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RETRENCHMENT GUIDELINE

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SUMMARY OF THE LARGE-SCALE RETRENCHMENT PROCESS

60 Days

Notice in terms of s189(3)

First facilitation meeting

Second facilitation meeting

Third facilitation meeting

Fourth facilitation meeting

Notice of termination meeting

Union/employees may give notice of strike or refer dispute to Labour Court

NOTE: The consultation period must continue for a minimum of 60 days.

RETRENCHMENT FAQS

What is a s189(3) notice and when must it be issued?

The s189(3) notice is a written notice issued by the employer that discloses all relevant information and invites the employee representatives and/or employees to consult with the employer. The s189(3) notice is an invitation to meaningfully engage on various issues pertaining to contemplated retrenchments. The s189(3) notice is to be distinguished from a termination notice and the contents of the s189(3) notice should not render retrenchments a foregone conclusion, undermining the consultation process.

The notice must be issued as soon as a retrenchment is contemplated.

Consultation

What are the categories of people with whom an employer must consult when contemplating dismissal on the basis of operational requirements?

In terms of s189(1) of the Labour Relations Act, No. 66 of 1995 (LRA), an employer must consult with:

1. Any person an employer is obliged to consult with in terms of a collective agreement
2. If there is no collective agreement, a workplace forum (if in existence) and any registered trade union whose members are likely to be affected by the proposed dismissals
3. If there is no workplace forum, any registered trade union whose members are likely to be affected by the proposed dismissals
4. If there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose

Must an employer consult with minority trade unions in circumstances where it has concluded a collective agreement concerning who it will consult with in the retrenchment process?

No. In the recent case of *AMCU and others v Royal Bafokeng Platinum Ltd and others* (CCT 181/18 dated 23 January 2020), the employer concluded a collective agreement pertaining to who it would consult with in respect of retrenchments. The agreement was extended to minority unions in terms of s23(1)(d) of the LRA. The Constitutional Court was called upon to determine the constitutional validity of s189(1) in light of the fact that it permitted the exclusion of minority unions from the consultation process when read together with s23(1)(d) of the LRA.

While the Constitutional Court was divided, the majority upheld the validity of s189(1) of the LRA and confirmed that the right to fair labour practices did not include the right to be individually consulted. The court upheld the principle of majoritarianism and found that the LRA provided individual employees with mechanisms by which to challenge the substantive fairness of their dismissals, in line with international standards. The court recognised the right to be consulted during the retrenchment process, but not a right to be individually consulted.

In *Ketse v Telkom SA SOC Limited* (P400/14) [2014] ZALCPE 38 (5 December 2014) the Labour Court held that where an employer nonetheless elects to consult with a non-unionised individual, notwithstanding the presence of a collective agreement which specifies the trade unions to be consulted in the event of a retrenchment, in such circumstances then, despite having no legal obligation to do so in terms of s189(1), the employer would be obliged to see its decision through by holding proper consultation with that employee.

Does an employer have to consult with individual employees if it has consulted with the employee representatives?

No. The duty of an employer to consult with individual employees has been removed in circumstances where consultation has taken place with the employees' representatives (*Baloyi v M & P Manufacturing* [2001] 4 BLLR 389 (LAC)). Employers will consult directly with individual employees where the body representing them no longer exists and the consultation process is incomplete.

NOTE: Failure to consult will render a retrenchment procedurally unfair (Aunde SA (Pty) Ltd v National Union of Metalworkers SA [2011] 32 ILJ 2617 (LAC)).

What if one party frustrates the consultation process?

Consultation is a joint consensus seeking exercise and mutual cooperation is required from both parties. In *Association of Mineworkers and Construction Union and Others v Tanker Services* (JS148/16) [2018] ZALCJHB 226, the court held that where the union fails to engage in the consultation process it cannot later claim that the process was inadequate. Similarly, in *Tirisano Transport and Services Workers Union and Others v Putco (Pty) Ltd* (J1879/18) [2018] ZALCJHB 207, the court dismissed the union's application in which it sought reinstatement of the retrenched employees and extension of the consultation process, where the union frustrated the consultation process.

LARGE SCALE RETRENCHMENTS

When does s189A of the LRA apply to a retrenchment process?

Section 189A(1) applies to employers that employ 50 or more employees and intend to retrench the following number of employees:

- 10 employees, if the employer employs up to 200 employees
- 20 employees, if the employer employs more than 200, but not more than 300, employees
- 30 employees, if the employer employs more than 300, but not more than 400, employees
- 40 employees, if the employer employs more than 400, but not more than 500, employees
- 50 employees, if the employer employs more than 500 employees
- if the number of employees that the employee intends to retrench, together with the employees that have been retrenched in the 12 months prior to issuing the s189(3) notice, is equal to or greater than the relevant number specified above

What is the main purpose of s189A?

- To facilitate and protect job security
- To effectively resolve disputes in large scale retrenchments and to provide speedy remedies, especially where procedural defects occur in the retrenchment process
- To promote meaningful engagement between employers and employees' representatives and/or employees in large scale retrenchments on issues pertaining to the retrenchment process, including the manner in which retrenchments may be avoided or minimised

FACILITATION VERSUS NON-FACILITATION

How can the intervention of a facilitator be secured in large scale retrenchments (S18A)?

There are three ways in which the intervention of a facilitator may be secured:

- the employer may request the appointment of a facilitator by the Commission for Conciliation, Mediation and Arbitration (CCMA) in its notice in terms of s189A(3)(a) of the LRA
- within 15 days of receiving the s189(3) notice, consulting parties representing the majority of the employees whom the employer contemplates dismissing, may request the appointment of a facilitator and notify the CCMA within 15 days of the issuing of the s189(3) notice
- the parties may agree to appoint a facilitator

NOTE: If the 60-day period lapses prior to the conclusion of the consultation process, the employer may not give notice of termination until the consultation process has been exhausted.

What is the primary purpose of appointing a facilitator?

- The role is not to actually consult with the employees, but to facilitate consultations between the parties. The duty to consult rests primarily with the parties
- The facilitator has certain specified obligations contained in the Facilitation Regulations that have been issued by the Minister of Employment and Labour. This includes an obligation to hold at least four facilitation meetings
- The facilitator has a minimum of 60 days, from the date that the s189(3) notice is issued, to invite employees to consult so as to promote consensus between them

Can parties agree to appoint an independent facilitator?

Yes, they may do so in terms of s189A(4) of the LRA that states that an agreement can be concluded to appoint a facilitator in circumstances not contemplated in S189A(3). This means that a facilitator may be appointed in any retrenchment process and that the facilitator need not be appointed by the CCMA. The facilitation process may be conducted privately by someone other than a CCMA appointed facilitator. This has been confirmed by the Labour Court. There are advantages to appointing an independent facilitator, for example, the consultation process can be expedited as there are no delays relating to availability of CCMA resources.

The appointment of an independent facilitator is becoming increasingly common due to the current economic conditions and the CCMA being inundated with requests for facilitation.

When can an employer give notice of termination in terms of s189A?

In terms of s189A(7)(a) of the LRA, an employer can only give a notice of termination once the 60-day period for consultation has lapsed and provided that the consultation process has been exhausted. What is the process in terms of S189A if no facilitator has been appointed?

- The parties must consult for a minimum period of 60 days before any notice of termination can be issued
- Prior to issuing any notice of termination, the parties must refer the dispute to the CCMA for conciliation. This can only be done after a period of 30 days from the date of issuing the s189(3) notice

How can employees challenge the fairness of a retrenchment process in terms of s 189A?

- Employees can challenge the procedural fairness of the large scale retrenchment process by way of an urgent application to the Labour Court in terms of s189A(13)
- Employees can challenge the substantive fairness of the termination of their employment by referring a dispute to the Labour Court or by engaging in industrial action

When must an application in terms of section 189A(13) be issued?

An application in terms of section 189A (13) may be filed at any time between the notice inviting employees to consult on contemplated retrenchments and the expiry of 30 days after notice of termination of employment, or the date of dismissal when no notice is given, whichever applies.

Where prior to dismissals, the CCMA facilitated the retrenchment consultations, must the subsequent unfair dismissal dispute also be referred to the CCMA or bargaining council before the labour court can determine the dispute?

Yes. Facilitation and consultation are two different processes. Despite the CCMA facilitating the retrenchment consultations, an unfair dismissal dispute must still be referred to CCMA or bargaining council before the Labour Court will determine the unfair dismissal dispute.

When does the 60-day consultation period commence?

The 60-day period in any large-scale retrenchment commences once a notice in terms of s189(3) has been issued.

What happens if the notice of termination is issued prior to the 60-day consultation period?

- The Constitutional Court in *Steenkamp and Others v Edcon Ltd* [2016] [ZACC1] held that the failure to comply with s189A(8) may impact on the procedural fairness of the dismissals, but not their validity. The court stressed 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 had complied with a fair procedure
- an employer may only issue a notice of termination once the periods referred to in s64(1)(a) of the LRA have expired. In other words, an employer cannot issue notices of termination until a further period of 30 days from the date on which the dispute is referred to the CCMA or the date on which the dispute is conciliated, whichever occurs first, has lapsed
- The issuing of a notice of termination before this time, does not render the dismissal invalid

What does an employer do where they cannot comply with the 60-day consultation period because it cannot afford to pay salaries for the duration of the consultation period?

An employer may enter into voluntary separation packages with employees, In *National Union of Metalworkers of South Africa obo Members and Another v South African Airways* (SOC) Limited (In Business Rescue) and Others (J424/20) [2020] ZALCJHB 94 (8 May 2020), the court held that a termination of the contract of employment by mutual agreement does not constitute a dismissal.

Alternatively, an employer may apply to be placed under voluntary business rescue.

COVID-19 AND RETRENCHMENTS

Is there a different retrenchment process during the lockdown or National Disaster?

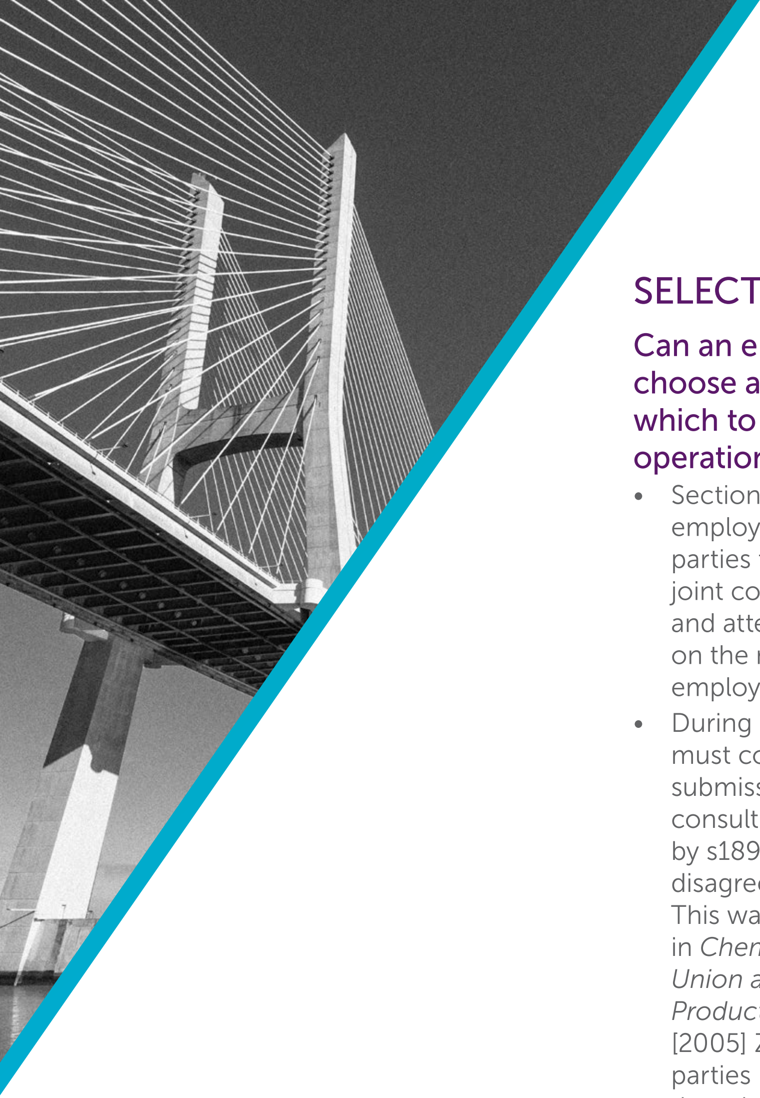
No. The procedure in section 189 or 189A still applies. Employers must still meaningfully consult with the affected employees or the union if any.

Is it a fair reason to retrench employees after the lockdown because the employer realised that it can do better business by employing technology?

Yes, provided the employer can show it is so and follows a fair procedure.

Where an employer suffers irreparable financial distress as a result of the partial or complete closure of their business operations as a result of COVID-19 and would therefore have to embark on retrenchments, may an employer rely on supervening impossibility of performance to automatically terminate contracts of employments with employees?

Contracts of employment will only terminate by operation of law owing to supervening impossibility where the impossibility is absolute. The lockdown has not created an absolute impossibility but rather a temporary impossibility of performance as restrictions are temporary and based on the prevailing circumstances. Employers would therefore be required to follow the procedure set out in section 189 of the LRA in order to retrench employees.



SELECTION CRITERIA

Can an employer unilaterally choose a selection criterion on which to base a dismissal for operational requirements?

- Section 189(2) requires an employer and the other consulting parties to engage in a meaningful, joint consensus-seeking process and attempt to reach consensus on the method for selecting the employees to be dismissed
- During consultation, the employer must consider and respond to the submissions made by the other consulting parties and, as required by s189(3), must state reasons if it disagrees with the representations. This was confirmed by the court in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd* (JA31/2002) [2005] ZALAC 14. If the consulting parties made written submissions, then the employer must respond in writing
- The essence of sections s189(2) and s189(6) is that an employer cannot decide on the criteria to use, without consulting the other consulting parties
- To the extent that the consultation on selection criteria does not result in consensus, it is then open to the employer to unilaterally decide on selection criteria to be used, provided that the employer will then have to show that the criteria was fair and objective

What selection criteria are regarded legally acceptable?

- Section 189(7) recognises two types of selection criteria that the employer may use to select the employees to dismiss:
  - one that has been agreed to by the consulting parties
  - one that is fair and objective if no selection criterion has been agreed upon
- The court in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*, held that what s189(7) means is that where the consulting parties have agreed upon selection criteria, the employer is obliged to use such criteria. Where there are no agreed selection criteria, the employer is obliged to use only fair and objective criteria
- In National Union of *Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd* (JS529/14) [2016] ZALCJHB 344 (30 March 2016), the court held: *"For an employer not to implement criteria agreed with the majority of representatives in a consultation process would in all probability be unfair; it would be equally unfair to apply a disparate range of selection criteria depending on a particular consulting party's preferences or demands"*
- Section 187(7) is consistent with the view that parties are not obliged to agree on the selection criterion, and in the absence thereof the employer has an obligation to show that the selection criteria adopted were fair and objective

Is the non-placement of employees a valid selection criterion?

The Labour Appeal Court in *Telkom SA SOC Limited v Staden and Others* [2020] JOL 49323 (LAC) confirmed that the non-placement of an employee pursuant to a placement process is a valid selection criteria for retrenchment, provided the placement process itself is fair and objective.

Which selection criteria to utilise?

- The LRA only facilitates the consultation process and does not prescribe the selection criteria to be used, instead leaving it to the parties to agree on the selection criteria
- The generally accepted selection criterion according the CCMA Code of Good Practice on Operational Requirements includes "*last in first out*" (LIFO), the length of service, skills and qualifications
- LIFO is the criterion associated with the least risk as long as it is fairly applied. However, where LIFO is inappropriate, as is often the case with senior level employees, employers may also use skills retention in the alternative
- In *NUM and Others v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC) and *Singh and Others v Mondi Paper* [2000] 4 BLLR 446 (LC) it was accepted that performance could be used as a criterion for selection provided it was objectively applied
- The parties may agree on selection criteria in a collective agreement or during the consultation process. In the absence of such an agreement the employer must apply fair and objective criteria

What must an employer do to determine the selection criteria for retrenchment?

- To the extent that agreement on selection criteria proves elusive, the employer may have no option but to unilaterally impose selection criteria. However, this option exposes the employer to the risk of the criteria being disputed later
- The safest approach would be to negotiate the selection criteria with the relevant unions, and conclude a collective agreement recording the criteria. This will make it more difficult for the unions to raise a dispute later, because the selection criteria were mutually negotiated

Which is the best selection criterion?

- There is no one answer. The LIFO method (last in, first out) is widely recognised as being the most objective criterion to select the employees to be retrenched. It is all the more objective because it tends to retain the most experienced employees, which is a valid goal when considering operational requirements
- The FIFO (first in, first out) method is dangerous because it has the indirect effect of discriminating on the basis of age
- LIFO however may not be appropriate for senior level employees where an employer seeks to retain top achievers or a particular set of skills. An employer may therefore decide upon a combination of selection criteria on the basis of their operational needs, provided the selection criteria are applied fairly and independently

Can the employer use more than one selection criterion?

Yes. The employer may opt not to use LIFO, and instead decide on a number of other criteria (for example skills, performance, personal circumstances and family commitments). Again, the safer, more conservative approach would be to arrive at these criteria by agreement with the relevant union.

A combination approach was endorsed in the judgment of *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd* (JS529/14) [2016] ZALCJHB 344 (30 March 2016), where the court held that an employer may use more than one selection criterion including, conduct, experience, skills and adaptability.

Can the employer invite affected employees to re-apply for their jobs?

Yes. The employer must be careful to ensure that it follows an objective and fair process by placing the onus on the employees to re-apply for their own positions. The interview process must be treated with caution and the selection process must be fair and objective. Such a process is a measure to avoid retrenchments and not a selection process.

In *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC), the LAC confirmed that where employees apply for their jobs, or apply for a limited number of jobs which are available in the restructured organisation, it may result in unfairness, especially if the employer tries to take irrelevant factors into account in the selection and recruitment process, such as past disciplinary or performance issues, or applies a subjective assessment of the employee's suitability for the role. The court also held the process by which employees re-apply for jobs within a restructured organisation is not a means to select employees for retrenchment, but rather a mechanism by which to avoid retrenchments.

Can misconduct, poor work performance, affirmative action or pay inequality be used as a selection criterion?

The Labour Appeal Court in Food and Allied Workers Union on behalf of *Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River* [2012] 33 ILJ 1729 (LAC) found misconduct to be an acceptable selection method.

Dismissals for operational requirements are not fault-based. Since misconduct is fault-based, the employer must not conflate the issues, and must rather keep them separate. Even though prior misconduct is being considered as a factor, the employee is not being dismissed for misconduct, but rather for operational reasons, with their prior misconduct being the determining factor of whether they are dismissed.

Employers are not permitted to use a retrenchment procedure to eliminate pay inequality. Accordingly, pay inequality is not an objective selection criterion.

Furthermore, in terms of the judgment of *Robinson & Others v Price Waterhouse Coopers* [2006] 5 BLLR 504 (LC), the court confirmed that *"affirmative action is not, and never has been, a legitimate ground for retrenchments."*

In *Louw v South African Breweries (Pty) Ltd* (C285/14) [2016] ZALCJHB 156, the Labour Court held that where selection criteria based on factors such as performance are used, employees should be given an opportunity to make representations against the negative conclusion that may be drawn against them.

BUSINESS RESCUE AND RETRENCHMENTS

When is an employer, who has filed for business rescue, permitted to issue s189(3) notices?

In terms of the judgment of *National Union of Metalworkers of South Africa obo Members and Another v South African Airways* (SOC) Limited (In Business Rescue) and Others [2020] ZALCJHB 94 (8 May 2020), the court held that it was procedurally unfair for a business rescue practitioner to issue a notice in terms of s189(3) of the LRA prior to the finalisation of the business rescue plan. The court held that the need for retrenchments must necessarily be rooted in the business rescue plan. On appeal, this position was confirmed.

Accordingly, an employer who is entering business rescue proceedings may either issue a s189(3) notice prior to entering said proceedings, or after the finalisation of the business rescue plan of the business rescue practitioner where the employer is already in business rescue proceedings.

VOLUNTARY SEVERANCE PACKAGES

What is a voluntary severance package?

A voluntary severance package is a financial incentive that is offered to an employee in lieu of their resignation or retirement.

Are there different types of voluntary severance packages?

Where a voluntary severance results in termination of employment, minimum severance benefits imposed by law cannot be contracted out of. However, additional benefits (in consequence of the voluntary nature of the termination) may take a variety of forms, such as:

- a voluntary severance package
- a retirement package
- a redeployment package

Can an employer offer voluntary severance packages outside of the s189 process, thereby negating its obligation to consult?

Previously, the only time an employer could offer any of the above packages, outside of the s189 process, is when it could be shown that when such offer was made, the employer was not contemplating retrenchments.

However, in the judgment of *SACU and another v Telkom SA SOC Ltd and others* [2020] JOL 46876 (LC), the court held that s189(3) of the LRA did not prescribe a rigid sequence in terms of which consultations were meant to proceed and that there was nothing untoward about Telkom inviting employee representatives to consult on voluntary separation packages. As a result of this judgment, employers may initiate VSP's even before sending s189(3) notices.

In *National Union of Metalworkers of South Africa obo Members and Another v South African Airways (SOC) Limited* (In Business Rescue) and Others (J424/20) [2020] ZALCJHB 94, the court held that it was permissible for an employer to initiate voluntary severance packages even where an employer has been placed under business rescue and had a moratorium on retrenchments as acceptance of a package does not constitute a dismissal on Appeal, the LAC confirmed this position.

When would it be permissible for an employer to offer the above packages to employees, without following the S189 consultation process?

The only circumstances that would enable a departure from this process are:

- if the offering of such alternative packages would avoid the possibility of retrenchments altogether at a later stage
- if the employer did not contemplate that the refusal of the offer could precipitate retrenchments

VACANCY BUMPING

Does an employer have a duty to find alternative employment for its employees prior to retrenchment?

Yes. The employer is under an obligation to search for alternatives, but no absolute obligation rests on it to find (or create) alternatives.

What does this duty entail?

An employer must:

- identify alternative options to retrenchment
- apply objective selection criteria when deciding who to retrench
- consider "*bumping*" long-serving employees into positions where they are capable of rendering services
- consult on all these issues before dismissal with a view to reaching a consensus

Is an employer required to consider the alternatives to retrenchment?

Yes. Employers must consider alternatives to proposing dismissals for operational requirements. If they do not do so the dismissals will be found to be unfair. In the recent, Constitutional Court case of *SACCAWU and others v Woolworths (Pty) Ltd* [2018] ZA CC 44, the employer decided to convert full-time workers to flexi-time workers. It offered the full-time workers various incentives to get them to agree to the conversion. All but 92 full- time employees agreed. SACCAWU proposed that they convert to flexitime but retain their existing salary and benefits. It later proposed the employees would in addition take a 11% salary decrease. Despite this, the employer retrenched the employees. The court found that the employer had failed to properly explore the proposed alternatives such as natural attrition, wage freezes or ring fencing and as a result the dismissals were substantively unfair.

May an employer retrench an employee who refuses the alternatives proposed without severance pay?

Yes. In the recent Labour Appeal Court judgment of *Lemley v Commission for Conciliation, Mediation and Arbitration and Others* (2020) 41 ILJ 1339 (LAC), the Labour Appeal Court held that an unreasonable refusal of alternatives proposed may lead to retrenchment without severance pay. In the aforementioned case the employer initiated a section 189 process and presented to the employee offers of alternative employment, all of which were dismissed as not being viable due to the employee's age and family circumstances. The Labour Appeal Court held that section 41(4) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) that it is clear that an employee is not entitled to insist on severance pay where he/she unreasonably refuses to accept offers of alternative employment. The court held further that the employee failed to meaningfully engage with his employer and to provide reasons for not accepting the proposed alternatives and that his age and years of service did not alter the fact that his refusal was unreasonable.

Does an employee forfeit their right to severance pay where they fail to apply for positions in an employers revised structure?

There is no clear answer to the question and there is no law governing this situation a present. We however believe that the answer will depend largely on the facts and circumstances related to the specific affected employee. However, in terms of section 41(4) of the BCEA, one of the grounds on which an employee would forfeit their severance pay is where they unreasonably refuse alternative employment. The application of section 41(4) of the BCEA would in our view be dependent on, among other things, whether the employee had indeed applied for the positions in the revised structure.

Is an employee entitled to severance pay where they continue to work, uninterrupted, after reaching the retirement age?

In *Barrier v Paramount Advanced Technologies (Pty) Ltd* (JA35/2020 18/2/ 2021) (Barrier) the employee had been in the employ of the company since 1985. It was agreed that his employment would terminate upon him reaching the retirement age of 65. However, despite reaching retirement age, the employee continued to work until his retrenchment, approximately four years after reaching the retirement age. The Labour Appeal Court had to determine whether the employee's severance pay would include the period for which he worked after reaching the retirement age. In doing so, the court looked at sections 41(2) and 84(1)of the BCEA. The Labour Appeal Court found that the employee was in "*continuous*" service until he was retrenched in 2017, despite his contract of employment having strictly speaking terminated upon his retirement which made no difference to his routine and he was accordingly entitled to severance pay including for the period of work after retirement.

Is the initial severance pay paid to a retrenched employee, when he is rehired, taken into account when he/she is subsequently retrenched for the second time?

Yes. If an employee had been retrenched and paid a severance package and later rehired by the same employer, the initial payment of severance pay is taken into account when calculating severance pay due upon a second retrenchment, to avoid a duplication of payment.

Is an employee entitled to severance pay notwithstanding the employee having a provident or pension fund benefit being paid out to them at the time of retirement prior to their subsequent retrenchment?

Yes. In Barrier the Labour Appeal Court looked at section 84(2) the Labour Appeal Court also held that an employee should not be disentitled to the statutory severance pay because of a pension, or provident fund, pay out made to the employee in a previous period of employment, and to which the employee was entitled by law.'

What can happen if the employer does not "*bump*" existing employees into other positions as part of the retrenchment PROCESS?

The court may find that fair selection criteria were not applied and that the retrenchment process was procedurally unfair. (See, for example, *CWIU and Others v Latex Surgical Products (Pty) Ltd* [2006] 2 BLLR 142 (LAC) and Food and Allied Workers Union on behalf of *Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River* [2012] 33 ILJ 1729 (LAC)).

What are the basic principles with regard to bumping?

In *Porter Motor Group v Karachi* [2002] 23 ILJ 348 (LAC), the court set out the principles as follows:

- Bumping is based on the LIFO (last in first out) principle, which is a fair selection criterion to apply, as it rewards employees who have served the employer for a longer period of time
- Depending on the circumstances of a case, bumping can take the form of vertical displacement or horizontal displacement
- Vertical bumping means that the employee is transferred to a position with a less favourable status, conditions of service and pay
- Horizontal bumping means that the employee is transferred to a position of similar status, conditions of service and pay
- An employer should first attempt to bump employees horizontally before bumping them vertically
- Vertical bumping should only take place where there is no suitable candidate to bump horizontally (into another position)
- In the case of large-scale bumping, also called "*domino bumping*", which could cause vast dislocation, inconvenience and disruption, the consultation process must be fair towards employees while minimising the disruption to the employer
- A balance must be achieved between the competing interests of the employees and the employer

These principles were applied in *Oosthuizen v Telkom SA Ltd* [2007] 11 BLLR 1013 (LAC) and *Super Group Supply Chain Partners v Dlamini and Another* [2013] BLLR 255 (LAC) amendment to terms and conditions of employment.

Is an employer permitted to embark on a retrenchment process to persuade employees to accede to a demand in respect of a matter of mutual interest?

No. In terms of s187(1)(c) a dismissal is automatically unfair if the reason for the dismissal is a refusal by an employee to accept a demand pertaining to a matter of mutual interest between him and his employer. However, where there is a genuine operational requirement and employees refuse to accede to a demand which is an alternative to dismissals, an employer may embark on a retrenchment process as a result of the operational requirement to do so.

However, in terms of the judgment of *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* 2020 ZACC 23, the Constitutional Court unanimously confirmed that where an employer has dismissed employees as a result of their refusal to accept a proposed change to their terms and conditions of employment, as an alternative to retrenchment and as part of a business restructuring to meet its operational needs, then such a dismissal will be for a fair reason and not constitute a contravention of section 187 (1)(c) of the LRA where the proximate cause of the dismissal is the employers operational requirement.

SHORT TIME

What is short time?

Short time entails the reduction of the working hours of an employee, with a corresponding decrease in the employee's remuneration.

What relief is available to employees who are placed on short time?

In terms of section 1B of the Unemployment Insurance Act 61 of 2001, a contributor employed in any sector who loses his or her income due to reduced working time, despite still being employed, is entitled to benefits if the contributor's total income falls below the benefit level that the contributor would have received if he or she had become wholly unemployed, subject to that contributor having enough credits.

An employee may also lodge a TERS claim where there has been a loss of income related to COVID-19, provided TERS remains available.

Can an employer unilaterally implement a reduction in pay as a result of an employee being placed on short time?

No. The basic principle is that (unless a collective agreement provides otherwise) any amendment/change to terms and conditions of employment requires the consent of the employees.

How does an employer ensure that short time is applied fairly?

Reduced hours should be allowed for everyone, where possible, as opposed to only certain employees working reduced time and others not working. It must also be done in terms of objective criteria. If a whole business unit / level cannot be selected due to the work available and employees' skills are interchangeable then this can lead to a discrimination (unequal treatment) claim. These disputes may arise under the general prohibition of discrimination on arbitrary grounds in terms of the Employment Equity Act 55 of 1995. Ideally, reduced hours must be worked on a rotational schedule so employees all work and earn a salary – this also mitigates risk.

TEMPORARY LAY'OFFS

What is a temporary layoff?

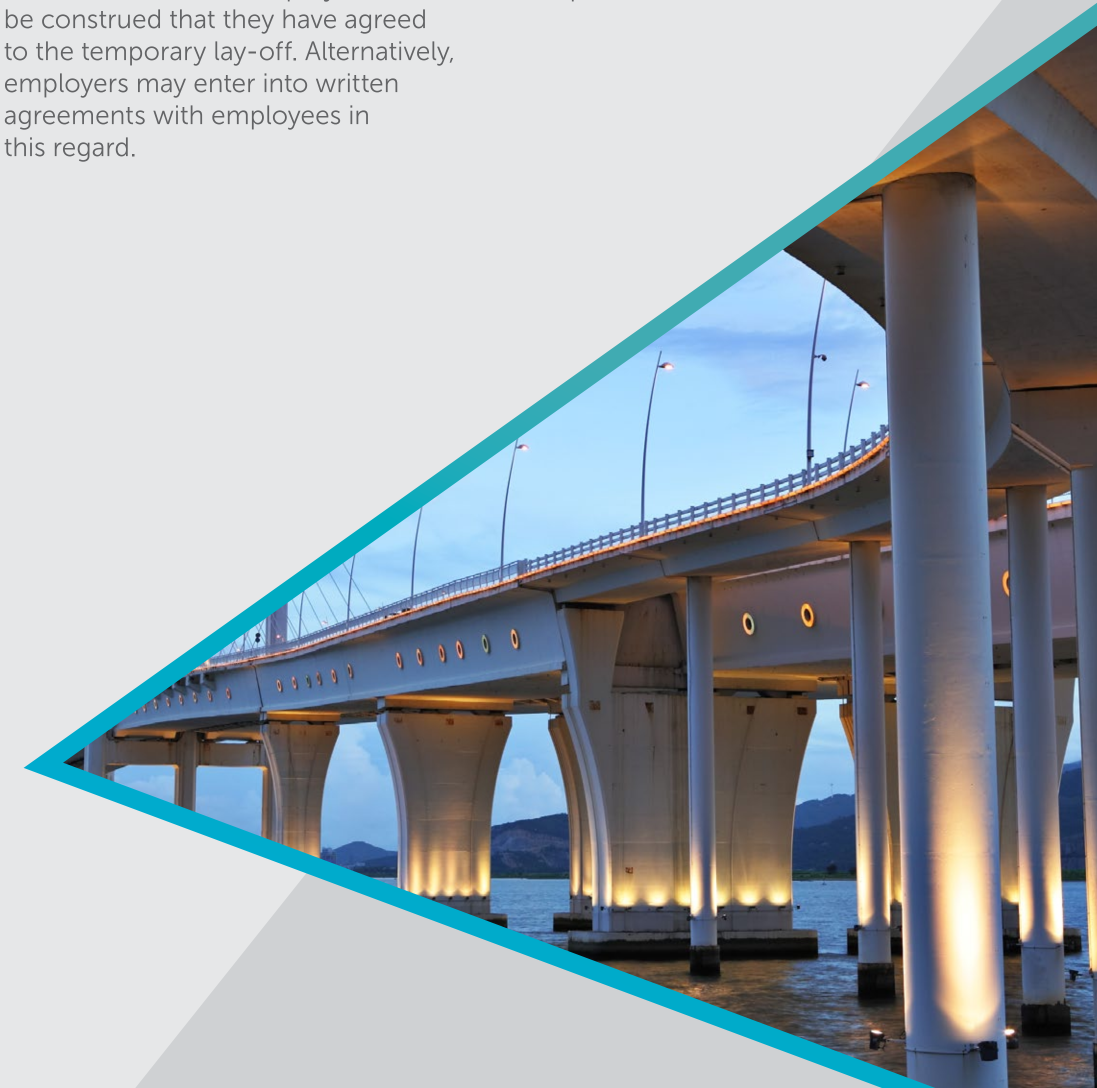
Temporary layoffs entail the temporary suspension of employees' employment where the employer is unable to afford its employees due to a lack of revenue coming into the business. In such an instance, an employee remains on the employer's payroll, however the employer does not pay the employee and the employee will render no services for a set period of time.

Is an employer entitled to unilaterally implement temporary lay off's?

No, temporary lay off's must be done by agreement with employees. This agreement can be done by way of a communication to employees giving the employees the option of a temporary lay-off and if no objection is received from the employees it shall be construed that they have agreed to the temporary lay-off. Alternatively, employers may enter into written agreements with employees in this regard.

What is the process to be followed in implementing temporary lay off's?

An employer must consider any agreements with trade unions and/or bargaining councils to determine any stipulated process for temporary layoffs. In the absence of such agreements, an employer must follow the provisions of BCEA and the LRA.



What relief is available to employees where they have been temporarily laid off?

Employees who have been temporarily laid off, not retrenched, as a result of a temporary closure or total closure of the company for 3 months or less as a result of COVID-19 are entitled to TERS for a period of 3 months.

Alternatively, ordinary UIF benefits remain applicable.

How does an employer, after the lockdown, obtain the agreement of employees for a temporary layoff or reduction in remuneration?

Through the protracted section 189 or 189A process. Employers are advised to take advice on the process before commencing any discussions.

The employer has implemented a temporary layoff during the lockdown, however now certain employees are required to be available for certain duties, what is the obligation of employees if initially placed on temporary layoff?

When the employer can provide work the employees are obliged to render the services for which they must be paid.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. ***The Legal 500 EMEA 2020–2024*** recommended the South African practice in Tier 1. ***The Legal 500 EMEA 2023–2024*** recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

The Legal 500 EMEA 2020–2023 recommended Jose Jorge for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

Hugo Pienaar is the Head of our Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2024* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2024* recommended him for employment.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

The Legal 500 EMEA 2023–2024 recommends Rizichi Kashero-Ondego for employment.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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