Retrenchment - Do We Recognise The Effect?

Measures how to avoid retrenchment.

By Johanette Rheeder

Retrenchment is never easy, both on the employer and the retrenched employee. The employer faces disputes, low morale, low productivity and even sabotage by disgruntled employees. Retrenchment may also have a devastating effect on the on the retrenched employee and his family life. White males, especially the older males, may find it difficult to obtain work again due to affirmative action candidates being favoured by employers.

Retrenchment is nothing but a dismissal. In this instance the dismissal is for operational reasons, which can include a variety of reasons such as the financial decline of a business or the loss of client contracts, an employer deciding to increase profits of his business or a part thereof, the introduction of new technology that results in a decline in positions or structural changes such as the transfer of a part of the business of the employer. Retrenchment is one of the three reasons accepted in the South African labour law to fairly dismiss an employee. Retrenchment is also known as a "no fault dismissal". An employer may therefore not retrench the sick or incapacitated employee or the poor performer or even the habitual transgressor. Due to the no fault status of retrenchment, the employer needs to follow different procedures to deal with these issues.

Due to the fact that it is in essence still a dismissal, the requirement of "fair labour practices" still applies. Fair labour practices are the constitutional right of every employee. The Constitution, by way of section 23(1) (a), specifically declares that every person has a fundamental right to fair labour practices. In the context of retrenchment, expression is given to this in the Labour Relations Act by affording an employee the right not to be unfairly dismissed and an employer the right to dismiss an employee for a fair reason based on the employer's operational requirements and in accordance with a fair procedure. The Labour Relations Act 66 of 1995 (LRA) codifies the requirements for retrenchments by way of section 189 and 189A. Employers cannot achieve a fair retrenchment process without following the requirements of the LRA as it underlines the constitutional right to fairness. Section 189 therefore regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons.

Because retrenchment is a "no fault" dismissal and because of its human cost, the LRA places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed, are treated fairly. Section 189 and 189A places a high value on consultations, in fact, if the employer fails to consult with employees on retrenchment, it will be an unfair retrenchment and the employer will face re-instatement or a compensation order. The purpose of consultation is to enable the parties, in the form of a joint problem-solving exercise, to strive for consensus, if that is possible.

It is required of the parties to attempt to reach consensus on, amongst other things, appropriate measures to avoid dismissals. This entails a genuine commitment from the parties to seek consensus. An employer who made up his mind about retrenching the employees prior to the consultation process and who is only going through the motions of consultation, will constitute a sham and will not pass the test of section 189.

In order for this process to be effective, the consultation process must commence as soon as a reduction of the workforce, through retrenchments or redundancies, is contemplated by the employer, so that possible alternatives can be explored. The employer should, in all good faith, keep an open mind throughout and seriously consider alternative proposals put forward. If this is not done and the employer made the decision before the process commenced, it will render the retrenchment substantively unfair. The parties must seek measures to avoid retrenchments. The list of measures to avoid dismissals is vast and dependent on the employer and the industry the employer is operating in. Examples thereof are:

- measures to increase productivity;
- short time;
- rationalizing costs and expenditure;
- increase or decrease in shifts and length of shifts;
- decreasing the number of contractors or casual labourers;
- using employees to perform the functions performed by contractors or casual labourers
- outsourcing a function to its own staff after the employees have formed themselves into a company;
- skills development to enable employees to move into different positions;
- stopping overtime or Sunday work
- bumping
- reducing wages (by agreement)
- early retirement offers or schemes
- moratoriums on hiring new employees
- gradual reduction of workforce by way of natural turnover
- extended unpaid leave or temporary lay-off

If one or more employees are to be selected for dismissal from a number of employees, the LRA requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria.

An example of fair selection criteria is "LIFO", which means that the last employee in, therefore the one with the least amount of service, is the first employee to be chosen for retrenchment. This criterion is based on years of service and not on any subjective means such as the performance or disciplinary record of the employee, which will be unfair.

What payment can the employee claim?

Employees dismissed for reasons based on the employer's operational requirements are entitled to severance pay of at least one week's remuneration for each completed year of continuous service with the employer, unless the employer is exempted from paying severance. If the employer has a policy on retrenchment stipulating a bigger severance, the employee will be entitled to this amount. Due to the fact that it is a no fault dismissal, the employee is also entitled to his statutory or contractual notice pay, payment for any accrued leave and any benefit she has contracted for with the employer. Should the employer not require the employee to work his notice period, the employer may pay the employee in lieu of notice. The employee is then relieved from service.

What can the employer deduct?

Section 34 deals with deductions and other acts concerning remuneration: in terms of section (1), an employer may not make any deduction from an employee's remuneration unless—

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

(2) If the deduction related to loss or damage suffered by the employer, then further requirements are set. A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if the loss or damage occurred in the course of employment and was due to the fault of the employee; and the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made (typically a hearing); and the total amount of the debt does not exceed the actual amount of the loss or damage; and the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.

(3) If the deduction is for goods purchased, then a further rule applies. The deduction in terms of subsection (1) (a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.

An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person, must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.

An employer may not require or permit an employee to repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or acknowledge receipt of an amount greater than the remuneration actually received.

In terms of 34A an employer that deducts from an employee's remuneration any amount for payment to a benefit fund must pay the amount to the fund within seven days of the deduction being made. Any contribution that an employer is required to make to a benefit fund on behalf of an employee, that is not deducted from the employee's remuneration, must be paid to the fund within seven days of the end of the period in respect of which the payment is made. If the employer is unsuccessful in deducting the money in accordance with the stipulations of the BCEA, then the option of civil litigation is always available. Few employers take this route, as it is costly, time consuming and does not guarantee money in the employer's pocket, even if the employer is successful in the court. The principle of "throwing good money after bad money" often applies.

The next option is deductions from the pension benefits of the employee, however, the deduction must comply with section 37D(b)(ii) of the Pension Funds Act. This section determines that if a debt is for damage caused by the employee's "theft, dishonesty, fraud or misconduct", the employer may ask the fund to deduct the amount of the debt and pay it over. However, the employee must have admitted liability in writing; otherwise the employer would need to get a court judgment against the employee for the amount or confirming that the offence did take place. Without the written acknowledgement of liability or a court judgement or order, it would be illegal to withhold the proceeds of the employee's pension fund benefits. The "theft, fraud, dishonest or misconduct" should have been committed while the employee was still a member of the fund. Contractual debts such as car, study or computer loans in respect of which the employee still owes a balance to the employer on the date of withdrawal from the fund do not fall within the ambit of section 37D(b)(ii).

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