THE CONSULTATION AND OTHER REQUIREMENTS OF DISMISSAL FOR OPERATIONAL REASONS

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUMMARY</td>
<td>iv</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>2. COMMON LAW</td>
<td>2</td>
</tr>
<tr>
<td>3. THE STATUTORY DEFINITION OF THE TERM “OPERATIONAL REQUIREMENTS”</td>
<td>5</td>
</tr>
<tr>
<td>3.1 Special operational needs of the business</td>
<td>6</td>
</tr>
<tr>
<td>3.2 The employee’s actions or presence affects the business negatively</td>
<td>7</td>
</tr>
<tr>
<td>3.3 The employee’s conduct has led to a breakdown of trust relationship</td>
<td>11</td>
</tr>
<tr>
<td>3.4 The enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment</td>
<td>14</td>
</tr>
<tr>
<td>4. HISTORICAL BACKGROUND IN SOUTH AFRICA</td>
<td>16</td>
</tr>
<tr>
<td>4.1 The development of the unfair labour practice concept</td>
<td>16</td>
</tr>
<tr>
<td>4.2 International labour standards regarding unfair dismissal</td>
<td>20</td>
</tr>
<tr>
<td>4.2.1 Substantive fairness of a dismissal</td>
<td>20</td>
</tr>
<tr>
<td>4.2.2 Procedural fairness of a dismissal</td>
<td>21</td>
</tr>
<tr>
<td>5. STATUTORY REQUIREMENTS FOR A FAIR DISMISSAL FOR OPERATIONAL REASONS</td>
<td>22</td>
</tr>
<tr>
<td>5.1 Substantive fairness of a dismissal for operational reasons</td>
<td>22</td>
</tr>
<tr>
<td>5.2 Procedural fairness of a dismissal for operational reasons</td>
<td>27</td>
</tr>
<tr>
<td>5.2.1 Prior consultation</td>
<td>28</td>
</tr>
<tr>
<td>5.2.2 Attempt to reach consensus over certain matters</td>
<td>29</td>
</tr>
<tr>
<td>5.2.3 Written disclosure of relevant information</td>
<td>34</td>
</tr>
<tr>
<td>5.2.4 The employer must allow the other party to make representation</td>
<td>36</td>
</tr>
<tr>
<td>5.2.5 The employer must consider and respond to the representations made by the other party</td>
<td>36</td>
</tr>
<tr>
<td>5.2.6 The selection of the employees for dismissal</td>
<td>36</td>
</tr>
<tr>
<td>5.2.7 Payment of severance pay to dismissed employees</td>
<td>37</td>
</tr>
<tr>
<td>6. THE NEW LAW ON RETRENCHMENT</td>
<td>37</td>
</tr>
<tr>
<td>6.1 Section 189 retrenchments</td>
<td>39</td>
</tr>
<tr>
<td>6.2 Section 189A retrenchments</td>
<td>42</td>
</tr>
<tr>
<td>6.2.1 Facilitation</td>
<td>43</td>
</tr>
<tr>
<td>6.2.2 No facilitator</td>
<td>46</td>
</tr>
<tr>
<td>6.3 New remedies</td>
<td>47</td>
</tr>
<tr>
<td>6.3.1 Challenging substantive fairness in the Labour Court</td>
<td>47</td>
</tr>
<tr>
<td>6.3.2 Alternatively the right to strike</td>
<td>49</td>
</tr>
<tr>
<td>6.3.3 Procedural fairness</td>
<td>50</td>
</tr>
<tr>
<td>6.4 The new section 191(12)</td>
<td>51</td>
</tr>
<tr>
<td>6.5 Implementation</td>
<td>52</td>
</tr>
<tr>
<td>7. CONCLUSION</td>
<td>53</td>
</tr>
</tbody>
</table>
BIBLIOGRAPHY

Articles  55
Books  55
List of Cases  55
Legislation  56
SUMMARY

Our employment law which originates from the common principles has in recent years undergone significant changes. Under common law the employers and employees capacity to regulate their relationship has always been limited.

The recommendations of the Wiehahn Commission introduced amendments to the Labour Relations Act of 1956. The introduction of the unfair labour practice concept and the establishment of the Industrial Court was a direct consequence of the recommendation of the Wiehahn Commission. The Industrial Court together with the higher courts developed new principles regarding unfair labour practices. In the process, a wealth of unfair labour practice jurisprudence was developed by these courts. However, the unfair labour practice definition did not include dismissals.

The coming into power of the democratic government played an important role in transforming our labour law system. After the Labour Relations Act 66 of 1995 was implemented on 11 November 1996, the old Labour Relations Act of 1956 was repealed.

The law on retrenchment forms an integral part of our law of dismissals. The South African labour market has in the past years been characterised by restructuring and consequently retrenchment of employees. In most cases, employer’s decisions to retrench were challenged by the employees and unions in our courts.

Section 189 of the Labour Relations Act of 1995 stipulates procedures to be followed by an employer when contemplating dismissal of one or more employees for reasons based on operational requirements. The employer does not only have to follow the procedures set out in section 189 to render dismissals for operational reasons fair, but there must also be a valid reason to dismiss. The courts have always not been willing to second-guess the employer’s decision to retrench provided that the decision is made in good faith.

Whilst section 189 deals with small-scale retrenchments, section 189A applies to large-scale retrenchments. These are employers who employ more than 50 employees and who contemplate retrenchment of more than the number of employees provided for in section
189(1)(a) or (b). Section 189A also introduced a facilitation process to be conducted in terms of regulations made by the Minister of Labour. The amendments to section 189 should be seen as an attempt to tighten the procedural aspect of retrenchments.

The new law on retrenchments is a product of tough negotiations between the social partners at NEDLAC in which compromises were reached. There are still certain areas of concern to both labour and business. In those areas in which uncertainty still exists, the courts will be required to provide some guidance.
1. INTRODUCTION

Dismissal for operational requirements is one of three broad categories of reasons for which an employer may dismiss an employee namely, misconduct, incapacity and the operational requirements of the business.

In chapter 1 the following definition of the term “operational requirements” as defined in the Labour Relations Act of 1995\(^1\) is discussed:

\[ \text{“Operational requirements means requirements based on the economic, technological, structural or similar needs of an employer.”} \] \(^2\)

This concept is discussed broadly under the following categories of similar reasons for dismissal as considered by the courts over the years:

- Special operational needs of the business.
- The employee’s actions or presence affect the business negatively.
- The employee’s conduct has lead to a breakdown of the trust relationship.
- The enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment.\(^3\)

The second chapter looks at the historical development of the South African law regarding unfair dismissal. It traces the introduction of the definition of the unfair labour practice concept and the establishment of the industrial court since 1979. The definition of the unfair labour practice in terms of the Labour Relations Act of 1995 is also discussed in this chapter.

The third chapter discusses the common law perspective with reference to relevant case law.

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\(^1\) Act 66 of 1995, as amended.

\(^2\) S 213.

In chapter 4 the statutory requirements for a fair dismissal for operational reasons namely, substantive and procedural fairness in terms of section 188 are discussed. Section 189A amendments to the Labour Relations Act of 1995 are also discussed in this last chapter.

2. COMMON LAW

Our law relating to employment originates from common law. It emphasised the capacity of parties in the employment relationship to regulate their rights and duties by independent agreements.

The common law recognised only two forms of dismissal:

- those with notice or
- those without notice.

The Labour Relations Act has widened the motion of dismissal to include other forms. Section 186 defines dismissal as follows:

Dismissal means that-

(a) an employer has terminated a contract of employment with or without notice,

(b) an employee reasonably expected the employer to renew a fixed term contract of employment in the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.

(c) an employer refused to allow an employee to resume work after she -

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) was absent from work for up to four weeks to eight weeks after the actual date of birth of her child;
(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

“In spite of the increasing statutory intrusion, the common law contract of employment remains the basis of the employment relationship in the sense that the legal relationship between the employer and the employee is created by it.”

The fact that parties have entered into an employment contract does not under common law guarantee perpetual employment.

“In the case of indefinite period contents, the common law has traditionally regarded the parties’ right to terminate on notice as unfettered. In other words the employer is not required to show good cause for terminating the contract, or to inform the other party of such reasons as they may be, or to follow any special procedure before termination. Neither fairness nor reasonableness, in other words, is relevant to the legality of a dismissal on notice.”

“Under common law, if there is no contractually stipulated notice period, the courts normally required a period of notice equivalent: one days notice for a person paid daily, a weeks notice for a person paid weekly, and a month’s notice for a person paid monthly.”

“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. In Key Delta v Marriner a magistrate had 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 months 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.”

5 Grogan 75.
6 Grogan 74.
7 (1996) 6 BLLR 647 (EC).
8 Grogan 31.
There was realisation that common law principles were not in keeping with new economic developments and industrialisation. Grogan discuss these deficiencies which necessitated statutory intrusion:

“The process of statutory intrusion was initiated by a general realization that common law had lagged behind condition in modern commerce and industry and, more recently, the entrenchment of a range of new fundamental constitutional rights.

Some deficiencies of the common law contract of employment to which legislators in various countries have given can be summarized as follows:

(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.

(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.”

It is clear from the above that procedural fairness and substantive fairness are not requirements for a fair dismissal under common law as long as the employer has given the employee notice of dismissal. However, the employer does not have an absolute right to terminate on notice. Section 38(6)(a) states that the giving of notice by the employer does not prevent the employee from challenging its fairness.

The role-played by common law together with the Labour Court under the Labour Relations Act of 1956 in developing principles which governed the employment relationships between the employers and employees cannot be simply ignored, although some of these principles have been overtaken by the statute.
3. THE STATUTORY DEFINITION OF THE TERM “OPERATIONAL REQUIREMENTS”

The Labour Relations Act of 1995 defines the term “operational requirements” as follows:

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

Basson et al\textsuperscript{10} provide useful insight into the definition. In essence the following is the suggested meaning of the terminology:

The **economic needs** of a business is a very broad concept which covers all those needs which relate to the economic well being of the enterprise. These include financial difficulties experienced by a business due to a down turn in the economy or a decrease in the demand for its products. This leads to the retrenchment of the employees due to redundancy.

The **technological needs** relate to the acquiring of modern and advanced technology. This also leads to the redundancy and retrenchment of the employees.

The **structural needs** refers to the restructuring of business to improve its productivity and profitability. This also results in some jobs being redundant.

The **similar needs** is a very broad concept. It is rather impossible to provide an exhaustive list of what constitutes similar needs. The courts, however, have had to consider various similar reasons over the past years. These can be categorised as follows:

- Special operational needs of the business.
- The employee’s actions or presence affect the business negatively.
- The employee’s conduct has lead to a breakdown of the trust relationship.
- The enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment.

\textsuperscript{9} S 213 supra.
\textsuperscript{10} Basson et al 186.
3.1 SPECIAL OPERATIONAL NEEDS OF THE BUSINESS

These needs depend on the nature of business. In this regard employees may be required to carry certain special tasks or meet certain business demands. The employer may require that employees must work overtime in order to meet a certain demand in the market. Refusal by an employee to work such overtime could lead to an employer losing business opportunities. The well being of the business could thus be jeopardized. In the circumstances the employer could argue for the dismissal of such an employee.

Basson et al\textsuperscript{11} discuss the Steel, Engineering & Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd\textsuperscript{12} case as follows:

“No express term existed in the employees’ contracts of service with Trident Steel to work overtime. The practice had, however, existed that employees would work overtime as and when the operational needs of business required it. The employees declared an overtime ban in pursuit of their wage demands and Trident Steel dismissed them after the ban had been enforced for more than a week. Trident Steel alleged that the working of overtime was essential to its business operations. The 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 Industrial Court deemed it unnecessary to consider whether an implied term to work overtime existed as there was, in its words, ‘another more satisfactory basis upon which the issue of overtime may be decided’. It held that the fairness of the dismissal had to be decided on ‘the wider employment relationship which existed between them’ and regarded the fact that the practice of working overtime, whenever the business exigencies or operational needs of the enterprise required it, as a prominent feature of the relationship. The court held that the employees had been dismissed for a valid operational reason since the business required workers who were prepared to work overtime as and when business demands necessitated it.”

The employer may dismiss employees who are either refusing or are unable to work overtime regardless of whether the overtime is compulsory or voluntary. The employer may, however dismiss an employee for misconduct if such an employee is refusing to work compulsory overtime. The employer could also dismiss for incapacity an employee who is willing but unable to work overtime for an unreasonably long time.

\textsuperscript{11} Basson et al 187-188.
\textsuperscript{12} (1986) 7 ILJ 86 (IC).
3.2 THE EMPLOYEE’S ACTIONS OR PRESENCE AFFECTS THE BUSINESS NEGATIVELY

It has been generally accepted by our courts that an employee whose actions or presence affects the business negatively could be dismissed. The employee may for example create disharmony and antagonize other employees in the workplace by continually making racist or sexist remarks. This introduces an interesting question about whether dismissals for incompatibility should be categorised under misconduct, incapacity or operational requirements. In *Erasmus v BB Bread Ltd*\(^3\) employees called for the dismissal of Erasmus, a manager of BB Bread. The employees complained about his uncompromising and difficult attitude towards them as well as his derogatory remarks – particularly those aimed at black employees. A shop steward also refused to attend disciplinary enquiries presided over by Erasmus because of the way in which the latter had spoken to him. BB Bread decided that Erasmus “was too great an industrial relations risk to continue with the company” and dismissed him. The court held that BB Bread’s decision was a valid one. It stated, “in my opinion an employer is entitled to insist on reasonably harmonious interpersonal relationships on his factory floor. Where disharmony results from the actions or presence of a particular employee, the employer is entitled to address the problem”. It may be necessary to remove an employee from the scene.

In view of this decision an employee could be dismissed for operational reasons if the latter’s incompatibility has such a negative effect on other employees or customers that the well-being of the business as a whole is threatened. However if an employee’s incompatibility has a fairly limited effect on the operation of the business, the reason for dismissal could be incapacity rather than operational.

It has been accepted by the courts that an employee could be dismissed for operational reasons if his/her mere presence causes disharmony amongst co-employees in the workplace. The employee’s race, gender or a serious disease the employee is suffering from such as aids could cause disharmony amongst other employees in the workplace to the extent that they threaten industrial action if the employee is not dismissed. This could have serious

\(^{13}\) *(1987) 8 ILJ 537 (IC).*
implications for the well-being of the business. This point is dealt with by the Industrial Court in *Jonker v Amalgamated Beverage Industry*.\(^{14}\)

*In casu* the applicant was employed at Amalgamated Beverage Industries (ABI) as a warehouse manager for two months. He resigned due to pressure from the company and on payment of three months salary. The company had put pressure on him to resign after the representative trade union; FAWU had threatened to call a strike on all ABI plants if he was not dismissed. FAWU’s demand stemmed from an incident which occurred in Boerstra Bakery in Pretoria where the applicant had previously been employed and FAWU had been the representative trade union. The applicant had himself also assaulted an employee during the strike in which the police had assaulted employees. The matter was referred to private arbitration by a member of the Johannesburg bar. FAWU was however not satisfied with the finding that could not find any blameworthy conduct on the part of the applicant.

The court held that the fact that the applicant had handed in his resignation was not, by itself, a bar to relief as an employee may, despite his resignation have been constructively dismissed. The court stated that the only reason for termination of employment that could be valid was that dismissal for operational reasons was necessary to avoid labour unrest. The court further stated that dismissals for operational reasons which have a commercial rationale are, generally speaking, not unfair. The court must however consider a number of factors before it can decide that dismissal at the behest of a third party is fair. The mere fact that a third party (the representative trade union) valued customer or fellow workers – the approach must be the same) insists on a dismissal will not *per se* make a dismissal fair.

The court looked at the factors discussed in *Mazibuko & Others v Mooi River Textiles Ltd*\(^{15}\) where that court had concluded that the mere fact that dismissal would ensure ongoing, smooth commercial operations is not sufficient to justify dismissal.

The court identified the following factors to be considered in deciding whether the dismissal at the behest of the third party was fair.

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\(^{14}\) (1993) 14 *ILJ* 199 (IC).

\(^{15}\) (1989) 10 *ILJ* 875 (IC).
(i) The employer would have to satisfy the court that he could resolve the problem created by the third party demand only by terminating the employee’s employment. Relocating or transferring the employee to an associate company would have to be considered.

(ii) Even if the third party’s demand was a valid reason for dismissal, the employer had to satisfy the court that it has done so properly.

(iii) The employer would have to have done what he reasonably could to persuade the third party to drop the demand. The employer must do what it can to avoid injustice to the employee.

(iv) The employer must take into account potential injustice suffered by the employee.

(v) The employer must also take into account his business needs and injustice to the employee and strike a balance, which ensures that fairness to the employee is possible in the circumstances.

The court found the dismissal to have been unfair and awarded compensation.

*Mazibuko & Others v Mooi River Textiles*\(^{16}\) is another example where the employee’s mere presence caused disharmony which impacted on the operation of the business as follows. The relevant facts were the following:

Mooi River Textiles had dismissed Mazibuko and 12 others who were all members of TAWU, a minority union. The company had dismissed them on the demand from the employees who were members of ACTWUSA, a majority union. The dismissals were, according to Mooi River Textiles based on operational reasons. The company argued that it had exhausted all conciliation avenues and dismissals had become inevitable to ensure productivity and to avoid labour unrest. Mooi River Textiles argued that it could also no longer guarantee the safety of the 12 employees. The Industrial Court accepted that there was a commercial rationale for the company’s decision to dismiss the employees. The court however, held that the dismissals were not legitimate in view of the provisions of the Labour

\(^{16}\) *Supra.*
Relations Act regarding freedom of association. The court held that the employees were unfairly dismissed and reinstated them.

In South Africa, the right to freedom of association is protected by both the Constitution\(^\text{17}\) and the Labour Relations Act of 1995.\(^\text{18}\) Furthermore, dismissal based on the employee’s membership of a trade union could constitute an automatically unfair dismissal in terms of the Labour Relations Act of 1995.\(^\text{19}\)

In *East Rand Proprietary Mines Ltd v UPUSA and Others*,\(^\text{20}\) the court dealt with the matter as follows:

The employer in this case, ERPN dismissed some 350 of its Zulu-speaking employees based on operational reasons. It argued that it could no longer guarantee the safety of its Zulu-speaking employees because other employees objected violently to their presence. The union, UPUSA challenged the dismissals in the Industrial Court as unfair labour practice. The Industrial Court ruled that the dismissal was unfair but that the workers should be denied the remedy of reinstatement. Each employee was given compensation of six months’ wages instead.

The employer appealed against the decision that the dismissed was unfair. It also appealed against the amount compensation awarded. In the cross-appeal the union and the dismissed employees sought reinstatement alternatively increased compensation.

In this case, the Labour Appeal Court had to determine the fairness of dismissal of Zulu-speaking employees after violent clashes between them and other workers. The Labour Appeal Court found that the dismissal had been unfair under the circumstances. It did however acknowledge that a dismissal on arbitrary grounds such as ethnic origin could be fair if the employer could prove that dismissal was the only option left to ensure the safety of the targeted employees and the well-being of the business. This could only happen when the employer truly had no other alternative.

\(^\text{17}\) S 23(a) and (b).
\(^\text{18}\) S 4.
\(^\text{19}\) S 187.
\(^\text{20}\) (1997) 1 BLLR 10 (LAC).
According to Grogan\textsuperscript{21} the Code of Good Practice: Dismissal does not expressly deal with incompatibility as a ground for dismissal. It probably falls under poor work performance or incapacity as it affects the employees’ ability to work according to their contracts.

In \textit{Larcombe v Natal Nylon Industries (Pty) Ltd}\textsuperscript{22} the employee’s dismissal on the ground of incompatibility was found to be unfair. The employee was dismissed after six months service. It was alleged that he was incompatible with other members of the management team. This was as a result of a petty quarrel he had with another member of the management team. The court found the reason for the dismissal of Larcombe to be inadequate.

Similarly, in \textit{Joslin v Olivetti System and Networks Africa (Pty) Ltd}\textsuperscript{23} the dismissal of the employee on the grounds of incompatibility was found to be unfair. In this case Mr Joslin was dismissed for his offending actions. He was amongst other things seen walking with pens in his shirt pocket promoting a yes vote in a national referendum. Mr Joslin was seen on one occasion wearing a springbok cricket cap to work. The court found the employee’s behaviour “odd” but not warranting dismissal.

In both \textit{Wright v St Mary Hospital}\textsuperscript{24} and \textit{SA Quilt Manufacturers (Pty) Ltd v Radebe}\textsuperscript{25} the court treated dismissals based on incompatibility as dismissals for operational requirements. Grogan however deals with it under poor work performance.

It is clear, in my view that the question of classification of incompatibility under different headings continues to divide the opinions of our courts and authors of relevant literature in this regard. The legislation should also give some guidance on the issue.

\textbf{3.3 THE EMPLOYEE’S CONDUCT HAS LED TO A BREAKDOWN OF TRUST RELATIONSHIP}

Trust forms part of the duties of the employee. It is not even regarded as an implied term of

\textsuperscript{21} Grogan 190.
\textsuperscript{22} (1986) 7 \textit{ILJ} 326 (IC).
\textsuperscript{23} (1993) 14 \textit{ILJ} 227 (IC).
\textsuperscript{24} (1992) 13 \textit{ILJ} 980 (IC).
\textsuperscript{25} (1994) 15 \textit{ILJ} 115 (LAC).
the contract but an integral part of that contract according to Basson. It exists even if it is not expressly worded in the employment contract. In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* the learned judge remarked:

“The true question to be considered was whether or not what respondent did had the effect of destroying or of seriously damaging the relationship of employer and employee between the parties, so that the continuation of that relationship could be regarded as intolerable.”

In *Central News Agency v CCAWUSA & Another*, the Labour Appeal Court expressed the following view:

“In my view it is axiomatic to the relationship between the employer and employee that the employer should be able to rely upon the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee ... [A]n employer unquestionably is entitled to expect from his employees that they would not steal from him and if an employee does steal from the employer that is such a breach of the relationship and of the contract between them and such a gross and criminal dereliction of duty that dismissal undoubtedly would be justified and fair.”

The importance of trust in the employment relationship was stated by the Appellate Division in *Council for Scientific Industrial Research v Fijen* as follows:

“It is well established that the relationship between employer and employee is in essence one of trust and confidence and that at common law, conduct clearly inconsistent therewith entitled the ‘innocent party’ to cancel the agreement ... It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from naturalia contractus.”

In *Williams v Gilbeys Distillers & Vinters* the court stated:

“If an employer for instance mistrusts an employee for reasons which he must obviously justify ... And he can show that mistrust, as a result of certain conduct of the employee is counter productive to his commercial activities or to the public interest (where appropriate), he would be entitled to terminate the relationship.”

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26 Basson *et al* 43.
28 (1991) 12 ILJ 340 (LAC) at 344 F-I.
29 (1996) 17 ILJ 18 (A) at 26 (per Harms JA).
30 (1993) 2 LCD 327 (IC).
According to Basson, an employee has a common law duty to act in good faith towards the employer’s business. The employer is entitled to dismiss an employee for breach of this duty if misconduct committed is serious. However, if the employer is unable to prove on a balance of probabilities that such a breach was committed, cannot dismiss the employee for misconduct. If the employer remains suspicious that an employee committed the breach, the employer can dismiss the employee for operational reasons. In this instance the employer could argue that although there is insufficient proof that the employee has indeed committed the breach of this duty, the employee is suspected of having done so or that he/she might do so in future and that the mistrust is counter productive to the operations of the business.

Basson discuss the position of the Industrial Court in Mahlangu v CIM Deltak, Gallant v CIM Deltak where the court was at first, not amenable to the argument that an employer should be able to dismiss an employee on suspicion of serious misconduct and the later cases of Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd and Food and Allied Workers Union & Others v Amalgamated Beverage Industries Ltd where the Industrial Court was not only prepared to consider the argument but also to endorse it.

In Mahlangu v CIM Deltak, Gallant v CIM Deltak the employer dismissed three employees on suspicion of theft. These three employees were suspected of having intercepted incoming mail containing credit cards and cheque books of the employees in the company. The matter was investigated by the police. The three employees however, denied involvement in the theft and fraudulent use of the documents. The lie detector showed that they were lying. They were dismissed. The Industrial Court rejected the results of the lie detector. The court treated the case as one of an alleged misconduct. It held that an employer cannot dismiss an employee on mere suspicion of theft. The court reinstated the employees.

However, in a later case in Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd, the Industrial Court held that the dismissal of an employee on suspicion of theft had been fair. The employee was a bottom-polisher of diamonds. He was accused of having swopped a
diamond for one of a lesser quality. He could not produce the original diamond when he was required to do so. He was subsequently dismissed. The court further found that as a diamond polisher the employee was in a position of trust. This together with the fact that the employer had a strong and a valid suspicion that the employee was guilty of dishonest conduct meant that the employer had a valid economic reason to dismiss the employee.

In *Food & General Workers Union & Others v Amalgamated Beverage Industries Ltd*, the Industrial Court accepted that the dismissal of employees on suspicion of assault had an operational rationale to it. The employees who were crewmen had assaulted a driver inside the cloak-room. The company could not identify the crewmen who assaulted the driver. The company charged for assault and intimidation all the crewmen who were on duty at the time of the incident. They were all found guilty and dismissed. The Industrial Court held that the dismissal was for operational reasons and it was fair.

3.4 THE ENTERPRISE’S BUSINESS REQUIREMENTS ARE SUCH THAT CHANGES MUST BE MADE TO THE EMPLOYEE’S TERMS AND CONDITIONS OF EMPLOYMENT

The employer may be required to restructure its business or effect alterations that may necessitate changes in its mode of operation to ensure survival and competitiveness in the market. This may affect the position of the employees in the company. In the process some employees’ positions may become redundant. The employer may alternatively offer some employees new positions within the company. An employee who unreasonably refuses an offer of alternative employment may be dismissed for operational reasons. A case in point is *Ndlela v SA Stevedores Ltd*. Ndlela was dismissed after he refused offers of alternative employment offered by the company. The employer argued that it dismissed Ndlela for operational reasons. The court’s view is that conditions of employment in the new position or alternative employment must not be less favourable than those, which governed the previous position. The employer may also consider a transfer which will also not be less favourable. The court found that Ndlela’s dismissal had been fair.

An employer is prohibited by section 187(1)(c) of the Labour Relations Act of 1995 from compelling an employee from compelling an employee to accept changes to terms and

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38 Supra.
conditions of employment. In this regard, the employer’s action will amount to an automatically unfair dismissal.

In some cases the employee’s conduct determines whether it is necessary to change the conditions of employment or not. In the circumstances the employer may dismiss the employee for misconduct or incapacity. The dismissal could only be fair if the Labour Court is convinced that the dismissal had an operational rationale to it.

In *Chetty v Raydee (Pty) Ltd t/a St James Accommodation*\(^{40}\) the employer changed the employee’s conditions of employment for operational reasons. As a manager, Chetty was required to change his working hours from 08:00 - 16:30 to 08:00 – 24:00. This demand went with the new position of a so-called full-time manager. He refused and was subsequently dismissed.

In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*\(^ {41}\) the Labour Appeal Court held that the employer had not acted unfairly in dismissing Vermeulen. As a tomato salesman Vermeulen earned more than other employees selling other vegetables. There was more commission in selling tomatoes than in selling other vegetables. Vermeulen earned a basic salary and commission. The employer proposed a new remuneration system to address the dissatisfaction amongst other employees. Vermeulen was given three alternatives: to either examine the present system and accept it or present an alternative system or resign. The employer rejected his proposal to have the old system retained. He resigned. The Labour Appeal Court remarked as follows:

“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. That remuneration structure (viz differentiated commissions) was a remnant of previous statutory determination and not only of an agreement between the employees and the employer. If the problem was not addressed the possibility of further problems arising, such as those mentioned earlier, would have increased. 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.”\(^ {42}\)

\(\text{\textsuperscript{40}}\) (1988) 9 *ILJ* 318 (IC).
\(\text{\textsuperscript{41}}\) (1997) 18 *ILJ* 361 (LAC).
\(\text{\textsuperscript{42}}\) *Supra* 366D-F.
4. HISTORICAL BACKGROUND IN SOUTH AFRICA

4.1 THE DEVELOPMENT OF THE UNFAIR LABOUR PRACTICE CONCEPT

The Wiehahn Commission of Inquiry was appointed in June 1977 to investigate labour legislation in our country.\(^{43}\) At the time South Africa was facing political and labour instability. There were dualistic negotiating structures for workers, the recognition of unregistered trade unions for black workers for negotiations purposes by specially multinational undertakings, discriminatory labour practices and shortages of skilled workers.

The Wiehahn Commission of Inquiry released Part 1 its report during May 1979.\(^{44}\) The following most important recommendations were contained in the report:

(i) Trade union rights should be granted to black workers.

(ii) More stringent requirements were needed for trade union registration.

(iii) Job reservation should be abolished.

(iv) A new industrial court should be established.

(v) A national manpower commission should be installed.

(vi) Provision should be made for legislation concerning fair labour practices.

(vii) Separate facilities in factories, shops and offices should be abolished, and

(viii) The name of the Department of Labour should be changed to the Department of Manpower.


There were various legislative amendments emanating from the report, which were adopted. Two of the amendments constituted the foundation of our law of unfair dismissal. These were:

- the introduction of the definition of unfair labour practice; and
- the establishment of the Industrial Court.

The Commission published Part 2 to 4 and 6 of the report in 1980 and in 1981.  During September 1981 Part 5 of the report was released. The report contained the following important recommendations:

(i) Labour law and practices should correspond with international conventions and codes.

(ii) Statutory requirements and procedures for registration of trade unions be revised.

(iii) Urgent attention be given to improve the defects of the Industrial Court.

(iv) The position of closed shops agreements be clarified.

(v) Bargaining rights of workers councils be statutorily laid down.

(vi) Basic labour rights be extended to the public sector.

(vii) Specific legislation should be adopted regarding unfair labour practice.

(viii) The Wage Act be retained but be amended.

(ix) Conditions of employment and working circumstances of women employees be revised in various aspects.

The government accepted these recommendations and were incorporated in the new legislation.

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45 Supra 151-755.
The period from 1983 to 1993 was characterised by the consolidation and incorporation of a new dispensation. Many of the recommendations of the Wiehahn Commission were already entrenched into legislation. However, court decisions and new statutory labour measures provided structures upon which the labour dispensation could be developed and refined further more.

The Industrial Court has, in those areas where serious deficiencies still existed not hesitated to lay down principles and guidelines. It established internationally recognized principles with regard to unfair dismissal and unfair retrenchment. The unfair dismissal concept was not defined in the 1979 amendments to the Labour Relations Act of 1956. The Industrial Court found very little or no guidance from the common law principles when it first had to deal with alleged unfair dismissal disputes. The reason being that the common law did not concern itself about the fairness of a dismissal. The functions of the Industrial Court were regulated by the Labour Relations Act of 1956. The Industrial Court did not have a specific function to determine disputes about unfair labour practices. However the definition of unfair labour practice was very broad to cover unfair dismissals as well, which constituted the majority of disputes referred to the Industrial Court at the time.

The Industrial Court derived its powers from section 43 and section 46(9) of the Labour Relations Act of 1956. In this regard the Industrial Court formulated requirements for a valid retrenchment with reference to the ILO Recommendation 119 and the United Kingdom code of industrial relations practice. The employers have also entered into collective agreements with trade unions governing retrenchments.

The Industrial Court has produced retrenchments guidelines\(^\text{46}\) in various seminal cases.\(^\text{47}\)

Before discussing these guidelines Grogan looks at the proposition that the employer has an undoubted right to retrench workers where economic needs so dictate.

\(^{46}\) Grogan Riekert’s Basic Employment Law (1993) 2nd ed 112.

\(^{47}\) United African Motor and Allied Workers Union and Others v Fodens (SA) (Pty) Ltd (1983) 4 ILJ 212 (IC); Shezi and Others v Consolidated Frame Cotton Corporation Ltd (1984) 5 ILJ 3 (IC); Gumede and Others v Richdens (Pty) Ltd t/a Richdens Food Liner (1984) 5 ILJ 84 (IC) and General Workers Union v Dorbyl Marine (Pty) Ltd (1985) 6 ILJ 52 (IC).

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Does this mean that the employer has an absolute right to retrench and no court may question management prerogative to reduce staffing levels where it is deemed necessary? This question is answered in the affirmative with qualifications.

The courts decided in numerous cases that an employer may unilaterally decide on the need to retrench.\textsuperscript{48}

The court’s intention is to guard against employers misuse of retrenchment for reasons not related to economic needs of the business.

The employer should not misuse retrenchments to get rid of unwanted elements within its workforce. It would be regarded as an improper purpose for instance, if the employer targets for retrenchment members of a particular union in its workplace.

According to Le Roux and Van Niekerk,\textsuperscript{49} the judgment issued by the court in \textit{Williams V Compare Maxam Ltd}\textsuperscript{50} together with guidelines issued by local employer organization and the Institute for Industrial Relations contributed to the formulation of a body of principles which were summarized by the Industrial Court as follows:

- The employer must consider ways to avoid or minimize retrenchment.
- The employer must give sufficient prior warning to a recognized 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, the employer must apply fair and objective selection criteria.

\textsuperscript{48} \textit{Building Construction and Allied Workers Union and Another v Murray and Roberts Building (Transvaal) (Pty) Ltd} (1991) 12 ILJ 112 (LAC) at 119A-G; \textit{Transport and General Workers Union v City Council of the City of Durban and Another} (1991) 12 ILJ 156 (IC); \textit{National Union of Metal Workers Union of South Africa v Atlantic Diesel Engines (Pty) Ltd} (1988) 9 ILJ 672 (IC).


\textsuperscript{50} (1982) IRLR 83.
• 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.

4.2 INTERNATIONAL LABOUR STANDARDS REGARDING UNFAIR DISMISSAL

It is clear that the International Labour Organisation (ILO) played an important role in influencing the decisions of our courts regarding unfair dismissals. When the Industrial court could not find any guidance from the common law with regard to unfair dismissals it also turned to the Recommendations and Conventions of the International Labour Organisation (ILO) for guidance. For this reason it becomes important to include the role of the ILO Recommendations and Conventions in the development of our law regarding unfair dismissals.

South Africa is a member country of the International Labour Organisation (ILO) which is based in Geneva. The ILO is an important source of labour standards across countries. The main aim of the ILO as an international organization 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 government actions.

4.2.1 SUBSTANTIVE FAIRNESS OF A DISMISSAL

Recommendation 119 of 1963 of the ILO which provided guidance to the Industrial Court regarding unfair dismissals. It was superseded by Convention 158 of 1982 and Recommendation 166 of 1982, which dealt with termination of employment at the initiative of the employer. Article 4 of the same Convention requires that an employer must have a reason for dismissal. It sets out three broad categories of reasons for dismissal namely:
• the capacity of the employee;
• the conduct of the employee;
• the operational requirements of the business.

Article 4\textsuperscript{51} requires that the dismissal must be justified or substantiated. This requirement relates to the substantive fairness of a dismissal. For a dismissal to be fair it must effected for one or more of these reasons. This is to guard against arbitrary dismissal of the employee by the employer.

4.2.2 PROCEDURAL FAIRNESS OF A DISMISSAL

The employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is provided an opportunity to defend himself against the allegation made, unless the employer cannot reasonably be expected to provide this opportunity.

In terms of this article the employer must give the employee an opportunity to answer to the allegations made by the employer against the employee. This requirement relates to the procedural fairness of the dismissal. If such an opportunity is not afforded the dismissal will be rendered procedurally unfair.

Article 13\textsuperscript{52} sets out requirements for a fair procedure to be met by an employer when contemplating dismissal for operational reasons:

• the employer must notify the employees representative trade union of the envisaged dismissals for operational reasons;

• the employer must provide the representative trade union with relevant information; and

• the employer must consult with the representative trade union.

\textsuperscript{51} ILO Convention 158 of 1982.
\textsuperscript{52} ILO Convention supra.
In determining alleged unfair dismissal cases the Industrial Court adopted articles 4, 7 and 13 guidelines for a fair dismissal. These guidelines were also accepted by the Labour Appeal Court and the Supreme Court of Appeal.

5. STATUTORY REQUIREMENTS FOR A FAIR DISMISSAL FOR OPERATIONAL REASONS

The Labour Relations Act Code of Good Practice\(^\text{53}\) regulates the requirements for a fair dismissal for operational reasons. It stipulates two requirements for a fair dismissal. Firstly, it requires that there must be a fair reason for dismissal namely, the operational requirements of the business. Secondly, the dismissal must be effected in accordance with a fair procedure.

5.1 SUBSTANTIVE FAIRNESS OF A DISMISSAL FOR OPERATIONAL REASONS

The dismissal of the employee for operational reasons is substantively fair if it is for a fair and valid reason. The reason must be based on the operational needs of the business. The reason given by the employer must fall within the statutory definition of the term “operational requirement” as discussed in chapter two of this treatise. The employer is required to prove that there was an operational reason to dismiss and that there was no ulterior motive to get rid of certain employees.

According to Le Roux,\(^\text{54}\) it has been established as a general rule that the court would not interfere with the employer’s decision to retrench. The court must be satisfied that an acceptable reason existed and that the decision was \textit{bona fide}. If any party challenges the employer’s decision to retrench on the basis that the employer had an ulterior motive to retrench, the party making such an allegation must prove by leading evidence that the employer had an ulterior motive. The court has been reluctant to interfere with the employer’s decision to retrench unless there is an alleged victimization or anti-union activity. However, if the employer’s decision is based on economic considerations the court will not interfere.

\(\text{\textsuperscript{53}}\) Schedule 8.

\(\text{\textsuperscript{54}}\) Le Roux \textit{et al} 242.
In *Mobius Group (Pty) Ltd v Corry*, the Labour Appeal Court held that neither it nor the Industrial Court is equipped to decide economic, business and commercial issues. I find this approach by the court to be rather problematic in that it does not require the employer to show that by embarking on a retrenchment exercise the company will cut costs and make a saving. This is notwithstanding the fact that a dismissal for operational reasons cannot be confined to cost-cutting and expenditure. It could also be acceptable reasons for dismissal for operational requirements if the employer could prove by leading evidence that it would make more profits and be more efficient by dismissing employees for operational reasons.

This view was held by the Labour Appeal Court in *Seven Abel CC t/a The Crest Hotel v Hotel & Restaurant Workers Union & Others*. In this case the Crest Hotel outsourced the work which was done by certain employees to an outside contractor. The purpose was to cut costs and improve the financial position of the hotel. The Industrial Court found the retrenchment of the employees to be unfair as the employer could not prove that the dismissal would result in direct saving. However, the Labour Appeal Court took a different view. It found that there had been an indirect saving because the work and expenditure involved in the supervision of the employees by management had fallen away and this could lead to the improvement of the hotel’s financial position.

In *NUMSA v Atlantis Diesel Engines (Pty) Ltd*, the Labour Appeal Court held a different view:

> “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 is 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.”

The Industrial Court expressed its view in the same case as follows:

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56 (1990) 11 ILJ 504 (LAC).
“We are somewhat doubtful... after all in business frequently not always the best, nor the correct decision is taken. Perhaps management has a right to be foolish as long as it is strictly bona fide in its deliberations.”

The Labour Appeal Court stated in *Kotze v Discount Liquor Group (Pty) Ltd*\(^{59}\) 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 no merely a sham”.

In dealing with substantive fairness of dismissal for operational requirements both the Labour Court and the Labour Appeal Court are not willing to second-guess the employer’s decision. The courts seem to be content with the fact that such a decision to retrench was made in “good faith” and do not bother to intervene and look at the merits of the decision. The courts have however found that the dismissal of an employee who was unfairly selected for retrenchment was substantively unfair. The Labour Appeal Court held in the *BMD Knitting Mills (Pty) Ltd*\(^{60}\) the decision to dismiss an employee on substantive grounds must have a reasonable basis. This does however, not protect the employee entirely from the management exercising its discretion in dismissing the employee for operational reasons.

The new amendments to the Labour Relations Act, 1995 provide that any registered union or the employees who have received notice of termination may:

\[ (i) \quad \text{give notice of a strike in terms of section (1)(b) or (d); or} \]

\[ (ii) \quad \text{refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court in terms of section 191(11).} \]

Section 189A(19) provides some guidelines to be applied by the Labour Court in considering the fairness of a reason to retrench. It provides that the Labour Court must find that dismissal of an employee was effected for a fair reason if:

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\(^{58}\) (1992) 13 ILJ 405 (IC).
\(^{59}\) (2000) 21 ILJ 129 (LAC).
\(^{60}\) (2001) 7 BLLR 705 (LAC).
• the dismissal was to give effect to a requirement based on the employer’s economic, technological, structural or similar needs;

• the dismissal was operationally justifiable on rational grounds;

• there was a proper consideration of alternations; and

• the criteria with based for selecting people for retrenchment were fair and objective.

According to Le Roux it appears to have been a generally accepted view that a retrenchment would be fair if the employer has had a bona fide reason to retrench, has met the requirements of section 189 of the Labour Relations Act and has utilised a fair criteria to select employees to be retrenched. According to him Brassey’s view in effect down-graded the importance of section 189. Brassey’s view is that non-compliance with section 189 would not make a dismissal unfair. Equally, complete compliance with section 189 would not necessarily make a dismissal fair. There could be other duties, which the employer could be required to comply with other than the provisions of section 189. The employer’s failure to comply with these duties could render the employee’s dismissal for operational requirements unfair. These duties would be derived from a more general duty of fairness as implied from section 185 (which states that an employee has the right not to be unfairly dismissed) and section 188 (which states that a dismissal is unfair if the employer fails to prove that the dismissal was for misconduct, incapacity or based on the operational requirements of the business and that a fair procedure was followed).

Section 189 of the Labour Relations Act 66 of 1995 is normally regarded as a source of the law governing dismissal for retrenchment, but in fact it does no more than set out a number of duties with which an employer must comply when (it) contemplates dismissing employees for operational reasons. None of its provisions deal expressly with dismissal, let alone with whether and when a dismissal will be fair. There is, for instance, no provision stating that non-compliance with the section makes a dismissal for operational requirements unfair nor any provision stating the converse - ie that compliance with the section makes a dismissal fair.

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For the provisions that have this effect, we must first look to section 185, which gives employees the right not to be unfairly dismissed, and then section 188, which states (so far as is now relevant) that a dismissal is unfair unless it is actuated by a fair reason based on the employer’s operational requirements and is effected in accordance with a fair procedure. Section 189 nothing expressly to say on matters of fairness.

What purpose, then, does section 189 serve?

Firstly it provides a set of self-standing duties with which an employer must comply or run the risk of retrenchment being declared invalid. A declaration of invalidity, which I accept is seldom made, is competent when the duty with which the employer fails to comply is held to be peremptory (as opposed to merely directory) and the facts of the case reveal good grounds for an exercise of discretion in favour of an order for specific performance. On these matters it is unnecessary to say more than that the remedial discretion is more likely to be exercised before the retrenchment has occurred than afterwards. This, I take it, provides one explanation why proposed retrenchments are sometimes interdicted on the grounds of non-compliance with the section but retrenchment that have been carried out in breach of this section are seldom condemned as invalid and reversed.

The second purpose served by section 189 is to shed light on what constitutes an unfair retrenchment. By setting down the processes to be followed before a retrenchment takes place, the legislature plainly reveals the belief that retrenchment without following these processes would be wrong, and steps from what is wrong to what is unfair is but a small one. The relationship between the dictates of section 189 and those of fairness is not one to one, however. It cannot be assumed that every breach of section 189 necessarily makes a retrenchment unfair: every invalid dismissal will doubtless be unfair but, as I have tried to make clear, not every dismissal in conflict with this section will necessarily be – or be treated as invalid. It would be even more dangerous to assume that that every retrenchment in compliance with this section is necessarily fair. Section 189, which (with one exception of no relevance here) deals only with matters of consultation, is obviously not intended to be exhaustive. A court determining the fairness of retrenchment must consider, in addition to the matters for which this section provides, whether the employer really needed to retrench, what steps (it) took to avoid retrenchment, and whether fair criteria were employed in deciding whom to retrench. Compliance with section 189, in short, is neither a necessary nor a
sufficient condition for the fairness or unfairness of the applicable act of retrenchment. This section gives content and colour to fairness in retrenchment and its significant as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively dispose of the issue of fairness.

According to Le Roux, Brassey’s analysis was regarded as “unarguable” by Jammy in *Fletcher v Elna Sewing Machine Centre (Pty) Ltd* and was also accepted in *Singh & others v Mondi Paper*. Both these decisions dealt with one aspect of the Brassey’s decision in *Sikhosana & others v Sasol Synthetic Fuels* that failure to comply with the provisions of section 189 does not make a retrenchment unfair. However, the Labour Appeal Court in *Baloyi v M & P Manufacturing* dealt with other aspects of the *Sikhosana* decision. In this case the employer had dismissed one of its three welders in a small manufacturing company manufacturing wrought iron furniture and decorations due to poor economic conditions. The employer utilized “general working skills”, “retaining employees with superior skills”, and records of poor work performance, misconduct, absenteeism and LIFO as its criteria. The employer refused to apply LIFO as the sole or even main criteria for selecting an employee for retrenchment. The work done by welders required that they possess certain skills. The retrenched employee had poor working skills than the other welders. He also needed more supervision and assistance and his work had to be corrected on many occasions. The employee was retrenched despite having a longer service than other welders. The court accepted the fairness of the selection criteria and found the dismissal to have been unfair.

### 5.2 PROCEDURAL FAIRNESS OF A DISMISSAL FOR OPERATIONAL REASONS

Section 188 of the Labour Relations Act, 1995 requires that a dismissal for operational requirements must be procedurally fair. Section 189 read with section 16 of the Labour Relations Act, 1995 and section 41 of the Basic Conditions of Employment Act, 1997 sets out the requirements for a fair dismissal for operational reasons. These requirements are now discussed:

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64 (2000) 21 ILJ 649 (LC).
65 (2001) 22 ILJ 359 LAC.
Prior consultation
• Attempt to reach consensus over certain matters
• Written disclosure of relevant information
• Allow an opportunity to make representations
• Consider representations
• Selection of employees for dismissal
• Severance pay

5.2.1 PRIOR CONSULTATION

Section 189(1) provides that, “when an employer contemplates dismissing one or more employees for reasons based on the employer’s operational requirements, the employer must consult”. The Labour Relations Act, 1995 places on the employer the duty to consult.

- When must consultation take place?

Prior the decision of the Appellate Division in *Atlantis Diesel Engines (Pty) Ltd v NUMSA*66 there has been a general view that it was not necessary to consult on the decision to retrench but only in so far as the implementation stage is concerned.

Section 189(1) provides that consultation must take place when the employer contemplates dismissal. This, in essence means that the employer must consult before the actual decision to retrench has been taken. The employer must consult in “good faith”. The Labour Relations Act requires that the employer must afford the other party the opportunity to make representation. The employer must consider and respond to such representation. If, however, the employer does not agree with representation made by the other party, the employer must state reasons for disagreeing. The employer has got a duty to disclose all relevant information to its consulting parties.

According to Grogan67 “consultation must commence when an employer contemplates dismissing one or more employees”. This makes it clear that the decision must not have already been finally taken when the employer begins consultations - the employees must not

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66 Supra.
67 Workplace Law 191.
be presented with a *fait accompli*. The employer must notify the employees as soon as the decision has been taken in principle to adopt a policy on rationalisation, restructuring or the sale of part of the business. He refers to the case of *Manyaka v Van der Wetering Engineering (Pty) Ltd* 68 where the labour court found the retrenchment to have been unfair on the basis that the employer had kept the employees “in the dark” for some time after the decision to retrench had already been taken.

- **With whom must the employer consult?**

Section 189(1) 69 provides that:

“When an employer contemplates dismissing one or more employees for reasons based on the operational requirements, the employer must consult.

a) any person whom the employer is required to consult in terms of a collective agreement;

b) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;

c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposal dismissal are employed, any registered trade union whose members are likely to be affected by the proposed dismissals:

d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.”

**5.2.2 ATTEMPT TO REACH CONSENSUS OVER CERTAIN MATTERS**

Section 189(2) 70 requires that the consulting parties must attempt to reach consensus on the following topics:

(a) appropriate measures –

(i) to avoid dismissals;

(ii) to minimize the number of dismissals;

(iii) to change the timing of the dismissals

(iv) to mitigate the adverse effects of the dismissals.

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68 (1997) BLLR 1458 (LC).
70 *Supra.*
(b) the method for selecting employees to be dismissed; and

(c) the severance pay for dismissed employees.

• **Appropriate measures to avoid dismissals**

The parties must consult in order to agree on appropriate measures to avoid dismissals. Du Toit\(^\text{71}\) states that in the *Atlantis Diesel* case, the Appellate Division held that the purpose of the duty to consult is to give the employer an opportunity to explain the reasons for the proposed retrenchment, to hear representations on possible ways of avoiding or minimising the effect of retrenchments and to discuss and consider alternatives.

The employer must consider amongst others, the following measures to avoid retrenchments:

- Redeployment of affected employees to an alternative position.
- Voluntary early retirement.
- Moratorium on recruitment or overtime.
- Training or re-training of employees.
- Reduction of wages.
- Reduction of night shift.
- Elimination of contract work.
- Early retirement.
- Short time, lay offs and job sharing.
- Voluntary severance packages.

• **Appropriate measures to minimise the number of dismissals**

Section 189(2)(a)(ii) requires that where dismissal cannot be avoided the parties must try and reach agreement on measures to minimise retrenchments. The parties would attempt to agree on measures to minimise the number of dismissals after they have acknowledged that there is a need to retrench or retrenchments are inevitable.

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These measures are not separate from one another but are interlinked. These measures may include:

- Transferring of employees to other departments/sections of the business or offering them alternative positions within the company.

- To allow natural attrition to take place. This means that retrenchments would have to be spread over a period of time.

- Training or re-training of employees.

- Voluntary retrenchment.

- Elimination of overtime.

- Extended unpaid leave or temporary lay-off.

- Early retirement and voluntary reduction in working hours.

**Appropriate measures to change the timing of retrenchment**

It may be in the interest of the trade union and employees to delay the actual date on which retrenchments are supposed to take place. This would allow employees targeted for retrenchments more opportunity to look for employment elsewhere and or sort out their affairs to minimise the impact of retrenchment.

This could also give parties more time to find other alternatives to retrenchments. The unions should however not unnecessarily delay the timing of retrenchments.

**Appropriate measure to mitigate the adverse effects of the dismissals**

The parties may enter into re-employment agreements that would ensure that the retrenched employees would receive preferential recruitment as and when suitable vacancies arise. The
employer may also assist employees by finding alternative employment within or outside the company. The employer is bound by the agreement to give the retrenched employees priority in re-employment when suitable vacancies arise. In terms of the Labour Relations Act, the failure or refusal by an employer to reinstate or re-employ a retrenched employee in terms of any agreement constitutes an unfair labour practice.

The dismissed employees are further protected in terms of section 186 of the Labour Relations Act of 1995. In terms of section 186, the employer who dismisses a number of employees for same or similar reasons and offers to re-employ one or more of them but refuses to re-employ another commits an unfair dismissal.

- **The method of selecting employees to be dismissed**

Section 189(7) re-affirms the position under the previous dispensation where one of the objectives of consultation was to reach agreement on criteria for dismissal and if parties failed to reach such an agreement the employer would be entitled to apply a fair and objective criteria.

The selection of employees for dismissal should not be arbitrary. It should be fair and objective and not be aimed at targeting certain employees for reasons, which have nothing to do with the employer’s operational requirements.

Basson discuss the following examples of selection criteria which may be used:

- **Seniority or “last in first out” (LIFO).** The employees with longer service are protected at the expense of those with shorter service. However retention of skills is also considered. Those employees who are skilled but have shorter service are protected.

- **Conduct:** employee’s conduct such as attendance record and previous warnings will be regarded as a fair and objective criterion.

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72. Schedule 7(2)(1)(d).
73. Supra.
74. Basson et al 204-205.
• Efficiency, ability, capacity, experience, attitude towards work and productivity. These criteria are regarded as fair and objective. They must however, not depend solely on the opinion of the person making a selection. These criteria are mostly preferred by employers, as they would like to retain their hard working employees who have shown aptitude or potential regardless of the time they have been employed.

• Attendance: the employer must have made employees aware that absenteeism is regarded in a serious light before applying this criterion and for it to be regarded as fair and objective.

• Bumping: in a situation where retrenchment affects one department employees are selected on a “LIFO” basis and the remaining employees are transferred to other departments. The employee with longer service replaces the less skilled employee in a less skilled job if the long serving employee’s skills cannot be utilised.

• Early retirement: the employees who have reached the minimum retirement age are given an option to volunteer for retrenchment. This is applied mostly in jobs that require physical fitness and strength.

• Volunteer: the employees are asked to volunteer first before applying any selection criteria.

• **Severance pay for dismissed employees**

Section 189(2)(c) of the Labour Relations Act, 1995 provides that the parties must attempt to reach consensus on the severance pay for dismissed employees. In the past there has been an argument about whether the employers had duty to pay severance pay to retrenched employees. Section 41 of the Basic Conditions of Employment Act, 1997 deals exclusively with severance pay. Section 41(2) creates an obligation on the part of the employer who is in the process of dismissing employees for operational reasons, to pay severance pay and stipulates the minimum severance pay that must be paid.\(^75\)

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\(^{75}\) Basson *et al* 205-206.
Whilst the Basic Conditions of Employment Act sets the minimum severance pay, which the employer must pay, nothing prevents parties from agreeing on an amount exceeding the minimum severance pay.

In terms of section 41(4) of the BCEA an employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or with other employer is not entitled to severance pay.

5.2.3 WRITTEN DISCLOSURE OF RELEVANT INFORMATION

Section 189(3) read with section 16 of the Labour Relations Act, 1995 deals with the requirement for a procedurally unfair dismissal for operational reasons. The information that the employer must disclose in terms of section 189(3) is listed hereunder:

“The employer must disclose in writing to the consulting party all relevant information, including, but not limited to -

(a) the reasons for the proposed dismissal;
(b) the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;
(c) the number of employees likely to be affected and the job categories in which they are employed;
(d) the proposed method for selecting which employees to dismiss;
(e) the time when, or the period during which, the dismissal are likely to take effect;
(f) the severance pay proposed;
(g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and
(h) the possibility of future re-employment of the employees who are dismissed.”

The employer is privy to relevant information that may assist the consulting party. Section 16(3) stipulates that, “whenever an employer is consulting … the employer must disclose to … [other party] all relevant information that will allow … [the other party] to engage effectively in consultation”. According to Basson,76 the Appellate Division in Atlantis Diesel Engineers (Pty) Ltd v National Union of Metal Workers of SA held that

“If an employer denies the relevant information requested by the other party, the onus rests on the employer to prove it. In other words, it is the duty of the employer to prove that the information is not relevant. In addition, where the employer alleges that the requested information is relevant but claims that it is unavailable, the court held that the employer take

76 Basson et al 207.
whatever reasonable steps may be necessary to obtain the information. However, the other party’s right to demand relevant information is not unrestricted.”

In terms of section 16(5) an employer is not required to disclose information -

(a) that is legally privileged;

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.

Basson\textsuperscript{77} discuss the information that the employer is not required to disclose in terms of section 16(5).

- **Information that is legally privileged**

The following requirements have been laid down by the Supreme Court: for a document to be legally privileged it must have been obtained for professional legal advice and it must have been obtained in reference to actual pending litigation or litigation which is contemplated or anticipated.

- **Confidential information that may cause harm if disclosed**

This relates to information that could harm the business competitiveness.

According to the Appellate Division in *Atlantis Diesel Engineering*,\textsuperscript{78} the onus is on the employer to show that the request information is confidential and it’s disclosure may harm the

\textsuperscript{77} Basson et al 208-209.

\textsuperscript{78} (1994) 15 ILJ 1247 (A).
employer’s business interests.

- **Private personal information relating to an employee**

Section 16(5)(d) of the Labour Relations Act stipulates that an employer is not required to disclose information that is private personal information relating to an employee, unless the employee consents to the disclosure of that information. Private personal information includes the employee’s medical records. The disclosure of private personal information is regulated in section 16(6)(12). If there is a dispute about disclosure of information, any party may refer a dispute to the CCMA. The CCMA commissioner must first decide whether the required information is relevant or not. If the commissioner decides that the information is relevant, the commissioner must balance the harm, which the disclosure is likely to cause the employee or the employer against the harm, which the failure to disclose the information is likely to cause to the ability of the other party to engage effectively in consultation.

5.2.4 **THE EMPLOYER MUST ALLOW THE OTHER PARTY TO MAKE REPRESENTATION**

Section 189(5) provides that the employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.

5.2.5 **THE EMPLOYER MUST CONSIDER AND RESPOND TO THE REPRESENTATIONS MADE BY THE OTHER PARTY**

In terms of section 189(6) the employer must consider and respond to the representations made by the consulting party and, if the employer does not agree with them, the employer must state the reason for disagreeing.

5.2.6 **THE SELECTION OF THE EMPLOYEES FOR DISMISSAL**

Section 189(7) requires that the employer must select the employees to be dismissed according to selection criteria:

(a) that have been agreed to by the consulting parties or,
(b) if no criteria have been agreed, criteria that are fair and objective.

5.2.7 PAYMENT OF SEVERANCE PAY TO DISMISSED EMPLOYEES

The payment of severance pay is regulated in section 41 of the Basic Conditions of Employment Act. Section 41(2) provides that an employer must pay an employee who is dismissed for reason based on the employer’s operational requirements severance pay. There is now a duty on the employer to pay severance pay. Payment of severance pay is in addition to any other amount which is payable in law.

Section 41(2) regulates the amount of severance pay payable to an employee dismissed for operational reason:

“An employer must pay an employee who is dismissed for reasons based on the operational requirements severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.”

In terms of section 41(4), an employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (2). If the employee refuses to accept a position with the same term and conditions as the previous position, since refusal may be unreasonable. It will however not be regarded as unreasonable to refuse the offer if the position offered is less favorable than the employee’s original position.

6. THE NEW LAW ON RETRENCHMENT

Given the massive restructuring that has take place since 1996 in both the private and public sectors of the economy, it was predictable that the legislature would revisit the provisions governing dismissal for operational requirements when amending the Labour Relations Act 66 of 1995 (hereinafter referred to as “the Act”) in 2002.  

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80 Supra.  
When the Minister of Labour invited business and labour to make submissions on the labour law amendments before the draft bill was prepared, COSATU argued that its members had been sold by the 1995 “Act”, regarding the existing provisions relating to retrenchment.\textsuperscript{82}

The unions argued the Labour Court judges were not concerned with ensuring a form of procedural fairness prior to retrenchment and typical unwilling to second guess managerial business decisions, which led to retrenchments. Provided the employer presented a case with a semblance of commercial rationality or, put differently, provided that the decision to retrench was made in good faith, the courts had traditionally shown an unwillingness to intervene and consider the merits of this type of decision.

The only area of substantive fairness that the Labour Court and Labour Appeal Court had been willing to interfere with, was the selection of employees to be retrenched, where the had shown the willingness to make findings on substantive unfairness where an employees were unfairly selected.\textsuperscript{83}

Historically then, retrenchment dispute were largely concern with the employer had moved through the procedural hoop set by the Act as to required process for consultation. COSATU’s complaints concerning our law in respect of retrenchment related however to both substantive and procedural fairness. It argued that the court’s unwillingness to consider the merits of managerial decisions regarding retrenchments had meant that there was, in effect, little protection against substantive unfair retrenchments.\textsuperscript{84}

COSATU initially proposed that employers be obliged to negotiate the terms of retrenchment, as opposed to the lesser obligation of consultation. This was tantamount, of course, to a demand that there should be a right to strike in these circumstances.\textsuperscript{85} This on the basis that if the courts were unable or unwilling to provide this protection, employees should be able to protect themselves against substantively unfair retrenchments.


\textsuperscript{84} Le Roux \textit{supra} 102.

\textsuperscript{85} Van Niekerk and Le Roux \textit{supra} 2167.
On the procedural side, and again according to COSATU, many consultation processes were a charade in which employers, advised by lawyers and industrial relations consultants, simply went through the motions and never really consulted properly. Unions’ suggestions and counter-proposals were simply ignored. COSATU therefore demanded that amendments be introduced to “lighten up” the duty to consult and avoid *fait accompli’s*.  

The effect of the amendments introduced in respect of retrenchments is to create two legal regimes governing the retrenchment process. It proceeds to divide employers into two categories - large and small. Small employers, or large employers conducting small retrenchments, continue to be governed by section 189, as amended. Large retrenchments are governed by the new section 189A.

### 6.1 SECTION 189 RETRENCHMENTS

The essential requirements and procedures for fair retrenchment in terms of section 189 by and large remain unaffected and have been described as peripheral. In terms of section 189(1) under the pre-amended “Act”), the employer was required to consult with prescribed entities. This section has now been amended slightly in cases where workplace forums exist. Employers are now required to consult with both the workplace forum and the registered trade union whose members are likely to be affected. Previously, in circumstance where both entities were in existence, only the workplace forum was required to be consulted with, as it had a “preferent ranking” to registered trade unions, so to speak. The rationale for this amendment would then appear to be to ensure that the fear that workplace forums may undermine trade unions’ status is quelled. This perception held by trade unionists has proved to be a major stumbling block to the establishment of such forums in the past.

Secondly, the inclusion of the word “or” at the end of the new section 189(1)(c) gives affect to the principle established in case law that the employer who consults with a listed party in Section 189(1) is not obliged to also consult with parties/entities listed below it.

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86 Le Roux *supra* 102.
For the first time mention is made in section 189(2) of the requirements that the employer and the other consulting parties must “engage in a meaningful joint consensus-seeking process and attempt to reach consensus on …” the various issues prescribed in this section.\textsuperscript{89}

This requirement has emanated from the principle established in case law, most notably in \textit{Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union},\textsuperscript{90} that rather than adopting a checklist approach to the issues to be consulted upon, a joint consensus-seeking exercise or process should transpire.

The rationale behind encapsulating this phrase into the act is to make it imperative that the consultative process is meaningful and exhaustive, and does not constitute the employer merely going through the motion with no intention of ever reaching agreement on the issues to be discussed and in so doing achieving superficial compliance with the requirements of section 189(2).

The matters on which parties are required to reach consensus, namely avoiding or minimising the number of dismissals, changing their timing and mitigating their adverse affects, the method for selection and severance pay, remain unaltered.

Section 189(3) of the “Act” now provides that instead of merely disclosing relevant information in writing to the other consulting party, employers must now also issue written notice inviting the other consulting party to consult. The information to be contained in the notice remains the same, except that employers must now, in addition, disclose the total number of employees employed by the employer and the number of employees dismissed by the employer for the reasons based on its operational requirements in the preceding 12 months.\textsuperscript{91}

The intended effect of this amendment would appear to be to ensure that the required notice and the disclosure of the information contained in it is issued prior to the commencement of the consultation process and not during or towards the end of the consultation. The other consultative entity would further be in a position to determine, prior to the commencement of

\textsuperscript{89} 12 of 2002 s 189(2).

\textsuperscript{90} (1998) 12 BLLR 1209 (LAC).

\textsuperscript{91} Grogan \textit{Employment Law} 5.
the consultation process, whether the section 189 or section 189A procedure is applicable, based on the now required additional disclosures.

There is also an attempt to tighten up on the employer’s disclosure obligations set out in the “Act”. The amended section 189(4)(b) states that if an arbitrator or the Labour Court is required to decide whether or not information is relevant to the proposed retrenchments, the onus in on the employer to prove that any information that it refuses to disclose is not relevant for the purpose it is sought.\textsuperscript{92}

This in essence constitutes a reversal of the onus of proof in respect of relevance, the onus previously having been upon the employee. The rationale behind imposing the onus of proof of irrelevance on the employer has, as its base, the fact the employer generally has possession and knowledge of the documents requested, whereas the other consultative entity has in the past had to justify the relevance of a document that they had no access to. It was therefore appropriate to create a shift in the onus in this regard.

Representations that may be permitted during consultation now go beyond “any matter on which the parties are consulting” to “any matter related to the proposed dismissals”. The range of issue on which consultations must take place have also, potentially at least, been extended.\textsuperscript{93}

In terms of section 189(6)(b), should the other consultative entity make representations in writing, the employer must respond thereto in writing.\textsuperscript{94} A mere verbal response will not be sufficient. Prudent employers have, in any event, adopted this approach in the past, simply to create an “evidentially trail”, in the event of a challenge being launched as to the procedure adopted.

Finally, a new sub-section 12 in section 191 of the “Act” gives individual employees the choice of referring a retrenchment dispute to the Labour Court or arbitration.\textsuperscript{95} This may well be to lighten the case load of the Labour Court and is an indication that more emphasis or

\textsuperscript{92} Le Roux \textit{CLL} 103
\textsuperscript{93} \textsuperscript{N92} supra.
\textsuperscript{94} 12 of 2002 s 189(6)(b).
\textsuperscript{95} Grogan \textit{Employment Law} 5.
importance is placed on multiple retrenchments by the drafters of the amendments to the “Act”.

The ability to refer individual retrenchments for arbitration was an option under the pre-amended “Act” in terms of section 141, however the consent of the employer was required. This remains an option as far as multiple retrenchments are concerned.

6.2 SECTION 189A RETRENCHMENTS

The most important amendments dealing with dismissals on the basis of operational requirements of the employer are to be found in the new section 189A. This section will apply if the total number of employees employed by the employer exceeds 50 and the employer proposes dismissing between ten and 50 employees. The applicability of the section to employers is depicted in the following table, which operates as a sliding scale.

<table>
<thead>
<tr>
<th>EMPLOYEMENT NUMBERS</th>
<th>RETRENCHMENT CONTEMPLATED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 200</td>
<td>10</td>
</tr>
<tr>
<td>&lt;300</td>
<td>20</td>
</tr>
<tr>
<td>&lt;400</td>
<td>30</td>
</tr>
<tr>
<td>&lt;500</td>
<td>40</td>
</tr>
<tr>
<td>&gt;500</td>
<td>50</td>
</tr>
</tbody>
</table>

The application of the sliding scale takes into consideration the total number of employees dismissed over a period of 12 months prior to the issuing of the section 189(3) notice.

Any employer may, however, avoid the more onerous provisions of section 189A when effecting retrenchments by staggering the number of employees to be retrenched over a period of more than 12 months. This course of action would depend upon the practicality of doing so.

If section 189A applies to a proposed retrenchment, two important innovations come into play. The first is an attempt to enhance the quality of the consultation process prior to the

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decision to retrench being taken, by making provision for the appointment of a facilitator to assist the parties during the consultation process. The appointment of a facilitator is, however, not automatic, as will be seen below.

The second innovation regulates the reaction of employees to a decision taken by an employer to proceed with retrenchments after the consultation process has been finalised. For the first time a strike may be called in certain circumstances.

6.2.1 FACILITATION

If an employer gives a notice of a proposed retrenchment which falls within the ambit of section 189A per section 189A(1), either the employer or the other consulting party may request the Commissioner for Conciliation, Mediation and Arbitration (the CCMA) to appoint a facilitator to assist the parties about to engage in retrenchment consultations.

As stated, the employer may, in its notice in terms of section 189(3), request facilitation. Presumably what is envisaged is that the said notice, addressed by the employer to the other consulting party, will contain such a request and will also be forwarded to the CCMA. However, draft regulations dealing with the facilitation process envisage the completion of a prescribed form for service on the other consulting parties and filing with the CCMA.

Secondly, if the employer does not request the appointment of the facilitator, the other consulting party or parties may do so, provided that they represent the majority of the employees whom the employer contemplate retrenching. Consulting parties must exercise their rights to request the appointment of the facilitator within 15 days of the issue of the notice of the proposed retrenchments per section 189(3).

The CCMA must appoint the facilitator under these circumstances. No option or discretion exists. A discretion to appoint a facilitator does however exist where the request for one’s appointment is not made in terms of section 189(3), ie not in terms of section 189(3) notice or

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97 Le Roux 103.
98 N92 supra.
99 N92 supra.
100 N92 supra.
not within 15 days by the other consultative entity or entities. Under these circumstances the CCMA may, but is not obliged to, appoint a facilitator. The opposing consulting party would however have to agree to the appointment.

The facilitation must be conducted in terms of regulations still to be issued by the Minister of Labour. Draft regulations have been negotiated by the partners within NEDLAC and have been circulated. The most important aspects of these rules still to be issued are anticipated to be the following, based on the draft regulations:

- A request for facilitation must be made by completing a prescribed form and serving it on the CCMA.

- The CCMA must maintain a panel of facilitators consisting of commissioners of the CCMA and other persons with knowledge, experience and expertise in the conciliation, mediation or facilitation of labour related disputes.

- The CCMA must, within seven day of the request, appoint a facilitator from the panel, notify the parties of the name of the facilitator and, after consultation with the parties, set the date for the first facilitation meeting, on at least seven days’ notice.

- The employer and the consulting parties may agree to appoint a facilitator other than the facilitator named in the notice issued by the CCMA. However, in these circumstances, the CCMA will not be liable to pay the fees of the facilitator.

- At the first meeting, the facilitator must seek to facilitate an agreement on the procedure to be adopted and followed during facilitation, the date and times of additional facilitation meetings and the information that the employer will be required to disclose, as well as when that information must be disclosed.

- A facilitator may conduct a maximum of four facilitation meetings between the parties, but the director of the CCMA may increase this number.
• Any meeting convened for the purposes of the facilitator arbitrating a dispute over the disclosure of the information will not be regarded as one of the aforesaid four meetings.

• Unless otherwise agreed between the parties, the facilitator may chair meetings between the parties, decide any procedural issues arise in the course of the meeting, arrange further facilitation meetings and direct that the parties engage in consultations without the facilitator being present. Procedural decisions taken by a facilitator are final and binding.

• A facilitator may order disclosure of information as well as any documentation, provided that before doing so he has received representation from the parties concerned.101

It is important to note that, unless the parties agree otherwise, the facilitator has no power to make decisions that are binding on the parties, as to whether or not a retrenchment may take place, who may be retrenched and when such retrenchment can take place. Viewed practically, it seems highly improbable that any employer contemplating retrenchments will agree to the appointed facilitator being possessed with such powers.

Facilitation will be conducted on a “with prejudice basis”. This means that any offers or statements made during the course of facilitation can be referred to in evidence in subsequent arbitrations or court proceedings. The parties may nevertheless agree in writing that a part of a facilitation may be conducted on a “with prejudice basis”. If this is the case, nothing regarding that part of the facilitation process can be disclosed in any court proceedings. A facilitator cannot, however, be called to give evidence on any aspect of facilitation.102 Section 189A(7) envisages a 60-day period during which facilitation will take place and during which the employer cannot proceed with the proposed retrenchments. The 60-day period is calculated from the day of the section 189(3) notice and not the date on which the request for the appointment of the facilitator is made. This time period may be varied in accordance with section 189(6)(a), which authorises the Minister of Labour to make regulations relating to

101 Le Roux 104.
102 Ibid.
time periods and the variation of time periods for facilitation. Interestingly, the draft regulations do not make provision for such time periods. 103

After the lapse of the 60-day period, the employer may give notice to terminate the contracts of employment of employees whom it wishes to retrench, in terms of section 189A(7)a. Notice must be given in accordance with section 37(1) of the Basic Conditions of Employment Act. 104 Thus, for example, employees who have been employed for more than one year will be entitled to a minimum of four weeks’ notice. An employer may presumably pay remuneration in lieu of notice.

In effects this would appear to create an additional financial burden on employers, who traditionally have employees work their notice period, having embarked upon the consultation process. Little point is served by having a retrenched employee work notice and accordingly it is anticipated that a further month’s notice pay will, in effect, be added to severance package at this point in the proceedings.

On receipt of notice of termination, the retrenched employee who is of the view that his/her retrenchment is substantively or procedurally unfair, is entitled to embark upon either the slightly amended traditional procedures or the new procedures in an attempt to enforce their claims and obtain relief. However, this will be discussed subsequent to the text dealing with the scenario where no facilitator has been appointed and under the heading of “New Remedies”.

6.2.2 NO FACILITATOR

If neither the employer nor the other consulting parties request facilitation, section 189A still envisaged a 60-day time period, during which consultation can take place and retrenchments are prohibited.

This is perhaps open to different interpretation, but it seems clear that the intention to prohibit retrenchment for a period of 60 days, calculated from the date on which the notice of the

103 N101 supra.
104 Act 75 of 1997.
proposed retrenchments is given, remains a requirement regardless of whether a facilitator has been appointed.

This is not clearly stipulated in the amended section and the employer is left having to interpret and add together the time periods in sections 189(8)(a) and 189(8)(b) before being in a position to effect retrenchment.

Section 189A(8)(a) states that if a facilitator has not been appointed, a party may not refer a dispute to a Council or the Commission, unless a period of 30 days has passed since the date on which the notice in terms of section 89(3) was given.

Section 189A(8)(b) then stipulates that the employer will be able to terminate the contracts of employment on the employees it wishes to retrench once the periods mentioned in section 64(1)(a) have lapsed. Once again, notice will have to be given in terms of section 37(1) of the Basic Conditions of Employment Act.\textsuperscript{105}

6.3 NEW REMEDIES

If a union or employees want to challenge the fairness of the reason for dismissal, they must choose whether to refer the dispute to the Labour Court or to strike. Once an election has been made, a change of remedy midstream is not permissible. Section 189(10)(b) provides that if a union gives a notice of a strike, then no member of that trade union and no employee who is governed by the collective agreement to which that union is a party, may refer a dispute concerning whether there is fair reason for a dismissal to the Labour Court. The notice to strike cannot be withdrawn to facilitate a Labour Court referral and by implication, the reverse scenario is also not permitted. The obligation to follow the path of the relief elected, and the bar on the implementing alternative relief, is absolute.\textsuperscript{106}

6.3.1 CHALLENGING SUBSTANTIVE FAIRNESS IN THE LABOUR COURT

Section 189A facilitate adjudication on the substantive rationale for an affected retrenchment. A referral challenging this aspect of the retrenchment must be made within 90 days of the

\textsuperscript{105} Le Roux 105.
notice of termination. The section states that the Labour 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;
- The dismissal was operationally justifiable on rational grounds;
- There were proper consideration of alternatives; and
- The criteria utilised for selecting people for retrenchment were fair and objective.

Most of the criteria the court is required to consider when evaluating the substantive fairness of a retrenchment are not new.

The inclusion of the phrase “operationally justifiable on rational grounds” is anticipated to raise problems, requiring interpretation by the courts. Firstly, economic decisions are largely subjective and no objective measure exists to determine rationality. It has 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 and a court should not prevent them from taking decisions, even if they turn out to be unwise. Such issues are best left for collective bargaining. The introduction of the phrase “operationally justifiable on rational grounds”, and the objectivity required thereby, may bring with it the unenviable position that the ability of South African business to adjust to the ever changing demands of the global economy to which now it is inextricably linked is decided, not in boardroom or the courts, but by workers who might 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.¹⁰⁷

Secondly, should the court adopt its historical approach to substantive challenges and not place too strict an interpretation on the words “operationally justifiable on rational grounds”,

it is probable that labour will rely increasingly on the right-to-strike option settle retrenchment disputes.\textsuperscript{108}

6.3.2 ALTERNATIVELY THE RIGHT TO STRIKE

The right to strike conferred in terms of section 189A is limited in extent in that the right is only applicable to a situation where the union or employees are arguing that there was not fair reason for the dismissal.

After the employer has been given notice of its intention to terminate employment, a registered trade union or the employees who have received notice of termination may give notice of a strike in terms of section 64(1)(b) or (d).

It is not entirely clear whether the notice to strike need be given immediately upon receipt of the notice of termination or whether they may delay giving notice for a period thereafter. At the very least, however, a notice to an employer of the commencement of a strike must specify in precise terms when the strike is to commence.\textsuperscript{109}

The normal provisions pertaining to strikes in the Labour Relations Act will apply. If the strike is unprotected, the employer will have the usual remedies contained in section 68. It is also important to note that an employer has the right to embark on a lockout in response to a protected strike called in terms of section 189A.\textsuperscript{110} Offensive lockouts are not provided for in the section 189A situation.

Secondary strikes in respect of a matter governed by section 189A are also permissible, with the only exception that 14 days’ prior notice of the strike must be given, rather than the normal seven-day notice period.\textsuperscript{111}

Whether the right to strike is an option which will be frequently exercised remains to be seen. One school of thought holds the view that the Labour Court’s and Labour Appeal Court’s past

\textsuperscript{108} Grogan \textit{Employment Law} 8.
\textsuperscript{109} \textit{Fidelity Guards Holdings v PTWV} (1997) 9 BLLR 1125 (LAC).
\textsuperscript{110} Le Roux 2002 \textit{CLL} 102.
\textsuperscript{111} 12 of 2002 s 189A(11)(c).
willingness to interfere with substantive decisions taken by the employers to retrench may be viewed by employees and trade unions alike as reason to follow the strike path. A second school of thought anticipates that employees may be reluctant to strike in the context of a retrenchment, as a strike could lead to further retrenchments. Also, the delays in strike trigger could affect the viability of this option.

6.3.3 PROCEDURAL FAIRNESS

Disputes concerning allegations that an operational requirements dismissal was procedurally unfair must still be adjudicated by the Labour Court and a protected strike on this issue cannot be called. Procedural challenges take the form of an interim remedy.112

This new procedure provides that if an employer does not comply with fair procedure, a consulting party may approach the Law Court, an application, for an order in terms of which:

- an employer may be compelled to comply with fair procedure;
- an employer may be interdicted or restrained from dismissing an employee prior to complying with fair procedure;
- an employer may be directed to reinstate an employee until the employer has complied with fair procedure; or
- an award for compensation may be made if one of the above orders is inappropriate.113

This application must be made not later than 30 days after the employer gave notice of termination or, if no notice of termination was given, within 30 days of the date on which the employee was dismissed. The Labour Court may however, on good cause shown, condone the failure to bring the application within the prescribe time limit.114

113 12 of 2002 s 189A(13).
The intention underpinning this procedure is clearly to attempt to provide a speedy mechanism for determining disputes regarding procedural fairness. Further, where possible, corrective action will be preferred to the payment of compensation. However, in practice, applications often give rise to disputes of fact. This would necessitate the hearing of oral evidence and potentially delay the process. It is hoped that the courts will devise procedures for dealing with problem expeditiously.\textsuperscript{115}

Another practical effect of this form of relief is that if employees do not complain during the consultative process about the conduct of the employer, they cannot do so later on if and when they refer a dispute under section 191(5)(b)(ii) to the Labour Court. When such referral come before the courts, the procedural aspects the retrenchment may not be placed in issues as, at this point, a court will only be empowered to consider the substantive fairness of the retrenchment.\textsuperscript{116}

\subsection*{6.4 THE NEW SECTION 191(12)}

The new section 191(12) states that if an individual employee has been retrenched following a consultation procedure that was applied to that employee only, that employee can elect to refer the dispute to arbitration rather than to the Labour Court.\textsuperscript{117}

The pre-amendment position only facilitated arbitration of retrenchment disputes by way of consent, in accordance with section 141 of the “Act”.

The option given to individually retrenched employees indicates that the drafters of this provisions have elected to place greater emphasis on retrenchments en masse, but have also possibly realized that arbitration, as opposed to adjudication, may resolve the potential costs orders in the Labour Court. The amendment thus facilitates proper ventilation of individual retrenchment disputes.

The obligation to consult with the single retrenchee is not different to the consultation requirements should a number of employees be potentially affected by retrenchment. The

\begin{flushleft}
\textsuperscript{115} Ibid.
\textsuperscript{116} Grogan (Part 5) 2002 Employment Law 7.
\textsuperscript{117} N115 supra.
\end{flushleft}
Labour Court has recently, in dealing with a single retrenchment, held that consultations must be held with all employees likely to be affected.\textsuperscript{118} The court indicated that the employer needs to meet collectively with its employees in the category with which it seeks to minimize its staff complement, with the purpose of pursuing the possibility of a voluntary retrenchment or to investigate the option of the employee taking up a different post within the organisation. This would facilitate safeguarding employment, should the aforesaid options be exercised. The failure to consult on this basis renders a retrenchment unfair.

The approach adopted by the court in dealing with a single retrenchment may be too wide. Practically, only those who have a direct interest or stake in the outcome of a retrenchment exercise should be engaged in the consultation.\textsuperscript{119}

\section*{6.5 IMPLEMENTATION}

Business and organized labour have subscribed to the amendments pertaining to retrenchments despite reservation concerning particular aspects, but have elected to accept a compromise under time constraints. There is still doubt that the new laws of retrenchment will make it more difficult and expensive for employers to restructure their operations.\textsuperscript{120}

On the positive side, the idea of facilitation as a way to enhance consultation is, in theory at least, a welcome step. The strike option may further prove a useful weapon to unions to fight retrenchments. Questions remain as to whether a right to strike should exist in this area, but it is hoped that this concession will encourage more co-operative relationships between capital and labour and it is premised on this right being an accepted feature of many labour law systems, according to the International Labour Organisation.\textsuperscript{121}

Potential negatives include new areas of uncertainty where the Labour Court will once again be called upon to provide guidance. One such area exists in the determination as to what constitute a substantively fair retrenchment per the new section 189A(19). Finally, the 60-day waiting period before a retrenchment can take place (in the absence of a agreement between

\begin{footnotesize}
\begin{enumerate}
\item Delport v Parts Incorporated Africa of Genuine Parts (Pty) Ltd (2002) 8 BLLR 755 (LC).
\item Greenstein 7.
\item Le Roux 108.
\end{enumerate}
\end{footnotesize}
the consulting parties to shorten this time period) may be too little, too late, to assist ailing business concerns.\textsuperscript{122}

7. CONCLUSION

Dismissal for operational requirements is a new phenomenon in our law. It is one of the broad categories of dismissals namely, misconduct, incapacity and dismissal for operational requirements. The Labour Relations Act of 1956 did not provide any definition for dismissal. Dismissal fell under the broad definition of an unfair labour practice. The Labour Relations Act of 1995, however specifically deals with dismissals.

In terms of the old unfair labour practice definition the act or omission had to fall within the definition of unfair labour practice for the Labour Court to have jurisdiction to intervene.

A dismissal for operational requirements, like dismissal for incapacity is regarded as a no-fault dismissal. The employer is required to effect dismissal for operational reason in accordance with a fair procedure and for a valid reason.

The introduction of the Labour Relations Act of 1995 was a turning point in the formal regulation of the employment relations in our country. In spite of such a significant move in changing our law, trade unions and understandably so, were still not content with certain provisions of the new Labour Relations Act including section 189 which deals with dismissals based on operational reasons. On the other hand the employers also harboured certain concerns about the new Labour Relations Act. It was seen to be taking away their rights and giving more to employees. These fears should be understood against the background of the employer’s history of domination over employees under common law and of being protected by legislation under the apartheid regime.

It is fair to say that the Labour Relations Act provides primarily, protection against procedurally unfair retrenchments. The courts have also been willing to impose tight set of standard when it comes to procedural fairness of retrenchments. The new amendments to the Labour Relations Act, 166 of 1995 must be seen as a compromise between the social partners.

\textsuperscript{122} Ibid.
The labour movement in particular COSATU has not been entirely satisfied with the current law of retrenchments hence its demand for the new amendments to be introduced to tighten up on the duty to consult. It would appear that most of their concerns were addressed by the amendments.

The important role played by our courts in interpreting from time to time these pieces of legislation as promulgated and thus developing jurisprudence, giving clarity and certainly in some areas, must be commended. Equally the influence of the ILO Conventions and Recommendations in shaping our retrenchment law, having gone through the rough history of our industrial relations in our country deserves recognition.

Today our labour law in general and dismissal law in particular can be hailed as one of the best in the world!
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