APPLICATION OF SECTION 189 AND SECTION 189A OF THE LABOUR RELATIONS ACT 66 OF 1995 AS AMENDED

by

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Summary

Economies worldwide have become more integrated and competitive due to the phenomenon of globalisation and its antecedents, which are improved technological communication, the use of technology in production, ever improving management of skills as well as standards of education. Amongst the consequences have been changing demands and rising expectations in terms of employee remuneration, job security and conditions of work. This has at the same time been accompanied by employers expecting greater profit. Against this backdrop, this treatise seeks to interrogate and to explain the processes that should constitute fair, rational and justifiable employee dismissal for operational purposes. This is done bearing in mind the global economic crisis and its impact on employees. The treatise constitutes an attempt to carve a cushioning mechanism for employees in the midst of the global economic storm.

We consider the inadequacies of common law principles. We also submit that section 189 in its present form and its application by courts do not provide for substantive fairness interrogation when dealing with dismissal for operational reasons.

We explore the legislative framework, interpretation by leading academics as well as applications by courts of section 189A, which prescribes that if dismissal is based on operational reasons, consideration must not only be based on substantive and procedural fairness but also that proper consideration of alternatives must have been explored before dismissal is effected.
Preface

If the saying is true that it is not the consciousness of man that determines its being, but that its being determines its consciousness, it must then follow that I must humbly recognise the South African Student’s Congress for its patience in developing my consciousness and capacity to view and analyse society in a scientific and analytical manner.

This dissertation was inspired to seek a balance and justice when those, who are engaged in production, are dismissed for reasons not of their fault, but for the operational reasons of those who own the means of production.

In completing this study I sincerely wish to thank my parents, Malibongwe and Nozipho Rune, for their insistence that I continue to study beyond my LLB degree. I shall always be grateful and indebted to them for their huge sacrifices, dedication and guidance.

I also wish to thank Prof Adriaan van der Walt for his support and instilling a belief and confidence in myself, which enabled me to complete this dissertation. I equally take my hat off for the dedication and patience demonstrated by Dr Pieter Wagener in guiding me through the completion of this dissertation.

It will be a serious oversight if I were not to acknowledge the support provided by my sister and brothers Mphathiswa, Luthando, Unathi & Vusumzi. You will always remain pillars of strength and wisdom in my life.

I must also thank my friends, who acted in challenging times as my brothers and sisters: Tumelo, Themba, Terris, Magasela, Mfundo, Ayongezwa, Buitumelo, Mio, Siphokazi, Mbulelo. Thank you very much, with special thanks to Zintle.

Special recognition and appreciation go to Nonzuzo Zulu, whose encouragement was unparalleled.

This dissertation would not have been successful without financial support from both my parents, in particular from my mother, the NRF and a NMMU Scholarship. To my sister Unathi, thanks a lot for your financial contribution.
Chapter 1: Introduction

1.1 Purpose of treatise

Economies worldwide have become more integrated and competitive due to the phenomenon of globalisation and its antecedents, which are improved technological communication, the use of technology in production, ever improving management of skills as well as standards of education. Amongst the consequences have been changing demands and rising expectations in terms of employee remuneration, job security and conditions of work. These expectations come in conflict with the desire of employers to increase their profits. Against this backdrop, this treatise seeks to investigate and to explain the processes that should constitute fair, rational and justifiable dismissal of employees. This is done bearing in mind the global economic crisis and its impact on employees. The treatise attempts to establish a cushioning mechanism for employees in the midst of the global economic storm.

Integration of the world economy and trading has resulted in the market becoming more competitive and this has pressurised those who own means of production, or are employers, to find more creative means of ensuring survival of their businesses, increasing productivity and therefore increasing profit. While on the other hand, workers believe that it is they who are responsible for means of production and that they therefore deserve appropriate surplus value for their labour and better working conditions. They should not only be viewed as a means of production and making profit, but more as essential partners, who are engaged in a mutually beneficial contract. They ought therefore to be remunerated and consulted meaningfully on how the business should be operated.

One should therefore attempt to find a balance between companies, which provide the means of production and want to survive the competitive global economy, while still being able to make a profit, with demands of workers who apply the means of production without the profits directly accruing in their pockets. To find such a balance between the two contending views is therefore the main theme of this treatise, while attempting to discover in which circumstances the employer would be justified in
dismissing employees as an adequate response to the pressures of the market and how that process should be implemented.

A need then arises for the elucidation of the context in which the South African operational requirements are applied. We shall discuss:

- The definition and context of operational requirements;
- the development of operational requirements in South African labour legislation;
- operational requirements in terms of South African common law;
- Grogan’s reasoning on the common law approach;
- the current view of courts on common law when applying it to labour cases.;
- international views on operational requirements as founded on the International Labour Organisation (ILO) Conventions; and
- labour case law in various countries.

We shall also discuss the interpretation and application section 189 and 189A by the courts. The premise is that section 189 in its present form and application by the courts does not provide for substantive fairness when dealing with dismissal for operational reasons.

We shall explore the legislative framework, interpretation by leading academics, as well as applications by the courts of section 189A. This section prescribes that if dismissal is based on operational reasons, consideration must not only be based on substantive and procedural fairness, but also that proper consideration of alternatives must be explored before dismissal is effected.

The first chapter comprises of the rationale behind the choice of this particular subject of study and the aims thereof. It then proceeds with an elucidation of the context in which the South African operational requirements are applied. The definition, context, as well as of operational requirements in South African common law; Grogan’s reasoning on the common law approach and the current view of courts on common law when applying it to cases will be provided. The chapter will trace the evolution of
operational requirements in South African legislation as far back as the days of discrimination to the present time of the Labour Relations Act (LRA), as emended. The chapter then gives an account of international views on operational requirements as founded on the International Labour Organisation (ILO) Conventions and case law in numerous countries.

Chapter two is concerned with the interpretation and application of section 189 and 189A by the courts. The chapter moves from the premise that section 189 in its present form and application by courts does not provide for substantive fairness interrogation when dealing with dismissal for operational reasons.

The chapter then explores the legislative framework, interpretation by leading academics as well as applications by courts of section 189A, which prescribed that if dismissal is based on operational reasons, consideration must not only be based on substantive and procedural fairness but also that proper consideration of alternatives must have been explored before dismissal is effected.

Chapter three substantiates on the duty of the employer to consult with employees when retrenchments are envisaged. It further elucidates on the point at which the employer must initiate the process of consultation. The contention is that the process of consultation must be a genuine consensus joint-seeking exercise and not a mere formality or mock consultation. The chapter concludes with a detailed argument on what should comprise the content of consultation and provides an alternative that seeks to make dismissal the last resort after the exploration of various alternatives to avoid retrenchments.

Chapter four compares and contrasts the practical effects of section 189A between employers who have employed employees on small scale against those who have employed at a larger scale. It then examines the mechanisms to be utilised when determining which category of employees must be retrenched. Subsequently the chapter interrogates the means applied when parties fail to reach consensus on the process which is inclusive of remedies at their disposal. The chapter concludes with an extensive critique on both the procedure (procedural) and substantive content of section 189 and 189A and exposes some of the limitations within above-mentioned sections of the LRA.
The treatise concludes by comparing and contrasting the practical effects of section 189A between employers who have employed employees on small scale, against those who have employed on a larger scale. It examines the mechanisms to be utilised when determining which category of employees must be retrenched. Subsequently, we investigate the means to be applied when the parties fail to reach consensus on the process and the remedies at their disposal. A criticism will be given of the procedural and substantive content of sections 189 and 189A. We also raise some of the limitations of the relevant sections of the LRA.
Chapter 2: The context of dismissal for operational reasons

2.1 Economic pressures

An employer may be pressurised by economic factors to dismiss employees. Some of these are:

1. Loss of clients.
2. Depreciation of the rand.
3. Fluctuation of inflation rates.
4. Drastic fluctuations of export or import duties.
5. New competitors entering the market.
6. Change of technology such as a shift from using gas and paraffin to electricity.

After due consideration employers need a fair reason for dismissing employees. Reduction of total employee remuneration may be a viable option. Alternatively, it may consider restructuring its organisation, which may result in some employees’ jobs becoming redundant or not being longer meaningful.

Equally, employers competing in an environment of large-scale introduction and improvement of technology may be compelled to introduce certain advanced technological equipment to improve production and reduce costs. This may result in fewer employees being required to operate the technology. The term ‘operational requirement,’ as it appears in the LRA, defines and sets about meaning and processes of dealing with dismissals resulting from the reasons stated above. It appears that this kind of dismissal does not relate to any act or omission of the employees, but rather relates to dismissal of the employees for certain economical needs of the employer.
2.2 Definition of dismissal for operational requirements

2.2.1 Common law

2.1.1.1 Definition

The common law principle has articulated its position on the basis that the relationship between employer and employee is based on the contract entered into by the parties. It revolves about the freedom of contract and other related common law principles. This relationship of the employer and employee is therefore, according to common law, best left for its regulation and determination to the specifications of the contract. This is based on the principle of the common law regarding contract of employment as of an individual nature. As a result, the common law approach was found wanting in regulating the changing nature of an employment contract, particularly as it relates to the stronger bargaining power of the employer, who owns the means of production, against the weaker one of the employee, who applies the means of production.

Concrete realities of economic hardship have shown that because of desperation for jobs and consequent willingness to enter into any form of contract as long as it would bring food onto the table, many employees enter into contracts of employment with aspirations that conditions of employment would improve and that job security would be ensured with time. On the other hand, from the employer’s point of view, it would probably mean ease of termination.

This was a significant limitation of the common law approach, which left employees at the mercy of employers. Some observers argued correctly that this approach was equally not in the interest of employers as improved conditions of employment and secure jobs would amount to happy employees, with a commensurate increase in productivity levels and standards.

2.2.1.1 Grogan’s reasoning on common law.

In Workplace Law John Grogan explains the evolution and application of common law principles in the recent past by arguing:
“The question whether under common law the court will read into a contract of employment an implicit term that the employee will not be dismissed without good reason or without being given a hearing - or, more broadly, whether statutory developments in dismissal law will be deemed to form part of all contract of employment - has not been fully resolved. Although the civil courts have been reluctant to hold that there is an implied duty to all fairly, the High Court has come to holding that such a term will almost invariably be applied.¹

In *Key Delta v Marinner* a magistrate granted the respondent damages equivalent to the remuneration he would have received in three months after he was summarily dismissed without a hearing and for no apparently sound reason. On appeal, the employer argued that in terms of the common law it was bound only to pay the respondent what he would have received had the contract been lawfully terminated – i.e. one month's notice. The court noted that generally employers and employees were aware of the fact that under the Labour Relations Act arbitrary dismissals amounted to unfair labour practice. Considering employment, the court took into account the status of the employee (he was of relatively senior status) and the size of the employer. It ruled that the parties must have understood that the employee could not be arbitrarily dismissed.”²

Grogan further explains the deficiencies of the common law, which need to be addressed by legislation:

“(a) The common law contract of employment is individualistic in nature, paying no regard to the collective relationship between employees and employers, which became of increasing importance with the growth of the trade union movement.

(b) The common law does not cater for the inherent inequality in bargaining power between the employer as the owner of the means of production and the employees, who are entirely dependent on supply and demand for their welfare and job security.

(c) The common law pays no regard to the employment relationship, giving the employee no inherent right to press for better conditions of employment as time goes by.

(d) The common law emphasis on freedom of contract encourages exploitation of labour.

² *Key Delta v Marinner* (1998) 6 BLLR 647 (E).
(e) The common law does not promote participative management, in which workers have a meaningful say in at least those management decisions, which directly affect their working conditions and legitimate interests.

(f) The common law does not provide effective protection to the job security of employees.”

2.2.1.2 A recent consideration of common law

A recent case for the consideration of common law to a greater extent was in the *Buthelezi v Municipal Demarcation Board*. It was held that the Constitution and legislation make inroads into the common law, with the caution that these inroads must be carefully interpreted, in that a common-law principle would be upheld where it was consistent with the spirit, purport and objects of the Bill of Rights.

It was further held that legislation would be restrictively interpreted in interfering with common-law rights, except where this was provided for in the specific statute. Accordingly, in common law there is no remedy for the employer being enabled prematurely to terminate the contract on operational grounds. The court noted the presumptions of inroads into the common law and noted that the LRA protects fixed-term employees from abuse by extending the definition of dismissal to include the non-renewal of such contracts where the employee reasonably expected this to happen. The court went on to note that, if the Legislature intended to give early termination rights to employers, it would have specifically done so. It introduced new rights for employees. By omitting similar treatment for employers, it intended that the common-law position was to remain intact with regard to employees.

It was accordingly held that the premature termination of contract in the above case was an unfair dismissal. It was not rendered fair because of the employer’s operational requirements, whatever the merits thereof. It was therefore unnecessary for the court to deal with the finding of procedural unfairness.

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3 Grogan.
4 *Buthelezi v Municipal Demarcation Board*. 2005 2 BLLR (LAC).
2.2 The South African Historical Account

South African labour relations were not immune to political instability across South Africa. Before the 1977 Wiehahn Commission of Inquiry it was almost impossible for employees to be unionised in the wake of the institutionalised discrimination on the basis of race. A dual system of legislation was the order of the day, with certain forms of legislation being enacted for black employees, many of whom were working long hours under hazardous conditions of employment, while earning very little. They could not work on particular jobs and acquire certain skills as these were reserved for white counterparts. They could be fired without any rational justification or hearing, and very few remedies were at their disposal. In most instances, blacks were not allowed to join unions, and were victimised and harassed when they unionised themselves. This anomaly led to situations where in certain instances white employees received better conditions of employment and earnings than their counterparts, while doing similar jobs.

In 1977 the Wiehahn Commission, which was to lay the foundation of South Africa legislation and the development of integrated labour relations, recommended that:

- Trade union rights should be granted to black workers.
- More stringent requirements were needed for trade union registration.
- Job reservation should be abolished.
- A new industrial court should be established.
- A national manpower commission should be installed.
- Provision should be made for legislation concerning fair labour practices.
- Separate facilities in factories, shops and offices should be abolished.
- The name of the Department of Labour should be changed to the Department of Manpower.\(^5\)

It was the 1980 and 1981 Commission reports that extended its horizons to recommend that:

• Labour law and practices should correspond with international conventions and codes.
• Statutory requirements and procedures for registration of trade unions be revised.
• Urgent attention be given to improve the defects of the Industrial Court.
• The position of closed shops agreements be clarified.
• Bargaining rights of workers councils be statutorily laid down.
• Basic labour rights be extended to the public sector.
• Specific legislation should be adopted regarding unfair labour practice.
• The Wage Act be retained but be amended.
• Conditions of employment and working circumstances of women employees be revised.

After these recommendations had been accepted, legislators were to attempt over the next years to incorporate this recommendations into legislation. However, they were not always successful and a number of legal questions arose. The attitude of the Industrial Court is well summarised by Le Roux and Van Niekerk on a judgment issued by the court in Williams v Compare Maxam Ltd⁶⁷ wherein it was held that:

• The employer must consider ways to avoid or minimise retrenchment.
• The employer must give sufficient prior warning to a recognised or representative trade union of the pending retrenchment.
• The employer must consult with such a trade union prior to the retrenchment.
• If no criteria are agreed to, the employer must apply fair and objective selection criteria.
• The employer must give sufficient prior warning to the employee selected for retrenchment.
• The employer must consult with the affected employee and consider any representation made on his behalf by the trade union.

2.3 Influence of international Organisations

The recognition of operational requirements as a ground for dismissal originates from Part II of the International Labour Organisation (ILO) Convention 158 (“the Convention”). The meaning of ‘operational requirements’ remains insufficiently stated, and it may be argued that it broadly incorporates a termination of employment in the circumstances outlined by Part III of the Convention, which refers to termination of employment for economic, technological, structural, or similar needs.

Over the past 20 years there have been important changes in national law and practice concerning dismissals, and the virtually complete discretion of the employer in initiating termination of employment has largely given way to protection. This tendency was advanced at the international level by means of the ILO’s Convention concerning Termination of Employment at Initiative of the Employer.\(^6\) The ILO, which is based in Geneva, and of which South Africa is a member country, is an important source of labour standards.

The main aim of the ILO as an international organisation is to promote social justice internationally. It has approximately 150 member states. It consists of three main bodies, namely the International Labour Conference; the Governing Body and the International Labour Office. The International Labour Conference meets once a year and adopts Conventions and Recommendations by a majority of two-thirds of delegates. Conventions create international obligation for the States, which ratify them. Recommendations merely provide guidelines for national legislation.

The Convention sets out the principle that a worker shall not be dismissed without a valid reason, related either to the operational needs of the enterprise or the conduct or capacity of the worker. It states the grounds, which shall not be considered valid reasons, including union membership, race, colour, sex, marital leave, family, responsibility, pregnancy, religion, political opinion, national extraction, social origin, and temporary absence due to maternity leave, illness or injury.

\(^6\)C158 Termination of Employment Convention, 1982 Session 68 of the conference, adopted 22: 06: 1982; Subject : termination of employment ; Dismissal; employment security.
The Convention establishes a procedural safeguard for determining a valid reason - for example, the right of appeal to an impartial body – and does not assign the burden of proof to the worker. However, some restrictions are placed on the application of these safeguards, the result of an effort to balance the interests of the workers and employers. The Convention permits the termination of employment based on operational requirements of the undertaking, establishment or service. Those requirements may be economic, technological, structural or the result of an accident or force majeure. A large number of the cases surveyed involved termination of employment for operational requirements.

In national law and practice, however, the Convention’s concept of “termination… based on the operational requirements of the enterprise, establishment or services” is typically embodied in a specific legal term (e.g. “redundancy” in the United Kingdom; “retrenchment” and/or “redundancy” in South Africa) whose statutory definition and judicial construction, while corresponding to concept expressed in the Convention, may vary slightly from one country to another. For the sake of accuracy, therefore, the original terms used in the cases presented below have been retained or, when translated, rendered as closely as possible to original (e.g. “dismissal for economic reasons” for the French “licenciement pour motif economique”).

2.2.2 Definition of operational requirements

Beyond the terminological difficulties inherent in a presentation of legal material from different countries, the definition of the scope of the particular term applicable to this class of dismissals under a country’s legal system has important substantive implications. Indeed, some courts have been asked to rule on the initial question of whether the alleged grounds for dismissal qualify it as being justified for operational requirements in terms of the applicable national statute.

2.2.3 Courts in France

The French Court of Appeal, reasoning that the relocation of jobs should be distinguished from the elimination of jobs, ruled that the dismissal of workers whose jobs had been transferred to another location, did not constitute justified termination for
economic reasons. But the court of cessation quashed that decision and rejected the underlying reasoning on the grounds that relocation of the employer’s activity - in this case only partly abroad – effectively entailed elimination of the jobs “in the place” where they used to be, thereby justifying the dismissals in terms of the statutory definition of “dismissal for economic reasons”. 9

2.2.4 Courts in Republic of Korea

In the Republic of Korea, by contrast, the Supreme Court held that redundancies must be based on the “compelling needs of management”, which it defines as generally excluding cases in which “the business is simply moved to another place where the same work is being continued.” The test for “compelling needs of management” is whether the redundancies are necessary to avert bankruptcy or are based on “objective rationality”. 10 Moving to another location or a temporary shutdown due to a strike are not compelling reasons.

2.2.5 Courts in South Africa

In Hlongwane & Another v Plastix (Pty) Ltd, 11 the South African Industrial Court was presented with a case in which it had made a distinction between “redundancy” and “retrenchment”, a term more commonly used in economic literature to mean a collective dismissal due to a substantial reduction in total personnel or a temporary closure. The court defined retrenchment as dismissal due to an economic downturn or other external factor requiring a reduction in force for the enterprise concerned, but not necessarily entailing permanent job loss. In such cases, the employer has a duty to the workers under threat of dismissal, but outside factors causing the retrenchment are taken into consideration in weighing the interests of workers and employers.

In contrast, the Court considered redundancy to be caused by internal factors such as restructuring or investing in technology. The employer therefore has a greater

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9 Court der cassation, 5 April 1995: Société Thomson Tubes et Display (ex Vidéocolor) c/x,y,z et Assedic de la région lyonnaise et de l’Isère, in Droit Social (Paris), NO 5, May 1995 page 488 quoted from international labour review, 1995, Volume, 134, NO 6 Judicial decisions concerning dismissals, some recent cases by Emily SIMS.


11 Hlongwane & Another v Plastix (Pty) Ltd (1990 11 ILJ 171 (K).
duty to the worker(s) being made redundant because the employer is in better control of the situation and need not act hastily. However, this distinction was flatly rejected in a subsequent case before the same court. In *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations) Ltd- President Brand Mines*,\(^{12}\) The Industrial Court stated that the distinction between retrenchment and redundancy previously drawn had no legal basis. All workers dismissed for operational reasons of whatever origin are “retrenched” because they or their jobs have become redundant. It noted that in South African law “retrenchment” was equivalent to the English legal term “dismissal for redundancy.”

### 2.4 Procedural requirements

The ILO convention and most national legal systems recognise the importance of safeguards in terminating employment for operational reasons. Safeguards include information, consultation, appeal to an impartial body and participation of workers’ representatives in the process. However, States may set a minimum number of workers to be terminated at an enterprise within a given period of time before these safeguards are required. Many such thresholds exist at the national level in labour codes, other statutes or collective agreement.

Among the cases surveyed, a high level of adherence to existing procedures was generally required, particularly when large numbers of workers were at risk of losing their jobs. The South African Labour Appeal Court has explained that retrenched employees lose their jobs through no fault of their own and therefore should be entitled to safeguards as protective as those for termination for misconduct.

### 2.2.6 On Consultation

Article 13, paragraph 1, of the ILO Convention specifies that employers contemplating termination for operational requirements shall provide the workers’ representative with the relevant information, including the reason for the contemplated termination, the number and categories of workers likely to be affected and the time

\(^{12}\) *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations)Ltd-President Brand Mines* (1994) 9 BLLR (IC); 1995 12 BLLR 8 (AD); 1996 (1) SA 422 (SCA) .
frame for carrying out terminations. The cases surveyed highlighted either, or both, of two reasons why it is important to inform workers’ representatives. Firstly, this process sets the stage for discussions between the employers and the workers’ representative. Secondly, informing workers enables them to prepare for possible loss of employment and to take steps to minimise the effect of such disruption.

2.2.7 Influence of Legislation and Courts

The Industrial Court, prior to the introduction of Labour Court and the LRA, had treated lack of fault on the part of the employer as the defining factor on this kind of dismissal and it included in this category dismissals at the behest of the third parties, dismissals for incompatibility and dismissals on a breakdown of trust. This attitude of the Industrial Court is elucidated in *East Rand Proprietary Mines Ltd v UPUSA*\(^\text{13}\), the Labour Appeal Court distinguishing between operational factors such as market forces and operational reasons, which had their roots in social conflict. The case involved the dismissal of 350 Zulu workers for operational reasons because the rest of the workforce objected to their continued employment and the employer could not guarantee their safety. The court refused to uphold the dismissals, ruling that the employer had to show that it truly had no alternative and that it was not sufficient to show that its response fell within a band of reasonable options.

Section 213 of the LRA outlines that:

“Operational requirements’ means requirements based on the economic, technological, structural or similar needs of an employer.”

The Code of Good Practice states as follows:

“As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent upon a restructuring of the employer’s enterprise.”\(^\text{14}\)

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\(^{13}\) *East Rand Proprietary Mines Ltd v UPUSA* 1997 1 BLLR 10 (LAC).

\(^{14}\) Code of Good Practice Item 1.
A.C Basson argues that:

"‘Technological needs’ refers to the introduction of new technology, such as more advanced machinery, mechanisation or computerisation that leads to the redundancy of employees. ‘Structural needs’ as a reason for the dismissal of employees refers to posts becoming redundant following a restructuring of the enterprise. Restructuring often follows upon a merger or an amalgamation between two or more businesses."

More striking is that it seems as if similar needs of an employer are restricted by the LRA on grounds related to the economic, technological and structural reorganisation of the enterprise. It seems also that similar needs cannot be stretched to include conduct or omission of the employees.

It has further been argued that there is no clear line of divide between an employer’s economic needs and similar needs in that there are often considerable overlaps. The same has been argued that at certain instances the line can be thin between operational grounds and other grounds of dismissals, such as incapacity or misconduct. In NASGAWU v Uluntu Security the court argued:

“That the categories overlap is undeniable. Dismissal for theft, for example, is normally seen as dismissal for misconduct; but it can also be regarded as dismissal for incapacity, because the employee is revealed as someone who lacks one of the qualities – trustworthiness – necessary for the job and with effort it can even be described as dismissal for operational reasons.”

It is therefore a matter of principle that focus should be on the actual reasons for dismissal because it could be related to, or based on, more than one legal ground. When the dismissal is based on operational reasons the code places a duty on the employer to justify that the dismissals were substantively fair, rational and the only suitable alternative. It was in the case Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd wherein it was held that if the employer relied on operational requirements as the reason for dismissal, he must bear the onus of proving that the dismissal was for a fair reason and effected in accordance with a fair procedure.

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17 Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd 2005 JDR 1449 (LC).
Logic was to determine the true reason for the dismissal on guidance as stated by Froneman DJP in *Sacwu & Others v Afrox Ltd*. The court adopted the following approach in determining the true reason for the dismissal of employees allegedly dismissed for operational requirements:

"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. The issue (the reason for the dismissal) is essentially one of the causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilised here. The first step is to determine factual causation: was participation or support, or intended participation or support of the protected strike, a sine qua non (or prerequisite) for the dismissal? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dormant", or "proximate", or "most likely" cause of the dismissal. There are no hard and fast rules to determine the question of legal causation. I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal."\(^{18}\)

If the reason is to "get rid of employees that do not meet the business requirements of the employer, so that new employees who will meet the business requirements can be employed", such dismissals will fall within Section 189 - dismissals for operational requirements.

\(^{18}\) *Sacwu & Others v Afrox Ltd* (1999) 10 BLLR 1005 (LAC) G – 1014 B.
Chapter 3: Interpretation of sections 189 and 189A

3.1 Substantive issues

3.1.1 Application of Section 189

Section 189 in its original form did not provide a statutory definition of substantive fairness in the operational requirement dismissal, and this omission led to courts establishing a legal precedent of showing reluctance to ‘second guess’ an employer’s decision to dismiss employees on the basis of operational grounds. The Court has established a two-fold inquiry:

- The employer must prove that the reason for dismissal is based on operational reasons by proving the reason for dismissal falls squarely within the ambit and spirit of statutory definition of operational reason;
- The employer must prove that operational reasons actually do exist and that it was the real reason for the dismissal.

This, therefore, translates to the onus to prove that such dismissal was not a cover-up for dismissal for any other reason, which is not an operational reason. This attitude was held in Kotze v Rebel Liquor Group (Pty) Ltd where the Labour Appeal Court stressed that its function is not to `second-guess the commercial and business efficacy of the employer’s ultimate decision, but to pass judgment on whether such a decision was genuine and not merely a sham.'

The inquiry was utilised to avoid the mischief as seen in the SA Chemical Workers Union & Toiletpak Manufactures (Pty) Ltd & others. The court detected that the employer had dismissed a number of employees, citing operational reasons, which was a mere cover-up for suspected misconduct with the employer attempting to avoid holding disciplinary hearings.

It was equally held in Pedzinki v Andisa Securities (Pty) Ltd:

19 Kotze v Rebel Liquor Group (Pty) Ltd (2000) 21 ILJ 129 (LAC) at133.
20 SA Chemical Workers Union & Toiletpak Manufactures (Pty) Ltd & others (1998) 9 ILJ 295 (IC).
“Although there may have been a reason to restructure the Compliance Department by changing its focus, Respondent's reason for retrenchment aimed at improving efficiency cannot fall within the ambit of operational requirements because the inefficiency of this Department could be resolved by applying other alternatives other than dismissing Applicant. The consultations undertaken between the Applicant and Respondent, which were intended to be in accordance with section 189 of the LRA, were not meaningful or even aimed at avoiding Applicant's dismissal in view of the fact that Respondent was not amenable to any counter-proposals suggested by Applicant despite the fact that it did not have an immediate replacement for either Applicant or Petersen. The reason for Applicant's retrenchment was a sham.”  

3.1.2 Dismissal to increase profits

In *Hendry v Adcock (Pty) Ltd v National Union Metalworkers of SA & others* the Labour Court held that:

“In this case court argued as follows “If the employer can show that the good profit is to be made in accordance with the sound economic rationale and it follows a fair process to retrench an employee as a result thereof, it is entitled to retrench. When judging and evaluating an employer’s decision to retrench, an employer’s court must be cautious not to interfere in the legitimate business decisions taken by employers who are entitled to make a profit and who, in doing so, are entitled to restructure their businesses.”

In *Enterprise Foods Ltd v Allen & Others* the Labour Court held in favour in that it was substantially fair wherein the company stakeholders demanded that costs be cut to achieve greater profitability. It expressed that there were objective reasons for the restructuring of the employer’s organisation, including the subsequent job losses.

In *Food & Allied Workers Union & others v SA Breweries Ltd* the Labour Court found that the company’s decision to restructure its operations was warranted by efficiency considerations and a drive to increase its profitability. The court held that in the market-driven economy there could no objection to an employer retrenching to increase profitability. The employer had established a valid commercial rationale for the retrenchment of its employees.

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22 *Hendry v Adcock (Pty) Ltd v National Union Metalworkers of SA & others* (2003) 24 ILJ.
The non-provision of guidance by section 189 allowed the courts to create a precedent, which did not interrogate the merits of dismissals on the basis of operational grounds of not wanting to second guess the intention of the employer. This attitude could not be in the best interest of the employees, who are relying on the courts to protect them to dispense justice. The basic principle and primary responsibilities of the court are to dispense justice and make sure that both parties receive fair treatment.

Therefore, reluctance of the court to interrogate the merits of the dismissal based on operational reasons cannot be said to have acted appropriately in its responsibility to treat both parties fairly.

3.2 Application of Section 189A

The new version of section 189A attempts to provide guidance to the effect that if the dismissal is based on operational reasons, it must comply and be in consideration of section 213. This implies that it must genuinely be an operational requirement and not a sham or another reason, which in many instances is incapacity or misconduct.

Section 189A goes further to affirm that it is not sufficient that the reason is based on operational requirements, but the section precludes the dismissal to be justifiable on rational grounds. Objective testing is applied to determine rationality, whereas what ought to be considered is the rationale given by the employer, which objectively amounts to what is acceptable as a reason of dismissal.

This section prescribes that if dismissal is based on operational reasons, consideration must not only be based on substantive and procedural fairness, but also that proper alternatives must have been explored before dismissal is affected. In practical terms this requires that during consultation, the employer and the employee must meaningfully attempt to find consensus on measures or ways to avoid dismissals. It requires that the parties must not in this instance simply go through motions or discuss the alternatives as mere formality, but that they must apply their minds and provide reasonable grounds, which are sustainable under scrutiny. If the employer decides to dismiss according to other alternatives, it must be able to provide logic and reason that will sustain an argument that dismissal was the only rational decision, which could have been taken under the circumstances.
The section further requires that during consultation, if the parties in one way or another, come to a conclusion that the only reasonable option is to dismiss employees, they must then attempt to reach agreement on the criteria to be used for dismissing employees. In instances wherein the parties deadlock on the criteria, the section places a responsibility upon the employer to apply criteria that are fair and objective. This means that the employer must have applied its mind to all possible methods and must have considered the methods that are the most fair and objective.

### 3.2.1 Role of the Courts

As discussed above, the Labour Court had earlier regarded its role as not to second-guess the employer’s decision. It limited its role to determining whether dismissing employees for operational reasons was a rational, commercial or operational decision. With the introduction of section 189A, courts recognised that procedural fairness is not only a value in its own right, but a means of establishing whether substantive grounds are in fact present and if so, stating the most appropriate ways of mitigating the consequences.

This was evident in the case of *NEHAWU v Agricultural Research Council,* where it was held that:

“Not merely to determine whether the requirement for a proper consultation process has been followed and whether the decision to retrench was commercially justifiable but whether the retrenchment was properly and genuinely justified by operational requirement in the sense that it was a reasonable option in the circumstances.”

In *Decision Surveys International (Pty) Ltd v Dlamini & Others* the Labour Appeal Court interrogated the meaning of ‘properly and genuinely’ justified by operational requirements. The Court explained as follows:

“If the employer resorts to retrenchment when alternatives to retrench are available, it cannot be said that the ultimate decision to retrench is necessarily fair. The courts will therefore the reason advanced for retrenchment in order to examine whether the ultimate decision to retrench is genuine and not a sham. However, this is not say that courts are to second-guess the commercial or business efficacy of the employer’s decision. Nor is the inquiry whether the

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25 *NEHAWU v Agricultural Research Council* 2000 8 BLLR 1081 (LC).
best decision was taken …The inquiry is whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances.”

It has been suggested that the appropriate balance between the two extreme views can be found if, on one hand it is to ‘second-guess the employer’s decision, and on the other hand to apply the ‘hands-off’ approach. This can be determined if the courts ensure that the provisions of the Act are complied with, taking into consideration the element of fairness. This implies that the reason for dismissal based on the employer’s operational requirements must be present. This, therefore, places an onus on the employer to establish a prima facie evidence that such a reason, based on the facts of each case, does exist. If there is a dispute about such fairness, then it becomes the court’s responsibility to decide such a case.

In *SA Clothing and Textile Workers Union & Others v Discreto – a Division of Trump and Springbok Holdings*, the Labour Appeal Court dealt with the above discussed matter:

> “Every person has the constitutional right to fair labour practices. As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer’s ultimate competence to make a final decision on whether to retrench or not… For the employee the fairness is found in the requirement of consultation prior to the final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. The purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer’s ultimate decision (an issue of which it is not generally qualified to pronounce upon) but to pass judgement on whether the ultimate decision arrived at was genuine and a mere sham (the kind of issue which courts are called upon to do, in different settings everyday).”

The manner in which the court adjudges the latter issue is to enquire whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is

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important to note that when determining the rationality of the employer’s ultimate decision on retrenchment, 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 or operational decision, properly taking into account what emerged during the consultation process.”

However we saw a different approach of the court in the case of *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* in that it focused on the fairness of the reasons to both the employer and employees:

“The word ‘fair’ in section 188 introduces a comparator that is the reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements and the court is entitled to examine the content of the reasons 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.”

The employer’s business and decision-making was further dealt with in considerable detail in *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd*:

“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… Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic… accordingly, where... the employer had chosen a solution that result in a dismissal… when there is an obvious and clear way in which it could have addressed the problems without any employees losing their jobs… and the court is satisfied, after hearing the employer on such a solution, that it can work, the court should not hesitate to deal with the matter on the basis of the employer using that solution which preserves jobs rather than one which causes job losses. This is especially so because resort to dismissal, especially a co-called no-fault dismissal… is meant to be a measure of last resort.”

Quoting in *Sacwu & Others v Afrox Ltd*:

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“It can no longer be said that the court’s function in scrutinizing the consultation process in dismissals for operational requirements is merely to determine the good faith of the employer. The matter is now one of proof by the employer, on a balance of probabilities of: the cause or reason for the dismissal the defined ‘operational requirements’ that the dismissal was based on a fair procedure in accordance with section 189 the facts upon which a finding of a substantively fair reason for the dismissal can be made.”\textsuperscript{30}

3.3 When dismissal is justified

In \textit{NUMSA v Atlantis Diesel Engines (Pty) Ltd} the Labour Appeal Court held that dismissal should be “the only reasonable option in the circumstances”\textsuperscript{31} This attitude has however been changed by \textit{SACWU v Afrox Ltd}, where it was stated:

“The court observed that It is implicit in the terms of section 189 (2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take appropriate measures to avoid dismissals; to mitigate the adverse effects of the dismissals; to change the timing of dismissals; to select a fair and objective method for the dismissals… and to provide appropriate severance pay for dismissed employees. What is appropriate will depend on the facts of each case, and on the evidence presented about the steps taken, if the matter proceeds to court.”\textsuperscript{32}

In \textit{Carephone (Pty) Ltd v Marcus NO & others}, Davis AJA commented:

“I have some doubt as to whether this differential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, “The reason for dismissal is a fair reason.” The word “fair” introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, 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 reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would

\textsuperscript{30} Sacwu & Others v Afrox 1999 10 BLLR 1005 (LAC).
\textsuperscript{31} NUMSA v Atlantis Diesel Engines (Pty) Ltd 1993 14 ILJ 642 (LAC).
\textsuperscript{32} SACWU v Afrox Ltd 1999 10 BLLR 1005 (LAC).
have been chosen by the court. Fairness, not correctness, is the mandated test.”

These are persuasive indicators that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational reasons

3.4 Proving substantive fairness

Section 189 (2) places a duty on the employer to prove, on balance of probabilities, the commercial rationality of its decision. In SACTWU v Discreto the Court formulated the following test as quoted below:

“As minimum evidence should be present by someone with personal knowledge of the respondent’s financial position and, more specifically, its relationship with its bankers, as well as evidence of the board’s decision to close the enterprise by someone who attended the meeting where the decision was taken.”

The court put it in more categorical terms in Afrox, when it held that:

“If the employer wishes to show that it considered appropriate options other than dismissal it must present evidence to show that effect and explain why it chose a particular course and not another. If an employee wishes to challenge that evidence it must do so by proper cross-examination on the relevant issues and if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer’s position, it will have a material effect on the final assessment of fairness… As assessment on ‘moral’ considerations not based on evidence led at the trial will be impermissible.”

It was further held by the Labour Appeal Court in NUMSA v Atlantis Diesel Engines (Pty) Ltd that:

“However, we respectfully differ from their suggestion that the decision to retrench could be fair simply because it is bona fide and made in a business like manner. That approach suggests that the court’s function was merely to determine whether or not the decision had been correct.

What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona
fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That in our view applies equally to termination of employment for economic or operational reasons.”

Chapter 4: Consequences of section 189A

4.1 On consultation

Sections 189A and 189 must clearly be read together. The overall effect of both provisions is to require all employers to consult in accordance with section 189 over the issues specified in that section. Larger employers contemplating bigger retrenchments must, in addition, comply with section 189A. The main additional obligations imposed by the new provision are that the employer must consult, and may not retrench, for the prescribed period: 60 days if facilitation is chosen, 30 days if it is not.

The new section 189A may have another practical effect; if employees do not complain during the consultation process about the conduct of the employer, they cannot do so later if and when they refer a dispute under section 191(5)(b)(ii). When such referrals come before the court, the procedural aspects of the retrenchment may not be placed at issue. Section 191(5)(b)(ii), read with section 197A(19), indicates that the court must now consider only the substantive fairness of the retrenchment.

4.2 On substantive fairness

Most of the criteria the court is required to consider when evaluating the substantive fairness of a retrenchment are not new – the courts have in many cases considered whether dismissals were for bona fide economic reasons. For example in National Union of Metalworkers of SA v Atlantis Diesel Engines, whether there was proper consideration of alternatives. What is new is the requirement that the court must decide whether retrenchment was “operationally justifiable on rational grounds”.

It may have been coincidental that the legislature chose the words used by Davis AJA in BMD Knitting Mills. However, by requiring the court to apply that test, the legislature has endorsed decisions that advocated a more “activist” approach to assessing the reasons

37 Ibid.
38 BMD Knitting Mills Pty Ltd v SA Clothing & Textile Workers Union 2001 22 ICJ2264(LAC).
behind retrenchments,\textsuperscript{39} as opposed to judgments like those in \textit{Hendry v Adcock Ingram (LC)}\textsuperscript{40}, which are less interventionist.

Requiring the court to determine whether a retrenchment was “operationally justifiable on rational grounds” compels all judges to enter an area into which many, for good reason, have been reluctant to tread. It has long been argued, with some cogency, that the merits of business decisions that result in job losses are not a proper subject for adjudication: managers know the needs of their business better than outsiders; it is not for the courts to prevent them from taking such decisions, even if they turn out unwise; nor is it for the courts to advise employers how their resources should be distributed; such issues are best left for collective bargaining. However, in the context of an Act that requires \textit{all} dismissals to be “for a fair reason”, the merits of a dismissal for operational requirements cannot really be avoided. This is perhaps why judges have had such difficulty deciding where to draw the line when assessing the substantive fairness of retrenchment cases.

But what will the courts make of the requirement that a retrenchment, to be fair, must be “operationally justifiable on rational grounds” when deciding whether a retrenchment is substantively fair? The lengthy and complex discussions over the meaning of the terms “rationality” and “justifiability” in the context of judicial review bear testimony to the difficulty of pinning a clear meaning to these words. Attempts to determine what is actually envisaged by a retrenchment that is “operationally justifiable on rational grounds” are likely to be no less tortuous, and no less controversial.

With very few exceptions, most managers who take decisions that result in redundancies are able to say, at the very least, that savings on wages will increase profits. Will this be enough to qualify an operational decision as “operationally justifiable”? One presumes so, even if it is not morally justifiable. But whether such a claim will make a retrenchment operationally justifiable “on rational grounds” introduces a different dimension to the test. Against which standard is the concept of rationality to be applied in this context? There is clearly no scientific standard.

\textsuperscript{39} At 710F.
\textsuperscript{40} \textit{Hendry v Adcock (Pty)Ltd 2002 24 ICJ}.
Economic decisions are largely subjective. Who is to say whether a decision to close down a production facility so that more resources can be pumped into advertising or promotion is rational? Perhaps it is possible to invoke some objective test, like profit. But even that cannot settle the issue, because the extent to which an enterprise should divert resources to activities designed to increase profits, or stem losses, at the expense of workers’ livelihoods is inherently controversial.

The fact that workers are offered a choice between settling these issues by adjudication or strike action will place an even greater burden on the courts. Should judges place too strict an interpretation on the words “operationally justifiable on rational grounds” and defer to employers’ decisions to an extent unacceptable to unions, it is probable that labour will rely increasingly on the strike option to settle retrenchment disputes. This would be regrettable. Industrial action is not generally conducive to rational consideration of the merits of the issue in dispute. It may well be, therefore, that the ability of South African business to adjust to the ever-changing demands of the global economy to which it is now inextricably linked is decided, not in boardrooms or by the courts, but by workers who might be unable or unwilling to understand that job sacrifices are sometimes necessary to attain longer-term economic goals and an ultimate expansion of the job market. At the very least, retrenchment must now become a more expensive process for larger employers.

### 4.3 On selection for retrenchment

The court reviewed the judgment in *Porter Motor Group v Karach.*

One of the central requirements of a fair retrenchment is that employees who are retrenched are selected according to criteria that are either agreed upon or are “fair and objective” (section 189(7) of the LRA). The choice of employees for retrenchment comes at the end of a process designed to avoid making that choice. However, once the point arrives when the employer decides that somebody must go, a choice must be made. In any retrenchment, the employer is naturally tempted to choose employees on the basis of

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preference – usually determined by employees’ ability to contribute to the continued prosperity of the business.\footnote{Porter Motor Group v Karachi [2002] 4 BLLR 357 (LAC).}

However, because retrenchments are caused by factors outside the control of employees, the courts accept that retrenchment should not be seized as an opportunity to “cull” poor workers. At the time of retrenchment, all employees are equally entitled to be considered on the basis of criteria that are both “objective” and “fair” – objective in the sense that the choice is not influenced by mere preference and whim on the part of the employer; “fair” in the sense that the decision to dismiss one employee is, in the circumstances, less unfair than the decision to dismiss another.

The criterion generally accepted as most “objective” is length of service: employees are selected for retrenchment according to the period they have served the employer; the shorter the period of service, the higher on the list of possible retrenches the employee’s name appears. This method of selection is known as “last in, first out” (LIFO). LIFO is unquestionably objective. But it is not necessarily fair. It can, for example, result in the dismissal of employees who have served their employers diligently for nine years, and the retention of others who have coasted for ten. LIFO can also retard the employer’s efforts to correct the very problems that might have caused the retrenchment, because better skilled employees might be lost, and “dead wood” might have to be kept on the payroll. This is why it is also accepted that LIFO can be qualified by the proviso that it be applied “subject to the retention of necessary skills”.

For better or for worse, it must be admitted that LIFO is probably the most objective and “fair” method of selecting employees in a process that is inevitably unfair, but for which nobody is to blame. But, because LIFO must be adapted to meet the needs of a real world, it remains a recipe for dispute. Many such disputes have reached the courts. They usually arise from claims by employees that the retention by their employers of shorter-serving colleagues rendered their retrenchments unfair, entitling them to compensation or reinstatement. Respondent employers usually claim that there was some “fair” basis for departure from the LIFO principle – either because the retained workers were better qualified, or because, for one reason or another, it was not possible to place the retrenched employees in their positions.
The latter defence raises the principle of “bumping”. If LIFO is applied consistently, it must entail offering employees whose positions have been declared redundant the choice of moving to surviving posts occupied by shorter serving employees, who must in turn be retrenched. Bumping has been considered in a number of cases under the present LRA and its predecessor.

The Labour Appeal Court recently had occasion to revisit the issue of “bumping” in Porter Motor Group v Karachi. The facts of this case illustrate the situations in which the issue typically arises. When the company engaged in a retrenchment exercise, Karachi was offered the position of another employee with shorter service than her, who was employed in the same branch. That position carried a salary of about R800 lower than that which Karachi was then earning. She claimed that she should have been offered the position of an employee in another branch, also with shorter service than hers, who was earning only R200 less than the salary Karachi was paid. Karachi declined the offer of the lower paid position. She was retrenched.

At the trial, the parties agreed that employees were to be selected for retrenchment on the basis of LIFO and that “bumping” should have occurred when appropriate. Whether Karachi should have been “bumped” was therefore not at issue. The dispute was over how it should have been done. The union, which had consulted on behalf of the employees, claimed that “horizontal bumping” should have occurred first, followed by “vertical bumping”. The company claimed that it had never practiced “vertical bumping”, and that it was not a realistic option in the circumstances.

The dispute over “horizontal” and “vertical” bumping adds a further dimension to the debate over the proper way of selecting employees for retrenchment. Horizontal bumping occurs when employees with longer service are moved to positions of equivalent rank, grade and status. This is what the Porter Motor Group claimed to have done when it offered Karachi the lower paid job. Vertical bumping occurs when employees with longer service are moved to positions lower (or higher) in the employer’s structure. Karachi claimed the right to be bumped downwards.

The court began with some general observations on selection for retrenchment. The first was:

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43 Porter Motor Group.
“It should be reiterated once again that fairness is not a one-way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.” 44

“Bumping”, then, is a necessary part of the debate over alternatives to retrenchment required by section 189(2) of the LRA. The duty rests on both parties to raise the possibility of bumping during consultations. But whether it should be applied depends on the needs of both the employer and the employee.

The court then paused to set out what is considered to be the justification for bumping:

“Bumping is situated within the ‘last in – first out’ (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise is an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated hereinafter, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.” 45

In so far as “bumping” flows from the LIFO principle, and in so far as the latter principle is inherently fair, it follows from this passage that “bumping” is a necessary component of a fair selection procedure, when it is possible. However, whether the LIFO principle derives its justification from the considerations mentioned by the court is debatable. Long service may be a tribute to an employee’s skills and commitment, but it need not be; it certainly need not prove that longer serving employees have behaved impeccably. An employee’s long service may equally be a tribute to the employer’s tolerance, or to the employer’s inability to find a legal basis for terminating their service earlier. In any event, employees can prove their skill, industry and good behaviour in ways other than by simply clinging to their jobs. LIFO derives its justification, not as a “reward” for long service, but from the fact that there is not a more objective way of

44 Ibid.
45 Ibid.
choosing between employees who are, *for purposes of the retrenchment*, deemed in fairness to be equally entitled to keep their jobs.

In *Porter Motor Group*, the court then noted that whether vertical bumping should be applied “depended on the circumstances of each case”. However, that choice must be made according to general principles, the first of which is that “bumping should always take place horizontally, before vertical displacement is resorted to”.\(^46\) The court observed in this regard:

> “The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.”\(^47\)

### 4.3.1 Domino bumping

However, large-scale bumping is a different matter:

> "Where large-scale bumping, sometimes referred to as “domino bumping”, necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimizing the disruption to the employer.”\(^48\)

Examples of disruption, provided by the court, which may be caused by “domino bumping were "difficulties caused by different pay levels, client or customer reaction to a replacement of employees and staff incompatibility". When the competing interests of the employer and the affected employees are evaluated, the consulting parties should carry out “a balancing exercise”: when the inconvenience to the employer outweighs the benefits to employees, “fairness requires that fewer employees should move”. The court made it clear, however, that “domino bumping” can only be rejected out of hand when it has multiple effects – when, in the court’s words, it becomes a “bizarre form of musical chairs” in which employees fight for positions recently vacated by others. All this is obviously true. However, it is a tall order to expect an employer to predict whether bumping will unleash a “domino effect” of the kind the court had in mind.

\(^{46}\) Ibid.
\(^{47}\) Ibid.
\(^{48}\) Ibid.
Apart from the number of employees involved, the court accepted that there may be another obstacle to bumping. This is the geography. The court observed in this regard:

“Fairness will require that limits be placed on how far an employee is expected to move to bump another. Although prejudice to the employer in long distance relocation cannot be excluded, in practice this will be rare. Generally speaking it is the employee who will suffer as a result of being removed from a cultural and social environment he or she has become accustomed to. Second-guessing the desires of employees is undesirable; if they are happy to translocate then bumping should take place whatever the distances involved.”

In other words, if fairness requires the bumping of an employee to another division of the company, the employee has the final choice, subject to a further consideration. This is whether the employees concerned are entitled to be bumped to the other divisions. In this regard, the court said:

“The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of a company within the parameters of its activities, national or international; fairness requires that the same circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.”

What of the argument, advanced by Porter Motor Group, that each division of the company is separately managed? This was the court’s answer:

“The independence of departments as separate business entities may be relevant but the argument that a company’s departments are managed separately should be strictly scrutinized. Even if there is no past practice of transferring between branches or departments, the employer must consider interdepartmental bumping unless it is injurious to itself and to other employees.”

Whether a case involves horizontal or vertical bumping, the ultimate question is whether the employee claiming another’s post is capable of performing the duties attached to that post. The court accepted that bumping does not apply to employees in different grades if longer-serving employees cannot do the work of employees with

49 Ibid.
50 Ibid.
51 Ibid.
shorter service in that grade. However, said the court, where it is possible to retrain longer serving employees, the employer should do so. Management also has greater discretion when it comes to “upward” bumping, because it has the prerogative to decide who should exercise managerial and supervisory functions. On the other hand, “downward” bumping should not be rejected because the employee may be demoralized. However, the unwillingness of the affected employee to accept a lower wage “may justify not bumping”.

Applying these principles, the court found that the company’s failure to grant Karachi the higher paid of the two available alternative posts was unfair. Hers would not have been a case of domino bumping. Nor was any significant skills gap involved. The greater physical distance between Karachi’s home and the branch where the alternative post was located was her problem, not that of the company. These considerations led the court to uphold the Labour Court’s order that the company compensate Karachi to the tune of over R27 000.

On the facts, the outcome in Porter Motor Group is justified. The company had agreed to “bump” employees in the selection process. Only two employees were involved, and the company failed to advance any compelling reason why Karachi should not have been offered the position that carried a salary closest to her own. The employee who would have been displaced had only nine months’ service, as compared to Karachi’s three years. Furthermore, that employee could have been offered the position Karachi had refused, the incumbent of which had only three months’ service. Presumably, if either of Karachi’s colleagues had referred a dispute concerning their retrenchment, the Labour Court would have found their dismissal fair on the basis that they had a less compelling entitlement to retain their jobs than Karachi had. Furthermore, as the court recognized, if Karachi had been given the higher paid of the two jobs, it would not really have amounted to “vertical bumping”, in spite of the fact that she would have received a slightly lower salary.

But what if greater numbers of employees had been involved? It is clear that the court did not intend the principles enunciated in the judgment to be inflexible. However, they are nevertheless stated in terms sufficiently general to be applicable to any retrenchment. In that sense, the Porter Motor Group judgment supports the view that,
whatever the scale of a retrenchment, LIFO is the preferred method of selecting employees. That being so, the employer and the employees are required to consider horizontal bumping and to apply it, unless it would lead to large-scale disruption. Employers are also required to consider vertical bumping if horizontal bumping is not possible and the employees concerned are prepared to accept lower paid positions. Neither form of bumping can be excluded as a matter of principle.

4.3.2 On skill levels

However, in *Porter Motor Group* the court also accepted that employers are entitled to take into account skills levels before resorting to bumping in particular cases, and that employees’ claims to alternative positions filled by shorter serving colleagues may be limited by geographical distance and the divisions of the company concerned.

*Porter Motor Group* does not deal with the vexed issue of the extent to which employers may depart from LIFO to retain “necessary skills”. However, the court clearly acknowledged that it is permissible to do so in appropriate circumstances. Where there is a clear difference in the functions of employees, few problems arise in this regard. The more comparable and menial the work, the less defensible the claim becomes. Thus in *Porter Motor Group* the court had no hesitation in rejecting the company’s claim that there was a “skills gap” between Karachi and the employee whose job she claimed. In other cases, however, it may be more difficult and less wise to gainsay the employer’s claim that retention of particular employees is vital to the business.

The Labour Court adopted that approach in *Naicker v Q Data Consulting*[^52] where the company instituted drastic cost-cutting measures to stem mounting losses. These included closing two service centers. Affected employees were urged to apply for positions in the new structure. Naicker, a double-amputee, applied for a position similar to that which he then held. However, his application was turned down because his knowledge of computer software was not as “up-to-date” as that of other applicants. The court held that departure from the LIFO principle was justified because the company’s survival depended on retaining staff with knowledge of the latest developments in technology and software. Pillay J observed that using knowledge as a criterion for

selection protected employees who had made efforts to keep abreast of developments in the field was both fair and rational; to have given Naicker the position he claimed would have been unfair to better qualified employees.\textsuperscript{53}

4.3.3 On Rationale

The following comment by the above court is noteworthy:

“Such an approach for the IT industry is rational from a commercial and socio-economic perspective. The employer retains the most suitable employees for the organization. The employees who have expended the time and energy to keep abreast of developments are fairly rewarded by being appointed. The wider socio-economic implication of the survival of the industry and the development of human resources that can compete with the best in a global economy can also not be missed. A deviation from the strict application of the LIFO principle must, therefore, be permitted in these circumstances.\textsuperscript{54}

This approach stands in stark contrast to the heavy and uncritical emphasis placed by the Labour Appeal Court on length of service as the main criterion for deciding whether employees should be retrenched.

However, \textit{Porter Motor Group} does not disturb the approach that has generally been adopted by the Labour Court in cases involving the selection of employees for retrenchment. Thus, in \textit{Nieuwenhuis v Group Five Roads & Others}\textsuperscript{55} the court found that the company acted unfairly by refusing to consider a manager for an alternative position occupied by a shorter serving colleague in another division because no disruption would have resulted. On the other hand, in \textit{NCB AWU & Others v Natural Stone Processors} the courts accepted that the disruption that would have been caused by bumping outweighed the retrenched employee’s right to claim the posts of longer serving employees in, respectively, another plant and on other contracts.\textsuperscript{56}

The facts in these cases were obviously different from those in \textit{Porter Motor Group}. As in so many other issues relating to retrenchment, the fairness of the way in which the employer has selected employees for retrenchment will continue to depend on the circumstances of each case.

\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\textsuperscript{55} \textit{Nieuwenhuis v Group Five Roads & Others} [2000] 12 BLLR 1467 (LC).
\textsuperscript{56} \textit{NCB AWU & Others v Natural Stone Processors} [2000] 6 BLLR 732 (LC).
Amendments to Section 189 instruct the employer that instead of consulting a workplace forum only in cases where workplace forums exist, employers are now required to consult with both the workplace forum and any registered trade union whose members are likely to be affected, if there is a workplace forum and a recognized registered union with which to consult.

4.4 On content of consultation

The above article further confirms the limitation of simply being required to “attempt to reach consensus” on the matters mentioned in subsection (2) because that approach often only meant that some parties were just going through the motions and consultation simply to formalize the process. A decision had already been taken by both parties, in that employers had pre-empted the mechanism and number of employees they are to dismiss, while on the other hand employees are already preparing to strike or are preparing documents for the Labour Court. The consulting parties are now required to “engage in a meaningful joint consensus-seeking process” during that attempt. This, in any event, is how the court described the process in Johnson & Johnson. 57

The matters on which parties are required to “attempt to reach consensus” – avoiding or minimizing the number of dismissals, changing their timing and mitigating their adverse effects, methods of selection and severance pay – remain unaltered. Instead of merely disclosing relevant information in writing to the other consulting party, employers must now also issue “a written notice inviting the other consulting party to consult”. The information to be contained in the notice remains the same, except that employers must, in addition, disclose the total number of employees employed by the employer, and the number of employees dismissed by the employer for reasons based on its operational requirements in the preceding 12 months. This, presumably, is to enable employee parties to establish whether the dismissal falls under Section 189A.

Under the original Section 189, employers contemplating retrenchment were required to consult any person the employer was obliged to consult: a workplace forum, if there was one, a registered trade union whose members might be affected or, in the absence of any of the aforementioned, the affected employees themselves.

57 Johnson & Johnson Pty Ltd v CWIU 1999 20 ILJ 89 (LAC).
purpose of these consultations was to “reach consensus” on “appropriate measures” to avoid or minimize the effects of dismissals; to agree, if possible, on criteria for selecting employees to be retrenched, and on their severance pay. To render these consultations effective, employers were obliged to disclose the reasons for proposals, details of how they proposed to set about the exercise, and any other information that enabled the employee parties to consult effectively. However, at the end of the day, the employers were free to retrench on their own terms, subject only to the retrenched employees’ right to challenge the fairness of their dismissals in the Labour Court.

The change brought about by section 189A is the introduction of a right to strike in event of dispute of fairness of the reason for dismissals based on operational requirements and the corresponding right to lock out.

Section 189A applies to dismissals based on operational requirements by employers with more than 50 employees. The heading describes the minimum threshold before the new section potentially applies. This section is tabulated as follows:

The employer contemplates dismissing by reason of the employer’s operational requirements, at least:

- 10 employees, if the employer employs up to 200 employees.
- 20 employees, if the employer employs more than 200, but not more than 300, employees.
- 30 employees, if the employer employs more than 300, but not more than 400, employees.
- 40 employees, if the employer employs more than 400, but not more than 500, employees.
- 50 employees, if the employer employs 500 employees or more; or
- The number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer’s operational requirements in the 12 months prior to the employer issuing a notice in terms of, is equal to, or exceeds the relevant number.
The numbers are clearly arbitrary. However, like all cut-offs expressed in numerical terms, they are absolute. Thus, an employer with a workforce of 400 that contemplates retrenching 29 employees, or an employer with a workforce of 49 that retrenches more that 10 employees, or an employer with a workforce in excess of 500 which retrenches 39 employees is not covered by section 189A. Furthermore, the numbers refer not to actual, but to “contemplated” dismissals. An employer who commences consultation with a number above the prescribed level in mind, but is persuaded to reduce the contemplated number to below the prescribed number, is therefore apparently bound by the section, even after the contemplated number is reduced.

Du Toit\textsuperscript{58} summarises the implication of section 189A as follows:

- Either party may invoke facilitation of the consultation process before notice of dismissal may be given.\textsuperscript{59}
- The employer may not give a notice of dismissal for minimum of 60 days from the date of the notice.\textsuperscript{60}
- If the union or employees want to challenge the fairness of the procedure, they can do so only by way of application to the Labour Court.\textsuperscript{61}
- If the union or the employees want to challenge the fairness of the reason for dismissal, they must choose whether to refer the dispute to the Labour Court or whether to strike.\textsuperscript{62}
- The employer may only lock out employees after strike notice has been given.\textsuperscript{63}

In a Labour Law Article\textsuperscript{64} the application of section 189A was categorically explained in that the consulting parties can handle a substantial retrenchment differently.

\textsuperscript{59} Section 189A (3).
\textsuperscript{60} Section 189A (3), section 189A (7) (8).
\textsuperscript{61} Section 189A (13) (18).
\textsuperscript{62} Section 189A (10).
\textsuperscript{63} Section 189A (3).
from section 189A, but in the absence of a contrary agreement the options of industrial action and recourse to the Labour Court will apply. The application of s189A can be illustrated as in Diagram 4.1:65

![Diagram 4.1: Options available under s189A](image)

The parties have the option of calling in a facilitator, privately or via the CCMA. This assistance can be requested unilaterally up front by the employer or a majority employee consultation party or later on by agreement. The efficacy of consultations is progressed through information disclosure. Section 16 on disclosure continues to apply, and disputes can be addressed therein by arbitration. A breakdown in process over procedural issues can be referred to the Labour Court, which has wide powers of relief. This can be done, although not exclusively, before terminations.

### 4.5 Securing a Facilitator

This goes beyond using a third party to facilitate the process. It deals with the process of engagement and consultation. It seems preferable to plan this step collaboratively rather than to kick-start the choice unilaterally.

A number of principles or options apply:

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64 Labour Law/Beaumonts Service/Beaumont Solutions/Coping with Corporate Re-organization/Section 189A – Substantial Retrenchments.

65 Beaumont.
The facilitator can be appointed by the CCMA or agreed to privately by the consulting parties. The latter allows the parties to chose the facilitator (section 189A(3)(a)).

Even if the employer decides against a facilitator, the other consulting parties, provided they represent a majority of employees exposed to retrenchment, can insist on a facilitator (section 189A(3)(b)).

The parties can change their mind later on by agreement to bring in a facilitator (section 189A(4)). This should be coupled with a revised timetable (section 189A(2)(c)) as the passing of the various stages of section 189A begins from the date of the initial notice.

The innovations are to be found in subsection (2). This provision requires the employer to give notice “in accordance with the provisions of this section” and permits the parties to vary the time limits for facilitation or consultation. Most significantly, strikes and lockouts over retrenchments are sanctioned, “despite section 65(1)(c)”. Since section 189A contains no further reference to a notice, the phrase “this section” must presumably apply to section 189(3). The time limits for facilitation or consultation must be gauged from what follows.

Facilitation occurs at the request of the employer or any consulting parties representing (whether alone or jointly is not specified) the majority of employees targeted for retrenchment. On receipt of a request, the CCMA is obliged to appoint a facilitator, who must conduct the exercise in terms of regulations still to be issued by the Minister of Labour, after consultation with NEDLAC. These regulations may specify the time to be allowed for facilitation, the powers and duties of facilitators, the fee, and other relevant matters. If facilitation fails, 60 days after notice of intention to retrench was given, the employer may give notice of termination of the affected employees’ contracts of employment (i.e. the dismissals must be on notice), and the employees or their union may either give notice of intention to strike or refer a dispute concerning “whether there was a fair reason for the dismissal” to the Labour Court.
Curiously, such referral must be “in terms of section 191(11)”, which merely sets the time limit for a referral in terms of section 191(5). What is presumably meant is that a party referring a retrenchment dispute for adjudication must do so within 90 days of the date on which the commissioner certified that facilitation had failed, or failing that, to seek condonation.

On the other hand, if the parties have not chosen facilitation, the employer may give notice of dismissal in terms of the BCEA 30 days after notice of retrenchment was given. Employees may not refer a dispute to the CCMA until the same period has lapsed. A registered trade union or the employees, who have received notice of termination, may then give notice of intention to strike or refer a dispute concerning whether there was a fair reason for the dismissal to the Labour Court. However, this time limit does not apply to employees if the employer gives notice of termination prematurely. The Minister can regulate the powers and duties, amongst other issues, of facilitators.

4.6 Remedies

By virtue of section 189A (13) the failure by the employer to comply with a fair procedure can be attacked by an employee consultation party via an application to the Labour Court. This remedy is only available to employees (and their representatives); the employer cannot use this section to continue consultations or to overcome what might be seen as delaying or uncooperative tactics by employees.

In this case an application here must be brought within 30 days of the date of notice of termination or in the absence thereof from the date of termination (section 189 A (17) (a)). Condonation is possible.

The powers of the court are wide. They are:

- An order to comply with a fair procedure;
- an interdict against dismissal;
- re-instatement pending compliance with a fair procedure;
• compensation (subject to the standard limits).\textsuperscript{66}

Employees are given an interim remedy. If they allege that the employer is not complying with a fair procedure (i.e. the procedure set out in section 189), employees may apply to the Labour Court for an order compelling the employer to do so, prohibiting any dismissal until the employer complied, reinstating any employee who has been dismissed, or to pay compensation. Disputes over disclosure of information must be referred for arbitration. These are the only procedures in terms of which the procedural fairness of a retrenchment can come under judicial scrutiny. In deciding that question, the court \textit{must} find that the dismissal was for a fair reason if the dismissal was “to give effect to a requirement based on the employer’s economic, technological, structural or similar needs”, if it was “operationally justifiable on rational grounds”, if there was “proper consideration of alternatives”, and if selection criteria were “fair and objective”.

4.7 Strike Action

It was held in \textit{Leoni Wiring Systems (East London) (Pty) Ltd (At); NUMSA (1R), F Alison & others (2&Further)}:

“In determining under what circumstances a strike may take place where a facilitator has been appointed, it is quite clear that the first requirement is that the notice of such strike action may only be given after 60 days have lapsed from the date on which the section 189(3) notice was given and only after receipt by a registered union or the employees of the notice of termination. Once a facilitator has been appointed, and 60 days have lapsed from the section 189(3) notice, the employer, without doing anything further, may give notice to terminate the contracts of employment in accordance with section 37(1) of the BCEA. As said, only once a registered trade union or the employees have received this notice, may they either give notice of a strike in terms of section 64(1) (b) or (d) of the LRA, or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11) of the LRA. As I have also already stated, there clearly is no requirement, when a facilitator has been appointed, for any further referral of a dispute to the Commission in terms of section 64(1)(a) of the LRA.

\textsuperscript{66} Section 189A (17) of LRA
When a facilitator has not been appointed, a dispute must be referred to the council. One sees that a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3) of the LRA. Section 189A(8)(a) must clearly be read in conjunction with section 189A(11), which makes it patently clear that section 64(1), in its entirety, applies to any strike or lock-out in terms of section 189A. Quite clearly that then requires that, where no facilitator had been appointed, a dispute must first be referred to a council or the Commission after a period of 30 days has lapsed from the date on which notice had been given in terms of section 189(3) of the LRA. Only once a certificate stating that the dispute remains unresolved had been issued, or a period of 30 days, or any agreed extension thereof, has elapsed since the referral was received by the council or the Commission, and a registered union or the employees received a notice of termination of employment, may notice of a strike be given and there then be a strike. Section 189A (11) (a) (i) specifically indicates that section 64(1) (a) does not apply if a facilitator is appointed in terms of section 189A. It will be remembered that section 64(1) (a) of the LRA is the specific section, which requires that an issue in dispute be referred to a council or Commission prior to strike or lockout action’.

Once employees or their union decide to refer the dispute to the Labour Court, they may not strike, and, similarly, they may not refer the dispute to the Labour Court once they have elected to strike. Minority unions are bound by majority unions’ decisions in this regard, if collective agreements dealing with consultation and/or facilitation have been extended to them in terms of section 23(1)(d). If a dispute has been referred to the court, it will be deemed withdrawn if the employees decide to strike.67

Employers may resort to lockouts only if a strike has been called. However, the prohibitions on industrial action set out in sections 65(1) and 65(3) apply to strikes related to retrenchments, as do the restrictions normally applicable to secondary strikes, except that secondary strikers must give 14 (rather than seven) days’ notice of the strike to the secondary employer (the employer faced with a secondary strike may also request conciliation). Sections 67 and 68 (which protect the parties during industrial action in compliance with the Act, and set out the consequences of unprotected industrial action); picketing rules (section 69); replacement labour (section 76) and section 67(5) are also applicable to strikes called in terms of section 189A.

67 Leoni Wiring Systems (East London) (Pty) Ltd (At); NUMSA (1R), F Alison & others Case marked as Reportable; Port Elizabeth Division; Port Elizabeth.
This means that employers retain the right to dismiss workers who strike in terms of section 189A for reasons based on operational requirements. However, the time limit of 30 or 60 days, whichever applicable, must expire before this can be contemplated. The amended Act does not make it clear whether, when the issue in dispute is a retrenchment, the dismissal of strikers would be adjudicated in terms of section 67(5) or section 189A(7)(b)(ii).

4.8 Criticism of the application of s189A

The reference to section 191(11) is odd in that provision merely sets the time limit for all referrals in terms of section 195(5) (b). Strange, too, is the requirement that the employees may give notice of a strike only after the employer has given notice of dismissal, because that requirement is immediately countermanded by a statement that the notice of termination is issued. Be that as it may, once the employees have made their choice, they are stuck with it. The Act specifically provides that employees may not give notice of a strike if they have referred the dispute concerning the substantive fairness of the retrenchment to the Labour Court once they have given notice of a strike. If notice of a strike is given, any referral of the Labour Court is deemed withdrawn.

Then comes section 189(13). This provides that if an employer contemplating retrenchment does not comply with a fair procedure, the employees may approach the Labour Court by way of an application for one or more of the following orders: compelling the employer to comply with a fair procedure; interdicting and restraining the employer from dismissing an employee prior to complying with a fair procedure; directing the employer to reinstate an employee until it has complied with a fair procedure; or awarding compensation to the employees if they have already been dismissed.

According to sub-section (18), the Labour Court “may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer’s operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii)”. However, in any dispute referred under the latter section that affects the number of employees specified in section 189A (1), the court must find that the employee was dismissed for a fair reason if the dismissal was “to give effect to a requirement based on the employer’s
economic, technological, structural or similar needs”, if the dismissal was “operationally justifiable on rational grounds”, if there was proper consideration of alternative”, and if the selection criteria were fair and objective.

4.9 Criticism of procedure

Employees are not deprived of the right to strike if they bring an application in terms of section 189A (13). Nor are employers deprived of the right to continue the retrenchment process even if the application is successful. The relief afforded by this provision is purely procedural – the court merely sends the parties back to consult properly or, if that cannot be done or employees so prefer, awards compensation for the failure to consult. This process was in any event open to employees before the advent of section 189A(13) - in several cases, the Labour Court used its general powers to restrain employers from retrenching as seen in  *FAWE v Simba (Pty) Ltd.*

However, section 189A is new to the extent that it formally divides the procedural and substantive aspects of retrenchments, and restricts applications to restrain employers from retrenching in cases, which it is alleged that the employer is not consulting as required by LRA. Challenges to the substantive fairness of retrenchment must either be resolved by strike action or by referring a dispute after the dismissal has been affected. Only then may the Labour Court adjudicate on the reason for the retrenchment.

The facts in *NUMSA & others v S.A Five Engineering & others* illustrate how confusing this somewhat convoluted provision may be in practice. The union and the company became embroiled in a dispute over retrenchment of about 110 workers engaged in refurbishing a seagoing vessel. The company contended that they had been hired for the duration of the project, and retrenched them when it was complete. Within days, NUMSA launched an application in terms of section 189A (13). After disposing of some technical matters, the court issued an order removing the application to the trial roll “for the determination of the fairness of the dismissal on both procedural and substantive grounds”. Waglay J also excused the union from referring the dispute for

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68 *FAWE v Simba (Pty) Ltd* [1997] 4 BBLR 408 (LC).
69 *NUMSA & others v S.A Five Engineering & others* [2004] ZALC 81.
conciliation. Almost a year later, when the trial was ultimately set down, the presiding judge (Murphy AJ) raised the question: could the court proceed with adjudicating the substantive challenge to the retrenchment if the matter had not been referred for conciliation, in spite of the fact that the court had earlier purported to condone non-compliance with that requirement? In answering that question, Murphy AJ began by analysing the provision of section 189A in these terms:

“What is most notable about this scheme for present purposes, is that referrals to the Labour Court are overtly restricted by sub-sections 189A (7) (b) (ii) and 189A (8) (b)(ii) (bb) to disputes ‘concerning whether there is fair reason for the dismissal’; in other words disputes about substantive fairness. Moreover, both provisions state expressly that the referral is to be made in terms of section 191(11)… Disputes about procedure in cases falling within the ambit of section 189A cannot be referred to the Labour Court by way of a statement of claim, but must be dealt with by way of motion proceedings as contemplated by Section 189A(13)…”

The effect of all this, said Murphy AJ, is to “exclude procedural issues from the determination of fairness where the employees have opted for adjudication rather than industrial action, providing instead for a mechanism to pre-empt procedural problems before the substantive issues become ripe for adjudication of industrial action.” The practical consequences of the rigid distinction drawn in section 189A between substantive and procedural issues escaped most commentators.

Most viewed the section 189A (13) procedure as a means of temporarily interdicting retrenchments if the employer is not consulting properly, but section 189A (17) (a) states that such application must be brought “not later than 30 days after the employer has given notice of termination the employees’ services or, if is not given, the date on which the employees are dismissed” i.e. it can also be brought after the dismissal is affected. If that phrase leaves any doubt that all disputes concerning procedural fairness must be brought under section 189A (18), it is removed by section 189A, which precludes the court from adjudicating “a dispute about the procedural fairness of a dismissal based on the employer’s operational requirements in any dispute referred to in terms of section 191(5) (b)(ii)”.

\[70\] Ibid.
In other words, in retrenchments covered by section 189A, the only basis on which employees may challenge the procedural fairness of a retrenchment is by way of application under section 189A (13). If this is not done, employees are confined to dispute the reason for the retrenchment (i.e. its substantive fairness) only by way of a normal referral after the dismissal, and then they are confined to the grounds set out in section 189A(19). How bizarre the effects of these provisions may be, is illustrated in the outcome of the *SA Five Engineering* case, as described above.

But before applying his analysis of section 189A to the facts before him, Murphy AJ raised an intriguing possibility:

“It could arguably follow that dismissal for operational requirements not falling within the ambit of section 189A should continue to be processed as they were before the introduction of the amendments, meaning that both disputes about procedural and substantive fairness may continue to be referred to the Labour Court in terms of section 191(11). However, a compelling argument can equally be made out that general language used in section 189A(18) operates to restrict all procedural disputes to application proceedings and excludes the referral of disputes about procedural fairness to the Labour Court for trial by means of statement of claim.”

Murphy AJ did not choose between these arguments. He merely warned litigants to “proceed with caution” until the issue was resolved.

**4.10 On intentions**

Was that warning necessary? If the second argument were correct, it would mean that in all cases in which the procedural fairness of a retrenchment is in doubt (whether or not the retrenchment is covered by section 189A (1)), employees must proceed by way of notice of motion, or risk being non-suited if they proceed instead by way of referral. On the other hand, if the second argument were wrong, employees dismissed in retrenchments not covered by section 189A may find themselves being thrown out of court if they challenge retrenchment by application as opposed to referral. Which argument is to be preferred?

There seems to be little doubt that despite the apparent breadth of section 189A (18) it is intended to apply only to retrenchments covered by section 189A. In the first
place, the opening paragraph of section 189(A) clearly states that this section applies to cases which meet the numerical thresholds and secondly, the options set out in subsection (2) also apply to cases of “any dismissal covered by this section” in its context; the phrase ‘this section’ can only apply to section 189A.

Interestingly, in the *Group Five* case in which NUMSA brought its initial application, it was only to compel the employer to comply with a fair procedure. However the court’s decision to remove the matter to the trial roll left that issue in abeyance and the retrenchment went ahead. After that, NUMSA wished to challenge the substantive fairness as well. Hence the “consolidation” of the proceedings by Waglay J and his decision, presumably intended to expedite an already protracted matter, to condone non-compliance with the requirement that the dispute be referred for conciliation. That, said Murphy AJ, was perfectly in order as far as the dispute relating to procedural fairness was concerned. The removal of the trial roll could be regarded as a referral for oral evidence of factual disputes that could not be resolved on the papers in the section 189A (13) application. Although the time for interdictal relief had long passed, Murphy AJ noted that section 189 (14) permits the court to grant compensation for procedural irregularities. There was no reason why the employees should not be permitted to claim that relief in an application under section 189A.

The court had to decide on the validity of whether the agreement by NUMSA and the employer that both procedural and substantive fairness would go to trial, and the matter would then be adjudicated against the requirement by section 191(11) (a) which specifies that referral in terms of section (5) (b) must be made within 90 days after the council or the commissioner has certified that the dispute remains unresolved. Murphy AJ held that the question resolved itself into whether the court had the authority to condone non-compliance with the necessary jurisdictional prerequisite of reference to the CCMA.\(^{72}\)

The case seems to have divided the Labour Appeal Court in *NUMSA v Driveline Technologies (Pty) Ltd & another*.\(^{73}\) In that case the issue was whether the dispute that arrived in the Labour Court via an amendment to the applicant’s statement of claim was

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\(^{72}\) *Group Five*.

the same as the dispute that had been referred for conciliation. Conradie JA noted that
the current LRA contains no provision akin to that of the former industrial court to
determine a dispute unless it had been referred for conciliation. Conradie JA inferred
from the absence of such a provision in the current Act, as well as from the inclusion of
a provision (section 157 (4) (a)) giving the Labour Court power to adjudicate matters if
not satisfied that an attempt has been made to conciliate the dispute, that the Labour
Court has jurisdiction even if the matter was not referred for conciliation.

Zondo J expressly disagreed. For him it was “as clear as daylight that the wording
of section 191 (5) imposes the referral of a dispute to conciliation as a precondition
before such a dispute can be either arbitrated or referred to the Labour Court for
adjudication.” 74

Murphy AJ recognised that some purpose may be served by reserving for the
Labour Court a power in appropriate circumstances to condone non-compliance with
mandatory conciliation. However, he considered himself bound by the plain wording of
the Act to conclude that the Labour Court lacked jurisdiction to do so. Since this is the
view of the majority, it is now law.

4.11 On pigeonholes

The courts have often warned of the artificiality of placing the “procedural” and
“substantive” aspects of a dismissal into separate pigeonholes when considering its
fairness.

In Unitrans Zululand (Pty) Ltd v Cebekhulu Du Plessis AJA wrote:

“The LRA makes a distinction between ‘unfair dismissals’ and ‘dismissals that
are unfair only because the employer did not follow a fair procedure’ (section
193(2)(d) and section 194(1)). In my view the distinction does not justify an
inference that substantive fairness and procedural fairness will always fall into
separate, impermeable compartments. There may be circumstances in which the
procedural fairness of a dismissal cannot be fair in the absence of a fair
procedure. There may be circumstances in which it will be impossible after the
event to determine that the dismissal was fair despite the failure to follow a
procedure.” 75

74 Ibid.
It was further held in *Whall v Brand Add Marketing (Pty) Ltd* that the Court is entitled, perhaps required, to ‘balance’ the seriousness of a procedural lapse against the circumstances relating to the need to retrench, before deciding on appropriate relief. How a judge can do this where procedural and substantive issues are split into distinct processes is difficult, if not impossible, to imagine.\(^{76}\)

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\(^{76}\) *Whall v Brand Add Marketing (Pty) Ltd* (1999) 6 BLLR 626 (LC).
Chapter 5: Conclusion

5.1 General

With the world becoming more integrated and driven by globalisation, it provides a new dimension for employer-employee relations, particular on how employers should strike a balance between pursuance of profit, medium and long term sustainability, creating and saving jobs, against paying employees decent living wages.

This treatise investigated the development of section 189 and 189A into how to handle the envisaged retrenchment, which does not arise as product of employee fault but motivated by employer operational grounds. The term ‘operational requirement,’ as it appears in the LRA, defines and sets about processes of dealing with dismissals resulting from loss of clients, depreciation of the rand, fluctuation of inflation rates, drastic fluctuation of export or import duties, new competitors entering the market and of changes in technology such as a shift from using gas and paraffin to electricity.

This kind of dismissal does not relate to any act or omission of the employees, but relates to dismissal of the employees due to certain economical needs of the employer. These new developments in relation to employer-employee relations have left the common law wanting in that this law regards contract of employment as of an individual nature, paying no regard to the collective relationship between employees and employers. Common law is limited as it relates to the stronger bargaining power of the employer, who owns the means of production, against the weaker one of the employee, who applies the means of production. The law fails to promote participative management, in which workers have a meaningful say in at least those management decisions, which directly affect their working conditions and legitimate interests.

In a South African context the evolution of inclusive recognition of retrenchment for operational reasons can be traced to the 1977 Wiehahn Commission. This Commission laid the foundation of South Africa labour legislation and the development of integrated labour relations. Its horizons were further extended by its 1980 and 1981 reports.

The early precedents by courts can be found, among others, in National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations)Ltd- President
Brand Mines. The Industrial Court stated that the distinction between retrenchment and redundancy previously drawn had no legal basis. All workers dismissed for operational reasons, of whatever origin, are “retrenched” because they or their jobs have become redundant. It noted that in South African law “retrenchment” was equivalent to the English legal term “dismissal for redundancy.”

On the international front the recognition of operational requirements as a ground for dismissal originates from Part II of the International Labour Organisation (ILO) Convention 158 (“the Convention”). The meaning of ‘operational requirements’ remains insufficiently stated, and it may be argued that it broadly incorporates a termination of employment in the circumstances outlined by Part III of the Convention, which refers to termination of employment for economic, technological, structural, or similar needs.

The Industrial Court, prior to the introduction of Labour Court and the LRA, had treated lack of fault on the part of the employer as the defining factor on this kind of dismissal and it included in this category dismissals at the behest of the third parties, dismissals for incompatibility and dismissals on a breakdown of trust. This attitude of the Industrial Court is elucidated in East Rand Proprietary Mines Ltd v UPUSA, the Labour Appeal Court distinguishing between operational factors such as market forces and operational reasons. Section 213 of the LRA states that:

“Operational requirements’ means requirements based on the economic, technological, structural or similar needs of an employer.”

It is therefore a matter of principle that focus should be on the actual reasons for dismissal because it could be related to, or based on, more than one legal ground. When the dismissal is based on operational reasons the code places a duty on the employer to justify that the dismissals were substantively and procedurally fair, rational and the only suitable alternative. It was held in Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd that if the employer relied on operational

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77 National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations)Ltd-President Brand Mines.
78 As quoted in UPUSA.
requirements as the reason for dismissal, he must bear the onus of proving that the
dismissal was for a fair reason and effected in accordance with a fair procedure.\textsuperscript{79}

Where the employees concerned are unionised, consultation with shop stewards
constitutes sufficient compliance with the obligation to consult with the employees’
union. An employer is not obliged to consult with everybody, unless some employees
outside the negotiating union are likely to be affected adversely by the proposed
dismissals. In \textit{NUMSA v Atlantis Diesel Engines (Pty) Ltd} the Appellant Division held
that the purpose of the duty to consult is to give the employer an opportunity to explain
the reasons for the proposed dismissals to all employees, to hear representations on
possible ways of avoiding or minimising the effects of dismissals and to consider
alternatives.\textsuperscript{80}

The 1995 LRA response, as found in section 189, puts consultation as being
central in determining procedural fairness. In \textit{Johnson and Johnson (Pty) Ltd v CWIU}
the Court said the following:

> “The section places some primary obligations on an employer in order to ensure
that an employee is not unfairly dismissed. The employer must initiate the
consultation process when it contemplates dismissal for operational reasons. ...
It must also disclose relevant information to the other consulting party… It
must allow the other consulting party an opportunity during consultation to
make representations about any matter on which they are consulting... It must
consider those representations and if it does not agree with them, it must give
its reasons...”\textsuperscript{81}

The court, according to Grogan, makes it clear that the final decision must not be
taken before the employer begins consultations. The employees must not be presented
with a \textit{fait accompli}. What is intended is that the employer should notify the workforce of
the possibility of retrenchment as soon as it has decided, in principle, to adopt a policy
(be it rationalisation, restructuring, the scale of part of the business, or whatever), which
could conceivably result in retrenchment. The test for determining when an employer
contemplates retrenchment is an objective one.

\textsuperscript{79} Pedzinski.
\textsuperscript{80} Atlantis Diesel Engines.
\textsuperscript{81} Johnson and Johnson.
In *Antlantis Diesel (Pty) Ltd v NUMSA*, Lagrange J stipulated that the problem-solving concept should be:

“[A]ims to get disputant parties to see their differences in the form of joint problems to which both parties are committed to seek solutions, rather than simply pursuing their own respective positions in a manner which excludes the other party’s interests as well.”\(^{82}\)

Section 189A makes provision that the employer must consult, and may not retrench, for the prescribed period: 60 days if facilitation is chosen, 30 days if it is not.

The section also requires that the court must decide whether retrenchment was “operationally justifiable on rational grounds”. Requiring the court to determine whether a retrenchment was “operationally justifiable on rational grounds” compels all judges to prevent abuse of operational reasons for other reasons.

The method of selecting the employees for dismissed, which must arise as a last resort, must consider, among other options, length of service, skills qualification, LIFO, conduct, efficiency, ability, capacity, experience, attitude towards work, productivity, volunteer, attendance, bumping.

Although LIFO is the most rational method, it is not necessarily fair. It can, for example, result in the dismissal of employees who have served their employers diligently for nine years, and the retention of others who have coasted for ten. LIFO can also retard the employer’s efforts to correct the very problems that might have caused the retrenchment, because better skilled employees might be lost, and “dead wood” might have to be kept on the payroll. This is why it is also accepted that LIFO can be qualified by the proviso that it be applied “subject to the retention of necessary skills”.

In this regard, the court observed in *Porter Motor Group*:

“The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.”\(^{83}\)

\(^{82}\) *Antlantis Diesel.*

\(^{83}\) *Porter Motor Group.*
With regard to domino bumping, fairness requires the bumping of an employee to another division of the company. The employee has the final choice, subject to further considerations. This is whether the employees concerned are entitled to be bumped to other divisions.

However, in *Porter Motor Group* the court also accepted that employers are entitled to take into account skills levels before resorting to bumping, and that employees’ claims to alternative positions filled by shorter serving colleagues may be limited by geographical distance and the divisions of the company concerned.

It has further been stated that the employer should disclose all “relevant information”. In addition, the employer must provide information on the number of employees employed and the number of employees that have been dismissed for operational reasons in the preceding twelve months. This is important so as to determine whether section 189A, which regulates large-scale dismissal by big employers, is applicable. An employer cannot be obliged to disclose information that could adversely affect his business competitiveness i.e. trade secrets, price concessions or reductions. Subsection (4) provides that in any such dispute an arbitrator, or the Labour Court, is required to decide on the relevance of information required by the employee parties.

The change brought about by section 189A is the introduction of a right to strike in the event of a dispute of fairness for the reason for dismissals based on operational requirements and the corresponding right to lock out. By virtue of section 189A (13) the failure by the employer to comply with a fair procedure can be attacked by an employee consultation party via an application to the Labour Court.

It was held in *Leoni Wiring Systems (East London) (Pty) Ltd (At); NUMSA (1R), F Alison & others (2&Further)*:

“In determining under what circumstances a strike may take place where a facilitator has been appointed, it is quite clear that the first requirement is that the notice of such strike action may only be given after 60 days have lapsed from the date on which the section 189(3) notice was given and only after receipt by a registered union or the employees of the notice of termination”\(^\text{84}\).

\(^84\) *Leoni Wiring Systems.*
Once a facilitator has been appointed, and 60 days have lapsed from the section 189(3) notice, the employer, without doing anything further, may give notice to terminate the contracts of employment in accordance with section 37(1) of the BCEA. As said, only once a registered trade union or the employees have received this notice, may they either give notice of a strike in terms of section 64(1) (b) or (d) of the LRA, or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11) of the LRA.

If notice of a strike is given, any referral of the Labour Court is deemed withdrawn.

5.2 Recommendations

- Sections 189A and 189 must clearly be read together. The overall effect of both provisions is to require all employers to consult in accordance with section 189 over the issues specified in that section.

- That an organisation should establish an agency or another entity, which will be responsible for doing due diligence exercises in ascertaining that reasons are indeed “operationally justifiable on rational grounds” as to bring certainty to both employer and employees.

- Mandatory use in event of dispute of either party to invoke facilitation of the consultation process before notice of dismissal may be given.

- The artificiality of placing the “procedural” and “substantive” aspects of a dismissal into separate pigeonholes when considering its fairness, need to be decisively removed as they erect artificial boundaries. Section 189A is new to the extent that it formally separates the procedural and substantive aspects of retrenchments, and restricts applications to restrain employers from retrenching in cases, which it is alleged that the employer is not consulting as required by LRA. Challenges to the substantive fairness of retrenchment must either be resolved by strike action or by referring a dispute after the dismissal has been affected. Only then may the Labour Court adjudicate on the reason for the retrenchment. The facts in NUMSA & others v S.A Five Engineering & others illustrate how confusing this somewhat convoluted provision may be in practice.
Reconcile the NUMSA majority view and contents of the LRA of 1995 as exposed by Murphy AJ, who recognised that some purpose may be served by reserving for the Labour Court a power in appropriate circumstances to condone non-compliance with mandatory conciliation. However, he considered himself bound by the plain wording of the Act to conclude that the Labour Court lacked jurisdiction to do so.

Legislation has to resolve some bizarre effects of retrenchments covered by section 189A. The only basis on which employees may challenge the procedural fairness of a retrenchment is by way of application under section 189A (13). If this is not done, employees are confined to dispute the reason for the retrenchment (i.e. its substantive fairness) only by way of a normal referral after the dismissal, and then they are confined to the grounds set out in section 189A(19).
Appendices

Appendix A: Table of cases

Buthelezi v Municipal Demarcation Board. 2005 2 BLLR (LAC).
Carephone (Pty) Ltd v Marcus NO & others (JA 52) 98 (1998) ZA LAC 11 (1 September 1998).
East Rand Proprietary Mines Ltd v UPUSA 1997 1 BLLR 10 (LAC).
FAWE v Simba (Pty) Ltd [1997] 4 BBLR 408 (LC).
Hendry v Adcock (Pty) Ltd v National Union Metalworkers of SA & others (2003) 24 ILJ.
Hlongwane & Another v Plastix (Pty) Ltd (1990 11 ILJ 171 (K).
Johnson & Johnson Pty Ltd v CWIU 1999 20 ILJ 89 (LAC).
Key Delta v Marinner (1996) 6 BLLR 647 (EC).
Leoni Wiring Systems (East London) (Pty) Ltd (At); NUMSA (1R), F Alison & others
Case marked as Reportable; Port Elizabeth Division; Port Elizabeth.
National Union of Mineworkers & Others v Free State Consolidated Gold Mines
(Operations)Ltd- President Brand Mines (1994) 9 BLLR (IC); 1995 12 BLLR 8 (AD); 1996 (1) SA 422 (SCA).
NEHAWU v Agricultural Research Council 2000 8 BLLR 1081 (LC).
NUMSA v Atlantis Diesel Engines (Pty) Ltd 1993 14 ILJ 642 (LAC).
SA Chemical Workers Union & Toiletpak Manufacturers (Pty) Ltd & others (1998) 9 ILJ 295 (IC).
SACTWU v Discreto 1998 12 BLLR 228 (LAC).
Appendix B: Bibliography

Labour Law/Beaumonts Service/Beaumont Solutions/Coping with Corporate Reorganization/Section 189A – Substantial Retrenchments.