

Dismissal based on an employer's operational requirements as per the Labour Relations Act



The current South African economic climate and the financial constraints as a result thereof may compel employers to consider dismissing employees based on operational requirements, resulting in retrenchments.

This article provides more clarity on the matter, with specific **focus on small- to medium-scale retrenchments** (*for employers with fewer than 50 employees).

What are 'operational requirements' as per the LRA?

Operational requirements are defined under the **Labour Relations Act** (LRA) as “requirements based on the economic, technological, structural or similar needs of an employer”. Realistic scenarios necessitating retrenchment would include, but are not limited to, issues relating to the financial well-being of the business (economic), new technology making an employee’s position obsolete/redundant (technological) or corporate restructuring post-merger (structural), or a combination of these requirements. Furthermore, it is not necessary for a business to be in financial difficulty before they are able to dismiss employees in terms of operational requirements. Operational requirement dismissal due to financial prudence is allowed provided there is a sound economic reason for the particular dismissal (productivity versus profit, for example). **Ultimately, retrenchments must be implemented in a fair manner and for relevant operational reasons.**

What procedure should be followed?

Dismissal based on the employer’s operational requirements must take place in accordance with the stringent provisions in the LRA.

- **Step one** – **As soon as the company starts considering retrenchments, the following information must be disclosed in writing to the relevant parties in the form of a contemplation letter / notice in terms of section 189(3) of the LRA, with the date on which the first consultation will take place.**

The notice/letter must contain the following information:

- *Reasons for the proposed dismissals.*
- *Alternatives the employer had considered before proposing the dismissals, and the reason for rejecting each of the alternatives.*
- *Number of employees likely to be affected and the job categories in which they are employed.*
- *Proposed method for selecting employees to be dismissed.*
- *Date on or the period during which the dismissals are likely to take effect.*
- *The **severance pay** proposed to those dismissed.*
- *Assistance the employer proposes to offer employees likely to be dismissed.*
- *Elaboration on the possibility or non-possibility of future re-employment of the employees who are dismissed.*
- *Number of persons employed by the employer.*
- *Number of employees that the employer has dismissed based on its operational requirements in the preceding 12 months.*

- **Step 2 – Transparency, bona fide consultations must be conducted with all possibly affected employees, union representatives, shop stewards, bargaining councils and workplace forums in order to reach consensus on the above-mentioned topics, with specific focus on the following:**

- Appropriate measures to–

- avoid the dismissals (adjusted working hours, elimination of temporary labour and overtime, early retirement and voluntary retrenchment); minimise the number of dismissals; change the timing of the dismissals; and mitigate the effect of the retrenchment

- Method of selecting the employees who will be dismissed.

- Severance pay that will be paid to the selected employees.

All parties must participate in the consultation process in an open manner as these consultations form the backbone of the retrenchment process.

Please take note that the LRA must not be seen or used as a mechanical checklist and that a meaningful, joint consensus-seeking process must still take place. Therefore, the employees affected cannot be determined unilaterally by the employer before the actual process starts or before consensus has been reached. A predetermined list of names cannot be generated prior to this process.

The parties must first reach consensus on the selection criteria that will be used across the board and where no consensus can be reached, the employer must apply criteria that are fair and objective. Only after the selection criteria have been determined, can they be applied to determine who will be dismissed.

What selection criteria can be used?

The court confirmed in **Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd** that **section 189(7)** means the employer is obliged to use the selection criteria on which the consulting parties had reached consensus. Where no agreement can be reached with regard to the selection criteria or where no consensus can be reached, the employer is obliged to use only fair and objective criteria.

The CCMA Code of Good Practice on Operational Requirements accepts the following selection criteria as fair and objective:

- LIFO – Last In, First Out (poses the least risk if fairly applied)
- Length of service or bumping (keeping positions that are core or fundamental to the operation of the business or bumping employees to other positions)
- Skills retention and experience or qualifications (must have proof of the employees' experience and qualifications).

Employers may ask the employees to re-apply for their positions, but the process of placing employees in the re-opened positions must be applied fairly and objectively, and reasons must be provided for the employer's decisions.

- In the case of **FAWU and others v Ruto mills (Pty) Ltd**, the court determined that performance can be used as a criterion for selection in certain circumstances. In this case, the employer could prove, amongst other things, that poor performance had resulted in a genuine and serious operational need to meet production targets. The criteria must be applied objectively by, for example, conducting performance evaluations over a few months, as held in **NUM and Others v Anglo American Research Laboratories (Pty) Ltd**. The employees must also be given an opportunity to make representations in the case made against them where productivity is used as a selection criterion, as confirmed in the case of **Louw v South African Breweries (Pty) Ltd**. The retrenchment must not be used as a disguise or procedure to solve underlying problems, as was held in **SA Mutual v IBSA & others**.
- In the case of **Food and Allied Workers Union obo Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River**, the court ruled that misconduct may be used as a selection criterion, bearing in mind that dismissal based on operational requirements is a no-fault termination, which means that the employee was not responsible for the termination. Since misconduct is the fault of the employee, the two should rather be kept separate to limit the employer's risks. (This selection criteria is not recommended.)

A combination of the above-mentioned selection criteria can also be used, such as LIFO, thus retaining core members of the company, skills and performance, personal circumstances, etc. as was done in the case of **National Union of Metalworkers of South Africa and others v Columbus Stainless (Pty) Ltd**.

Normally, LIFO will be used and when a deadlock has been reached, for example where two or more employees started on the same day and one of them must be selected, the employer can decide to look at one of the other selection criteria, such as productivity or importance of keeping core members, to make a decision.

Criteria that infringe upon the fundamental rights of an employee will be regarded as unfair (for example, selection on the basis of union membership or activity, race, pregnancy, religion, sex, etc.). Criteria must be examined carefully to ensure that when they are applied, it does not have a discriminatory effect on the employees. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

- **Step 3 - Apply the selection criteria and make payments to the selected employees.**

Dismissal-related severance payment

The selected employees will be entitled to severance pay of at least one week's remuneration for each completed year of continued service with the employer. During consultations, both parties will attempt to reach middle-ground consensus on a higher amount of severance pay. This severance is to be paid out to the selected employees. In the event of an impasse in severance negotiations, the “week severance pay per year worked” is the statutory minimum in terms **section 41** of the **Basic Conditions of Employment Act**.

If the selected employee unreasonably refuses to accept a reasonable offer of alternative employment, he or she will not be entitled to severance pay. Reasonableness of the offer, including the terms and conditions of employment, remuneration, status and job security and the employee's personal circumstances, will be taken into account when considering whether his/her refusal to accept the offer was reasonable.

The selected employees will further be entitled to their notice pay as per **section 37** of the **Basic Conditions of Employment Act**, as well as outstanding wages and accrued leave.

- **Step 4 - to terminate the employment and provide the employee with all the necessary documents.**

Termination

Once consensus has been reached on all of the relevant issues, the employees must be informed accordingly, and their contract of employment will then terminate after they have received the payments as discussed above. It must also be borne in mind that the employer may not terminate the employment of the selected employees if 30 days has not yet passed since issuing the contemplation letter in terms of **section 189(3)**.

The employer must also assist the employee with a Certificate of Service and Letter of Reference and to secure unemployment insurance benefits (**UI19**) upon his/her termination of employment.

In terms of the CCMA Code of Good Practice on Operational Requirements, retrenched employees must be given the opportunity to be rehired should a similar position open with the company in the future or if their position changes.

Conclusion

Our Labour Pro product and services focus on labour-related solutions and our Labour team has both the capability and proficiency to unpack and resolve any retrenchment-related scenarios, empowering the employer to avoid any legal pitfalls that may result due to unfair dismissal or failure to follow proper procedure.

Our Labour team specialises in navigating the various pitfalls and labour/union consultations that make retrenchment such a difficult undertaking. We assist all businesses and employers with the retrenchment process and necessary documentation, as well as providing specialist legal advice and personal assistance during consultations with the affected parties to reduce employer exploitation and to speed up negotiations. Furthermore, we alleviate the pressure put on the employer by providing professional guidance during operational dismissals to ensure full compliance with legislation and the United Employers Organisation can assist in all cases referred to the CCMA. We put our clients first and turn a difficult undertaking into a quick and easy solution.

About the Author: Angelique van der Sandt joined SERR Synergy in March 2016 and she is a Legal Advisor at our Cape Town Branch. She completed her BA LLB degree and Law School at the University of Pretoria. She is also an admitted attorney of the High Court and holds a post-graduate Certificate in Advanced Labour Law from the University of Pretoria.

Case Law References:

- Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd (JA31/2002) [2005] ZALAC 14; [2006] 2 BLLR 142 (LAC) (25 November 2005)
- FAWU and others v Ruto mills (Pty) Ltd (CLL Vol. 17 No. 6, January 2008)
- NUM and Others v Anglo American Research Laboratories (Pty) Ltd [2005] 2 BLLR 148 (LC)
- Louw v South African Breweries (Pty) Ltd (C285/14) [2016] ZALCJHB 156 (19 April 2016)
- SA Mutual v IBSA & others (2001, 9 BLLR 1045)
- Food and Allied Workers Union obo Kapesi and Others v Premier Foods t/a Blue Ribbon Salt River (C640/07) [2010] ZALC 61; (2010) 31 ILJ 1654 (LC); [2010] 9 BLLR 903 (LC) (4 May 2010)
- National Union of Metalworkers of South Africa and others v Columbus Stainless (Pty) Ltd (JS529/14) [2016] ZALCJHB 344 (30 March 2016).

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