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REDEFINING THE WORKPLACE IN LABOUR LAW AND ITS IMPLICATIONS FOR REMOTE WORK, RETRENCHMENT AND UNION REPRESENTATION



Understanding the definition of ‘workplace’ in labour law is crucial for navigating various aspects of employment, including union representation, retrenchment procedures, and the modern trend of working from home.

The concept is defined in section **213 of the Labour Relations Act of 1995** (hereinafter referred to as and the LRA) and can have significant implications for both employers and employees.

This blog explores how the definition of ‘workplace’ affects these areas and what it means for your business.

Definition of the ‘workplace’ in the context of labour law

Defining ‘workplace’ in terms section 213 of the LRA:

“(c) (workplace in the Private sector) means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation....”

While this definition provides a framework, the practical application often requires a case-by-case analysis. It appears from caselaw that CCMA commissioners do not readily accept that geographically distinct places of work constitute separate workplaces.

The bias appears to be towards the business, as a whole, being regarded as one workplace, with the onus on the party alleging that workplaces should be fragmented, to prove its case.

For example, in *Specialty Stores v SACCAWU & Another* [1997] 8 BLLR 1099 (LC) the Labour Court was unwilling, in the absence of proof submitted by the trade union, to find that different stores of a retailer constituted different workplaces.

The Labour Court also made it clear that the onus rests on the trade union to prove whether two operations are different workplaces. A similar view was accepted in *SA Commercial Catering & Allied Workers Union v The Hub* (1999) 20 ILJ 479 (CCMA). In *OCGAWU v Total SA* (CCMA WEI5487), all the employer’s 38 distribution depots were held to constitute one workplace.

Why is the definition of ‘workplace’ important?

The definition of ‘workplace’ plays a crucial role in the context of labour legislation, particularly in matters of remote work, retrenchments and union representation.

Let us explore these elements in more detail:



Working from home

The term “*workplace*” is defined in section 1 of the Occupational Health And Safety Act 85 of 1993 (OHSA) as “... *any premises or place where a person performs work in the course of his (or her) employment*”.

The term “*work*” means “... *work as an employee or as a self-employed person, and for such purpose an employee is deemed to be at work during the time that he is in the course of his employment ...*”.

Employees who perform work, as defined, at home, will in most instances be acting in the course and scope of their employment, and therefore their home/residence constitutes a “workplace” as defined in the OHSA.

- The term “*employer*” is defined in section 1 of the OHSA as any person who employs or provides work for any person and remunerates that person.
- The term “*employee*” is defined in section 1 of the OHSA as any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration, or who works under the direction or supervision of an employer or any other person.

Persons who are employed by an employer and work from home, are employees of their employer.

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Retrenchment procedure

Whether a *retrenchment procedure* would be a section 189 or section 189A procedure as set out in the LRA, could depend on the number of employees in the workplace and thus whether different operations constitute one or more workplaces. Section 189A differs from section 189 as it places further procedural obligations on larger employers (50 or more employees).

For example, one of the operations of an employer has 40 employees (section 189 LRA applies in the case of retrenchment), while the other operation has 20 employees (section 189 LRA would apply in the case of retrenchment).

However, if these two operations are regarded as one workplace, then section 189A would apply if 10 or more employees are to be retrenched as there would be more than 50 employees in the workplace.

Union representation

Whether a union has sufficient representation or majority representation and is entitled to organisational rights as determined by sections 11 to 26 of the LRA could depend on whether two or more operations constitute one workplace or several.

For instance, if an operation with 20 employees (15 of them are union members) and another operation with 30 employees (non-union members) are considered separate, the first operation has majority union representation.

However, if the two operations are considered one workplace, the union representation becomes 15 out of 50 employees, which may only constitute sufficient representation without the rights afforded by majority representation.

Case Law

In *Chamber of Mines of South Africa obo Harmony Gold Mining Company Ltd and Others v Association of Mineworkers of South Africa and Others* [2014] ZALCJHB 22, it was held that the following factors suggest a single workplace: all operational decisions are subject to approval by a central board; all operating procedures are standardised across an employer's branches and are determined by a central board; and the production planning and financial management of the business are centralised.

It was further held in the above case that “[w]hat is required is an application of the definition of ‘workplace’ to the facts and a determination of the place or places where an employer’s employees work and whether the employer’s mines, to the extent that they comprise of different operations carried on by each employer, can be said to be independent of one another by reason of their size, function or organisation”.

The point of departure in terms of the definition would therefore be that all places where the employees of an employer work will constitute a single workplace unless two or more of such operations are independent of one another by reason of size, function or organisation. These operations will then constitute separate workplaces.

Conclusion

Determining whether your business locations constitute one or multiple workplaces is crucial under labour law. This definition impacts union representation, retrenchment procedures, and considerations for employees working from home. Careful analysis and understanding of the relevant legislation and case law are essential to ensure compliance and proper management of these aspects in your business.

SERR Synergy can assist businesses in navigating these complex issues. We offer expert advice and tailored solutions to help you determine the appropriate classification of your workplaces. *Whether you need guidance on union representation, retrenchment procedures*, or compliance with *occupational health and safety regulations for remote work*, our team of experienced legal advisors is ready to support your business.

About the Author: Jaco Conradie joined SERR Synergy in September 2017. He is a Specialist Labour Legal Advisor at our Cape Town branch. He completed his Bachelor of Laws (LLB) degree at the University of Stellenbosch.

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