retrenchments came about as a last resort during an organisational restructure which was necessitated by the need for cost saving exercises in order to remain profitable and viable.

The dispute was referred by NUMSA on the basis that the dismissals of their members were automatically unfair, as the dismissals were as a result of the employees' refusal to accept the employer's demand/proposal in respect of a change to their conditions of employment. Aveng, for operational reasons, was forced to, *inter alia*, redesign job descriptions which were aimed at

achieving necessary cost savings. Aveng however maintained, and it was ultimately found as such, that the dismissals were not automatically unfair as envisaged in s187(1)(c), but rather that of genuine operational requirements which were found to be justifiable in the circumstances.

The court came to this decision by considering the approach in *Fry's Metals (Pty) Ltd v NUMSA & others (Fry's Metals)* by both the LAC and the Supreme Court of Appeal (SCA), where similarly the court was faced with a dispute where employees argued that their dismissals had been automatically unfair as they had refused to work a new shift system.

In the Aveng case, considered in the context of the amended s187(1)(c), the court asked if the reason for dismissal was as a result of "a refusal by employees to accept a demand". Due to Aveng having only dismissed employees after consultations regarding reasonable alternatives for the retrenchments, and where the regrading of the positions had been rejected, the court held that this did not invoke the provisions of s187(1)(c) and that the dismissal was therefore considered not to be automatically unfair. This question was distinguishable to that asked in *Fry's Metals* as same was phrased in accordance with the wording of the LRA prior to the amendments which read that a dismissal will be automatically unfair if the reason for dismissal was "to compel the employee to accept a demand".

## When are the winds of change justified? Determining dismissals where employees refuse an employer's proposal...*continued*

Considering this, the LAC held that the dominant or proximate cause for the dismissals was Aveng's operational requirements, which had underpinned the entire process, and which had informed all of the consultations regarding the changes to terms and conditions of employment.

The Appeal court in *Aveng* in considering the matter further, implemented a two-stage enquiry to determine whether or not the dismissals were automatically unfair. The first determination that the court sought to make was that of factual causation. The first question to be asked is whether the dismissal would have occurred but for the refusal of the demand. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no, as it was in this case, one would need to move onto the second leg of the enquiry; that of legal causation.

In determining legal causation, the court held that even where there is evidence suggesting a credible possibility that dismissal occurred because the employees refused to accept a demand, the employer

can still show that the dismissal was for a different, more dominant and proximate reason that is fair.

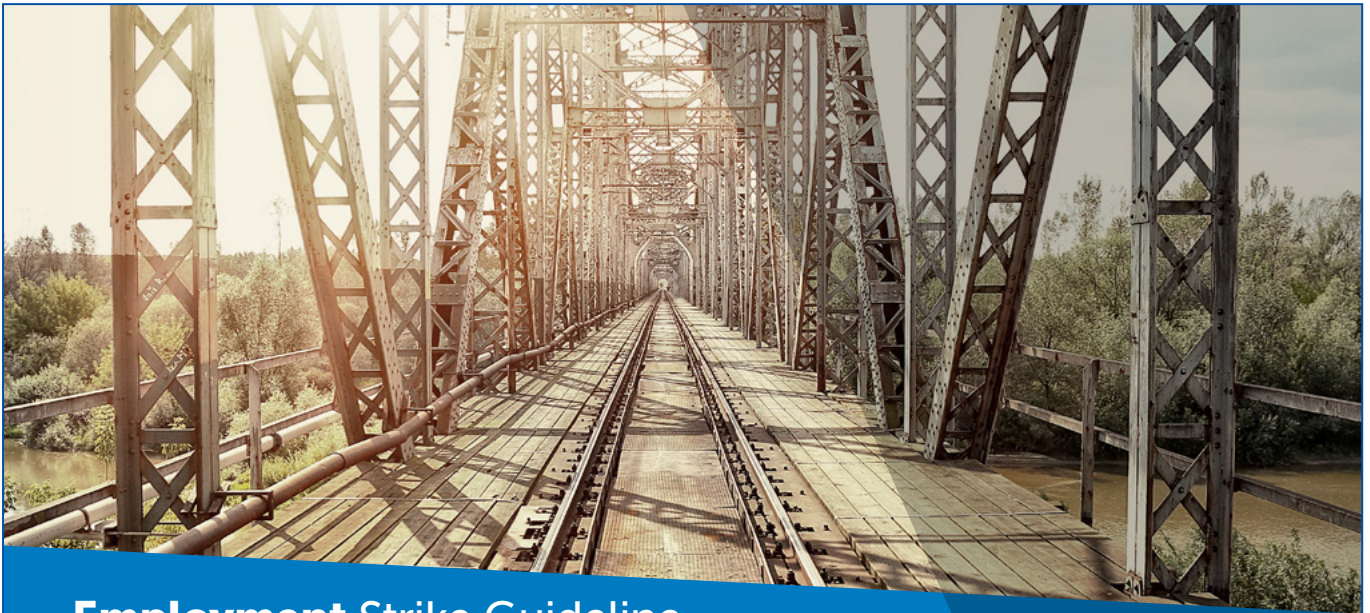
Considering this, the LAC held that the dominant or proximate cause for the dismissals was Aveng's operational requirements, which had underpinned the entire process, and which had informed all of the consultations regarding the changes to terms and conditions of employment.

The employees' dismissals consequently fell within a zone of permissible dismissals for operational requirements and did not fall foul of s187(1)(c) of the LRA.

Accordingly, while employees cannot be dismissed for refusing to accept a demand, they can be dismissed if the reason for the refusal results in a more dominant or proximate operational necessity.

*Mohsina Chenia, Nicholas Preston and Jessica Osmond*

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