THE RELATIONSHIP BETWEEN AN AUTOMATICALLY UNFAIR DISMISSAL IN TERMS OF SECTION 187(1)(c) OF THE LABOUR RELATIONS ACT AND A DISMISSAL FOR OPERATIONAL REASONS

by

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SUMMARY

Common law does recognise the concept of dismissal based on operational requirements. It recognises dismissals that are based on breach of expressed or implied terms of contract of employment. The concept of operational requirements has its roots in the Labour Relations Act 28 of 1956. This Act recognised termination of employment of a number of employees due to ability, capacity, productivity, conduct and operational requirements and needs of undertaking industry trade or occupation of the employer as legitimate.

Under the 1956 LRA, employers were allowed to dismiss employees if employees refused to accept the proposed change to conditions of employment. The dismissal is called lock-out dismissal. This kind of dismissal entitled employers to dismiss employees on condition that the dismissal was temporary and the workers would be re-employed when they agree to the demands of the employer. After the contract of employment was terminated between the employer and employees, the employer was allowed to implement the changes using scab labour.

The 1995 Labour Relations Act introduced section 187(1)(c) that was intended to re-enforce the abolishing of the lock-out dismissal. This section strictly forbids the dismissal of employees in order to compel them to accept demands of the employer in matters of mutual interest. Such dismissals are regarded as automatically unfair.

In terms of section 64(4) of the 1995 LRA employers are not permitted to unilaterally effect changes to employees’ terms and conditions of employment. They are required to seek and obtain consent of the affected employees. If employees refuse to accept the proposed changes, the employer can use lock-out as defence. Firstly, the employer can initiate lock-out until employees accede to its demand.

Secondly, the employer can lock-out employees in response to the notice of strike or strike of the employees. The employer can use scab labour during this lock-out period. Unlike the lock-out dismissal, lock-out under the 1995 LRA does not include termination of contract of employment.
In contrast, employers are allowed to dismiss employees who refuse to agree to change to their terms and conditions of employment on the ground of operational requirements provided a fair procedure is followed. This reason for dismissal is not viewed by the courts as a dismissal to induce employees to accept the demand of the employer.

The question that this study seeks to examine is the relationship between automatic unfair dismissal in terms of section 187(1)(c) of the Labour Relations Act and dismissal for operational requirements.

A dispute between the employer and employees regarding change to terms and conditions of employment is a mutual interest dispute; and it therefore falls under collective bargaining. The same dispute can easily fall to rights dispute, because the reason for the proposed change to the production system and demand to the pursuit of improved efficiency and better achievement of profit objective related to operational requirement. There is obvious overlap between operational requirements and wage work bargaining.

In *Schoeman v Samsung Electronics*, the court held that the employer is entitled to run its business in a prosperous way and this may entail affecting changes to terms and conditions of employment when the market forces demand so.

In *Mwasa v Independent Newspapers*, the court held that change to terms and conditions of service of an employee can be proposed as a way to avoid retrenchment; dismissal of employees for refusing to accept the change is not covered by section 187(1)(c).

In *Fry’s Metals v Numsa*, the court has rejected the notion that there is tension between section 187(1)(c) and section 188(1)(a)(ii). The court held that section 186(1) refers to dismissal or termination of workforce with the intention to end the employment contract and replacing the workforce with employees that are prepared to accept terms and conditions of employment that suit the employer’s operational requirements. The court argued further that the meaning of dismissal should be a
starting point when one wants to dispute the two sections. On the other hand, section 187(1)(c) was effected with a certain purpose, which is to prohibit the employer from dismissing employees in order to compel them to accept its demand in dispute of mutual interest. The court held that the dismissal in this case was final. The employer dismissed its employees because it did not need them anymore. This dismissal is in accordance with section 186(1). The court rejected that operational requirements is confirmed to saving business from bankruptcy. The court argued that the principle includes measures calculated to increase efficiency and profitability. The employer can dismiss and make more profit.
CHAPTER 1
INTRODUCTION

Employers are sometimes compelled for economic reasons to review their work method or system. This may lead to job loss. Economic reasons may be influenced by competitive market forces, efficiency or the employer may want to better its profits. Under the circumstances the employer may consider restructuring its organisation. Restructuring may mean the introduction of new working system that might lead to changing the terms and conditions of employment. Sometimes, restructuring leads to some employees losing their positions in the organisation because their jobs become redundant. Some employers may decide to take a long term view and invest heavily on advanced technology requiring fewer employees to control and operate it. Again employees lose their jobs.¹

Before the employer is able to implement any of the above considerations, the employer must first involve employees that are going to be adversely affected by the changes and their representative in decision making. The Labour Relations Act² (hereinafter “the 1995 LRA”) strictly prohibits introduction of unilateral change. According to section 64(4) of the 1995 LRA the following consensus flows from unilateral change to the conditions of employment:

- Employees may choose to go on strike in order to stop the employer from implementing the changes;

- If the changes have been effected, employees may request the employer to restore the status quo.

When the employer proposes change to the terms and conditions of employment, that dispute can be classified as a dispute of mutual interest. Dispute of mutual interest can be negotiated through collective bargaining. In the event negotiations between the parties do not reach agreement stage, the employer cannot unilaterally

² 66 of 1995.
implement the changes or dismiss employees in order to compel them to accept the proposed changes. This kind of dismissal is prohibited by section 187(1)(c) of the 1995 LRA. It is regarded as an automatically unfair dismissal.

Under the 1956 LRA employers were allowed to dismiss employees if employees refused to accept the proposed changes. The dismissal is called lock-out dismissal. This kind of dismissal entitled employers to dismiss employees on condition that the dismissal was temporary and the workers would be re-employed when they agree to the demands of the employer. After the contract of employment was terminated between the employer and employees, the employer was allowed to implement the changes using scab labour.

The 1995 LRA introduced section 187(1)(c) that was intended to re-enforce the abolishing of the lock-out dismissal. This section strictly forbids the dismissal of employees in order to compel them to accept demands of the employer in matters of mutual interest. Such dismissals are regarded as automatically unfair. Lock-out is still an option for employers under the 1995 LRA. Unlike the lock-out dismissal, lock-out under the 1995 LRA does not include termination of contract of employment. lock-out can only be used to force employees to accede to employer’s demand and it falls short of dismissal.3

If employees refuse to accept the proposal of the employer to changes of terms and conditions of employment, the employer has three defenses. First, the employer can initiate lock-out. This means that the employer can lock employees out until they accede to its demand. The employer is not allowed to employ scab labour during the lock-out period. Second, the employer can lock-out employees in response to the notice of strike or strike of the employees. The employer can use scab labour during the lock-out period. Again employees are locked-out until they agree to the employer’s demand. Third, the employer can dismiss employees for operational

requirements. The employer must show reasons that are justified and fair for this dismissal and a fair procedure must be followed.\(^4\)

Grogan\(^6\) argues that a contract of employment ought to be treated in terms of law of contract and common law. According to these laws employees have a legal right to accept or reject the proposal of the employer to change the contract of employment. If the employer decides to unilaterally change the contract of employment, the employer will be in breach of contract. The employee can sue for damages or hold the employer to the contract in terms of section 34 of the Basic Conditions of Employment Act\(^7\) (hereinafter “the BCEA”). Section 34 of the BCEA allows employees to sue employers and recover lost wages and damages. The employee has a choice to accept or refuse the proposed changes. The question that remains to be answered is whether the employer can dismiss employees if employees refuse to accept changes to conditions of employment.

Courts had no easy task in trying to determine the precise meaning and effect of section 187(1)(c) of 1995 LRA, particularly with regards to right and interests of the employer to dismiss workers for fair reason relating to operational requirements as opposed to the right and interest of the employee in relation to right to work security and under section 187(1)(c).

In Schoeman v Samsung Electronics (Pty) Ltd,\(^8\) the court held that:

“An employer may not dismiss employees in order to compel acceptance of a demand but this does not prevent the employer resorting to dismissal for operational requirements in a genuine case.”\(^9\)

The relationship between employer and employee is characterised by inherent inequality, with the employer in a very powerful position. By prohibiting lock-out dismissal or any dismissal, the 1995 LRA is attempting to strike a balance between the two. However, an employer is entitled to run its business in a prosperous way

\(^5\) S 188(1)(a)(ii).
\(^7\) 75 of 1997.
\(^8\) (1997) 10 BLLR 1364 (LC).
\(^9\) (1997) 10 BLLR 1364 (LC) at para 19.
and this may entail effecting change to terms and conditions of employment when the market forces demand so. This is in line with the purpose of the 1995 LRA, which is to advance economic development as well as social justice.\(^\text{10}\)

Section 188(1)(a)(ii)\(^\text{11}\) permits employers to dismiss its employees for operational requirements. Section 213\(^\text{12}\) defines operational requirements as follows:

“As a general rule, economic reasons are those that relate to the financial management of the enterprise, technological reasons refer to new technology that affects work relationships, and structural reasons relate to the redundancy of posts consequent on the restructuring of the employer’s enterprise.”

Section 188(1)(a)(i) of the 1995 LRA read together with the definition of operational requirements mean that even within the context of collective bargaining, where an employer wants to change the terms and conditions of employment and employees refuse to accept the new conditions, the employer may dismiss employees for operational requirements; subject to the condition that a fair procedure is followed and there exist a justified and reasonable ground for the dismissal.

In *MWASA v Independent Newspapers (Pty) Ltd,*\(^\text{13}\) the court held that if change to conditions of service of employees is proposed as a way of avoiding retrenchment, dismissal of employees for refusing to accept the change is not covered by section 187(1)(c).

Cheadle argues that:

“Section 187(1)(c) makes classic lock-out dismissal automatically unfair. An employer may no longer dismiss employees to compel them to accept how different is that from dismissing an employee on grounds of operational requirements because the employer needs to change terms and conditions of employment and the employee refused to agree to it.”

\(^{10}\) S 1.

\(^{11}\) 1995 Labour Relations Act.

\(^{12}\) *Ibid*.

\(^{13}\) (2002) 23 *ILJ* 918 (LC).
This is precisely the question that Landman J grapples with in *South African Chemical Workers Union v Afrox Ltd.* He recognised that the purpose is the same - to change terms and conditions of employment. The reason for changing terms and conditions of employment is the same - operational requirements. He suggested somewhat differently, that the difference may lie in the procedure to be adopted in effecting the dismissal - an operational requirement dismissal has to follow a detailed procedure. But if the reason (compelling an employer to accept new terms and conditions), is automatically unfair, then complying with section 189 cannot transform into a fair one.

Todd and Damant argue the same point differently. They argue that there is no conceptual distinction that can be properly drawn between the subject matter of collective bargaining and the subject matter of retrenchment consultation, and there is no proper distinction that can be maintained in the two processes. Both disputes of collective bargaining and retrenchment can be discussed in the same process. All of these matters relate to wage-work bargaining. The employer’s operational requirements are the only instrument to measure the difference. The final decision on the viability of the business entity is the managers’ prerogative. Managers are said to have exclusive managerial prerogative, because it is them that are vested with knowledge and expertise of running a business.

In *Chemical Workers Industrial Union v Algorax (Pty) Ltd,* the Labour Appeal Court reiterated that “the enquiry is one which would have been chosen by the court ... the courts should be slow to interfere to direct those decisions”. The question that the court still had to deal with is the distinction between the context of changing terms and conditions of employment dismissal that is meant to compel employees to accept new terms and conditions of employment falling within section 187(1)(c), and that which is based on operational requirements. However, the Labour Appeal Court in *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of South Africa,* has rejected the notion that there is tension between the two sections.

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In *Fry's Metals*, the court rejected Thompson’s migration approach. The court argued that there is a distinction between the meaning of section 186(1) and section 187(1)(c). Section 186(1) refers to dismissal or termination of workforce with the intention ending the employment contract and replacing the workforce with employees that are prepared to accept terms and conditions of employment that suit the employer’s operational requirements. The court argued further that the meaning of dismissal should be the starting point when one wants to dispute the two sections. On the other hand, section 187(1)(c) was effected with a certain purpose; which is, to prohibit the employer from dismissing employees in order to compel them to accept its demand in dispute of mutual interest. The court held that the dismissal in this case was final. The employer dismissed the employee without conditions or promise of re-employment. The employer dismissed its employees because it did not need them anymore. This dismissal was in accordance with section 186(1).

In *Algorax*, by contrast, *Algorax* repeatedly offered those employees who were dismissed re-employment.

The court said the employer’s conduct was automatically unfair, because its conduct was in the realm of the lock-out dismissal. The effect of prohibiting the lock-out dismissal is to signal to employers that the decision to retrench may be made only at the point at which it is clear that no form of persuasion is likely to come from the employer.

Todd and Damant argue that section 187(1)(c) does not purport to prohibit a dismissal where the reason for the dismissal is the failure of employees to accept a change to their conditions of employment. This section does not prohibit threat of dismissal as a means of persuasion in the collective bargaining process. This section prohibits a dismissal where the reason for the dismissal is to compel employees to accept a collective bargaining demand. “Collective bargaining conduct may, it seems, be calculated to induce (through force of argument) acceptance of a demand; but nevertheless fall short of an attempt to compel that acceptance.”

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20 Todd and Damant “Unfair Dismissal - Operational Requirements” 1916.
line is crossed only where a party in the collective bargaining process attempts to compel acceptance of a demand by definition involves some action designed to force the other party’s had. That is the action that goes beyond persuasion such as lock-out or dismissal.

In *Hendry v Adcock Ingrams*, the court allowed a retrenchment for profit. The court argued that if the employer is able to show that a good profit is to be made in accordance with sound economic rationale, and a fair procedure was followed during the retrenchment process, the employer can dismiss.

In *Fry’s Metals v National Union of Metalworkers of South Africa*, the court confirmed retrenchment for profit. The court argued that the principle ‘operational requirements’ is not confined to saving business from bankruptcy, but it includes measures calculated to increase efficiency and profitability. The employer can dismiss and make more profit.

In this treatise the focus will be more on the relationship between section 187(1)(c) and discussion based on operational requirements. Chapter two deals with automatically unfair dismissals in terms of section 187(1)(c). In Chapter three dismissal for operational requirements is discussed. Chapter four will deal with the test for substantive fairness and the role of the court in determining the fairness of dismissals that are based on operational requirements. Chapter five deals with the critical analysis of the relationship between dismissal for operational requirements and collective bargaining. Chapter six provides a conclusion and recommendations.

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CHAPTER 2
AUTOMATICALLY UNFAIR DISMISSALS IN TERMS OF SECTION 187(1)(c)

2.1 INTRODUCTION

Section 187(1)(c) originates from the 1956 LRA’s definition of lock-out. According to this Act, lock-out definition permitted the use of conditional dismissal as a tool of compulsion during the collective bargaining process. The employer was allowed to temporarily dismiss employees who refused to accept the employer’s demand during collective bargaining process on condition that they would be re-employed when they acceded to the demand of the employer.

Section 187(1)(c) is intended to reinforce the abolition of the lock-out dismissal. Unlike the definition of local dismissal, lock-out definition under 1995 LRA does not include the termination of contract of the employee concerned. Lock-out under the 1995 LRA falls short of dismissal.22 Employers may chose to invoke offensive lock-out or defensive lock-out at the point of impasse in an attempt to force the employee to accept its demand. Offensive lock-out refers to a lock-out that is initiated by the employer. The employer is not allowed to make use of replacement labour.23 Defensive lock-out refers to a lock-out that is in response to the notice of strike or strike by the employees. During this lock-out the employer is allowed to use scab labour.

2.2 LOCK-OUT DISMISSAL (under the Labour Relations Act 28 of 1956)

Lock-out means any one or more of the following acts or omissions by a person who is or has been an employer.

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22 Grogan Workplace Law 434.
23 S 76(1)(b).
(a) The exclusion by him of anybody or a number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed, or

(b) total or partial discontinuance by him of his business or of the provision of work; or

(c) the breach or termination by him of the contracts of employment of anybody or number of persons in his employ; or

(d) the refusal or failure by him to re-employ anybody who has been in his employ, if the purpose of that exclusion, discontinuance, breach, termination, refusal, or failure is to induce or compel any person, who is or has been in his employ or in the employ of other persons; or

(e) to agree to or comply with any demands or proposals concerning terms and conditions of employment or other matters made by him or on his behalf or on behalf of any other person who is or has been an employer; or

(f) to accept any change in terms of conditions of employment; or

(g) to agree to the employment or the suspension or termination of the employment of any person.24

The above definition means that employers were allowed to introduce change unilaterally to terms and conditions of employment of their employees through termination lock-out option.

The requirement for a legal lock-out dismissal was that the dismissal has to have a purpose and also be conditional. The employer was allowed to use lock-out dismissal in the context of collective bargaining. Lock-out dismissal was intended to compel employees to accept demands of the employer that were related to disputes

24 S 1(a)-(d).
of mutual interest. The dismissals were conditional. The condition was that employees were dismissed until they accepted to the demands of employers. Lock-out dismissals were not designed to be final. Lock-out dismissal that was made final was declared unlawful. Lock-out dismissals were allowed, provided that the employer had a reasonable business rationale. The employer must have negotiated with the employees or their representatives in good faith to deadlock on the issue and must have given a reasonable notice to the employees.25

In *K Ngubane v NTE Limited*26 the court observed and noted that the requirement is that the old contract of employment must be terminated with the purpose of inducing acceptance of a demand or proposal, or the employer can simultaneously terminate the contract of employment and give the employee his final offer. The offer must remain open for acceptance for a specific time or an indefinite time. If the offer is indefinite it would lapse when it is withdrawn. Although termination of employment is final by its nature, the lock-out ends when the offer of re-employment expires.

In *National Union of Metalworkers of South Africa v Eveready SA (Pty) Ltd*27 the court confirmed that conditional termination of employment constituted a lock-out in terms of the 1956 LRA.28 The court confirmed that dismissal of employees coupled with an offer to re-employ if the offer was accepted was in line with the requirements of lock-out dismissal. Lock-out dismissals were designed to be temporary coupled with the offer of re-employment upon acceptance of the offer. If a dismissal was not coupled with the offer of re-employment, such dismissals were declared unlawful and outside the ambit of lock-out dismissal definition.

In *Commercial Catering and Allied Workers Union of South Africa v Game Discount World Ltd*29 the employer failed to reach an agreement in negotiations about wages and other terms and conditions of employment. The employer dismissed employees. The dismissals were final and irrevocable. The court held that the dismissals fell outside the ambit of lock-out definition and were therefore unlawful.

25 Todd and Damant “Unfair Dismissal - Operational Requirements” 910.
26 (1990) 1 (10) SALLR 11 (IC).
27 (1990) 11 ILJ 338 (IC).
28 S 65(d)(i)–(ii).
29 (1990) 11 ILJ 162 (IC).
In *National Union of Metalworkers of South Africa v Aerial King Sales (Pty) Ltd*\(^30\) the employer dismissed employees for rejecting a final wage offer. The court emphasised the importance of the prohibition of the final dismissal within the context of collective bargaining as follows:

“There is, however, nothing in the Act that suggests that para (c) of the definition of a lock-out permits an employer to use the lock-out as a weapon to achieve a valid final dismissal of its employees. To dismiss employees because they do not want to accept management’s final offer on wages cannot constitute a valid reason for dismissal.”\(^31\)

### 2.3 LOCK-OUT (under the Labour Relations Act 66 of 1995)

Section 213\(^32\) defines a lock-out as follows:

“The exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees’ contracts of employment in the course of or for the purpose of that exclusion.”

As opposed to the 1956 LRA, the 1995 LRA appears to want to regulate the situation of its predecessor in a different way. The 1995 LRA prohibits termination of employees’ contracts of employment, whether the termination is conditional or final, as a way of inducing compliance with the employer’s demand in the context of collective bargaining. Employers are only allowed to physically exclude employees from its premises as a way of compelling them to accept its demands in any matter of mutual interest. Lock-out under the current Act must be short of dismissal.

### 2.4 SECTION 187(1)(c)

Section 187(1)(c)\(^33\) states:

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\(^{30}\) (1994) 15 *ILJ* 1384 (IC).

\(^{31}\) (1994) 15 *ILJ* 1384 (IC) at 1393.

\(^{32}\) Labour Relations Act 66 of 1995.

\(^{33}\) 1995 Labour Relations Act.
“(1) A dismissal is automatically unfair if the employer, in dismissing the employees, acts contrary to section 5, or, if the reason for the dismissal is –

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.”

This section is aimed at preventing employers from resorting to lock-out dismissals when they cannot get their way in collective bargaining processes. According to this section the employers may not threaten employees with disciplinary action if employees refuse to accept the demand of the employer.

In the past the Labour Court was faced with a challenge about the meaning of section 187(1)(c) in situations in which employees were threatened with dismissal or actual dismissal for refusing to accept unilateral change to their conditions of employment by their employer.

Schoeman v Samsung Electronic (Pty) Ltd\textsuperscript{34} concerns two sales executives who were paid a salary package consisting of basic salary, commission and fringe benefits. As a result of company restructuring exercise there was a substantial increase in sales volume that was not related to improvement in their own performance. The two executive began to earn large amounts of commission that anticipated when the basis for the calculation of commission had been agreed. The employer decided that the amounts of the commission payments were not justified when the employer calculated what the company would have to pay in the market to replace them. Negotiation between these employees and their employer deadlocked. The employer attempted unsuccessfully to lock them out in an attempt to persuade them to accept a lower commission. The employer decided to embark on retrenchment consultations and ultimately dismissed them.

The Labour Court ruled that:

“The employer in the private sector needs to be able to survive and prosper economically. To do this the employer must meet changed market circumstances and be competitive. To meet the changes of the market adaptations are required. An employer needs the flexibility to deploy, reasonably quickly and efficiently, the resources at the employer’s disposal. The employer

\textsuperscript{34} (1997) 10 BLLR 1364 (LC).
has various options open to him to achieve this. One of them is the lock-out route which is used to compel acceptance of a demand."

The court went further and said an employer may not dismiss employees in order to compel acceptance of a demand. The employer could have opted for dismissal for operational requirements. In the opinion of the court dismissal for operational requirements could be used not only in relation to an employer’s need for change to work obligation but also the remuneration of an employee.

In *ECCAWUSA v Shoprite Checkers t/a OK Bazaars Krugersdorp* the employer was under financial collapse before the business could be sold to Shoprite group as a going concern. *OK Bazaars Krugersdorp* began consulting with its worker’s union. Agreement was reached that both parties would take all reasonable measures to avoid job losses. *OK Bazaars Krugersdorp* and the union also agreed that flexible work practices were an important component of this plan in order to avoid job losses. Subsequent to the agreement with the union the employer introduced new and more economical shift pattern. Employees refused to accept the new shift patterns. The employer retrenched them.

The court found that the new shift patterns were introduced as alternative to retrenchment. Amendment to terms and conditions of employment can be preferred as an alternative to retrenchment. *OK Bazaars Krugersdorp* was justified in dismissing employees who refused to accept the alternative on offer.

In *MWASA v Independent Newspaper (Pty) Ltd* the company had placed its editorial employees in a pool and required them to work for all its publications, instead of only one publication as before. Employees rejected the offer of the company and they were retrenched. The court held that the dismissal of employees who refused to accept of the company was fair. The Labour Court adopted a different approach in *National Union of Metalworkers of South Africa v Fry’s (Pty) Ltd.* The employer bargained with the union in an attempt to secure an agreement

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36  Todd and Damant “Unfair Dismissal - Operational Requirements” 911-912.
to introduce a new shift pattern, but negotiations between the parties failed. The employer threatened to dismiss the employee if they refused to accept the new shift pattern.

The court held that dismissal was not a legitimate instrument coercion in the collective bargaining process. The court made reference to the definition of lock-out. The court argued that lock-out under the 1995 LRA means that tactical dismissals are precluded. Section 187(1)(c) renders any dismissal to compel acceptance of an employment demand automatically unfair. Wage-work deal must be the product of methods stopping short of dismissal.40

In NCBAWU v Hernic Premier Refractories (Pty) Ltd41 the company retrenched its employees because they refused to accept changed conditions of employment offer, after the company had taken over the business of their former employer. The court held that retrenchment could not have been the true reason for their dismissal, as the employee had been replaced with contract workers. The only conclusion that was plausible was that the retrenchment was caused by the employee’s refusal to accept the demand of the employer. The court said the dismissal was automatically unfair. However, in Fry’s Metals and Hernie Premier Refractories, Grogan argues that the Labour Court was persuaded that the employer threatened employees with dismissal in order to avoid a lock-out.42

The employer bargained with the union in an attempt to secure an agreement to introduce a new shift pattern. Negotiations between the parties failed. The employer threatened to dismiss the employee if they refused to accept the new shift pattern.

This debate took a different angle and conclusion in the appeal against the Fry’s Metals judgment.43 The Labour Appeal Court held that there were two issues that were raised in the appeal. The first issue was whether an employer has a right to dismiss employees who were not prepared to agree to changes to their terms and conditions of employment. The second issue was, the nature of the relation between

40  Grogan Workplace Law 143.
42  Grogan Workplace Law 143.
that right and the employee right not to be dismissed for the purpose of being compelled to agree to a demand in respect of a matter of mutual interest.

The court raised that operational requirement is one of the ground that the 1995 LRA provides for dismissal. Section 187(1)(c) was an attempt to resolve the debate over termination lock-out under the 1956 LRA.

Under the 1956 LRA, it had been correctly held that a final and irrevocable dismissal did not constitute a lock-out because the dismissal was not aimed at inducing the employee to accept a demand. Once a dismissal is final, the dismissal is not a lock-out dismissal. According to the Labour Appeal Court in Fry’s Metals judgment the reasoning in the 1956 LRA applies equally to section 187(1)(c). A final dismissal purpose is to get rid of the dismissed employees and replace them with the new employees who are willing to work according to the new structure of the employer. This kind of dismissal is retrenchment. The decision of the Supreme Court of Appeal upheld this decision. The Constitutional Court dismissed the appeal of the National Union of Metalworkers without giving reasons.

The court in Mazista Tiles (Pty) Ltd v National Union of Mine Workers⁴⁴ confirmed the dismissal of employees who refused to accept the proposal of the employer. In this case, the employer proposed the closure of the hostel where employees were residing, the discontinuation of the feeding scheme and wanted to covert its employees into independent contractors who would be self employed. This would cause the employees to work at basic wages and on incentive system that would be based on productivity. The employees showed willingness to accept the proposal concerning the closure of the hostel and abolition of the feeding scheme. They rejected the proposal of becoming independent contractors or incentive employees. The employer dismissed the employees on operational grounds. The court held that because the dismissal was final and irrevocable it fell outside the ambit of section 187(1)(c).

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In *Chemical Workers Industries Union v Algorax (Pty) Ltd*\(^45\) employees were dismissed for refusal to work a new shift system. The employer tried in vain to persuade them to change their minds before the ultimate dismissal. Unlike in *Fry’s Metals*, Algorax offered to re-employ the dismissed workers if they were willing to work the new shift system, and kept that offer open until the matter reached the Labour Court. The court found that the dismissal was only procedurally unfair. The union appealed the decision of the Labour Court, that stated that the dismissal was not automatically or substantively unfair. The Appeal Court in *Chemical Workers Industries Union v Algorax* held that the employer had infringed on section 187(1)(c) because it offered to reinstate the employees after dismissing them. Algorax did not formally declare a lock-out. If the lock-out was declared the employer would have kept the employees outside as long as it did without compensating them for unfair dismissal. The court reinstated the employees with compensation of the full period that they were locked out.

In circumstances where employees are locked out or are on a legal strike, the employer is not precluded from dismissing them for operational requirements or disciplining them for misconduct. *South African Chemical Workers Union v Algorax Ltd*\(^46\) illustrates this point more clearly. The employer had a distribution system that resulted in its drivers working in excess of overtime permitted by law. The employer decided to introduce a staggered shift system to overcome the problem. Drivers embarked on a strike, but subsequently succumbed to the change. Five months later employees, at one of the employer’s branches decided to embark on a strike action again, demanding that the staggered shift system be abandoned. The employer responded by locking them out and informing their union that the striking employees would be retrenched. Employees at the other branches embarked on a solidarity strike in support of the threatened drivers. The employer retrenched the strikers. The union claimed that the dismissal was automatically unfair. The Labour Appeal Court held that the dismissal had been effected for operational requirements.

\(^{46}\) (1999) 20 ILJ 1718 (LC).
The 1995 LRA allows employers to dismiss employees for a fair reason relating to the employee's conduct, capacity or operational requirements. In *Slagment (Pty) Ltd v Building Construction & Allied Workers Union* employees refused to work under a newly appointed supervisor and were dismissed after several warnings.

In *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of South Africa* employees were dismissed after they refused to operate two machines instead of one for a limited period. In both cases the court held that the employer's instructions were reasonable and fair. The employees were contractually obliged to perform the work demanded of them. The actions of the employees constituted insubordination. Although both of these cases were decided under the 1956 LRA, the reasoning adopted in them is still relevant to establish boundaries of section 187(1)(c).

### 2.5 ONUS OF PROOF

The common law interpretation of the onus is that "he who asserts must prove". Section 192 of the 1995 LRA set the general rule on the onus of proof. This section provides that in dismissal proceedings the employee must establish the existence of the dismissal whereafter the employer must prove that the dismissal is fair. However, in automatically unfair dismissals, the employee rests with the onus to prove the dismissal and that the dismissal is automatically unfair. The employee is required to provide *prima facie* evidence in support of his allegation. If it is proved that an employee was dismissed on automatically unfair grounds listed in section 187, it is not open to the employer to show that the dismissal was fair. The proceedings must directly consider the remedy to which the employee is entitled. In *Jada v First National Bank* the employee was dismissed for misconduct. He alleged that he was victimised and dismissed because of his trade union activities, and discriminated against because of his race. The court considered whether the

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47 Ss 67(5) and 188.
employee had a duty to adduce prima facie evidence of the automatically unfair dismissal. The court adopted Mashada v Cuzen & Woods Attorney\textsuperscript{53} approach that held that “if an employee alleges that he was dismissed for prohibited grounds eg pregnancy, then it would seem that the employee must in addition to making the allegation at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly on this ground”.\textsuperscript{54} The court in Kroukam v SA Airlinks\textsuperscript{55} concluded that in providing the onus the employee does not need to prove anything. The employee is only required to raise doubts about the reason for dismissal.

\textbf{2.6 CONCLUSION}

Section 187(1)(c) of the 1995 LRA is intended to end the debate over whether employer may fairly dismiss employees pursuant to lock-outs. In terms of this section dismissals are deemed to be automatically unfair if the reason for the dismissal is to compel employees to accept a demand in respect of any dispute of mutual interest between employer and employee. Under both 1956 and 1995 LRA employers have a remedy to lock-out employees at the point where negotiations have reached impasse. Under the 1956 LRA, the employer was allowed to use a lock-out dismissal to pressure or induce employees to accept its demand. Lock-out dismissal had to be coupled with re-employment option at the point of acceptance of the employer’s demand. Under the 1995 LRA lock-out does not include termination of contracts of employees. This type of lock-out allows the employer only to exclude employees from entering its premises until they accede to its demand.

With this background, it is clear that section 187(1)(c) prevents dismissals that are meant to compel employees to accept the employer’s demand on matter of mutual interest, but it does not prevent employers from dismissing employees who refuse to accept a demand if the effect of that dismissal is to save other workers from retrenchment, nor does it preclude employers from dismissing grossly insubordinate employees. The onus of proof under automatically unfair dismissal requires the

\textsuperscript{53} (2000) 21 ILJ 402 (LC).
\textsuperscript{55} (2005) 26 ILJ 2153 (LAC).
employee to cast doubt about the reason for dismissal as opposed to proof on balance of probability that is required in terms of section 192. Chapter three deals with dismissal for operational requirements.
CHAPTER 3
DISMISSAL FOR OPERATIONAL REQUIREMENTS

3.1 INTRODUCTION

Employers are seldom compelled for a wide variety of economic reasons to review or consider reducing its wage bill by terminating the employment of some of their employees. The common scenario is that, the employer may consider restructuring its organisation. Restructuring may mean introducing new working systems that might lead to change of terms and conditions of employments. Sometimes, because of restructuring some employees lose their positions in the organisation because their job becomes redundant. Some employers might decide to take a long term view and invest heavily on advanced technology requiring fewer employees to control and operate this technology. Again employees lose their jobs.56

This kind of dismissal is called dismissal for operational requirements and commonly known as retrenchment or no fault dismissal.57 Dismissal for operational requirements is one of the three grounds of termination of employment that is recognised by the 1995 LRA58 which might be legitimate. Retrenchment becomes legitimate provided the employer can show that the dismissal is fair and justified and a fair procedure was followed.59 Dismissal for operational requirements are regulated in section 189 and 189A respectively.60

3.2 MEANING OF OPERATIONAL REQUIREMENTS

Section 213 of the 1995 LRA define operational requirements as follows:

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

56 Basson Essential Labour Law 146.
57 Grogan Dismissal, Discrimination and Unfair Labour Practice 361.
58 S 188(1)(a)(ii).
60 1995 Labour Relations Act.
Both the term operational requirements and its definition are drawn from the International Labour Organisation Convention 158.

“Article 4 of the Convention recognises a valid reason based on the operational requirements of the undertaking, establishment or services as a legitimate justification for dismissal. Article 13 of the Convention imposes specific obligations on employers who contemplate terminations for reasons of an economic, technological, structural or similar nature. The Convention provides little further guidance as to precisely what reasons are contemplated by this provision. The recommendation that accompanies the Convention (Termination of Employment Recommendation No. 66 of 1982) refers to consultation with workers’ representatives when an employer contemplates the introduction of major changes in production, programme organisation, structure or technology that are likely to entail termination.”

The Code of Good Practice on Dismissal Based on Operational Requirements notes that there is difficulty in defining all the circumstances that might legitimately form the basis of a dismissal in these circumstances.

The Code gives guidance to the interpretation of section 213 as follows:

“As a general rule, economic reasons are those that relate to the financial management of the enterprise, technological reasons refer to new technology that affects work relationships, and structural reasons relate to the reducing of posts consequent on the restructuring of the employers enterprise.”

Van Niekerk argues that the definition of operational requirements is expansive. Over the years the courts have included dismissal for incapacity, refusal to accept the change to conditions of employment consequent upon the need to reorganise work as well as dismissal at the behest of third party.

This definition refers to four categories of operations requirements; namely the employer’s economic needs, technological need, structural or similar need. This definition clearly demonstrates that the reason for the dismissal does not relate to the employee, but to the needs of the employer.

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61 Van Niekerk et al Law@Work 270.
63 Van Niekerk et al Law@Work 271.
64 Schedule 8 Labour Relations Act 1995.
65 Van Niekerk et al Law@Work 271.
66 Basson et al Essential Labour Law 146.
Grogan interprets this definition as follows:

“Economic need for example include those needs and requirements relating to the economic well being of the enterprise.”

Technological need 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.

3.2.1 THE EMPLOYER’S SIMILAR NEEDS

Similar needs is a very broad concept. It is not possible to compile a full and exhaustive list of what would constitute similar reasons. Each case might be treated with reference to its own circumstances. There seem to be no dividing line between an employer’s economic needs and similar needs.

3.2.1.1 CHANGE TO AN EMPLOYEE’S TERMS AND CONDITIONS OF EMPLOYMENT

Because of economic and other business difficulties, a business may need to be restructured. I may merge or amalgamate with another enterprise, change operations in order to ensure its survival or competitiveness or to enable to keep abreast of the latest developments in the industry. These changes might lead to retrenchment due to redundancy or employees might be offered new positions with changes to the terms and conditions of their employment. Employees that unreasonably refuse to accept the changes to the terms and conditions of employment may be faced with dismissal due to operational requirements.

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67 Basson et al Essential Labour Law 147.
The courts have been emphasising this point in various judgments. In *WL Oschse Webb & Pretorius (Pty) Ltd v Vermuelen* the employee was a tomato salesman for the employer. He was earning more than the other employees as the sale of tomatoes attracted a higher commission than the sale of the vegetable sold by the other employees.

This caused dissatisfaction among other employees. The employer tried to address the issue by proposing a new remuneration system. The salesman was given three alternatives. He could either accept the new system or present an alternative system or resign. He proposed that the old system be retained. When his proposal was rejected by the employer he resigned. The Labour Appeal Court held that the employer had not acted unfairly. The court’s argument was that:

> “Any successful business needs contented employees. Unhappiness can lead to problems such as labour unrest, a drop in productivity, and the like. The appellant (the employer) sought to address the unhappiness of the majority of its employees with the old remuneration structure, by seeking ways to change it … The evidence on record does not establish an ulterior motive on the part of the appellant for attempting to find a new remuneration package. A commercial rationale for the changes was thus established.”

In *Fry’s Metals (Pty) Ltd v Nation Union of MetalWorkers of South Africa*, the court explained the difference between a lock-out dismissal and a dismissal for operational requirements as follows:

> “A lock-out dismissal entails that the employer wants his existing employee to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employee does not agree to the proposed changes he would dismiss them – not for operational requirements but to compel them to agree to the change. In such a case the employees thereafter would have an opportunity to agree to the changed working conditions.

When they agree to the change, the dismissal ceases because it has served its purpose … he purpose of a dismissal for operational requirements … is to get rid of employees who do not meet the business requirements of the employer so that new employees who will meet the business requirements of the employer can be employed.”

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In Chemical Workers Industrial Union v Algorax (Pty) Ltd\textsuperscript{72} the merits of this case are essentially similar to Fry’s Metals. The Labour Appeal Court took a different outcome to that of Fry’s Metals. The court pointed out the fundamental difference between an operational requirements dismissal as envisaged by section 187(1)(c) the 1995 LRA. The court said the difference between the two sections lies in the reason for the dismissal. The court found that Algorax willingness to keep the offer of re-employment open was enough to distinguish the two cases. Fry’s Metals could not possibly have been intended to compel its employees to accept the new shift system after it had dismissed the employees finally and irrevocably. However, Algorax’s actions amounted to lock-out dismissal, which is prohibited by section 187(1)(c) of the 1995 LRA.

In Mazista Tiles (Pty) Ltd v National Union of Mine Workers\textsuperscript{73} the employer suffered increased competition and engaged with the union for a long period without success. Eventually the employer decided to embark on retrenchment exercise for operational requirements.

The Labour Appeal Court held that the employer intended to terminate the contract of employment of its employees, so that the employees would become independent contractors. The court held that the dismissal was not temporary, which the employer would withdraw if the employees accepted the change. The court upheld the dismissal of the employees and rejected the argument of their union that says the dismissal fell within the ambit of section 187(1)(c).

The change in terms and conditions of employment is not always as a result of the changes regarding the business. Change can be brought about by certain circumstances or attitude of the employees that could have caused serious repercussions for the business of the employer.

\textsuperscript{72} (2004) 24 ILJ 1917 (LAC) at 1929.
\textsuperscript{73} (2007) 25 ILJ 2156 (LAC).
In *Steel, Engineering & Allied Workers Union of South Africa v Trident Steel (Pty) Ltd*\(^7^4\) there was no provision in the contract of service that employees would work overtime as and when the operational needs of the business so required it. Employees declared an overtime ban in pursuit of their wage demand. The employer dismissed its employees for operational requirements. The employer argued that overtime was essential to its business operations, and working of overtime permitted it to offer a 24 hour service, which enabled it to retain its market share in a highly competitive field.

The court deemed it unnecessary to consider whether an implied term to work overtime existed. It rather concentrated on wider employment relationship which existed between the parties. The court held that the employees were dismissed for valid operational reasons since the business required workers who were prepared to work according to business needs.

### 3.2.1.2 INCOMPATIBILITY AND RELATED REASONS

The courts has established and confirmed that an employee whose actions negatively affect the operations of business, could be dismissed for operational requirements. This situation could be presented by the actions of the employee who creates disharmony amongst co-workers.

In *Erasmus v BB Bread Ltd*\(^7^5\) employees demanded dismissal of a manager for his negative attitude and his derogatory remarks towards black employees. The dismissal was upheld by the court. “The court held that the employer had a right to insist on reasonable harmonious interpersonal relationships between employees.

In *East Rand Proprietary Mines Ltd v UPUSA*\(^7^6\) the employer dismissed a number of Zulu speaking workers for a violent clash between them and other workers belonging to other ethnic group. The court acknowledged that the dismissal was unfair under the circumstances, because it had the element of arbitrary ground. However, the

\(^7^4\) (1986) 7 ILJ 86 (IC).
\(^7^5\) (1987) 8 ILJ 537 (IC).
\(^7^6\) (1997) 1 BLLR 10 (LAC).
court found the employer to have dismissed employees fairly, because the employer is charged with the responsibility of ensuring the safety of other employees. Dismissal was the only option available for the employer.

3.2.1.3 BREAKDOWN IN THE TRUST RELATIONSHIP

Employees have a common law duty to act in good faith towards their employers. The relationship between the employer and the employee is that of trust.

Trust, from the employer’s perspective, entails the belief or confidence, that the employee is complying to the common-law duty to act in good faith towards the employer and business.

If it can be established by facts on balance of probabilities that this duty has been breached, the employee is guilty of misconduct. If the employer is unable to prove the misconduct, the employer may dismiss the employee for operational requirements.

The above discussion has been decided by the industrial court in terms of the 1956 LRA. In Mahlangu v CIM Deltak, Gallant v CIM\textsuperscript{77} the employer dismissed three of its employees on the basis of suspected theft and its operational requirements. The Industrial Court disputed the dismissal and held that an employer cannot dismiss an employee on the mere suspicion of theft. The court in Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd\textsuperscript{78} held that the employer’s dismissal of an employee on suspicion of theft has been fair.

In Food & Allied Workers Union v Amalgamated Beverage Industries Ltd\textsuperscript{79} the court accepted that the dismissal of a number of employees on suspicion of assault had an operational rationale to it.

\textsuperscript{77} (1986) 7 ILJ 346 (IC).
\textsuperscript{78} (1993) 2 ICD 310 (IC).
\textsuperscript{79} (1994) 15 ILJ 630 (IC).
In *Chauke v Lee Service Centre CC t/a Leeson Motors*\(^80\) the employer could not identify employees who were involved in certain incidents of malicious damage to property and sabotage.

The Labour Appeal Court held that the employer may dismiss employees for operational requirements where dismissals are necessary to save the life of the enterprise.

### 3.3 CONCLUSION

The concept of operational requirements has its roots in the 1956 LRA. The definition of which is expansive, because dismissal on the ground of operational requirements differ depending on the merits of each case. The definition of operational requirements is open-ended because similar needs may include any reason. Under the 1995 LRA, dismissal for operational requirements is permissible where employees refuse to accept changes to terms and conditions of employment in the course of negotiations.\(^81\) Brassey argues that the employer must have negotiated to impasse first, then they can retrench and implement the change unilaterally.\(^82\) Chapter four deals with the test for substantive fairness.

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\(^{80}\) (1998) 19 *ILJ* 1441 (LAC).

\(^{81}\) Ss 67, 188 and 189.

\(^{82}\) Thompson “Bargaining, Business, Restructuring and the Operational Requirements Dismissal” 760.
CHAPTER 4
THE TEST FOR SUBSTANTIVE FAIRNESS

4.1 INTRODUCTION

Section 188 of the 1995 LRA lays down the general provision that an employer must establish a fair reason to dismiss. Courts were however reluctant to subject employer's rationale for retrenchment to extensive scrutiny. The judicial officers adopted the view that they were not necessarily the best qualified people to assess the merits of business decisions to determine whether they are based on sound business or economic principle. The other reason was that the judicial officers were reluctant to allow the fair labour practice jurisdiction to restrict the range of possible economic decisions that could be taken by business manager in the genuine belief that they were pursuing the best interest of business.\textsuperscript{83} All that was required of the employer was to establish substantive fairness or to demonstrate that it had a \textit{bona fide} reason to retrench.\textsuperscript{84}

4.2 THE ROLE OF THE COURT

\textit{Atlantis Diesel Engine}\textsuperscript{85} the Labour Appeal Court asserted a greater role for courts. The court rejected the \textit{bona fide}, non-discriminatory and commercial justification of the decision to retrench as the only reasons that the court must consider in determining fairness of retrenchment. The court recognised that business decision could not readily be categorised as correct or incorrect; because some business decisions may be considered better than others on a relative scale.

The court held further that termination of employment for economical or operational reasons must be a measure of last resort.

\textsuperscript{83} Todd and Damant "Unfair Dismissal - Operational Requirements" 916.
\textsuperscript{85} (1992) 13 \textit{ILJ} 405 (IC).
Thompson\textsuperscript{86} argues that:

“Testing the fairness of a decision does indeed go further than a cursory look at its \textit{bona fides} and commercial rationale, but it surely cannot go as far as setting up the requirement that the termination of employment is the only reasonable option in the circumstances. If the decision is based on a demonstrably sensible business analysis that has been probed in the consultative process, is not unreasonable in context nor disproportionate in the trade of between gains and hardships, it should withstand scrutiny.”

In \textit{South African Clothing & Textile Workers Union v Discrete}\textsuperscript{87} the Labour Appeal Court’s approach to substantive fairness relied on rationality and it held that the question is whether the ultimate decision arrived at by the employer is operationally and commercially justified on rational ground, having regard to what emerged from the consultation process. The court described its role as being similar to that of a court dealing with the judicial review of administrative action. In this case the court did not follow the approach of \textit{Atlantis Diesel Engine}.

The court found:

“The function of a court in scrutinising the consultation process is not to second guess the commercial or business efficiency of the employer’s ultimate decision (an issue on which it is generally not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in a different setting, everyday).

The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process had been followed, and if so, 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 important to note that when determining the rationality of the employer’s ultimate decision on retrenchment, it is not the courts’ 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.”\textsuperscript{88}

\begin{footnotesize}
\begin{enumerate}
\item Thompson “Bargaining, Business, Restructuring and the Operational Requirements Dismissal” 770.
\item (1998) 12 BLLR 228 (LAC).
\item Numsa v Atlantis Diesel Engine (1999) 14 ILJ 642 (LAC).
\end{enumerate}
\end{footnotesize}
In *BMD Knitting Mills (Pty) Ltd v South African Clothing & Textile Workers Union*\(^{89}\) the Labour Appeal Court questioned or doubted whether or not the test in *SACTWU v Discreto* was applicable in labour law as it is sourced from the principles of administrative review. The court reaffirmed that the test for dismissal is fairness not correctness. The court went further and suggested that the employer should establish that it was necessary to retrench, as opposed to mere accepting the employer’s decision at face value. The court recognised that the starting point is whether there is a commercial rational for the employer’s decision, but the court emphasised that it was entitled to enquire whether there was a reasonable basis for retrenchment.

In *Chemical Workers Industrial Union v Algorax*\(^{90}\) the Labour Court took the test a step further. The court warned that the judicial officer must guard against accepting the merely said so of the employer in regard to the need to retrench.

It is the duty of the court to decide whether the dismissal is fair or not. The employer must show that the retrenchment was the last resort. The courts accepted that dismissal for operational requirements need not be restricted to the cutting of costs and expenditure. Profit or an increase in profit, or gaining some advantage such as a more efficient enterprise can also be an acceptable reason for dismissal for operational requirements.\(^{91}\)

In *Hendry v Adcock Ingram*,\(^{92}\) a merger between two companies resulted in the dismissal of an employee. Work of one employee was added to the task of another employee as a cost saving exercise. The Labour Court approved of this reason as a fair reason to dismiss for operational requirements. The court held that fair labour practice does not give employees indefinite employment to a particular employer. The employer can retrench if it is financially crippled or if a sound economic rational is shown.

\(^{89}\) (1992) 13 *ILJ* 405 (IC).
\(^{90}\) (2003) 24 *ILJ* 1917 (LAC).
\(^{91}\) *Food & Allied Workers Union v Kellogg SA (Pty) Ltd* (1993) 14 *ILJ* 406 (LC).
\(^{92}\) (1998) 19 *ILJ* 85 (LC).
In Fry’s Metals (Pty) Ltd v National Union of MetalWorkers of South Africa\(^93\) the court said the 1995 LRA does not distinguish between operational requirements in the context where the business is fighting for survival and operational requirements in the case of a profitable business wanting to make even more profit.

In Enterprise Foods (Pty) Ltd v Allen\(^94\) the shareholder of the company decided to cut costs so that they can achieve more profits. The court confirmed the dismissal on the basis of Algorax decision and reasserted Discreto cautious approach that the reasonable operations available in the circumstances must be used, but the employer must be allowed to exercise managerial prerogative.

In Mazista Tiles (Pty) Ltd v National Union of Mineworkers\(^95\) the Labour Appeal Court accepted that even though the employer had continued to make profits this in itself did not preclude a company from retrenching the employees. Employers have a right to retrench if it becomes necessary to be more profitable.

In Food & Allied Workers Union v South African Breweries Ltd\(^96\) the Labour Court held that the employer’s decision to restructure its operations was warranted by efficiency considerations and a drive to increase its profitability. The court found that in a market driven economy there could be no objection to an employer retrenching to increase its profits, provided that the employer’s conduct remains fair on a general assessment of all the evidence.

4.3 CONCLUSION

The Industrial Court and Labour Court were weary to interfere with the decision of employer to retrench. Courts were of the view that a decision to retrench is a business decision that ought to be left in the hand of manager. In Atlantis Diesel Engine the court rejected this approach and said that retrenchment must be based on fair reasons and it must be a measure of last resort. In Algorax the court took the test in Atlantis Diesel Engine a step further. The court warned that the judicial

officers must guard against accepting the mere said so of the employer, but must
decide whether the dismissal is fair or not. The Labour Appeal Court confirmed that
the employers can retrench for making more profit. Chapter five deals with
relationship between dismissal for operations requirements and collective bargaining.
CHAPTER 5
RELATIONSHIP BETWEEN DISMISSAL FOR OPERATIONAL REQUIREMENTS AND COLLECTIVE BARGAINING

5.1 INTRODUCTION

Before the enactment of the 1995 LRA there was no regulations that governed retrenchments that arose as the result of the employer’s purpose to change the way that its employees did their work or how they were paid for services that they rendered. Issue relating to conditions of employment between the employer and its employees was a matter of negotiations. If negotiations, regarding conditions of employment, fail or reach a deadlock, the employer was generally considered under the 1956 LRA to be entitled to introduce the changes unilaterally. The employee’s contract of employment would come to an end. The employer would issue employees with termination notice, or they could be disciplined and ultimately dismissed, having continued to tender their services under the new regime, for failing or for refusing to work the changed work pattern when it was required.

The employer was required to show that there existed a valid commercial rationale, it has negotiated with the employees in good faith and or until negotiations deadlocked in the issue and a reasonable notice was issued before the contract of employees were terminated. If all the above requirements were satisfied, that would be found to constitute a fair labour practice.

5.2 MEANING AND EFFECT OF SECTION 187(1)(c)

It is against the above background that the 1995 LRA was enacted. The 1995 LRA attempted to regulate this situation in a different way, inter alia, by introducing automatic unfair dismissal in section 187(1)(c). The Labour Court has attempted to determine the precise meaning and effect of section 187(1)(c) through case law.

The question that the court attempted to address was the right that an employer has to dismiss workers for a fair reason relating to operational requirements.
In *Schoeman v Samsung Electronics (Pty) Ltd*\(^{97}\) Ms Schoeman and Ms Rossouw were sales executives paid a salary package consisting of a basic salary, commission and fringe benefits. As a result of a substantial increase in sales volumes that were not related to improvement in their own performance, Ms Schoeman and Ms Rossouw began to earn substantially large amounts of commission than had been anticipated when the basis for the calculation of commission had been agreed. The employer considered that the amount of the commission payments were not justified when the employer considered what the company would have to pay in the market to replace them. After negotiations reached impasse, the employer attempted, unsuccessfully to accept a lower basis for the calculation of commission. The employer decided to embark on retrenchment consultations and ultimately dismissed both employees.

The Labour Court held that although the employer is not allowed or prohibited to dismiss employees in order to compel them to accept the employer's demand on matters of mutual interest, the employer is not prohibited from resorting to dismissal for operational requirements. The court said “a dismissal for operational requirements could be used not only in relation to an employer's need to change the work obligation but also for the remuneration of an employee”. The court found further that the employer was motivated by commercial reasons to make its offer and to dismiss the applicant. The employer was of the *bona fide* view that the employees were not worth the old package of the company. On this point the court argued that this was beyond the scope of adjudication.\(^{98}\)

### 5.3 MIGRATION

The judgment of *Schoeman v Samsung* was heavily criticised by authors such as Thompson. Thompson in article sets out how the prohibition on the use of dismissal as weapon in collective bargaining was to be reconciled with the operational requirements dismissal. He attempted to establish the principle that may be used to

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\(^{97}\) (1999) 20 *ILJ* 200 (LC).

determine how the engagement between management and labour could migrate from the arena of collective bargaining to the arena of dismissal. Thompson argued that the world of work and business defies sharp categorisation and the 1995 LRA appeared to pursue competing policy objectives in successive breaths. He pointed out two areas of interaction between labour and management. “When the contest between management and labour is purely over the wage work bargaining in other words, the substantive term of the next collective agreement dismissal will never permissible, the ‘for profit termination’ offends against section (1)(c). An employer may argue, however, that not a quest for profit but sheer operational requirements obliged a particular economic outcome, even to the point of sanctioning the discharge of those who hold out. But the Labour Court should learn against a result that allows a dispute on a wage work deal to escape the protected zone of collective bargaining. When in exceptional circumstances the case for migration is made, the employer must still overcome a formidable fairness hurdle in the judicial process.”

Thompson is of the view that an exchange over employment changes driven by operational requirements does not fit well within the conventional bargaining framework. He states that this is because the wage profit split is not directly at stake and precipitating factors are often beyond the partners’ control. He argues further that business restructuring fits better in section 189 of the 1995 LRA.

Todd and Damant differ with Thompson as far as the existence of distinction between the subject matter of engagement between labour and management over classic mutual interest disputes and those disputes that constitute the employer’s sheer operational requirement. They differ again on the maintenance of conceptual distinction between the process of collective bargaining and the process of consultation that is envisaged in section 189 of the 1995 LRA.

Todd and Damant argue that it is artificial to talk of migration of engagement form the arena of bargaining to the arena of dismissal, because there can be no conceptual distinction that can be properly drawn between matters of mutual interest and matters that cause employers to contemplate retrenchment.

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Both disputes impact ultimately on wage work bargaining and should be discussed in the same process of engagement between management and labour. They accept Thompson’s view that states that the debate over the operational requirement of a business is essentially an economic one, not a legal one, and that the debate should therefore, begin in the bargaining arena.\textsuperscript{101}

Todd and Damant argue further that there is no proper distinction that can be drawn between matters that are in a pure sense the subject of the wage work deal and the employer’s operational requirements. Wage work bargaining matters can form alternative to retrenchment during the consultations for operational requirements. They referred to the litigation in both \textit{Fry’s Metals} and \textit{Algorax}, where employers wanted to introduce change to existing shift systems. The reason for the proposed change was the alteration of production system and demand, to the pursuit of improved efficiency and better achievements of its profit objectives. The reasons advanced by the employer relates to operational requirements. But hours of work, payment for those hours and working conditions that go with the employer’s operational requirements are matters of mutual interest. There is obvious overlap between operational requirements and wage work bargaining. There is no reason for conceptual distinction between the matters which form the subject of engagement in negotiations over conditions of service and typical retrenchment consultation.

There is not distinction that can be drawn between the process that is followed in consultation and bargaining process. Both processes require information sharing on good faith commitment to reach outcome or solutions, consensus, or agreement in relation to the subject matter of bargaining. There is no greater duty to compromise in bargaining than is required in consultation. There is no added compulsion or incentive to reach agreement merely because the process of engagement is styled bargaining or negotiation rather than consultation. The court in \textit{National Union of Metal Workers of South Africa v Atlantis Diesel Engine}\textsuperscript{102} rejected the notion that

\textsuperscript{101} Thompson “Bargaining, Business, Restructuring and the Operational Requirements Dismissal” 755.
\textsuperscript{102} (1992) 13 \textit{ILJ} 405 (IC).
retrenchment consultations merely present an opportunity for workers or their representatives to make representations.

5.4 MEANING OF SECTION 187(1)(c)

Section 187(1)(c) does not purport to prohibit a dismissal where a reason for the dismissal is the failure of employees to accept a change to their conditions of employment. This section does not prohibit threat of dismissal as a means of persuasion in the collective bargaining process. This section prohibits a dismissal where the reason for the dismissal is to compel employees to accept a collective bargaining demand which may, it seems, be calculated to induce (through force of argument) acceptance of a demand, but nevertheless fall short of an attempt to compel that acceptance.103

The line is crossed when a party in the collective bargaining process attempts to compel acceptance of a demand that involves some action designed to force the other party's hand.

The action that goes beyond persuasion is lock-out or dismissal. An employer whose motive is to persuade its employee to accept his demand may not use dismissal to achieve his objective. Section 187(1)(c) prohibits the use of dismissal in the circumstance.

On the other hand, an employer that requires its employees to work according to a new shift pattern for rational and justifiable operational reasons and is willing to get rid of its existing workforce in favour of a new workforce may dismiss if this satisfies the test for operational requirements dismissal. The dismissal must be operationally and commercially justifiable on rational grounds.

The purpose of section 187(1)(c) was to end the debate of lock-out dismissal and to prohibit dismissals that are intended to force employees to accept demands of employers.

103 Todd and Damant “Unfair Dismissal - Operational Requirements” 916.
To deal with conceptual discomfort, the Labour Appeal Court was constrained in *Fry’s Metals* to describe the section 187(1)(c) dismissal as one distinction from dismissal which that section 186 refers to. It is a special kind of dismissal.

In *Fry’s Metals*, the employer made it clear to its employees that if they fail to signify their acceptance of the proposed new shift system by a particular dated, their contract would be terminated. Many efforts were made to stress the importance of deadline, but once it had passed the employer acted decisively. Employees were dismissed finally, with no prospects of being re-engaged if they later changed their minds. This meant that the dismissal did not violate the section 187(1)(c) prohibition.

In *Algorax*, by contrast the employer went an extra mile to persuade employees to accept its proposed new shift configuration. The deadline was extended repeatedly. Employees were requested to reconsider their position. After employees are dismissed, *Algorax* repeated its offer to re-employ those that were dismissed if they indicated their willingness to return on the new conditions.

This meant that the dismissal of the employees was tantamount to lock-out dismissal and in contravention of section 187(1)(c). The employers conduct was said to be automatically unfair. The employees were reinstated into the old shift system with several years of back pay.

The effect of prohibiting the lock-out dismissal is to signal to employers that the decision to dismiss may be taken only at the point at which it is clear that no form of persuasion is likely to induce the workers to change their minds and accept the employers new shift system or terms. At that point the employer must take a firm stand against those workers who continue to reject the required change. The decision must be commercially rational. It must be defensible on the ordinary test for the substantive fairness of operational requirements dismissal. Chapter six deals with conclusions and recommendations.
CHAPTER 6
CONCLUSION AND RECOMMENDATION

6.1 CONCLUSION

Employers are often faced with economic reasons that require them to review their staffing levels, or to terminate the employment of some of their employees. Economic reasons may be influenced by competitive market forces or the employer may want to better achieve its profit objective. Under these circumstances the employer would normally invite its employee or their representative to discuss the problem that is facing the company and the implications thereof.

In terms of section 64\(^\text{104}\) the employer is not allowed to unilaterally introduce a change to terms and conditions of employment of employee. The consent of employee has to be obtained. The employer is forced to initiate negotiations with its employees or their representatives if the employer wishes to introduce any change. This is the beginning of collective bargaining process. If negotiations reach a point of impasse, the employer has legal remedies.

The employer can choose to embark on an offensive lock-out or a defensive lock-out, or a retrenchment exercise. On the other hand the employees have a right to call for a legal strike, refuse to agree to the change of their contract and hold the employer to the contract., in terms of section 41(4) of the BCEA, or in terms of other comparable provisions that may be contained in the employers policies or applicable collective agreement.

At this point a question of conflict arises. The courts are faced with a difficulty of weighing the interests of employees to social security\(^\text{105}\) and the interests of employers to economic contract. How does the law conceive of the contests, what measures may the parties legitimately take in an attempt to impose their will? Is

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\(^{104}\) 1995 Labour Relations Act.
\(^{105}\) S 1 of 1995 Labour Relations Act.
dismissal a legitimate instrument to coerce the employees to accept the employers demand in the collective bargaining process?\textsuperscript{106}

Dismissal is not permitted in disputes that concern matters of mutual interest. Dismissal is not a legitimate instrument of coercion in the collective bargaining process.\textsuperscript{107} Under the 1956 LRA, employers were permitted to discuss employees (temporary) in order to compel them to accept a demand. Lock-out dismissals had to be coupled with a condition of re-employment at the point of the employee acceptance to the demand of the employer. Section 187(1)(c) of the 1995 LRA was enacted to end the existence of lock-out dismissal. In terms of this section the dismissal becomes automatically unfair if it is intended to compel employees to accept a demand. Lock-out under the 1995 LRA allows the employer to exclude employees from its premises or production area in an attempt to compel them to accede to a demand. This kind of lock-out falls short of dismissal.

In contrast, employers are allowed to dismiss employees who refuse to agree to change to their conditions of employment on the ground of operational requirements, provided a fair procedure is followed.\textsuperscript{108} Change to the conditions of employment discussed under the banner of collective bargaining, is regarded as a mutual interest matter.

If the change is discussed, in consultation, for operational reasons, the matter or dispute is of right. It is at this point that an overlap between section 187(1)(c) and dismissal based on operational requirements starts.

Todd and Damant call this overlap the relationship between dismissal for operations requirements and collective bargaining.\textsuperscript{109} The Labour Appeal Court\textsuperscript{110} and the Supreme Court of Appeal have held that the only dismissal that section 187(1)(c) targeted was lock-out dismissal. The legislature intended to end the debate about lock-out dismissal.

\textsuperscript{107} National Union of Metalworkers of South Africa v Fry’s Metals (Pty) Ltd at para. 38.
\textsuperscript{108} S 188(1)(a)(ii).
\textsuperscript{109} Todd and Damant “Unfair Dismissal - Operational Requirements” 910.
\textsuperscript{110} Fry’s Metals (Pty) Ltd v National Union of Metalworkers of South Africa (2003) 24 ILJ 133 (LAC).
Dismissal must be final and it must not be coupled with any condition of re-employment. Section 187(1)(c) was intended to prohibit conditional dismissal in an attempt to compel employees to accept a demand. Dismissal must be irrevocable and final with no prospects of re-employment. Conditional dismissal or dismissal that is not final is tantamount to lock-out dismissal, and it contravenes section 187(1)(c).

In *Chemical Industrial Workers Union v Algorax*\(^{111}\) the Labour Appeal Court found the dismissal to be unfair, dispute concession that the employer had a valid operational requirement to dismiss. The dismissal was declared unfair because *Algorax* offered to re-employ the dismissed employees even after the so-called final dismissal. The court held that the actions of the employer constitute lock-out dismissal and are in conflict with section 187(1)(c) of the 1995 LRA.

Todd and Damant\(^ {112}\) argue that, there is no need for conceptualisation. “Migration” from the arena of collective bargaining to the arena of dismissal does not exist. Consultation over retrenchment and negotiation in collective bargaining require some information sharing and good faith commitment jointly to reach outcomes of solutions, consensus or agreement in relation to the subject matter of bargaining.

The potential alternatives and different permutations may be put on the same table. They argue further that if the argument is accepted, then the provisions of section 187(1)(c) of the LRA would make no sense if they prohibited the kind of dismissal that took place in *Fry’s Metals*.

### 6.2 RECOMMENDATIONS

#### 6.2.1 REINSTATE LOCK-OUT DISMISSAL

Todd and Damant\(^ {113}\) argue that lock-out dismissal is preferable by a big margin to final dismissal. Lock-out dismissal might have been an attempt to prevent employers from circumventing the prohibition on the employment of replacement labour in the


\(^{112}\) “Unfair Dismissal - Operational Requirements” 915.

\(^{113}\) “Unfair Dismissal - Operational Requirements” 919.
employer's initial lock-outs. This does not help employees because employers could dismiss employees and employ scab labour while ultimately hoping to compel the dismissed workers to accede to its demand.

This situation can be saved by lock-out dismissal. Lock-out dismissal would make it difficult for employers to dismiss before they have exhausted attempts at reaching the point of resolving the dispute through industrial action.

The employer will only argue dismissal once it has reached the point in collective bargaining process when its operational requirements justify total replacement of workforce, with all the costs and convenience that this exercise go with.

6.2.2 REMOVAL OF SECTION 187(1)(c) FROM THE CATEGORY OF AUTOMATICALLY UNFAIR DISMISSALS

Thompson suggests that section 187(1)(c) should be removed from the category of automatically unfair dismissals. He argues:

“Option one could be to remove the prohibition of tactical and temporary dismissals from the category of automatically unfair dismissal. It simply does not belong there and spawns anomalies. In fact, it probably does not belong anywhere else either. The shoulders of section (1)(a)(ii) are broad enough to deal with fairness of all dismissals in the operational requirements context, and strong enough to give all dismissals that subvert the bargaining process, whether temporary or permanent, their proper due.”

Todd and Damant suggest that, if their opinion that no conceptual distinction can properly be drawn between the subject matter of collective bargaining and the subject matter of retrenchment consultation is correct, and that no proper distinction can be maintained between the processes required to be followed, then the provisions of section 187(1)(c) of the LRA would make no sense if they prohibited the kind of dismissal that took place in Fry’s Metals. The distinction between what is and what is not permissible would become difficult if not impossible to draw.

115 “Unfair Dismissal - Operational Requirements” 916.
Interpreted broadly, the section 187(1)(c) prohibition would make very far reaching inroads into the employer’s ability to use retrenchment to effect workplace restructuring.

6.2.3 AMENDMENT OF SECTION 187(1)(c)

Roskam\textsuperscript{116} suggests and recommends the amendment of section 187(1)(c) of the LRA. He argues that collective bargaining has always been the preferred mechanism for resolving disputes about wages and other terms and conditions of employment. It is imperative that the sanctity of collective bargaining be protected.

Roskam further suggests that section 187(1)(c) be read as follows after it is amended:

- “A dismissal is automatically unfair if the employer in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is -

  (c) the employee’s refusal to accept a demand in respect of any matter of mutual interest between employer and employee.”

6.2.4 USE OF “CAUSATION” TEST

Cohen\textsuperscript{117} argues for the use of causation test in examining within the context of proposed changes to terms and conditions of employment. Whether dismissal is based on operational requirements or is aimed at compelling employees to accede to an employer demand.

In \textit{South African Chemical Workers Union v Afrox Ltd} the court used causation test. Employees were dismissed while they were on strike. The question that was before the court was whether the employees were dismissed because of their participation in the strike action or the dismissal was for genuine operational requirements. The court concluded that the employees were dismissed for operational requirements.

\textsuperscript{116} \textit{An Exploratory Look into Labour Market Regulation} (2006) 45.
\textsuperscript{117} “Dismissal to Force Changes to Terms and Conditions of Employment – Automatically Unfair or Operationally Justifiable” (2004) 25 \textit{ILJ} 1883.
Causation test consists of factual causation and legal causation.

### 6.3 FACTUAL CAUSATION

The test is whether the employees would have been dismissed if the employer had not attempted to introduce changes to their terms and conditions of employment. If the answer is that the dismissal would have taken place even if the employer had not proposed changes to the terms and conditions of employment, the dismissal would not be automatically unfair. If the answer to the same question is negative (no), this does not render the dismissal automatically unfair. The next step of enquiry of causation test kicks in; that is legal causation.

### 6.4 LEGAL CAUSATION

The enquiry is whether the proposed changes to terms and conditions of employment were the main or dominant reason behind the dismissal. If it cannot be inferred that the dismissal was intended to compel employees to accept the employer’s demand, the next stage should be to bring section 189 so as to ascertain whether the dismissal was effected for a fair reason based on operational requirements, and whether a fair procedure was followed or not.

Looking at the above conclusion and recommendation, the question that still needs to be answered is whether section 187(1)(c) is still relevant after Fry’s Metals judgment.
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