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Important tips when dealing with a retrenchment process



Almost every industry throughout the world is experiencing some form of adverse economic impact. This negative economic climate invariably results in a reduction in the number of employees of each affected company.

The speed with which an employer can reduce its workforce fairly through a retrenchment may potentially be the difference between staying in business or having to cease trading. In a previous blog we looked at [*How to overcome unforeseen delays during a retrenchment consultation*](#), in this blog we discuss the retrenchment process in more detail.

Can the retrenchment process be delayed by trade unions?

In the recent Labour Court (LC) case of ***The Association of Mineworkers and Construction Union & Others vs Tanker Services (Pty) Ltd, Case NO JS 148/16 (Unreported)***, the court had to deal with the issue of a trade union **unduly delaying** retrenchment consultations in order to prolong the process.

- “The LC in the ***Tanker Services*** case held that the relevant legal principles are well-established. In relation to substantive fairness, it is incumbent on the employer party to establish a **commercial rationale** for the retrenchment. Insofar as **procedure** is concerned, section 189 of Labour Relations Act (LRA) contemplates that the consultation process is one in which the parties **jointly seek** to avoid retrenchment and ameliorate its consequences. It is not a process in which the employer party simply announces the decisions that it intends to implement – the employer must **remain open to persuasion**.
- “Equally, union parties to the consultation are **obliged to co-operate** in achieving the objectives of the process. The process is not one of collective bargaining, and the power play that often characterizes collective bargaining engagements is not, generally speaking, appropriate. Of course, a union can and no doubt will bring whatever collective muscle it may have in order to influence the outcome of any consultation process, but the nature of the process is one in which **active co-operation rather than obstruction is required**. The courts have emphasized on many occasions that **adversarialism is inconsistent with joint consensus-seeking** and that mutual co-operation is necessarily required from both parties.”

The LC in the ***Tanker Services*** case relied on the case of ***Van Rooyen v Blue Financial Services (SA) (Pty) Ltd (2010) 31 ILJ 2735 (LC)*** and held as follows:

- “Fair procedure primarily requires that the parties engage in a meaningful joint consensus-seeking process. This obligation, which has its origins in ***Johnson & Johnson v Chemical Industrial Workers Union (1999) 20 ILJ 89 (LAC)***, requires at least that the parties **attempt to reach consensus** on the issues listed in section 189(2) and (3) of the LRA. More precisely, the employer must invite representations on these issues from the appropriate consulting party, and seriously consider and respond to any representations that are made. Both parties are required, in good faith, to seek consensus. This is not a mechanical process – meaningful joint decision-making requires that the parties seek an honest intention of exploring the prospects of an agreement. If no joint consensus-seeking process has occurred, the court is obliged to determine which party was responsible for the state of affairs. If it was the employer party, the dismissal was procedurally unfair.”

The LC in the **Tanker Services** case further relied on the case of **NUMSA v Kaefer Thermal Contracting Services (Pty) Ltd (2002) 6 BLLR 570 (LC)** wherein the court held as follows:

- o “Where the consultation process has been frustrated it is **not for the party who caused** the frustration to complain that there was non-compliance with the consultation process.” This is referred to as the ‘**correlative duty**’ on the other consulting party to cooperate in an attempt to reach consensus before the employer ultimately exercises its right to take the final decision. The Court ultimately held that the employer party had made genuine attempts to engage the union on the retrenchment process and could not allow the union to delay the process indefinitely in circumstances where the union had overplayed its hand by adopting a recalcitrant attitude.

In conclusion

The LC in the **Tanker Services** case ultimately was satisfied that the employer made genuine attempts to engage with the union on the retrenchment process. However, it could not allow the union to delay the process of restructuring indefinitely. The union had **overplayed its hand and must now accept the consequences** of its ill-advised decision to unnecessarily delay the consultation process.

At SERR Synergy we assist employers to prepare for a retrenchment consultation meeting(s) with a trade union. We also chair the consultation meetings wherein we guide employers as to their rights in terms of section 189 of the LRA. We assist employers to ensure that the consultation process is handled fairly and decisively without any undue delays or postponements. Should the matter proceed to the CCMA, we provide expert legal assistance to employers through our employer organisation.

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