

MAY AN EMPLOYER REQUIRE YOU TO RE-APPLY FOR YOUR JOB DURING A RETRENCHMENT PROCESS?



A fast-developing trend of late during retrenchment processes has been where employers resort to ensuring that an employee's position becomes redundant for economic or structural reasons.

Thereafter the remaining employees are required to re-apply and/or apply for the remaining positions as a result of the restructure. Section 189(7) of the Labour Relations Act (LRA) enjoins an employer to select employees to be dismissed according to a **selection criterion**. If no criteria had been agreed on, such criterion must be **fair and objective**.

The critical question now is whether requiring employees to apply for vacant positions constitutes a fair and objective selection criterion.

- The Court, in the matter of ***Mweli and Another v MTN Group Management Services (Pty) Ltd (Unreported Case No JS 610/16)***, provided definitive answers to this question on 22 May 2019.
- The court, in the ***MTN Group*** case, firstly relied on the case of ***SA Breweries (Pty) Ltd v Louw (2018) 39 ILJ 189 (LAC)***. An employer who seeks to avoid dismissal of a dislocated employee and who invites the dislocated employee **to compete for one or more of the new posts** therefore does not act unfairly nor contravenes sections 189(2)(b) or 189(7) of the LRA. Filling posts after a restructuring process in this manner cannot be faulted. Being required to compete for such a post **is not a method of selecting** for dismissal but rather a legitimate method of **avoiding the need to dismiss** a dislocated employee.
- The court, in the ***MTN Group*** case, held that employees are technically dismissed when their **positions are made redundant**. Requiring them to apply for positions serves to delay the eventual effect. Once a position of an employee is declared redundant and if he or she is not placed in another position shortly thereafter, such employee would eventually be dismissed. When that eventuality arises, it would have happened without a fair selection criterion being applied. Therefore, requiring an employee to apply for a position is **not a selection criterion**.
- The court, in the ***MTN Group*** case, further held that until dismissed, an applicant for his or her own job **retains job security** which calls for protection under the Constitution and the LRA. To then subject such an employee to a stressful process that threatens his or her job security **is imminently unfair**. This torturous process should not be embraced by this Court.

In conclusion

The court, in the **MTN Group** case, then concluded and held that requiring employees to apply for positions was part of an obligation to avoid a dismissal as opposed to a method of selecting employees for dismissal. Therefore, an employer who failed to place a number of employees is **still required to choose a method** to select those employees for dismissal. The chosen method must either be agreed upon or be one that is fair and objective. In such a situation, an employer may still choose an exceptional method to select for experience, skills and qualifications. However, the process of attempting to avoid dismissal cannot be equated to the selection method. The employees in this case were dislocated and not selected for dismissal. The process, which the **MTN Group** termed as part of a selection method, **was nothing but a means to avoid dismissal**. The evidence demonstrated that approximately 9 out of 15 employees were dislocated. Only 2 were subsequently dismissed. That being so, it can hardly be said that those who were placed were subjected to a selection method. The selection is for dismissal and not for placement. Appropriately called, the process of placement was not a selection method but an attempt to avoid dismissal.

We at SERR Synergy assist employers to conduct a fair and objective retrenchment procedure. This incorporates adopting and analysing a fair and objective selection criterion to be implemented during the retrenchment. We strive to use the relevant provisions of section 189 of the LRA, the applicable Code of Good Practices and the most recent Labour Court judgements to ensure that we offer our clients the best possible advice. We further chair the internal consultation meetings, provide representation at the CCMA, and assist in Labour Court matters should the retrenchment be challenged based on the procedure followed and reasons for the retrenchment.

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