RETRENCHMENTS
IMPORTANT INFORMATION FOR EMPLOYERS

(Note, these guidelines are for employers with less than 50 employees)

The decision to retrench is certainly not made lightly, but it has become an unfortunate reality for many businesses in the current economic climate. As a cash-strapped company, maintaining the *status quo* has no doubt become untenable, and the only alternative now may be to reduce the wage bill to save the business from going under.

In the course of making this difficult decision, an employer will undoubtedly consider different and creative solutions to avoid dismissing employees in an attempt to increase profitability and to ultimately save jobs such. Alternatives to retrenchment could be company restructuring, changing conditions of employment, wage reductions, or offering unpaid or future leave. Some of these options will be effective for your business and some simply won't be.

Retrenchment is a form of dismissal due to an employer's operational requirements, and provided it is done in accordance with fair procedures, this type of dismissal is not unfair. Operational requirements are defined as those based on the economic, technological, structural, or similar needs of the employer.

What is important for employers to remember in these desperate and stressful times is that retrenchment is a process that has certain legal requirements and that failure to adhere to these can have significant consequences for employers. The deciding factor in proving a lawful retrenchment will lie in not only the objective, financial requirements of the employer, but also in the fairness and good faith exercised in the employer's decision-making process.

The operational requirements for each business may vary but the procedure for retrenchment is clear and unwavering in our law. The procedural requirements for lawful retrenchments are outlined in Section 189 of the Labour Relations Act ("LRA") and can be summarised as follows.

1. **Written notice to employee of intention to consult for purposes of retrenchment;**
2. **Consultation with employee; and**
3. **Representations by employee and response thereto by employer.**

Consultation is the defining feature of the retrenchment process and is a necessary step for employees to firstly, understand the reasons for the proposed retrenchments, and secondly for them to motivate for keeping their positions and to suggest alternatives to their employer. The discussion of other solutions and the ability for these to come from the employee is vital to the need discuss and consider alternatives to retrenchment.

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WHAT THE LAW SAYS

The written notice : necessary starting point

Section 189 of LRA

*(1) The employer must issue **a written notice inviting the consulting party to consult** with it **and disclose in writing all relevant information**, including, but not limited to-*

*(a) The **reasons** for the proposed dismissals;*
*(b) The **alternative**s that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;*
*(c) The **number of employees likely to be affected** and the job categories in which they are employed;*
*(d) The **proposed method for selecting** which employees to dismiss;*
(e) The time when, or the period during which, the dismissals are likely to take effect;
*(f) The **severance pay** proposed;*
*(g) Any **assistance** that the employer proposes to offer to the employees likely to be dismissed;*
*(h) The **possibility of future re-employment** of the employees who are dismissed;*
*(i) The **number of employees** employed by the employer; and*
*(j) **The number of employees that the employer has dismissed for reasons** based on its operational requirements in the preceding 12 months.*

(2) (Note that for any information you refuse to provide, the onus is on the employer to prove that it is not relevant, per section 189(40(b)).

The consultation : a good-faith consultation is core to a valid retrenchment

Section 189 of LRA

*(3) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer **must consult**-*
(d) … the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

*(4) The employer and the other consulting parties must… engage in a meaningful joint consensus-seeking process and **attempt to reach consensus on**-*
*(a) **appropriate measures** –*
(i) to avoid the dismissals;
(ii) to minimise the number of dismissals;
(iii) to change the timing of the dismissals; and
(iv) to mitigate the adverse effects of the dismissals;
*(b) the **method for selecting the employees** to be dismissed; and*
*(c) the **severance pay** for dismissed employees.*

*(7) The employer must select the employees to be dismissed according to **selection criteria**–*
*(a) That have been **agreed to** by the consulting parties; **or***
*(b) If no criteria have been agreed, criteria that are **fair and objective**.*

The representations : an opportunity for the employee to be heard

Section 189 of LRA

*(5) The employer must allow the other consulting party an opportunity during the consultation to make written **representations** about any matter dealt with (above) as well as any other matter relating to the proposed dismissals.*

(6)
*(a) The employer must **consider and respond to the representations** made by the other consulting party and, of the employer does not agree with them, the employer must state the **reasons** for disagreeing.*
*(b) If any representation is made **in writing**, the employer must respond in writing.*

TIPS FOR EFFECTIVE CONSULTATION MEETINGS FOR EMPLOYERS

Consultation is the defining feature of the retrenchment process and is a necessary step for employees to firstly, understand the reasons for the proposed retrenchments, and secondly for them to motivate for keeping their positions and to suggest alternatives to their employer.

Consultation should therefore be thought of a "joint-problem solving," as opposed to an opportunity for employees to merely comment on decisions that have already been taken regarding their livelihoods.

- Think of consultation as a **process**, and not one meeting. Be open to scheduling more consultation meetings. Employers can lose retrenchment disputes for insufficient or inadequate consultation (*Jenkin v Khumbula Media Connexion (Pty) Ltd* (Case No. D914/08))

- Prepare an **agenda** for all meeting to ensure that the meeting has a logical flow and purpose

- Be clear on the **goal** of the consultation: the goal is to save the company and to figure out the best way to do this.

- Confirm that all parties received the **written notice**

- Engage in **frank discussions** with employees and **full disclosure** of the reasons for retrenchment and the company's financial position

- Invite employees to **ask questions** or request any additional information they need

- Be sure to tell employees that the initial consultation is to give them information and that they are not required to response to it immediately and can go away and **consider** whatever option or packages are presented to them.

- Be sure to tell employees that they may make oral or written **representations** to save their jobs and that these representations will be considered and responded to

- Type out detailed **minutes** of the meeting, particularly with regard to the solutions/questions raised from the employer and the responses thereto

- Get **legal advice** if you are unsure of the requirements or procedure for retrenchments.

The goal is a good-faith attempt to reach consensus, but agreement is not always possible. If no agreement is reached, the company should be sure that valid operational reasons exist for the retrenchment and that these have been explained to staff.

FREQUENTLY ASKED QUESTIONS

WHEN DO I NEED TO START THE RETRENCHMENT PROCESS?

The obligation on an employer to consult for purposes of retrenchment is triggered **when the employer, having foreseen the need for it, contemplates retrenchment.** Therefore, the 'rule of thumb' is sooner, rather than later! Remember, the process may take some time, and also, it is only fair that employees are informed so that they can start to make their own arrangements and can start to look for new employment as soon as possible.

WHAT AM I REQUIRED TO PAY OUT AS SEVERANCE PAY?

The legislative requirement is **one week's remuneration for every year of completed service** (section 196(1) of LRA) but parties can of course agree on a higher compensation.

Some points to note:

1. Severance pay does not include or affect an employee's right to any other amount payable by law (that is, pay-outs for unused annual leave, notice pay, pro-rata payment of pension, etc)
2. Payment dates for severance packages are negotiable.
3. There are important tax implications on severance package pay-outs, so it is important for the employer to disclose to SARS when applying for the necessary tax directive to pay out a retrenchment package that the dismissal was due to "operational requirements." The first R500 000 of any retrenchment package for an employee is tax-free and this will obviously greatly benefit the employee.
4. An employee who unreasonably refuses to accept the employer's offer of alternative employment is not entitled to severance pay (section 196(3) of LRA).

WHAT CAN I EXPECT FROM EMPLOYEES IN THE CONSULTATION PROCESS?

If an employer simply cannot afford to keep their employees on for fear of losing their entire business, there is very little that anyone can practically do to change this commercial and factual reality.

But:

1. Employees can make **representations** in the retrenchment consultation process, where they can **suggest alternatives** to their employers (such as leave without pay, different salary structures, or changes in employment conditions) or motivate on ethical, moral or emotional grounds to their employers for them to retain their job. Employers must consider and respond to these representations.
2. If the employee believes the dismissal has been unfair in terms of grounds or the procedure followed, they can **challenge the retrenchment.**
    a. Employees have 30 days to refer the dispute to the CCMA or bargaining council from date of dismissal (section 191(1)(b)(i) of LRA) and the dispute will be considered.
    b. If the dismissal applies to one employee only, that employee may refer to the dismissal to arbitration or to the Labour Court (Section 191(12) LRA)
    c. Note in any dismissal dispute, the onus is on the employee to establish the existence of the dismissal and the onus then shifts to the employer to show that the dismissal was fair (Section 192 LRA).

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CASE NOTE

Is a dismissal for refusal to accept employee changes in conditions permissible? The short answer is, yes, it can be.

In the recent 2019 case of *National Union of Metal Metalworkers of South Africa and Another v Aveng Trident Steel and Others* (JA25/18) [2019] ZALAC 36, the Labour Appeal Court had to grapple with this issue.

In this case, the employer embarked on a process of restructuring and gave notice to its employees that it was contemplating retrenchment. In the course of its required consultation process with its employees and their trade unions, the employer proposed a change in the employees' conditions of employment as an alternative to retrenchment. These proposed changes in employment terms were found to be unacceptable to the trade union, and as a result, certain employees were retrenched.

The trade union challenged the dismissal as unfair and relied on section 187(1)(c) of the Labour Relations Act ("LRA") in this regard, which states that *"a dismissal is automatically unfair... if the reason for the dismissal is… a refusal by employees to accept a demand in respect of any matter of mutual interest."* The employer argued that the dismissal was fair as it was a valid retrenchment and that reducing staff was not only necessary to cut the wage bill, but also served to improve its operations and productivity, thus making the dismissal one of operational requirements. The Labour Court ruled in favour of the employer but the union took the matter on appeal.

The Appeal Court confirmed that employees cannot be dismissed solely for refusing to accept a demand in terms of section 187(1)(c), but held that employees can be dismissed if that refusal results in a more dominant operational necessity occurring for the employer. Therefore, notwithstanding the wording of section 187(1)(c), this provision does not deprive the employer of its right to retrench if there are valid reasons for the retrenchment. In other words, the Court held that the employer's right to retrench is implicit in the wording of section 187(1)(c).

The Court highlighted that if a proposed change in employment is refused and a dismissal ensues, it does not necessarily mean that the dismissal is necessarily caused by the refusal to accept the proposed change. What is rather needed is an interrogation of the "true reason" for the dismissal. To determine this, the Court held, the first enquiry is the factual causation of the dismissal: that is, whether the dismissal would have occurred if the employees had not refused the demand. An answer in the affirmative means that the dismissal was not automatically unfair, in and of itself. The second test is for legal causation, being an enquiry into whether the refusal was the main, dominant, or most likely cause of the dismissal. If operational reasons are found to be the driving force behind the decision to dismiss after an employee refuses to accept changes to employment terms as an alternative to retrenchment, then the dismissal is not automatically unfair.

The Court aptly observed that ruling in the employees' favour here would be to undermine a fundamental purpose of consultation in the retrenchment process, which is to encourage engagement on all potentially viable alternatives to dismissal. In this case, the changed employment conditions were a suitable alternative to retrenchment. The Appeal Court ultimately held in this case that insurmountable operational requirements existed that constituted a fair reason for dismissal, and found that the correct procedure had been followed by the employer to do so.

Therefore, what is important to take away from this judgment is that the existence of legitimate operational requirements permit the fair dismissal of employees, provided, of course, the correct procedure is followed throughout the retrenchment process. Consultation is vital as it can lead to creative solutions to avoid cutting jobs, and that will benefit both parties in the long run.