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EMPLOYMENT

Fair selection criteria in retrenchments – can your employer make you re-apply for your job?

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In South Africa an employee's services can be terminated as a result of his/her misconduct or incapacity or as a result of the employer's operational requirements. Where a dismissal is based on the employer's operational requirements, or more specifically as a result of the employer's economical, technological, structural or similar needs, the procedures to be followed by the employer are prescribed in section 189 and 189A of the LRA. Retrenchments/redundancy falls within the ambit of section 189 and 189A.

A dismissal based on the employer's operational requirements is as a result of the employer's business circumstances rather than an act or omission on the part of an employee and as a consequence is regarded as a "no fault" dismissal. For this reason a more prescriptive procedure is outlined in the LRA in order to secure employment as far as possible.

To prevent an unfair dismissal claim, the retrenchment must be substantively and procedurally fair. In terms of substantive fairness, there must be a fair reason for the retrenchment, relating to the employer's operational requirements. Procedural fairness requires a fair procedure to be carried out when retrenching employees. One of the aspects surrounding procedural fairness includes the consultation process which requires the employer to engage in a meaningful joint consensus-seeking process with employees who may be affected by the employer's operational requirements ("**the consultation process**"). The LRA in section 189(2) prescribes the consideration of certain factors during the consultation process, one of which is "the method for selecting the employees to be dismissed".

In the absence of an agreement between the consulting parties on the selection criteria, the employer must apply a fair and objective criteria which does not have the effect of discriminating against a particular group of employees. If employees are selected in terms of unfair criteria their dismissals with be considered unfair. The most commonly used and often preferred selection criterion when retrenching employees is the last in first out ("**LIFO**") principle. The Labour Court has consistently accepted the LIFO criterion as fair.

The application of LIFO is generally applied subject to a right to retain special skills, especially where such skills are crucial for the employer's business to continue operating. This occurred in the case of ***NUM & others v Anglo American Research Laboratories (Pty) Ltd [2005] 2 BLLR 148 (LC)***, where the applicant who had been retrenched had a longer period of service that employees who had not been retrenched, who had skills that the applicant did not. The employer had used past performance to decipher which employees possessed special skills that needed to be retained. This test was considered to be objective and so the departure from LIFO was warranted.

Other generally accepted selection criteria include length of service, merit, performance and qualifications or a combination of these criteria. It goes without saying that retrenchment of employees on the basis of an employer's subjective preferences is unfair.

Any departure from these accepted selection criteria could be unfair. In *SA Breweries (Pty) Ltd v Louw (2018) 39 ILJ 189 (LAC)* the court found that there was procedural unfairness when the employer took into account objectively unfair selection criteria, by using the past performance ratings of the candidates interviewed to fill the newly created post of area manager. Ordinarily, any retrenchment process which proposes that employees apply for their jobs, or apply for a limited number of jobs which are available in the restructured organisation, could be unfair. This will especially be the case if the employer tries to take irrelevant factors into account in the selection and recruitment process, such as past disciplinary or performance issues, or applies a subjective assessment of the employee's suitability for the role.

Taking into account years of service, on the other hand, to determine who will be retrenched or who remains where there is a reduction of the number of jobs, is the fairest and most objective way to affect the downsizing.

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