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EMPLOYMENT

Retrenchment consultations: the use of video-conferencing

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Issue

Whether an employer may utilise Zoom when conducting consultations in a retrenchment exercise. If not, does the continuation of the consultations in such circumstances result in procedural unfairness?

Summary

The Labour Relations Act 66 of 1995 ("**LRA**") does not regulate how section 189 consultations are to be held (i.e. in person or via video conference). Normally, consultations take place physically, though this is not a necessary requirement. Due to Covid-19 a "new normal" has been created. Just because consultations cannot happen physically does not mean consultations cannot take place at all. Rather, given the Covid-19 pandemic Zoom is an appropriate medium for such consultations. This also ensures that adequate health and safety measures are adhered to.

Facts

In the case of *Food and Allied Workers Union (FAWU) v South African Breweries (Pty) Ltd (SAB) (J435/20) [2020] ZALCJHB 92 (28 May 2020)*, the Labour Court had to deal with, among others, the above issue. The facts of the matter are briefly set out below.

South African Breweries ("**employer**") decided to restructure its business operations. As a result, a section 189(3) notice was issued, as required by the LRA. A facilitator was also appointed (due to it being a so-called 'large scale retrenchment'). The running of the facilitation process was subsequently affected by the Covid-19 pandemic and the implementation of the national lockdown. As a result, the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") sought alternatives as to how to run the facilitation process (and consultations), one of which being the use of Zoom. FAWU objected to the use of alternative methods for the purposes of continuing the facilitation process. This resulted in the facilitator recusing himself. A new facilitator was appointed thereafter to assist in the process.

Prior to the implementation of national lockdown and the restrictive measures arising as a result thereof a timeline for consultations had been agreed to.

One of the facilitation meetings was scheduled to take place on or about 25 March 2020. It was proposed that meeting take place via Zoom or that the facilitated process be halted until the lockdown restrictions are lifted. No agreement could be reached on what alternative to pursue. FAWU elected not to participate in the process until the restrictions had been lifted (i.e. the end of the lockdown period). After the required 60 day period had lapsed, the employer issued notices of termination to the employees. As a result FAWU launched an application in the Labour Court in terms of section 189A (13) of the LRA.

FAWU sought, amongst others, an order declaring the consultation process procedurally unfair. FAWU asked the Court to interdict SAB from continuing with the consultation process without further facilitation from the CCMA and the physical presence of FAWU's members at such process. They also sought to interdict SAB from implementing the notices of termination and from issuing new notices of termination of employment as well as the reinstatement of those employees already dismissed.

Aside from the issue as to whether Zoom was the appropriate medium through which to conduct the consultations, FAWU also had other objections regarding the consultation process. The first being that the number of employees consulted in the retrenchment process had increased from that reflected in the initial section 189(3) notices (from 500 to 1200). The second objection regarded the implementation of an organogram regarding the restructure without agreement being reached on same. The third objection was that the consultation process had not been completed at the time the notices to terminate were issued. These latter issues are not considered for purposes of this update.

Labour Court's evaluation

The Labour Court held that when one considers the issue of procedural fairness one must have regard to the LRA and the Code of Good Practice: Dismissal. Any process which complies with the obligations set out therein will be procedurally fair. The Code provides that a consultation "would be regarded as proper, if an opportunity to meet and report back to employees is provided, the opportunity to meet with the employer is provided and the request, receipt of information and consideration thereof is provided." Section 189(3) furthermore requires that in any consultation process the parties engage in meaningful joint consensus-seeking process.

The Labour Court noted that consultations do normally take the form of physical meetings. This is not a necessary requirement, however. It does not follow that where consultations cannot be held in person they cannot be held at all. In fact, the use of video conferencing to conduct consultations predates the Covid-19 pandemic. The Labour Court found that the use of the Zoom application is a necessary tool to ensure that restrictions such as social distancing as a measure to avoid the spread of the virus is observed. There is nothing procedurally unfair if a consulting party suggests the usage of the Zoom application or some other form of videoconferencing. FAWU tried to demonstrate the problems inherent in using the Zoom application by pointing out an incident where screen and connectivity issues arose. The Labour Court accepted that wherever there is technology used, problems are expected to emerge. However, this does not necessarily give rise to procedural unfairness. FAWU's application was dismissed by the Court.

Importance of the case

There is flexibility in how section 189 consultations may be held. Due to the circumstances created by Covid-19, section 189 consultations may be conducted via videoconferencing. This is important to ensure that social distancing is maintained and health and safety standards are upheld.

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