

EMPLOYMENT

Labour and employment: rebuilding and restructuring post lockdown

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Introduction

With the easing of the nationwide lockdown in response to the COVID-19 pandemic through the Government's "Risk Adjusted Strategy" (comprising of five lockdown levels), more and more businesses can lawfully operate again. As a result, employees will be returning to work and employers will be obliged to remunerate them again. The unfortunate reality, however, is that the environment within which businesses will now operate in, is vastly different to that which existed prior to the lockdown. An altered business climate coupled with a reduction in demand for certain services and goods may leave a number of businesses in a difficult situation. They will be open for business and will have all their staff able to tender their services but the businesses may not have work for their employees to perform or sufficient business to cover the costs of being in business. The future of some businesses may depend on doing business differently by finding ways of cutting costs, reducing expenses and even right-sizing, at least in the short to medium term.

In order to get through the initial economic challenges of the reviving economy, employers must to consider the manner in which employment and labour costs can be lawfully reduced. This will assist in ensuring the continued operations of the business as well as its long term sustainability. Retrenchment should not be the first port of call under the current, challenging economic conditions.

Cost saving measures

The first step is to consider what relief funds remain available and of relevance to an employer. There have been a number of general funds established for the benefit of, largely, all employers (for example the COVID-19 Temporary Employer / Employee Relief Scheme "**TERS**"), funds for the benefit of Small Medium and Micro Enterprises ("SMMEs") (such as the Debt Relief Finance Scheme and the Business Growth Resilience Facilities) and more sector specific funds (such as the Tourism Relief Fund).

These funds will offer only temporary relief.

In addition to the funds mentioned above, the following should be considered to ensure ongoing sustainability and return to profitability:

- Short time;
- Furloughs / Layoffs;
- Salary reductions; and/or
- Sabbaticals (paid or unpaid);

Short time is where an employee's working hours are reduced and, as a result, his/her remuneration. This can be contrasted with salary reductions where an employee's hours of work remain the same but his/her salary is reduced. Furloughs or temporary lay-offs entails the suspension of the employee's obligation to tender services and the employer's obligation to pay remuneration – for a period of time. The employee remains employed. This is similar to an unpaid sabbatical where an employee can take unpaid time off.

Importantly, where any measure (short of dismissal) results in a change to terms and conditions of employment of employees, it must be implemented by agreement with the employees or relevant parties (such as trade unions). The measure cannot be unilaterally implemented.

The adoption of these measures can be raised with employees in essentially two ways: prior to the commencement of a retrenchment consultation process, or as part of such a process. The latter occurs where the measures are proposed as alternatives to retrenchment and would only be proposed, once the retrenchment proceedings have commenced. The former approach involves these measures being raised prior to any retrenchment proceedings being implemented. They would be tabled as a means of trying to avoid the need to enter into retrenchment proceedings in the first place.

In certain instances these measures can be coupled for relief from, for instance, a 'Reduced Work Time Benefit' as provided for by the Unemployment Insurance Fund if the employee works short time.

Restructuring / retrenchments

Where alternative measures are not agreed upon or they do not adequately reduce costs / address operational challenges then a restructuring or retrenchment exercise may have to be considered. In this regard, the Labour Relations Act 66 of 1995 ("LRA") and the Code of Good Practice: Dismissal ("Code") set out the requirements that must be adhered to in order to ensure that such dismissals are fair.

Conclusion

With the current reopening of the economy it is important that employers consider how their businesses need to adapt to the new challenges posed by the so-called "new normal" the world must face. A number of measures are available to do so.

Werksmans Attorneys are well placed to assist and guide employers during these challenging and difficult times to ensure the survival and continued profitability of their businesses. Please feel free to contact us should you require assistance or have any queries regarding the above.



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