



EMPLOYMENT

Interviewing for survival: When competitive interviews during retrenchment are fair

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Employers undertaking restructuring exercises are frequently faced with a practical dilemma: where the new organisational structure contains fewer or different positions, how should they determine which employees are placed into those positions without turning the placement exercise itself into an unfair selection process?

The Labour Court's recent judgment in *SASBO – The Finance Union on behalf of Members v Access Bank (SA) Ltd; Kau & others v Access Bank (SA) Ltd* provides useful guidance – and some welcome reassurance for employers. Access Bank embarked on a large-scale restructuring process which affected approximately 150 employees. As part of the restructuring, employees were required to interview for positions in the new organisational structure. The interviews took place while the section 189A consultation process was still underway, and this became one of the employees' principal complaints. The employees argued that the Bank's approach to selection was flawed. Among other things, they contended that the criteria were applied inconsistently, that the Bank had departed from Last-In, First-Out (LIFO) and had relied on subjective performance assessments. They also objected to interviews being conducted while consultations were ongoing.

The Bank, however, drew an important distinction between selecting employees for retrenchment and attempting to place employees into positions in the restructured business.

Its proposed selection criteria included skills, qualifications, experience and business-critical competencies, with LIFO applying where candidates were equally suitable. Importantly, the Bank maintained that the interviews were not being used to identify employees for dismissal. Rather, they formed part of its efforts to avoid or mitigate retrenchments by redeploying employees and placing them into available positions. That distinction found favour with the Court. The Court confirmed that sections 189 and 189A require an employer to be transparent and responsive during consultation. They do not, however, require the employer to secure agreement on selection criteria. The fact that employees or their representatives disagree with the employer's proposed criteria does not mean that consultation has failed. Indeed, the Court expressly confirmed that the rejection of counter-proposals does not, without more, amount to a failure to consult. This is an important point for employers. Consultation is a consensus-seeking exercise, not a consensus-requiring exercise.

Perhaps more significantly, the Court accepted that requiring employees to compete for positions through an interview process can be fair where the purpose of that process is to avoid retrenchment, rather than to determine who should be retrenched. Where agreement cannot be reached, an employer may ultimately implement fair and objective selection criteria after properly considering the alternatives proposed during consultation. In this case, the combination of skills, qualifications, experience, business-critical requirements and LIFO where employees were equally suitable was not found to demonstrate a failure to consult in good faith.

There is, however, an important caution. The Court acknowledged that conducting interviews while consultation was still underway could reasonably create the impression that the outcome had already been determined and could undermine confidence in the consultation process. Nevertheless, even if the timing of the interviews was procedurally irregular, that did not render the consultation process fundamentally defective. The critical consideration was the purpose of the interviews: on the Bank's version, they were directed at redeployment and placement, rather than identifying employees for retrenchment. The judgment therefore provides employers with a useful roadmap when restructuring. There is nothing inherently unfair about asking employees to compete for positions in a new structure. Employers should, however, maintain a clear distinction between the criteria used to select employees for retrenchment and an assessment or interview process used to determine whether employees can be placed or redeployed into available positions.

That distinction should not exist only on paper. The purpose of the interviews, the positions available and the criteria against which employees are assessed should be clearly communicated during consultation. Employers should also genuinely consult on proposed retrenchment selection criteria, consider counter-proposals and be able to explain why those proposals were rejected.

Ultimately, *Access Bank* is a welcome reminder that the LRA does not require an employer restructuring its business to abandon legitimate considerations of skills, qualifications, experience and business-critical requirements, nor does it necessarily prevent employees from being interviewed for positions in a new structure. The key is knowing what the interview is for. An interview designed to select who leaves may form part of the retrenchment selection criteria. An interview designed to find a place for an employee in the restructured business may instead be part of the employer's attempt to prevent that retrenchment altogether.



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