

The concept of job security and fairness for employees in retrenchments

By Alex Davies

1. INTRODUCTION:

- The general principles in relation to dismissals based on an employer's operational requirements are set out in section 189 and 189A of the Labour Relations Act^[1] ("the LRA").
- At first blush the general principles appear to be fairly straightforward and easy to apply when entering into a retrenchment process and ultimately terminating the employment of those unlucky employees who are eventually impacted by no-fault terminations. However, on a practical level, the application of the general principles is no less of a minefield for disputes than in the case of any other type of termination.

2. THE BASICS OF RETRENCHMENT: SELECTION CRITERIA

- A no-fault termination, like any other termination, is assessed on the basis of the principle of fairness (procedural^[2] and substantive) under the provisions of the LRA.
- Emphasis is placed on a consultation process where the parties involved must try to reach agreement on various prescribed aspects including but not limited to the criteria to be utilised when selecting employees for *dismissal*. Where no agreement is reached on the selection criteria the employer will then apply a selection criteria.
- All selection criteria must be fair and objective both in their nature and in their factual application.
- It is important to consider that selection criteria which appear at face value to be neutral may in fact be discriminatory at a deeper level through treating groups of employees differently and preventing a level playing field.
- In disputes, the Employer carries the onus of proof in respect of fairness.

3. VAN STADEN AND 13 OTHERS // TELKOM SA (SOC) LIMITED^[3]

- The Labour Court in the *van Staden* judgement set out an in depth analysis into the aspect of the fairness of the retrenchment process undertaken by Telkom during 2014. For the purposes of this article the detail of the evidence is not repeated however the following aspects are important.
- Telkom undertook a restructuring exercise in 2014 in an attempt to reduce costs at a managerial level, the aim was to place Telkom in a better financial position through a new leaner structure and reduced costs. The operational rationale was in principle not in dispute however the application of selection criteria was disputed.
- The process undertaken entailed a number of aspects including requiring employees to apply for possible positions for which they qualified. Employees who applied for positions went through three selection stages for placement into the new structure.
- The first stage was a very strict, largely mechanical process of placement where employees met the criteria for a specific position. In the second stage there was somewhat more flexibility in the placement of employees within positions which remained vacant after the stage one placements were made.
- Employees who were not successful in securing placements during the selection for placement were ultimately issued with dismissal notices unless they were able to secure positions in a third stage through a process of competitive *recruitment*.
- On analysis of the application of selection criteria applied for the dismissal of employees the Court found that it was clear that the selection criteria applied to the dismissals was in reality whether or not an employee had been placed within the new structure or not. The Court found that this is not an acceptable or fair criteria that may be used to select employees for *dismissal*.
- Ultimately close to 100 employees were dismissed, including the Applicants, in circumstances where about 170 alternative vacant positions existed within the new structure which were not offered to the employees prior to their termination.
- The Court quoted, with approval, the following extract from the judgement of the Labour Appeal Court in the matter of *Oosthuizen v Telkom SA Ltd*^[4] in its rejection of the notion that existing employees should apply for internal jobs in order to survive dismissal:

"A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason."^[5]

- The Court further rejected the argument that the Applicants lacked the skills to fill the vacant positions, stating that it could not simply accept this explanation, which was not born out from the evidence led. The Court questioned why the option of skilling individuals was not considered by Telkom if indeed they lacked skills.
- Ultimately, the Labour Court found the dismissals were unfair and reinstated the Applicants on a retrospective basis without loss of benefits into the positions that they held prior to their termination.
- The Applicants were effectively reinstated into their positions where they were not yet placed into positions in the new structure but also not yet terminated pursuant to a finalisation of the process.

4. CONCLUSION:

- When undertaking restructuring or retrenchment exercises employers must ensure that the selection criteria applied are objectively fair criteria and that they are applied fairly across a level playing field of impacted staff members who are all treated equally.
- Dismissal should be imposed by an employer as a last resort where alternatives have been properly investigated in order to avoid the dismissals.
- The process of requiring staff members to successfully apply and compete for positions in order to ensure continued job security is unfair when used as a selection criteria for dismissals.

[1] Act 66 of 1995, as amended

[2] In large scale retrenchment proceedings conducted in terms of section 189A of the LRA it is imperative that any procedural disputes are raised timeously in accordance with section 189A(13) of the LRA failing which the right to do so is forfeited as confirmed by the Constitutional Court in *Steenkamp and Others v Edcon Limited*, unreported judgement under case number CCT29/18 handed down on 30 April 2019.

[3] Unreported Judgement of the Labour Court under case number JS95/15 as handed down on 11 May 2019

[4] [2007] JOL 20249 (LAC)

[5] See para 8