



Dismissals for operational requirements

TAPIWA GANDIDZE

Attorney of the High Court, Cheadle, Thompson & Haysom

SUMMARY

Dismissals for operational requirements are permitted by the Labour Relations Act.¹ However, such dismissals must still pass the test for substantive and procedural fairness. Of great interest to labour are cases dealing with whether an employer who unilaterally changes terms and conditions of employment may dismiss the affected employee for operational requirements should that employee refuse to accept the new terms and conditions. Also of significance in the area of dismissals for operational requirements are the 2002 amendments to the LRA allowing labour to either strike or refer a matter to the Labour Court in the face of proposed retrenchments.

Section 189A of the LRA allows employees to approach the Labour Court for an appropriate order should an employer insist that it will retrench before exhausting the procedures that are set out in the LRA. However, the case law has cast doubt on the effectiveness of the remedy of approaching the court for such an order.

Another important issue in the context of dismissals for operational requirements is that an employee's right not to be dismissed for taking part in protected strike action has, from a labour point of view, also been dealt a huge blow. This is due to the case law which permits an employer to dismiss a striking employee for reasons based on the employer's operational requirements.

The LRA recognises that an employer may dismiss employees if the operational requirements of its business make such a dismissal unavoidable. However, the courts will uphold a dismissal as fair only where such dismissal was both substantively and procedurally fair.

Failure by an employer to show that a dismissal was fair in that it was necessitated by operational requirements will result in such dismissal being substantively unfair.

The LRA also sets out the procedure an employer needs to follow to ensure that a dismissal is procedurally fair. Procedural fairness requires the employer to consult timeously with the employees affected, to explore alternatives to dismissal and to ensure that employees are fully informed about their rights throughout the process.

¹ Act 66 of 1995 (the LRA)



The LRA also prohibits industrial action over disputes relating to dismissals for operational reasons. The dismissal of an employee because of participation in a protected strike will be automatically unfair.

In terms of the LRA, an employer may unilaterally change an employee's terms of employment and then dismiss such employee for failing to agree to the new terms.

1 INTRODUCTION

Section 188 of the LRA recognises retrenchments or dismissals for operational requirements as an acceptable form of dismissal. Section 213 of the LRA defines operational requirements as requirements based on the economic, technological, structural or similar needs of the employer. A dismissal for any of the above-mentioned reasons only becomes unfair if the employer fails to prove that the reason for dismissal is a fair reason based on the employer's operational requirements. Failure by the employer to prove that the reason for dismissal is a fair reason based on the employer's operational requirements will result in the dismissal failing the substantive test.

Dismissals for operational requirements must also be procedurally fair. Section 188(1)(b) of the LRA requires that such dismissals must be effected in accordance with a fair procedure. A fair procedure is set out in section 189 of the LRA.

2 CODE OF GOOD PRACTICE ON DISMISSALS: OPERATIONAL REQUIREMENTS

Section 188(2) of the LRA states that:

'any person considering whether or not the reason for dismissal is a fair reason, or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act'.

Section 203(3) states:

Any person interpreting or applying this Act must take into account any relevant code of good practice.

While the word 'must' appears to have a binding effect, section 203(4) goes on to state that the Code of Good Practice may provide that a code must be taken into account in applying or interpreting any employment law. The Code of Good Practice on operational requirements does not state that it must be taken into account. The Labour Court, in the case of *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & Another*² stated that codes provide guidelines but do not give rise to rights. But, said the court, although a code is not law in itself, 'a person ignores it at his own peril'.

2 [1997] 10 BLLR 1320 (LC) at 1325 H-I



3 PROCEDURAL FAIRNESS

3.1 Who must be consulted?

The primary duty imposed by section 189 is that of consultation.³ An employer who contemplates dismissing one or more employees for operational requirements must consult with the person referred to in a collective agreement or if there is no such collective agreement, a workplace forum and if there is no such forum, a registered trade union and if there is no trade union, the employee likely to be affected by the dismissal or their representative.

In cases where the collective agreement provides that a majority union will be consulted, a minority union cannot insist on being consulted unless it is evident that to do so would result in unfairness. The collective agreement must expressly designate the trade union to be consulted, failing which all trade unions can insist on being consulted. In *Baloyi v M & P Manufacturing*⁴, the court found that an employer is not required to consult an individual employee, where a trade union is in existence, even where the selection criteria include the employee's personal attributes. The court held that to allow parallel consultations 'would undermine the very purpose of the section'. It has been suggested by some academics that when the union is unable to perform adequately or fairly, then the employer must consult with the employees themselves.

3.2 When to consult

Section 189 provides that consultation must be held when the employer contemplates dismissals. In *Atlantis Diesel Engines (Pty) Ltd v NUMSA*⁵, Conradie JA held as follows:

- 42 Before the debate with employees is opened, a provisional decision ... must have been taken ...
- 43 ... consultation is required once the possible need for retrenchment is identified ...
- 44 ... news of impending lay-offs is profoundly disturbing to employees ... A prudent manager will not put out such news unless he or she is sure that ... the proposed dismissals are operationally justifiable.
- 45 But from an industrial relations point of view, he dare not be certain before he invites consultation ... an employer must remain sufficiently flexible to conduct meaningful discussions with his employees ... if he fails to do this ... he leaves himself small opportunity of arguing before a court that his mind had not been made up.

The purpose of the consultation is therefore to determine by way of consensus whether there is any practical and viable basis for changing the in-principle decision to dismiss.

3.3 What must be consulted on?

The LRA requires the parties to engage in a meaningful joint consensus-seeking process and to attempt to reach consensus on:

- (a) appropriate measures:

3 Le Roux P 'Development in individual labour law' *Current Labour Law* (1995) at 17

4 [2001] 4 BLLR 389 (LAC)

5 [1995] 1 BLLR 1 (A)

- (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.

3.4 Disclosure of information

Section 189(3) of LRA gives the minimum information that the employer must disclose in writing to the consulting party, who is invited to consult over possible retrenchments. The list should include, but is not limited to:

- the reasons for the proposed dismissals;
- alternatives that the employer has considered before proposing the dismissals and the reasons for rejecting each of those alternatives;
- the number of employees likely to be affected and the job categories in which they are employed;
- the proposed method for selecting which employees to dismiss;
- the time when, or the period during which, the dismissals are likely to take effect;
- the severance pay proposed;
- any assistance that the employer proposes to offer to the employees likely to be dismissed;
- the possibility of the future re-employment of the dismissed employees;
- the number of employees employed by the employer; and
- the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

Disclosure plays an integral part in alerting the trade union or employees as to whether or not all alternatives to retrenchment have been considered.⁶ This is important because employees share in the responsibility to consult. Trade union officials and employees too must make creative proposals. They must raise alternatives to dismissal not thought of by the employer. Employees cannot later complain that the employer was unfair in not considering, for example, bumping, if they themselves did not raise this possibility in the consensus seeking stage. This has been recognised in *SACCAWU & Others v Gallo Africa*⁷ where it was held that pre-retrenchment consultation is a two-way process and if an employee withdraws from those consultations, it will not be unfair for the employer to finalise the retrenchment process alone.⁸

⁶ Rycroft A 'Pre-Retrenchment disclosure? Well, maybe not ... *Robinson & Others v PricewaterhouseCoopers* (2006) 27 ILJ 836 (LC) *Chester Wholesale Meats (Pty) Ltd v NIWUSA* (2006) 27 ILJ 915 (LAC)' (2006) 27 ILJ 2014 at 2018.

⁷ (2005) 26 ILJ 2397 (LV)

⁸ See (fn 6 above).

Information should be disclosed a reasonable time before consultation to enable the other party to consider it and meaningfully take part in the consultation. A useful case, in this regard, is that of *Robbertze v Marsh (SA) (Pty) Ltd*⁹ which deals with many aspects of disclosure of information, confidentiality, possible harm to parties, relevance of the information and the possible impact of a refusal to disclose on the dismissal.

3.5 Meaningful consultation

The employer is obliged to consider and respond to the representations made by the consulting party and to give reasons for disagreeing with the representations.

The consultation process is meant to be a rational process.¹⁰ As sections 189(5) and 189(6) put it, the employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting. The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

The LRA also requires that an employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.¹¹ In *Strauss & Another v Plessey (Pty) Ltd*¹² it was held that it is procedurally unfair of an employer to approach pre-retrenchment consultation in a mechanical 'checklist' manner that allows for consultation in the literal sense but ignores the qualitative assessment of the consultation that a court is required to make. Even if the employer believes that further consultation will be fruitless, a fair procedure must be followed.¹³ The employer must select employees to be dismissed according to agreed selection criteria and if no criteria have been agreed on, according to criteria that are fair and objective. Generally, LIFO (last in, first out) is recognised as a fair criterion for selection. However, there is nothing preventing the parties from agreeing to FIFO (first in, first out).¹⁴ Other factors to consider include skills and qualifications, competence and merit, technical knowledge or experience, conduct and service record. Whereas 'willingness to co-operate' and 'personal relationships' have been held to be subjective¹⁵, 'attitude' and 'personality' are accepted as relevant in determining an employee's suitability for alternative positions.¹⁶

3.6 Time limits for consultations

Although section 189 does not stipulate the time periods for consultation, it has been established through case law that the process 'must be of sufficient

9 (2002) 23 ILJ 1448 (LC).

10 See (fn 6 above).

11 *Ibid.*

12 (2002) 23 ILJ 175 (LC)

13 See *De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd* (1999) 20 ILJ 1753 (LC).

14 *NEHAWU & Others v The Agricultural Research Council & Others* [2000] 9 BLLR 1081 (LC).

15 *Singh & Others v Mondi Paper* [2000] 4 BLLR 446 (LC).

16 *SACCAWU & Others v Game Discount World* [1994] 7 BLLR 108 (IC).

duration to enable the parties to each put their respective proposals on the table, to consider them and to enter into a joint process to try and reach consensus'.¹⁷

A consultation that lasted between five and ten minutes with forty people involved was held to be insufficient.¹⁸ In another case it was held that consultations held in June 1996 could not be relied on to justify retrenchments in January 1997.¹⁹

There is nothing preventing a party who needs to be consulted from waiving the right to be consulted. The waiver must, however, be voluntary, unequivocal and with full knowledge of the terms and implications. An agreement stating that acceptance of severance pay is in full and final settlement of the dispute does not prevent the employees from challenging the dismissal.

4 NATURE OF SECTION 189 DUTIES

The duties created by section 189 are reciprocal in nature. As I pointed out above, if one party withholds his co-operation by refusing to take part or delaying the process, this will absolve the other from consulting. The employer must, however, ensure that both his procedure and decision are fair. Non-compliance with the provisions of section 189 will only be permissible in exceptional circumstances, such as where one party does not co-operate or where the employees concerned occupied senior managerial positions and were therefore privy to all the discussions.

5 FIXED-TERM CONTRACTS AND OPERATIONAL REQUIREMENTS

An employer, who terminates an employee's fixed-term contract before its expiry, runs the risk of the dismissal being challenged as a repudiation which constitutes an unfair dismissal.²⁰ A question that might sometimes arise is whether the provisions of section 189 of the LRA are applicable to temporary employment services.

Temporary contracts of employment between a temporary employment service (TES) and an employee often contain the following clause:

'The employment relationship shall terminate if the client, for any reason whatsoever advises the employer or the employee that it no longer wishes to make use of the employee's services'.

It has been suggested that the clause is unobjectionable and valid. Properly construed, the clause provides that the contract of employment terminates automatically when 'the client informs the TES that the employee's services are no longer required. This would not constitute a dismissal as defined in the Labour Relations Act (LRA)', goes the argument.²¹

17 *Johnson & Johnson Pty Ltd v CWIU* [1998] 12 BLLR 1105 (LC)

18 *Dhlamini & Others v Faraday Wholesale Meat Supply* [1999] 11 BLLR 1225 (LC)

19 *NUMSA & Others v Precious Metal Chains Pty Ltd* [1997] 8 BLLR 1068 (LC)

20 *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC)

21 See Hutchinson W and Le Roux P 'Temporary employment services and the LRA: Labour brokers, their clients and the dismissal of employees' (2000) 9(6) *Contemporary Labour Law* at 56.

DISMISSALS FOR OPERATIONAL REQUIREMENTS

In the case of *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group*,²² the commissioner had occasion to consider the legal effect of the same clause in a contract of employment between a TES and an employee engaged in a temporary assignment.

The commissioner observed that the clause, 'definitely leaves one with a sense of uneasiness. At the very least it seems unfair. It also appears to be an attempt to exploit loopholes and grey areas in the LRA'.²³ Nevertheless, the commissioner went on to hold that he was not empowered in terms of the LRA to declare clauses in a contract of employment invalid. This task had been entrusted to the Labour Court acting in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997.

6 SEVERANCE PAY

In terms of section 41(2) of the Basic Conditions of Employment Act, an employer must pay an employee who is dismissed for reasons based on the employer's operational requirements, severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.²⁴ The employee is not entitled to severance pay if she unreasonably refuses an offer of alternative employment with the same or another employer, or if the employee accepts an offer of alternative employment.²⁵

7 SECTION 189A PROCEDURES

7.1 Right to strike

Section 189 deals with dismissals for operational requirements by employers employing more than 50 employees.

Section 65(1)(c) read with section 191(5)(b)(ii) of the LRA prohibits industrial action over disputes arising out of dismissals for operational requirements.

Section 65(1)(c) reads:

1. No person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or a lockout if:
 - (a) ...
 - (b) ...
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

Section 191(5)(b)(ii) states that:

an employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is based on the employer's operational requirements.

22 (2005) 26ILJ 2224 (CCMA).

23 See para 30.

24 Grogan J 'Golden handshake: When severance pay is due.' (2006) October *Employment Law*

25 *Irvin & Johnson Ltd v CCMA & Others* [2006] 7 BLLR 613 (LAC)

For a long time trade unions were discontented about this as they felt helpless in the face of large-scale retrenchments in the clothing and other industries. Pressure from the trade unions resulted in the inclusion of section 189A in the 2002 amendments to the LRA.²⁶ This provision allows labour to use strike action to halt proposed retrenchments.

The provisions of section 189 also apply to section 189A retrenchments. Section 189A(1)(b) refers to the need for section 189(3) notice for 189A retrenchments. It follows that section 189(1) on who should be consulted, 189(2), 189(5) and (6) on the guidelines for meaningful consultation and section 189(4) on disclosure of information are also requirements for fair consultation procedures for the purposes of section 189A.

Section 189A further allows for the use of a facilitator under the auspices of the CCMA at the request of either the employer or the consulting party.

7.2 Time limits

While no time limits are prescribed for consultation in section 189, section 189A prescribes time limits.

- Where the services of a facilitator have been used, the employer may only give notice of termination after 60 days have elapsed following the notice of possible retrenchments in terms of section 189(3).²⁷
- Only once the employer has given the employees or their union notice of termination of employment, may the union give notice of a strike in terms of section 64(1)(b) or (d). It appears from the wording of this provision that it is not necessary that the matter should first be referred for mediation or conciliation in terms of section 64(1)(a). The section, however, leaves this question unclear.
- If no facilitator has been appointed, a party may refer a dispute over the proposed retrenchments only after 30 days have elapsed from the date of section 189(3) notice.
- Only after the matter has been mediated or 30 days have elapsed since the date of the referral of the dispute, may the employer give notice to terminate the contracts of employment and the union give strike notice in terms of section 64(1)(b) or (d).²⁸

Instead of striking over the substantive fairness of the retrenchments, the union may also choose to refer the matter to the Labour Court for adjudication in terms of section 191(11). In this regard, the Labour Court, in *NUMSA & Others v SA Five Engineering & Others*²⁹, held that the matter should first be conciliated in terms of section 191(1)(a).

If, however, in terms of section 189A(9), an employer gives notice of dismissal before the expiry of the 60- or 30-day period, whichever is applicable,

²⁶ See Grogan J 'Complicating retrenchment law. Unforeseen effects of section 189A' (2005) 21(2) *Employment Law* at 16.

²⁷ s189A(7)

²⁸ s189A(8)

²⁹ [2005] 1 BLLR 53 (LC) at 60 A-J

the union may give notice of commencement of a strike. This section appears to condone only non-compliance by employers of the 30- and 60-day period provided that they are prepared to withstand possible earlier industrial action by the union. It is not clear whether such action by an employer could be challenged as procedurally unfair in terms of section 189A(13). If the union elects to strike over a section 189A dismissal, it cannot refer the matter for adjudication and any such matter referred to the Labour Court would be deemed to have been withdrawn.³⁰

7.3 Procedural and substantive fairness

Section 189A(13) states that:

If an employer does not comply with the requirements for a fair procedure, a consulting party may approach the Labour Court by way of an application for an order:

- (a) compelling the employer to comply with such requirements ;
- (b) interdicting or restraining the employer from dismissing an employee prior to so complying;
- (c) directing the employer to reinstate an employee until it has complied with the requirements of fair procedure;
- (d) making an award of compensation, if an order in terms of paragraphs (a) to (c) is not applicable.

Procedurally unfair dismissals can thus only be challenged by way of application and not by an action procedure.³¹ The relevant application must be brought within 30 days after notice of dismissal has been issued by the employer.

At first glance it might appear to most that section 189A(13) will serve to compel employers to comply with the requirements of fair procedures as speedily as possible in order to encourage consultation rather than confrontation.³² *NUMSA & Others v SA Five Engineering & Others*³³ was the first case on section 189A. Soon after the applicants were given notice of dismissal, they filed a notice of motion on 11 October 2002 in terms of section 189A(13), seeking an order declaring that their dismissal had been procedurally unfair and directing the respondents to reinstate them pending compliance with the requirements of fair consultation.

On 6 March 2003 the Labour Court ordered the matter to be put on the trial roll to determine both the procedural and substantive fairness of the dismissal. On 13 October 2004 the Labour Court ordered a separation of the enquiry into procedural fairness in terms of section 189A(13) and that of substantive fairness. It then ordered the matter to be set down for the hearing of oral evidence to resolve the dispute of facts appearing on the papers.

³⁰ s189A(10)

³¹ See Grogan (fn 26 above) at 17.

³² *Ibid.*

³³ *Ibid.*

This shows the confusion about the interpretation of section 189A, as well as the ineffectiveness of section 189A(13).

8 SUBSTANTIVE FAIRNESS TEST IN DISMISSALS FOR OPERATIONAL REQUIREMENTS

The LRA defines 'operational requirements' as requirements based on the economic, technological, structural or similar needs of an employer. Technological and structural changes at companies are almost always economically motivated. If such restructuring result in a surplus of labour and the company wishes to reduce its salary expenditure, this would constitute an economic reason for retrenchments. Even where it is company mismanagement that resulted in the retrenchments, the test would be merely whether the reason for the retrenchment was a *bona fide* one or not.³⁴

Similarly, 'economic needs' do not require the company to show that it faces the prospect of financial ruin.³⁵ In *Fry's Metals (Pty) Ltd v NUMSA & Others*³⁶ the Labour Appeal Court held that the argument that an employer cannot retrench employees in order to increase profits, but only to ensure survival, is not supported by a proper reading of the LRA.

Where operational requirements are demonstrated but the parties cannot agree on change during negotiations (or consultations), fairness must operate as the controlling criterion in determining whether the normally protected collective bargaining process should yield to business claims carrying the dismissal sanction.³⁷ First, in deciding what constitutes a fair reason for retrenchments, the court enquires only whether the company's business decision was a *bona fide* one and not whether it was correct. In the case of *SACTWU & Others v Discreto*³⁸ the court stated that:

'it is important to note that when determining the rationality of the employer's ultimate decision, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial decision, properly taking into account what emerged during the consultation process'.

Cases following *SACTWU & Others v Discreto* departed from the level of deference afforded to employers. In *BMD Knitting Mills (Pty) Ltd v SACTWU*³⁹ the court suggested the following approach:

'the word 'fair' introduces a comparator, that is a reason which must be fair to both parties affected by the decision ... To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision ... to dismiss for operational requirements is predicated ... Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reason given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test'.

34 *Benjamin & Other v Plessey Tellemat SA Ltd* [1998] 3 BLLR 272 (LC)

35 *Van Rensburg v Austin Safe Company* [1998] 1 BLLR 86 (LC)

36 [2003] 2 BLLR 140 (LAC)

37 Thompson C 'Bargaining over business imperatives: The music of the spheres after Fry's Metals' (2006) 27 *ILJ* 704

38 [1998] 12 BLLR 1228 (LAC) at 1230

39 [2001] 7 BLLR 705 (LAC)

In *CWIU & Others v Algorax (Pty) Ltd*⁴⁰ the court moved towards greater interventionism and stated:

'... sometimes it is said that a court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in his business because it normally will not have business knowledge or expertise with which the employer as a business person may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. Whenever the Labour Court or this court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question ... In other words, it cannot say that the employer thinks it is fair, and therefore, it is or should be fair.

9 RETRENCHMENT OF STRIKING WORKERS

Section 67(4) of the LRA provides that an employer may not dismiss an employee for participating in a protected strike. Such a dismissal will be automatically unfair in terms of section 187(1)(a)

However section 67(5) states that it is not unlawful to dismiss a striking employee for reasons based on the employer's operational requirements.

In *SA Chemical Workers Union & Others v Afrox Ltd*,⁴¹ Afrox consulted with the union and its members over proposed changes to the shift pattern of its drivers in order to avoid its drivers having to work overtime in excess of that allowed by the Basic Conditions of Employment Act 75 of 1997. The company made it clear from the outset that if no agreement was reached, this could lead to retrenchments. Following many months of consultation and just before the dismissal of the employees who were on strike, the employer lifted the lockout and gave the union notice of retrenchments.

The court was faced with the conundrum created by the LRA where section 67(4) read with section 187(1)(a) prohibits the dismissal of striking employees but section 67(5) 'does not prohibit an employer from fairly dismissing an employee ... for reasons based on an employer's operational requirements'.⁴² In the Labour Court, Landman J resolved the conflict by stating that a strike becomes counter-productive if it threatens the very existence of the enterprise against which it is directed.⁴³

In the Labour Appeal Court Froneman DJP referred to the case of *Johnson & Johnson v CWIU*⁴⁴ which stated that 'the employee's right to fair labour practices in the form of a right to a fair dismissal based on operational requirements ... must come into play when the exercise of the right to strike threatens the continued operation of the employer's enterprise'.⁴⁵

The problem created by the decision is that it frustrates the chief purpose of a strike and limits its effectiveness.

40 [2003] 11 BLLR 1081 (LAC) at 1101 H-J

41 (1999) 20 ILJ 1718 (LAC)

42 See also Grogan J 'Retrenching striking workers – the limits of protection' *Employment Law* (September 1999) Volume 15(4) at 5.

43 *Ibid* at 6

44 [1998] 12 BLLR 1209 (LAC)

45 (1999) 20 ILJ 1718 (LAC) at 1726 B-C

The facts in *General Food Industries Ltd v Food & Allied Workers Union*⁴⁶ are as follows:

During the 1999 wage negotiations, Genfood sought a reduction in the wage bill, asserting that an undue increase in the wage bill might lead to retrenchments and outsourcing. The union refused to discuss either of these proposals and faced with imminent strike action, the company agreed to an overall 6% increase. Thereafter, the company gave the union notice of retrenchments and in February 2000 the company retrenched 58 workers.

The Labour Court accepted the union's argument that the dismissal fell foul of section 187(1)(c) of the LRA in that the dismissals were executed in order to compel employees to accept the company's demands, which demands the company was unable to enforce during wage negotiations and that the dismissals were therefore automatically unfair.

But the Labour Appeal Court disagreed, stating that as the union had been fully informed of the company's agenda throughout wage negotiations, the court could find nothing wrong with the company's persistence in effecting its efficiency proposals and retrenchments, after an expensive wage settlement.⁴⁷

The effect of this decision is that employers may use retrenchments to achieve the goals which they could not achieve during wage negotiations, provided that they announce such intentions at the wage negotiations.

It seems therefore that the Labour Appeal Court will readily allow employers to use the migration process to transform a mutual interest dispute to one of rights in order to retrench employees. In other words, the employer can simply turn a dispute of interests (a strikeable dispute) into one of rights which is not strikeable.

*Mazista Tiles (Pty) Ltd v National Union of Mineworkers & Others*⁴⁸ is authority for the proposition that restructuring at a workplace may necessitate changes to the terms and conditions of employment and if an employee refuses to accept the changes necessary to meet operational requirements and they are found to be justified, the employer may dismiss such employee.

In *CWIU & Others v Algorax (Pty) Ltd*⁴⁹ before dismissal the employees had been repeatedly told that if they were dismissed for refusing to work the new shifts, they would later be given the opportunity to change their minds. After their dismissal, the employer repeatedly offered to reinstate them, provided that they accepted the new shifts. Witnesses for the company testified in court that the company had never wanted to dismiss the workers, but had merely 'wanted them to change their minds'. The majority held that the company's decision fell within the ambit of section 187(1)(c) and was therefore automatically unfair.

46 (2004) 25 ILJ 1260 (LAC)

47 See Thompson (fn 37 above) 713

48 (2004) 25 ILJ 2156 (LAC)

49 [2003] 11 BLLR 1051 (LAC)

DISMISSALS FOR OPERATIONAL REQUIREMENTS

The facts in *National Union of Metalworkers of SA & Others v Fry's Metals (Pty) Ltd*⁵⁰ are similar to those of *Algorax* discussed above. The difference is that the court could not find any evidence that Fry's Metals had indicated to the workers that they would be reinstated if they changed their minds and accepted the new shift system. The case is therefore authority for the proposition that an employer who dismisses employees who refuse to accept its demands without offering reinstatement should employees change their minds, will not fall foul of the provisions of section 187(1)(c).

The irony of the two cases is that by making attempts to resuscitate the employment relationship – which is one of the purposes of the LRA – *Algorax* made itself guilty of an automatically unfair dismissal while Fry's Metals was absolved from having to make such attempts. Fry's Metals has therefore been criticised for adopting a literal reading of section 187(1)(c), that is, that a dismissal is one that has already been effected to the exclusion of those contemplated. Further, the case fails to appreciate that a dismissal is always final. Employees were afforded an opportunity to accept the new shift system before they were dismissed. Thus, the real threat was that an employee would be dismissed if he refused to accept the new terms.

Thus, an employer can simply change an employee's terms of employment without giving such employee an opportunity to change his mind. Should employees refuse to accede to the new terms, the employer may simply dismiss them and such dismissal will not fall foul of the provisions of section 187(1)(c).

However, the question will still remain whether the dismissal was substantively fair, that is, whether the employer had a fair reason to dismiss.

10 CONCLUSION

Although some decisions of the courts have compromised the worker's rights in terms of the LRA, it should not be forgotten that any dismissal for operational requirements must still pass the tests of substantive and procedural fairness.

According to Du Toit, the principles derived from a review of the case law may be summarised as follows⁵¹:

- (a) To be valid, a dismissal for operational reasons must be (i) based on an 'operational requirement' as defined in section 213 of the LRA and, within this framework, (ii) for a 'fair' reason.
- (b) A fair reason for dismissal is not limited to efforts to save a business but may be related to any legitimate business objective, including *bona fide* attempts at improving its efficiency, profitability or competitiveness.

⁵⁰ (2005) 26 ILJ 689 (SLA)

⁵¹ Du Toit 'Business restructuring and operational requirements dismissals: *Algorax* and beyond' (2005) 26 ILJ 595

- (c) However, not every reason related to a legitimate business objective will be fair. Dismissal will only be substantively fair if it represents 'a measure of last resort', or is 'necessary', to achieve the objective in question. The employer must show, in other words, that in pursuing that objective 'all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum'.⁵²

There is no doubt that since 1995 labour has made great strides in protecting the rights of workers dismissed for operational requirements.

BIBLIOGRAPHY

- Du Toit D 'Business restructuring and operational requirements dismissals: *Algorax and beyond*' (2005) 26 *ILJ* 595
- Grogan J 'Complicating retrenchment law. Unforeseen effects of section 189A'(2005) 21(2) *Employment Law*
- Grogan J 'Food for thought: Retrenchment to enforce demands' (2004) 20(5) *Employment Law*
- Grogan J 'Golden handshake: When severance pay is due.' (2006) October *Employment Law*
- Grogan J, 'Retrenching striking workers – the limits of protection' (1999) September *Employment Law*
- Hutchinson W and Le Roux P 'Temporary employment services and the LRA: Labour brokers, their clients and the dismissal of employees' (2000) 9(6) *Contemporary Labour Law*
- Le Roux P 'Development in individual Labour Law'. *Current Labour Law* (1995)
- Rycroft A 'Pre-Retrenchment disclosure? Well, maybe not ... *Robinson & Others v PricewaterhouseCoopers* (2006) 27 *ILJ* 836 (LC); *Chester Wholesale Meats (Pty) Ltd v NIWUSA* (2006) 27 *ILJ* 915 (LAC)' (2006) 27 *ILJ* 2014
- Thompson C 'Bargaining over business imperatives: The music of the spheres after Fry's Metals' (2006) 27 *ILJ* 704

52 *General Food Industries v FAWU* (fn 46 above). Similarly, Grogan (in 'Food for thought: Retrenchment to enforce demands' (2004) 20(5) *Employment Law*) states that '[e]mployers are not precluded from retrenching merely to increase profits, provided that retrenchment is the only rational way to secure that end'.