THE LAW RELATING TO RETRENCHMENT

by

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SUMMARY

Retrenchment, as a form of dismissal, is regulated by section 189 and 189A of the Labour Relations Act 1995. In order for a retrenchment to be fair, it must comply with both the substantive and procedural requirements stipulated in the Act. After an employee has proved the dismissal, the onus rests on the employer to comply with these two requirements by providing proof thereof. One of the most important procedural requirements that must be complied with by the employer is that the employer cannot merely make a decision to retrench. This decision may only be made once the employer, when contemplating a retrenchment, followed the lengthy consultation process as required in section 189. Recent amendments to section 189 introduced a distinction between a small and big employer and further between a large-scale and small-scale dismissal. If the employee is of the opinion that the employer did not comply with either the procedural or substantive requirements or both, he/she may refer such a dispute for conciliation and thereafter for arbitration or adjudication, according to a dispute resolution process contained in the Act, during which process certain remedies are available to the dismissed employee. The Labour Relations Act 1995 also introduced important amendments which have the effect that employees are allowed to, in certain circumstances, to strike over collective retrenchment disputes.
CHAPTER 1
RETRENCHMENT AS A FORM OF DISMISSAL

1. INTRODUCTION

Retrenchment is a form of dismissal defined in section 186 of the Labour Relations Act\(^1\) (hereinafter referred to as “the LRA”) inter alia as follows:

“‘Dismissal’ means that -
(a) an employer has terminated a contract of employment.”

Retrenchment is a dismissal where the employer has terminated a contract of employment with notice. It is important to note that the employer has terminated a contract of employment.

Termination is at the behest of the employer.\(^2\) A dismissal as referred to above may be with or without notice. The period of notice which is required may be expressly stated in the employment contract, in terms of a statute such as the Basic Conditions of Employment Act\(^3\) (hereinafter referred to as “the BCEA”) or even in terms of a collective agreement. The BCEA requires one week’s notice if the employee has been employed for less than six months, two week’s notice if the employee has been employed for more than six months but less than a year, and four weeks’ notice if the employee has been employed for more than a year.\(^4\) In general, the employer gives notice of the dismissal. The employee may, however, also give notice and terminate the contract of employment. This is generally referred to as a resignation, or in some instances as a constructive dismissal, which will not be discussed herein.

Summary termination of employment or termination without notice by the employer is also allowed and can be justified where an employee “has committed a serious or fundamental

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1 Act 66 of 1995, as amended.
3 Act 75 of 1997, as amended.
4 S37(1).
A breach of a material term of the contract.\(^5\)

An example would be when an employee has committed an act of a dishonest nature, for example stealing from the employer, and the employer has caught the employee in the act.

Generally however, notice of termination of the contract of employment is required and the guidelines as stipulated in Schedule 8 of the LRA, need not be given.

The technical definition of dismissal has been examined in various cases, but in the type of dismissal under discussion, namely retrenchment, the fact that there was a dismissal as stipulated in the LRA, is normally not in dispute, especially where the employer has followed the necessary procedures, as will be discussed. However, if the employer has not followed any procedures, there can be a dispute over whether there has been in fact a dismissal. In such an instance, and also in general, the onus is on the employee to prove that there has been a dismissal. This inference can primarily be drawn from the wording of section 188 of the LRA, where it is stated in subsection 1:

“[A] dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a) that the reason for dismissal is a fair -
   (i) related to the employee’s conduct or capacity; or
   (ii) based on the employer’s operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.”

In practice, this has the effect that when an employee alleges that he/she has been dismissed, he/she will need to prove the dismissal as defined in section 186 of the LRA and only once this dismissal has been proved, the onus will be on the employer to prove that the dismissal was in fact justified, based on a fair and valid reason (substantive fairness) and that a fair procedure was followed (procedural fairness). These requirements will be discussed in some detail in Chapter 5.

The date of the dismissal can also be in dispute in many instances. Section 190(1) of the LRA stipulates that:

5 Basson et al supra 125.
“The date of dismissal is the earlier of (a) the date on which the contract terminated; or (b) the date on which the employee left the service of the employer.

There are a few special provisions regarding the date of dismissal, which relate specifically to a failure to renew a fixed term contract, a failure or refusal to allow an employee to resume work after she has been on maternity leave and a selective refusal to re-employ certain employees. In all of these situations the date of dismissal will be the date on which the employer first refused the employee - be it to renew a fixed term contract, or an offer to renew but on less favourable terms; to allow the female employee to resume work after she has had maternity leave; or the selective refusal to reinstate or re-employ an employee.”

The LRA has codified guidelines for the substantive and procedural fairness of a dismissal based on operational requirements.

To summarise, it can be stated that retrenchment is a form of dismissal as contemplated in section 186 of the LRA, where an employer, in general, gives notice of termination of employment.

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6 Basson et al supra 143.
7 S189 and the Code of Good Practice (Schedule 8).
CHAPTER 2

RETRENCHMENT AS A CATEGORY OF REASONS FOR THE EMPLOYER TO DISMISS THE EMPLOYEE

1. INTRODUCTION

As discussed in Chapter 1, section 188 of the LRA distinguishes between the three most general categories of dismissals, *ie* dismissals related to the employee’s conduct, the employee’s capacity or based on the employer’s operational requirements.

What is of the essence is that the dismissal relating to the employee’s conduct or capacity is not codified in the Act in as much detail as retrenchments (or dismissals relating to the employer’s operational requirements). The LRA is helpful in that the Code of Good Practice for Dismissals gives guidelines for dismissals based on conduct and capacity, which is not exactly the case with retrenchments, which are discussed in detail in section 189 of the LRA itself, which sets out the requirements to be met and the procedures to be followed.

2. DISMISSALS BASED ON MISCONDUCT

A dismissal relating to the conduct of the employee is generally referred to as a dismissal for misconduct, which is a dismissal that follows when the employee has acted in a way that gives rise to his or her misconduct. The employee and not the employer, is at fault and the subsequent dismissal is a direct result of the misconduct of the employee. This is a wide category of dismissal and also the most common category. This form of dismissal is also most probably the reason why discipline is needed in the workplace.

“The function of discipline in the employment realm is to ensure that individual employees contribute effectively and efficiently to the goals of the common enterprise. Production and the provision of services will clearly be impeded if employees are free to stay away from work when they choose, to work at their own pace, to fight with their fellow employees or to disobey their employer’s instructions. Hence it is the employer’s right and duty to ensure that its employees adhere to reasonable standards of efficiency and conduct.”

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8 Schedule 8.
Rules and standards are therefore necessary for the employer on the one hand, to ensure that his enterprise runs smoothly and to the employees on the other, to obey them, provided that these rules and standards are reasonable and applied fairly and consistently by the employer. The Act promotes disciplinary codes and procedures which are the subject of collective agreements or the outcome of joint decision-making between an employer and a workplace forum. Therefore the LRA states that

"[t]his Act emphasises the primary of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements or the outcome of joint decision-making by an employer and a workplace forum.

Further, the key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed both on employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees."11

3. DISMISSALS BASED ON INCAPACITY

Dismissals relating to the capacity of the employee are generally referred to as dismissals based on incapacity. “Unfortunately there is no definition of incapacity in the Act.”12

Basson et al13 are of the opinion that incapacity is not an easy term to either define or confine within the parameters set by the Act. “Even the distinction between substantive and procedural fairness for a dismissal based on incapacity is somewhat blurred in the Code’s guidelines.”14

It is important to note that, as is the case in the majority of retrenchments, the element of fault or culpability is not present in a dismissal based on incapacity. The employee is, due to some or other reason, not capable of doing the work. Incapacity can be divided into three sub-categories,

(a) incapacity due to poor work performance,
(b) ill health or injury, and/or

10 Grogan supra 90.
11 Schedule 8, Item 1(3).
13 Supra 199.
14 Basson et al supra 199.
(c) incompatibility.

It can certainly be argued that an alcoholic has caused his own fate when dismissed due to incapacity.

On the other hand, it can be argued that alcoholism is an illness for which the employee cannot be totally blamed for.

4. DISMISSALS BASED ON OPERATIONAL REQUIREMENTS

The third category of reasons for dismissal is dismissals based on the operational requirements of the employer, also generally known as *retrenchments*.

This category forms the subject-matter of this work and will be discussed in the chapters that follow.

At this stage, it is sufficient to state that retrenchments can generally, but not always, be regarded as no-fault dismissals, which put them in a different category from dismissals based on misconduct, and mainly in a similar category to dismissals based on incapacity, as far as the element of fault on the part of the employee is concerned.
CHAPTER 3
RETRENCHMENTS ONLY APPLICABLE TO EMPLOYEES
(AS DEFINED IN SECTION 213 OF THE LABOUR RELATIONS ACT 1995)

1. INTRODUCTION

A retrenchment can only take place where an employment contract exists.

“The employment contract forms the foundation of the relationship between an employee and that employee’s employer, and it is the starting point for the entire system of labour law rules. All rules of labour law, at least initially, on there being a contract of employment which links the individual employee to the employer. By carefully evaluating a given set of contractual terms, we may be able to determine what the nature of that contractually-based relationship is.” 15

2. THE EMPLOYMENT CONTRACT

Basson et al16 defines the employment contract as follows:

“The contract of employment is an agreement in terms of which one person (the employee) works for another (the employer) in exchange for remuneration.”

The employee, as one party to the employment contract, is defined by the LRA17 as:

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive, any remuneration, and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

3. THE DISTINCTION: AN EMPLOYEE v INDEPENDENT CONTRACTOR

The distinction between an employee and an independent contractor is of importance as only, in the minority of cases, employees, as defined in the LRA, enjoy protection and benefits from labour legislation and have access to dispute-resolution processes.

15 Basson et al supra 22.
16 Supra 23.
17 S213.
Owing to the fact that many employers tend to raise the defence that the person who declared the dispute is not an employee but an independent contractor, it is necessary to discuss the different characteristics of an employee and an independent contractor.

A number of tests have been established through case law in an attempt to distinguish between a contract of employment and the independent contractor. These includes the control, organisation, and dominant impression test.

The first test, being the control test, was formulated in Colonial Mutual Life Assurance Society Ltd v Macdonald, where the court commented as follows:

“[O]ne thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the rights of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workplace what work has to be done, but also the manner in which such work has to be done.”

Secondly, the organisation test “is based upon the assumption that the test of being a servant does not rest on a submission to orders. It depends on whether the person is part and parcel of the organisation.” The Labour Appeal Court summarised this test as follows:

“The second test is the organisation test: a person is an employee or he is ‘part and parcel of the organisation’ (Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248 (CA) at 295), whereas the work of an independent contractor ‘although done for the business, is not integrated into it but is only accessory to it’ (Stevenson Jordan and Harrisson Ltd v Macdonald and Evans [1952] 1 TLR 101 (CA) at 111).”

Thirdly, the multiple or dominant impression test is often seen as the standard test used in our courts. This test relies on various indications to determine whether the contract is one of independent contractor or employment.

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18 1931 AD 412 at 434-435.
19 My emphasis.
20 Basson et al supra 29.
21 My emphasis.
22 SABC v McKenzie (1999) 1 BLLR 1 (LAC) at 5.
23 Basson et al supra 29.
This test examines a number of factors according to Basson et al.,\textsuperscript{24} namely:

- the right to supervision;
- how dependent the worker is on the employer;
- whether the employee is not allowed to work for another;
- whether the worker is required to devote a specific time to his work;
- whether the worker must perform his duties personally;
- whether the worker is paid a fixed rate or commission;
- whether the worker provides his own tools and equipment;
- whether the employer has the right to discipline the worker.

This test has been formulated as follows by the Labour Court:

\begin{quote}
\textit{“The dominant impression test, it seems, entails that one should have regard to all those considerations or indicia which would contribute towards an indication whether the contract is that of service or a contract of work and react to the impression one gets upon a consideration of all such indicia ... This is still unsatisfactory but, it seems to me that, it is as unsatisfactory as is the question of how one decides whether a dismissal is fair or unfair and indeed, whether certain conduct is reasonable or unreasonable.”}\textsuperscript{25}
\end{quote}

In Smit v Workmen’s Compensation Commissioner,\textsuperscript{26} the Appellate Division found that Smit, an agent at an insurance company, was not an employee based on the principles of the dominant impression test, which test has also been subjected to severe criticism. Mureinik\textsuperscript{27} \textit{inter alia} alleges that the dominant impression test “offers no guidance in answering the (legal) question whether the facts are of such a nature that the propositus may be held to be servant within the meaning of the common law in difficult (penumbral) cases.”

4. SECTION 200A: DOES THE NEW AMENDMENT CHANGE THE POSITION?

Without discussing these aspects further, which could surely form a detailed work on their own, it needs to be established whether a worker is an employee before retrenching him/her.

\begin{footnotes}
\item[24] Supra 30.
\item[25] Medical Association of SA & Others v Minister of Health & Another (1997) 5 BLLR 562 (LC) at 569 F-G.
\item[26] 1979 (1) SA 51 (A) at 62 D-G.
\item[27] “The Contract of Service: An Easy Test for Hard Cases” (1980) 97 SALJ 246 at 258.
\end{footnotes}
In many cases, *employers* literally hide behind this convenient mask of an independent contractor when the *employee*, who is of the opinion that he/she is an *employee* as defined in the Act,\(^\text{28}\) follows the dispute resolution process. The employer, sometimes conveniently, alleges that the relevant forum does not have jurisdiction to hear the dispute due to the fact that the employee *is an independent contractor* and enjoys no protection from labour legislation.

The CCMA, for this very reason, developed a process\(^\text{29}\) whereby the conciliator at an early stage, needs to decide on such a *point in limine* before the matter can go for arbitration or to the Labour Court for adjudication.

The new amendment in terms of section 200A of the LRA, now creates a presumption as to whether a worker is an employee or not. The factors as laid down in section 200A are basically the same as those factors relied on in the dominant impression test.

Before this amendment, the onus was on the employee to prove (by means of the dominant impression test) that he/she was an employee in terms of the LRA. Now however, if some of the factors as set out in section 200A of the LRA are present, it is presumed that a worker is an employee and the onus is accordingly placed on the employer to prove that such a person is not an employee.

In cases of uncertainty, however, the dominant impression test will still be the appropriate way to establish if a person is an employee or an independent contractor (especially in cases where the parties to the contract of employment want to disguise the true nature of their relationship by reason of, for example, tax evasion).

\(^{28}\) S213.

\(^{29}\) CCMA Rule 19.
CHAPTER 4
THE MEANING OF THE TERM
“OPERATIONAL REQUIREMENTS”

1. INTRODUCTION

What is the meaning of operational requirements? With the contents of Chapters 1 to 3 in mind, as an important background to retrenchments, this question (which, it is submitted, is one of the most important questions to be answered) needs to be discussed.

2. WHAT IS THE MEANING OF “OPERATIONAL REQUIREMENTS”?  

The term operational requirements is defined as follows in the LRA, which is certainly the primary source of this thesis:

“‘[O]perational requirements’ means requirements based on the economic, technological, structural or similar needs of an employer.”\(^{30}\)

This definition is in itself a very broad definition and needs to be discussed in some detail.

According to Du Toit et al\(^ {31} \) “these requirements relate to the financial strength of the business and its continued viability, the introduction of new equipment, and reorganisation of the enterprise to meet changes in the market or to enhance productivity. In all these situations jobs may become redundant and motivate dismissals”.

Owing to this broad definition of operational requirements, our Labour Courts have to develop an extensive body of case law over the past 15 years.

According to Grogan,\(^ {32} \)

\(^{30}\) S213.
\(^{32}\) Grogan supra 160-161.
Retrenchment is aimed at downsizing a workforce because the employer does not need as many employees as it currently has on its books. It takes place when jobs become redundant, and is aimed at effecting savings on the wage bills.

Numerous considerations might tempt an employer to resort to this step: a drop in demand for its products or services; the introduction of new technology which makes production less labour intensive; re-organisation, or the introduction of more productive and cost-efficient work methods.

Brand\textsuperscript{33} states that “[t]his could include the fact that some employees are no longer needed (they have become redundant) because of the introduction of new machinery, or that the organisational structure of the employer’s undertaking has been changed, and that workers have become redundant through the re-organisation”.

Grogan\textsuperscript{34} is of the opinion that the definition for operational requirements is an “expansive definition” and also reconcilable with the approach taken by the Labour Courts that a retrenchment will be \textit{bona fide} if it is designed not only to stem losses but also to increase profits.\textsuperscript{35}

It remains important that retrenchments must be \textit{bona fide} and not be to get rid of trade union members,\textsuperscript{36} or have some other “automatically unfair objective, even if such dismissal will, objectively speaking have a favourable economic effect.”\textsuperscript{37}

Economic, technological and structural needs are relatively easy to identify in a business. “Similar needs”, however, are not so simple to identify and require a detailed discussion.

3. \textit{“SIMILAR NEEDS” OF THE EMPLOYER}

The following “similar needs”, according to Basson\textit{et al},\textsuperscript{38} can be distinguished:

- Special operational needs of the business;

\textsuperscript{33} \textit{Labour Dispute Resolution} (1997) 229-230.
\textsuperscript{34} Supra 161.
\textsuperscript{35} See also \textit{Food & Allied Workers Union & Others v Kellogg SA (Pty) Ltd} (1993) 14 \textit{ILJ} 406 (IC) at 413A. 
\textsuperscript{36} \textit{Food & Allied Workers Union v Pietersburg Milling Co (A Division of Tiger Milling & Feeds Ltd)} (1995) 16 \textit{ILJ} 1497 (LAC).
\textsuperscript{37} Grogan \textit{supra} 161.
\textsuperscript{38} Basson \textit{et al supra} 226.
• The employee’s actions or presence affect the business negatively;

• The employee’s conduct has led to a breakdown of the trust relationship; and/or

• The enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment.

3.1 SPECIAL OPERATIONAL NEEDS OF THE BUSINESS

The nature of the business is relevant in this instance. The nature may be such that special demands are made of the employees. If the employee is not able, or refuses, to comply with these requirements, it could jeopardise the well-being of the business and it could be argued on behalf of the employer that it will be fair to dismiss such an employee.

Basson et al\textsuperscript{39} discuss the Steel, Engineering and Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd case\textsuperscript{40} 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 the 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 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 on 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 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.”

3.2 THE EMPLOYEE’S ACTIONS OR PRESENCE AFFECT THE BUSINESS NEGATIVELY

An important question to answer is whether dismissals due to incompatibility should be classified as misconduct, incapacity or operational requirements since, dependent upon the

\textsuperscript{39} Basson et al supra 226-227.
\textsuperscript{40} (1986) 7 ILJ 86 (IC).
classification, different tests for the fairness of the dismissal are prescribed in the guidelines found in Schedule 8 of the LRA.

Despite the new LRA having been in existence for a few years, with its different tests for different categories of dismissal, clarity on exactly where the species of dismissal relating to incompatibility belongs, is still shrouded in mystery.

A further difficulty of this position is that if incompatibility is regarded an operational requirement dismissal, the CCMA would lack jurisdiction to hear such matters.

A dismissal based on incompatibility was treated as a dismissal for operational requirements by De Kock SM, presiding over *Wright v St Mary’s Hospital*.41 He based this view on the fact that the employer is entitled to address the problem if an employee’s action or presence causes disharmony in the workplace. He concluded that it may even be necessary for the employer to remove the employee from the scene.

However, it is not clear what the connection of the quoted section is with operational requirements. The Labour Appeal Court in *SA Quilt Manufactures (Pty) Ltd v Radebe*42 regarded the dismissal of an incompatible supervisor as one for operational requirements. The Labour Appeal Court in *Lebowa Platinum Mines v Andrew Hill*,43 however, viewed the problem as one of incapacity but, in a case where ethnic incompatibility was being deliberated upon, in *East Rand Proprietary Mines Ltd v UPUSA & Others*,44 the court’s view was that “the case sits uneasily within the operational reasons framework”.

A possible explanation for the problem with the categorisation of incompatibility is that when presiding officers focus on the cause of incompatibility, they classify it as incapacity; whereas when they focus on the effect of the incompatibility, they view the problem as operational. The concept and manifestations thereof too, are multifaceted and, dependent on the unique facts of each case, a different classification may be appropriate.

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41 (1992) 13 ILJ 980 (IC).
43 Case number JA 79/97, LAC dated 30 March 1998 (unreported).
44 (1997) 1 BLLR 10 (LAC).
It has been argued that incompatibility springs from a characteristic or conduct of the employee and cannot, therefore, be classified as a no-fault dismissal, but should rather be treated as a species of incapacity, as getting along with colleagues is a skill. However, the nature of incompatibility is not clear.

It is submitted that incompatibility cannot be classified as a fault, which implies an element of choice or wilfulness on the part of the subject. Irremediable incompatibility clearly points to a state that cannot be cured (certainly not in the short or medium term - if ever).

Du Toit et al\textsuperscript{45} classify incompatibility as a form of incapacity, and acknowledge that the concept has “led a somewhat uncertain existence under the previous Act”. They also mention that opinions have been divided over where it belongs. Most importantly, they stress the vital need, for the purposes of the LRA, to bring it under an appropriate heading, which they submit should be either operational requirements or incapacity, despite their having included it under incapacity.

Finally, Grogan\textsuperscript{46} deals with incompatibility under the heading “Poor work performance” because he regards it as a more subtle form thereof, springing nevertheless from the employee’s performance. He acknowledges the difficulty that the complaints dealt with are “somewhat nebulous”, but that they very often can lead to very serious problems. In addition, he deals with third party dismissals under the same heading, by implication categorising them as variants of the same underlying problem - incompatibility.

Disappointingly, the literature available on the subject, as can be inferred from the above, does not do much more than point out the difficulties and problems. In fact, on review, it increases the confusion and only serves to augment the call for an in-depth focus on the subject.

Perhaps because of the paucity of literature in South Africa, the problem of incompatibility, which must of necessity be a universal one, must be researched with much of the focus on case law in other countries.

\textsuperscript{45} Supra 397.  
\textsuperscript{46} Supra 161.
It is submitted that the view of Du Toit et al\textsuperscript{47} that incompatibility should always be treated as a form of incapacity, is correct. According to the authors "incompatibility relates wholly to the subjective relationship between the employee and others in the enterprise and bears no relationship to the definition of operational requirements". In short, individuals must be able to sort out themselves.

3.3 THE EMPLOYEE’S CONDUCT HAS LED TO A BREAKDOWN OF THE TRUST RELATIONSHIP

Every employer and employee is bound by an employment contract. From this contract an employment relationship is determined, which hopefully results in a trust relationship.

The employment relationship is regulated by common law, legislation and the employment contract. These also provide guidelines as to when an employer may dismiss an employee for breach of contract.

The foundation for the trust relationship is to be found in the employment contract. The trust relationship itself is difficult to define and breach thereof causes many problems for the parties to the relationship. It is well-known that dismissals make up most of the disputes in the CCMA and Labour Courts.

Interpretation of breach of trust causes employers the most problems. This forms part of substantive fairness and requires a judgement decision to be made by a disciplinary chairman. A major concern for an employer is to decide on an individual basis when a breach of trust warrants dismissal.

Since the employment relationship is based on trust it is logical to argue that when an employee breaches this trust, if the breach is serious, then the employer may dismiss the employee for misconduct after the employer has proved the misconduct on a balance of probabilities. This would then be viewed as a dismissal based on misconduct. The onus is on the employer to prove the alleged misconduct on a balance of probabilities.

\textsuperscript{47} Supra 367.
However, should there be insufficient proof available to the employer, he may base his dismissal on an operational requirement in that the employee’s conduct has lead to a breakdown of the trust relationship.

In other words: When the employer cannot prove theft by an employee, he can merely allege that there has been a breakdown of the trust relationship due to the employee’s conduct.

Is it not every person’s constitutional right to be presumed innocent until proven guilty?

It seems as if it is not the case since the Industrial Court held that an employee’s dismissal on suspicion of theft had been fair in *Census Tseko Moletsane v Ascot Diamonds*. 48 The facts, in short, were that the employee, Moletsane, who was responsible for the polishing of diamonds, had been alleged to substitute diamonds. Although the court ruled that a substitution had taken place, it found that it could not be established that Moletsane substituted the diamonds. Based on the position of Moletsane, which was one of extreme trust with his employer, together with the fact that Ascot Diamonds had a strong and valid suspicion that Moletsane was guilty of this dishonest conduct, the court held that the employer had a valid economic reason for dismissing Moletsane.

Similarly the court, in *Food & Allied Workers Union & Others v Amalgamated Beverage Industries*, 49 accepted that the dismissal of a number of employees on suspicion of assault had an operational rationale to it. A summary of the facts of this case is as follows: A new delivery system was introduced by the employer to which the drivers and crewmen objected. The system was rejected by them in the form of late-coming, go-slow and refusals to deliver second loads. The employer requested drivers to assist in the loading of vehicles in order to overcome the backlog. One driver did so and was seriously assaulted by some crewmen. The employer was unable to identify the crewmen who assaulted the driver. They were able to determine who were on duty at the time and held a mass enquiry. The crewmen refused to give evidence. They were all charged with assault and intimidation, found guilty and dismissed. The court found that the crewmen’s collective action had the effect of destroying the relationship between them and the employer so that the continuation of that relationship was intolerable. The dismissal was for operational reasons and was fair.

48 (1993) 2 *ILJ* 310 (IC).
49 (1994) 15 *ILJ* 630 (IC).
It is submitted that this approach by the courts may surely be debated. It is trite law in South Africa, and also a constitutional right, to be presumed innocent until proven guilty. Although not criminal in nature, labour legislation should surely have the same approach when one examines the requirement of procedural fairness in a dismissal.

The one argument, it is submitted, will be that a court cannot order that a retrenchment is substantively fair when it is based on the employer’s suspicion that the employee had committed an offence. It can also be argued that such a view does not adhere to the above-mentioned constitutional right of an employee. However, on the other hand, such a dismissal is not a dismissal based on misconduct. There is only a suspicion of misconduct, although it can most probably not be proven. An employee may be found not guilty due to technical reasons, but in the mind of the employer, who is responsible for managing his business, the employee is most probably the guilty one.

It is submitted that, due to the fact that the business is per se the property of the employer and that the employer must trust the employee to effectively run his business, this approach of the courts is correct.

It is submitted that national bodies that give input on legislation in the labour field need, as a matter of urgency, to take up this issue concerning “breach of trust relationship” to engineer its rightful and overt inclusion in the LRA.

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

Section 187(1)(c) of the LRA prohibits an employer from compelling an employee to accept changes to terms and conditions of employment. In such a case, the compulsion will be regarded as an automatically unfair dismissal.

A dismissal based on the above category of “similar reasons” brings about the following question:
Does the employer want to compel an employee to accept changes to the terms and conditions of his/her employment OR does an operational requirement exist in that the enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment?

It is true that, especially in South Africa’s current economic climate, businesses have had to take measures in order to survive economic pressures. This entails mergers with other enterprises or the alteration of their mode of operation in order to maintain a competitive edge. Instead of an employee becoming redundant in circumstances as set out above, employers try to soften the blow by offering an employee a new position with changes to the terms and conditions of employment. What happens if the employee unreasonably refuses to accept the changes to the terms and conditions of employment? May the employer dismiss him/her for operational requirements?

In Ndlela v SA Stevedores Ltd,\textsuperscript{50} it was said that the employer must take steps to ensure “that as little harm to the employees as possible arises”.

As stated in Basson \textit{et al},\textsuperscript{51} “the change in the terms and conditions of employment need not always be the result of changes regarding the business. The circumstances or attitude of the employee could change and this could hold serious economic repercussions for the employer that the latter deems it vital to change the employee’s conditions of employment”.

It appears that situations are encountered where the employee’s conduct determines whether it is necessary to change the conditions of employment. It is submitted that in a situation where an employee’s conduct as such brings about the possibility that the employer considers a change to the employee’s terms of employment, the employer should rather consider the options available in accordance with the requirements as set out under dismissals due to misconduct or incapacity.

A dismissal could be fair if the Labour Court can be convinced that the reason for the dismissal was operational and not to compel the employee to accept the new terms and conditions of employment.

\textsuperscript{50} (1992) 13 \textit{ILJ} 663 (IC).
\textsuperscript{51} \textit{Supra} 22.
It is submitted that it will be very difficult to convince the Labour Court that the reason for a dismissal was based on operational requirements in circumstances where the employer tampered with the employee’s conditions of employment. It is submitted that the employee could easily rely on section 187(1)(c) of the LRA and that this category under "similar needs" is of little use in practice.

4. CONCLUSION

Further examples of operational requirements include the following:

- redundancy of position;
- restructuring business and transformation of council;\(^{52}\)
- closure of business;\(^{53}\)
- outsourcing;\(^{54}\)\(^{55}\)
- combining functions of employees;\(^{56}\)
- financial difficulties of the company;
- cut-back in production;\(^{57}\)
- negative trading;\(^{58}\) and/or
- redundancy due to merger.\(^{59}\)

Surely an endless list of examples can be provided of operational requirements. The above are examples of the most common operational requirements. It is also safe to say that operational requirements are mostly requirements to save the company financially or to improve the financial position of the company.

\(^{52}\) National Health & Allied Workers Union & Others v The Agricultural Research Council & Others case number J39670/98, Labour Court.

\(^{53}\) Cyster & Others v CIBA Speciality Chemicals (Pty) Ltd case number C551/98, Labour Court.

\(^{54}\) Visser v Sanlam case number C105/99, Labour Court.


\(^{56}\) Scribante v Avgold Ltd (Hartbeesfontein Division) (2000) 21 ILJ 1864. The Court found that the combining of functions of the chief safety officer with risk management is fair.


\(^{58}\) Burger v Alert Engine Parts (Pty) Ltd case number J998/98, Labour Court.

\(^{59}\) Hendry v Adcock Ingram (1998) 19 ILJ 85.
It seems to be clear from the above that the economic, technological, structural or similar needs of the employer should thus be carefully determined in order to establish grounds for dismissal based on operational requirements.
CHAPTER 5
STATUTORY REQUIREMENTS FOR RETRENCHMENT

1. INTRODUCTION

Whilst section 188 of the LRA lays the foundation for a fair dismissal, section 189 and 189A are the most important.

Section 188 lays down two requirements for a fair dismissal. Firstly, “(a) that the reason for the dismissal is a fair reason;” and secondly, “(b) that the dismissal was effected in accordance with a fair procedure.”

Section 188(1)(a) is generally referred to as substantive fairness and section 188(1)(b) as procedural fairness. In practical terms, substantive fairness means that there must be a valid reason for the dismissal. This reason must be based on the operational requirements of the business and this reason must be fair.

Procedural fairness means that the dismissal must be effected in accordance with a fair procedure.

If either one of the above is absent, the retrenchment is unfair, in which case the employee may refer the matter for adjudication.

As a new amendment to the LRA, section 189A distinguishes between the size of employers and also the size of dismissals when regulating substantive and procedural fairness of dismissals for operational reasons. It is thus relevant and appropriate to first examine these distinctions before proceeding with the requirements for substantive and procedural fairness.

Section 189A(1) distinguishes between a small employer and a big employer and further states that a small employer is one that employs 50 or fewer employees and a big employer is one that employs more than 50 employees.

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60 S188(1)(a).
61 S188(1)(b).
This section also distinguishes between a *large-scale dismissal* and a *small-scale dismissal* by a big employer. It states that a *large-scale dismissal by a big employer* is a dismissal of a stipulated minimum number of employees relative to the size of the employer. In terms of section 189A(1)(a), a *large-scale dismissal* is one in which an employer contemplates dismissing at least:

- 10 employees, if the employer employs more than 50 and up to 200 employees;
- 20 employees, if the employer employs more than 200, but not more than 300 employees;
- 30 employees, if the employer employs more than 300, but not more than 400 employees;
- 40 employees, if the employer employs more than 400, but not more than 500 employees; or
- 50 employees, if the employer employs more than 500 employees.

Section 189A(1)(b) also states that a dismissal by a big employer of fewer employees than the prescribed minimum listed above, might nevertheless constitute a *large-scale dismissal*. This will be the case if the number of employees to be dismissed, together with the number of employees that have been dismissed for operational reasons in the 12 months prior to this proposed dismissal, is equal to or exceeds the numbers specified above.

This 12-month period is generally referred to as the rolling 12-month period. It is relevant that this period must always be calculated backwards, starting from the date on which the employer gives notice in terms of section 189(3) of the latest proposed dismissal for operational reasons. The purpose of the 12-month provision is to ensure that employers do not manipulate the number of employees to be dismissed so that the dismissal always falls outside the ambit of section 189A.
The above is a short discussion of the concepts of *small* and *big* employers and *small-scale* and *large-scale* dismissals.

2. **SUBSTANTIVE FAIRNESS**

As mentioned earlier, section 189 of the LRA, together with the guidelines in Schedule 8 thereof, were the only *statutory* help in determining the substantive fairness of a retrenchment. No statutory definition of substantive fairness in regard to retrenchment existed.

It was the task of the then Industrial Court and recently, the Labour and Labour Appeal Court, to intervene and give clarity on the concept of substantive fairness. Recently, however, section 189A introduced a definition of *substantive fairness*.

This definition however is only applicable to *large-scale dismissals of a big employer*. Section 189, prior to the insertion of section 189A, basically and mainly dealt with procedures to be followed. As will be seen later, it touched on certain substantive fairness aspects.

In the case of a small-scale dismissal by a big employer and a dismissal by a small employer, the factual question of whether a retrenchment was substantively fair, still needs to be decided by the courts. As also stated earlier, the onus is on the employer to prove that the retrenchment was fair, albeit substantively and procedurally.\(^{62}\) In the case of retrenchment, the employer must prove that the proffered reason for retrenchment is one based on the *operational requirements*, as discussed and defined above. In other words, the employer must prove that the reason for dismissal falls within this statutory definition of *operational requirements* as set out in section 213 of the LRA.

The employer must further prove that the *operational reason* actually existed and that it was the real reason for the dismissal. In other words, the employer must prove that the proffered operational reason is "*not a mere cover-up for another reason for dismissal of the employees*"\(^{63}\) as is the case with many retrenchments.

\(^{62}\) S192 of Act 66 of 1995, as amended.

\(^{63}\) Basson *et al* supra 236.
Du Toit et al\textsuperscript{64} states as follows:

\begin{quote}
“When is a dismissal for operational reasons justified in a substantive sense? Under the previous Act\textsuperscript{65} the labour courts showed a marked reluctance to second-guess an employer’s decision to retrench workers on operational grounds. The early decisions considered a bona fide and non-discriminatory decision by the employer to be sufficient and, once that was established would enquire no further into the merits of the decision.”\textsuperscript{66}
\end{quote}

The above is certainly not the case today under the new Labour Relations Act. Certainly in most disputes before the Labour Courts, this aspect is one that is dealt with extensively by both parties and by the court itself.

Le Roux, on the other hand, is of the opinion that “allowing the courts to enquire into the merits of management decisions would constitute an intrusion into managerial prerogative by an institution not qualified to do so”\textsuperscript{67}

One can certainly agree that Le Roux has a valid point when arguing the above. Is the court really in a position to question the employer on his decision to retrench? Is it not the employer that knows best about the problems existing in his business? A further question to ask is, what actually gave rise to the courts inquiring into the decisions of management? Are the employers \textit{mala fide}?

In \textit{National Union of Metalworkers of SA v Atlantis Diesel Engines Ltd}\textsuperscript{68} the Labour Appeal Court stated the following:

\begin{quote}
“[F]airness in this context goes further than a bona fide and 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.”
\end{quote}

It seems as though, in the above statement, the court wanted to establish that the dismissal must in fact be a measure of last resort and that it is the duty of the court, after considering the

\textsuperscript{65}Act 28 of 1956.
\textsuperscript{66}Building Construction & Allied Workers Union v Murray and Roberts (Pty) Ltd (1991) 12 ILJ 112 (LAC).
\textsuperscript{67}Du Toit et al supra 401.
\textsuperscript{68}(1993) 14 ILJ 642 (LAC).
facts before it, to establish certainty on that point. One could even argue that, in the *Atlantis Diesel* case, the court wanted to come to the assistance of the parties to establish whether the dismissal was the only way out.

What is also interesting, is the following statement by Du Toit *et al.*:

> “On the other hand, it is also relevant to consider the extent to which managerial prerogative has become limited in recent decades by the demands of new technology and more participative decision-making as well as the changing norms of public policy, favours greater democratisation of the workplace, as encapsulated in the RDP. From this perspective, employees have a real contribution to make to the substantive decision-making process. Important decisions, such as the decision to retrench, should be subject to the greatest possible degree of consultation with employees or their representatives, not merely for the reasons of procedural fairness but as part of establishing whether substantive grounds for dismissal are present. This, broadly speaking, is the approach adopted by the Act.”

If one looks at the democratic nature of South Africa and consequently of labour law after the 1994 elections, it cannot be ruled out that employee participation has become an essential concept in all aspects of the workplace.

The old concept of the master-servant relationship certainly cannot continue. It would be a non-recognition of the Constitution and would not fit in with a democratic society.

According to Du Toit, it is the role of the court “to ensure that the provisions of the Act are complied with”. The process is very simple: The courts have an obligation to ensure that the Act is complied with. If the employee does not agree with the employer’s decision to dismiss, he/she can refer a dispute for adjudication. The court then has to weigh up the arguments and facts placed before it and make a ruling as to which party complied with the provisions of the Act.

What follows is a number of cases where the Industrial Court ruled that the operational reasons advanced by the employer, did not constitute the real reason for dismissal.

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69 *Supra.*

70 *Supra* 401.


72 *Supra* 401.
In *SA Chemical Workers Union & Others v Toiletpak Manufacturers (Pty) Ltd & Others*,\(^73\) the facts, as summarised by Basson *et al.*,\(^74\) were as follows:

Toiletpak Manufacturers transferred its business to another company. The transfer necessitated the dismissal for operational reasons of the employees. The Industrial Court held that the real reason for the transfer was Toiletpak Manufacturers’ desire to rid itself of a number of employees whom it suspected of misconduct. It had tried to avoid having to hold disciplinary hearings by disguising the dismissal as one for operational reasons. What sometimes seems to amaze, is the fact that the employer chooses to follow the route of retrenchments, rather than taking disciplinary action based on misconduct. When one looks at the possible difficulties of proving substantive and procedural fairness with a retrenchment, it is not always wise to dismiss on the basis of operational reasons. Would it not be wiser to dismiss for misconduct? The problem may lie with the employer perhaps having difficulty with directly confronting the employee with the alleged misconduct? What is interesting and, it is submitted, quite acceptable, is that “the courts held that a dismissal for operational reasons need not be restricted to the cutting of costs and expenditure. Profit, or an increase in profit, or gaining some advantage such as a more efficient enterprise, can also be acceptable reasons for dismissal for operational reasons.”\(^75\)

This point is further illustrated in *Seven Able CC t/a The Crest Hotel v Hotel & Restaurant Workers’ Union & Others.*\(^76\) The facts\(^77\) were as follows:

The Crest Hotel retrenched certain employees and entered into a contract with an outside contractor to do the retrenched employees’ work. The contract was aimed at cutting costs and thereby improving the hotel’s financial position. The Industrial Court held that the employees’ dismissal was unfair as no direct saving could be proved. However, the Labour Appeal Court held that the Industrial Court had erred in confining itself to a comparison between the contractor’s charges and the expenditure necessary to employ workers directly. It found that there had been an indirect saving because the work and expenditure involved in supervising the retrenched employees by the managerial staff had fallen away. There was

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\(^{73}\) (1988) 9 ILJ 295 (IC).

\(^{74}\) Supra 236-237.

\(^{75}\) Basson *et al* supra 237.

\(^{76}\) (1990) 11 ILJ 504 (LAC).

\(^{77}\) Supra 237.
probably an improvement in the way management exercised their functions since they now had more time available to attend to these functions. The court held that this could lead to improvement in the hotel’s financial position in the long run.

In *Hendry v Adcock Ingram*, the applicant employee was recruited in Europe by the respondent pharmaceutical company for its highly specialised position of international marketing manager. She relocated to South Africa and commenced employment on 1 April 1996. Soon thereafter, the company merged with another company and the employee’s position became redundant. She was retrenched in January 1997 although she alleged that she had been given the assurance that the merger would not affect her position. Since there were no other positions similar to hers in South Africa, she was forced to accept employment at another pharmaceutical company as a local marketing manager, which position she regarded as a step backwards in her career.

In proceedings before the Labour Court, the court had to decide whether the company had fair reason to retrench the employee and whether it followed a fair process in doing so, and if not, whether compensation including relocation costs should be awarded.

The court in the above matter rejected the argument of the employee that there was no fair reason to retrench her in the light of the letter sent to the Department of Home Affairs justifying a work permit for her in this highly specialised position for which no suitable local candidate could be recruited.

The court thus found that owing to the merger and the resulting change in the business focus, the company’s international division was taken over by the domestic division, and that such a radical change necessarily resulted in the redundancy of the employee’s position.

The court further stated that an employer need not keep in existence a position, particularly a very exclusive one, if legitimate and sound business decisions have the result that the position is no longer required.

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The court further, interestingly, stated that although an employee is entitled to fair labour practices, which are endorsed by the Constitution and protected by the Labour Relations Act, this does not, however, mean that an employee has a right to definite and permanent employment by a particular employer or that the employer may only retrench if it can show financial ruin.

The court found further that the fact that the employee had been given the assurance that the merger would not affect her position but it had in fact affected her harshly, did not render a legitimate financial decision to retrench her unfair reason for retrenchment. The court found in the circumstances that the company had proved that it had a fair reason to terminate the services of the employee for operational requirements and that it had also followed a fair procedure. The court also stated:

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

It is clear from the above judgement that the courts will be reluctant to interfere with the employer’s legitimate business decision and furthermore that if the employer can prove that the economic rationale was that a good profit was to be made, the decision of the employer to dismiss will be fair.

It is submitted that the courts should still endeavour to look at the facts and circumstances of each case very carefully, since it can be very easy for an employer to disguise its real intention to dismiss as one based on the economic rationale of making a good profit.

Every employer wants its business to be better, bigger and to have a greater turnover and make a bigger profit. This judgement, it is submitted, seems to open a door for unscrupulous employers to abuse the protection afforded to employees in terms of the LRA.

Is it not logical to argue that an employer will make a bigger profit if a particular employee’s

79 Hendry v Adcock Ingram supra at 92 B-C.
salary doesn’t have to be paid anymore?

And how easy will it not be for an employer with *mala fide* intentions to hide behind the concept of a *good profit*. A solution for this scenario might be if the term *good profit* can be defined in greater detail.

There have also been different approaches where the courts had to decide to what extent they would consider the business merits of the decision of the employer when considering the substantive fairness of dismissing for operational reasons.

In the *Atlantis Diesel* case,\(^{80}\) it was stated that “[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”.

Le Roux and Van Niekerk\(^{81}\) also agreed with the approach of the *Atlantis* case *supra*. “They argued that, if an operational reason for a dismissal existed, judicial intervention had to be restricted to dismissals in bad faith or for improper motives.”

A different view was held by the Labour Appeal Court in *National Union of Metal Workers of South Africa v Atlantis Diesel Engines (Pty) Ltd*,\(^{82}\) where it stated:

“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.”\(^{83}\)

Du Toit *et al*\(^{84}\) are of the opinion that the court in the *Atlantis Diesel* case *supra* “came close to recognising a property right in a job by requiring the decision to expropriate that right to be fair and reasonable”.

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\(^{80}\) (1992) 13 *ILJ* 405 (IC).
\(^{82}\) (1993) 14 *ILJ* 642 (LAC).
\(^{83}\) At 648 C-D.
\(^{84}\) *Supra* 382.
They are further of the opinion that the approach adopted by the LRA, appears to be that employees have a real contribution to make to the substantive decision-making process.

A slightly different view was accepted in *Van Rensburg v Austen Safe Co*,\(^{85}\) namely that

> “the Labour Court down played its role in deciding the business merits of an employer’s decision to dismiss to a certain degree. It held that it did not have to decide whether an employer’s decision to dismiss was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision. It held further that the purpose of consultation is to ensure that the ultimate decision is properly and genuinely justifiable by operational requirements.”\(^{86}\)

When one looks at the scenario where an employer has decided to close his business due to economic reasons, the question remains whether this employer needs to follow this consultation process (which will be discussed later). With the above in mind, the purpose would certainly be to give the employee the opportunity to ensure that the closure of the business is the only option that remains.

It seems as though even the courts are not in full agreement on this topic of how much they must be allowed to interfere with the decision of the employer to retrench.

In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Worker’s Union*,\(^ {87}\) the following was stated:\(^ {88}\)

> “The word ‘fair’ (in section 188) introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.”

\(^{85}\) (1998) 19 ILJ 158 (LC).
\(^{86}\) See Basson *et al* supra at 239.
\(^{87}\) (2001) 22 ILJ 2264 (LAC).
\(^{88}\) At 2269.
Four requirements were introduced by section 189A(19) of the LRA, which regulate the substantive fairness of large-scale dismissals by big employers. They are as follows:

- **The dismissal was to give effect to a requirement based on the employer’s economic, technological, structural or similar needs.**

This requirement simply entails that the reason for the dismissal must be for *operational requirements* and nothing else. A detailed discussion has been given in Chapter 4. It is important for the employer not to camouflage the dismissal with another reason. As already stated, the courts often find, once the circumstances and facts of the case are put before them, that the operational reason advanced by the employer did not constitute the real reason for the dismissal.

- **The dismissal was operationally justifiable on rational grounds:**

In *Van Rensburg v Austen Safe Co*,\(^89\) already discussed above, and in *SA Clothing & Textile Workers’ Union & Other v Discreto - A Division of Trump & Springbok Holdings*,\(^90\) the court also relied on the *rational test*. In the latter case it stated that the court does not have the function of second-guessing the commercial or business efficacy of the employer’s ultimate decision. The court must critically look at what happened during the consultation process and then determine whether the decision to retrench was the best decision under the circumstances.

The court cannot create facts which were not discussed during the consultation process.\(^91\) It is thus a factual question whether the reasons given by the employer for the dismissal would pass the test of rationality or not. It is also an objective, and not a subjective, test to be applied.

According to Basson *et al*,\(^92\) reason and logic play an important role in determining whether the decision was rational.

\(^{89}\) Supra.

\(^{90}\) (1998) 19 ILJ 1451 (LAC).

\(^{91}\) See also *South African Chemical Workers Union & Others v Afrox Ltd* (1999) 10 BLLR 1005 (LAC).

\(^{92}\) Supra 241.
There was a proper consideration of alternatives

Section 189(2)(i) of the LRA states that

“the consulting parties must attempt to reach consensus on –

(a) appropriate measures;
(i) to avoid the dismissals.”

This was generally seen as a procedural requirement for retrenchment, but section 189A of the LRA gave this requirement a substantive nature. The employer cannot simply take note of alternatives furnished and proposed by the employees. It needs to consider them properly and to state reasons why it is rejecting them. It needs to apply its mind to them and needs to consult extensively on them with the employees. Once this cannot be proven, the dismissal will be (substantively) unfair. The employer must prove that there were no workable alternatives and that the dismissal (retrenchment) was the last resort, the only way out of the problems and dilemma that the employer faced.

It often, with respect, happens in practice that an employer has, before the consultation-process commenced, made up his mind and has decided that retrenchments are unavoidable, before it even considered alternatives tabled by the employees. The purpose of the courts are to avoid such a single-minded approach and to ensure that when a matter is before it, the employer has applied its mind to possible alternatives.

• Selection criteria were fair and objective

This requirement, which has always been procedural of nature, was also introduced by section 189A of the LRA as a substantive requirement. It attempts to ensure that the employer objectively considers all the possible criteria that could be used and that it applies only those that are both fair and objective under the circumstances.

It also often happens that an employer dislikes a specific employee for some or other reason and then subjectively selects to retrench that employee. This scenario is avoided by this requirement and unfairness towards the employee is limited, although it can sometimes be difficult to get behind the real reason why a certain employee has been selected. Again, it is
the duty of the courts to examine this requirement diligently and carefully, taking into consideration all the circumstances of the case before it.

One wonders why section 189A only established substantive requirements for a big employer with large-scale dismissals. The relevance of applying these requirements to big employers only can be seen, but the question can also be asked if the courts should not be consistent and also apply these requirements to small employers as well. Basson et al\textsuperscript{93} are of the opinion that the courts will be consistent and apply these requirements to small employers as well.

In summary, it can be stated that the courts will not, as in the past, accept with closed eyes the reason for the retrenchment to be fair without duly examining it.

It will be interesting to see if the Labour Court will \textit{mero muto} look into this aspect, or only when required to make a ruling on it. Surely, as in most matters that serve before the courts for adjudication, the court will only examine this aspect if it is in dispute between the parties.

Finally, Du Toit et al\textsuperscript{94} make the following very important statement:

\begin{quote}
\textit{The emphasis that some have placed on the court's lack of expertise in the area of managerial decision-making is somewhat inconsistent. In other areas where issues of great complexity may present themselves, ranging from forensic evidence in criminal cases to problems of financial management and scientific questions arising from patent law, it is taken for granted that the courts should adjudicate, if necessary, with the assistance of expert assessors."
\end{quote}

3. PROCEDURAL FAIRNESS

As discussed, section 188 of the LRA requires that a retrenchment must be effected in accordance with a fair procedure. Section 189 further provides for the specific requirements for a procedurally fair retrenchment, also read with section 16. Section 1 of the BCEA,\textsuperscript{95} is also of importance. The above sections regulate procedural fairness of a retrenchment by a small employer or a small-scale dismissal by a big employer, as well as in the case of a large-

\textsuperscript{93} Supra 242.  
\textsuperscript{94} Supra 401, ft 167.  
\textsuperscript{95} Act 75 of 1997.
scale dismissal by big employer. However, additional\textsuperscript{96} requirements for procedural fairness in large-scale dismissals were introduced by section 189A of the LRA.

A discussion will firstly follow on the procedural requirements in the case of a dismissal by a small employer or a small-scale dismissal by a big employer. Thereafter, the additional requirements as introduced by section 189A of the LRA will follow.

3.1 PROCEDURAL REQUIREMENTS FOR A SMALL EMPLOYER OR A SMALL-SCALE DISMISSAL BY A BIG EMPLOYER

There are seven requirements contained in the LRA that an employer must comply with under these circumstances, namely:

- 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; and
- severance pay.

According to Basson et al,\textsuperscript{97} “[t]he requirements are interlinked and it is not always possible to keep them totally separate.”

Du Toit et al\textsuperscript{98} make the valid comment that “[u]nder the previous Act, the essence of procedural fairness lay in the employer’s duty to consult with the trade union or employees concerned, and, linked to this, to provide them with sufficient prior notice of impending retrenchments for the union to engage in meaningful consultation and for the affected employees to seek alternative employment”.

Each one of these requirements will now be discussed:

\textsuperscript{96} My emphasis.
\textsuperscript{97} Supra 243.
\textsuperscript{98} Supra 402.
3.1.1 PRIOR CONSULTATION

Section 189(1) of the LRA states the following:

“When an employer contemplates disconnecting one or more employees for reasons based on the employer’s operational requirements, the employer must consult…”

The immediate question that arises, is when this consultation must take place.

“It simply means that an employer who senses that it might have to retrench employees in order to meet operational objectives, must consult with the employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reasons for it.”

In the above case, the Labour Appeal Court rejected the idea that consultation was not necessary on the decision to retrench but only at the stage of implementation.

The question also arises whether the above will be followed in practice. Is it really possible for the employer not to make a decision to retrench until it has finished the consultation process with the relevant party?

Is this requirement not merely covered up by the employer and only followed due to the fact that it is prescribed by the LRA? Surely this must be the case if one looks at the large number of reported and unreported cases on this point.

It is interesting to note that the LRA does not state over which period this consultation process must take place.

According to Item 3 of the Code of Good Practice on Dismissals based on Operational Requirements, “the consultation process must commence as soon as a reduction of the work force, through retrenchments and redundancies, is contemplated by the employer”.

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99 My emphasis.
101 My view.
102 Item 5 of the Code of Good Practice on Dismissals based on Operational Requirements.
According to Basson et al.,\textsuperscript{103} “[t]his requirement ensures that the employees are afforded the opportunity to influence the employer in its final decision to dismiss or not. The actual timing of consultation will depend on the circumstances of each case. When considering this question, the interests of both the employer and the employees should be taken into consideration and balanced”.

In \textit{Atlantis Diesel Engines (Pty) Ltd v National Union of Metal Workers of SA},\textsuperscript{104} Smalberger JA states further to the above, the following:

“It seems to me that the duty to consult arises, as a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment. This would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing, a consideration of the causes and possible remedies; and appreciation of the need to take remedial measures. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable. Consultation provides an opportunity, inter alia, to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment (or softening its effect) and to discuss and consider alternative measures.”\textsuperscript{105}

In \textit{SA Clothing and Textile Workers’ Union & Others v Discreto - A Division of Trump & Springbok Holdings},\textsuperscript{106} the employees concerned worked at a factory where denim jeans were produced. The production of denim jeans was what made the factory viable. Towards the end of 1995, the respondent (the employer) decided to discontinue denim production at the factory, with the inevitable result of closure and the termination of employment of the people who worked there.

According to Froneman DJP, the manner in which this decision was taken and in which it was conveyed to the trade union representatives and the employees at the factory was nothing short of remarkable. Froneman further states that “one of the requirements of a proper consultation process is that consultation must precede a final decision on retrenchment. The reason for this requirement should be obvious: it is impossible to determine beforehand what might emerge from the consultation process and to what extent these results might influence a

\textsuperscript{103} Supra 243.  
\textsuperscript{104} (1994) 15 ILJ 1247 (A).  
\textsuperscript{105} At 1252 E-H.  
\textsuperscript{106} Labour Appeal Court, case number JA95/97.
final decision\textsuperscript{107} and conversely, once a decision is taken without consultation, any representation after the event will be met with a natural reaction to justify the original decision”.\textsuperscript{108} The court accordingly found that the dismissal was unfair.

In Item 6 of the Code,\textsuperscript{109} it is importantly stated that the more urgent the employer’s need to respond to the situation that is giving rise to any contemplated termination of employment, the more \textit{truncated} the consultation process might be. “\textit{However, it goes on to state that urgency may not be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. The parties who are entitled to be consulted, must also not slow the process down; they must meet, as soon, and as frequently, as may be reasonably practicable during the consultation process.”}\textsuperscript{110}

What is clear from the LRA, and from case law, is that the employer definitely has a \textit{duty to consult}.

\textit{National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd}\textsuperscript{111} is a good illustration of the views that the Industrial Court previously had with regard to when consultation should commence, if at all. It is stated that “[a] retrenchment generally has two stages. \textit{The first stage is the management decision to retrench. This decision is the sole prerogative of management, and if it is taken in a bona fide and business-like manner, the court will accept it as valid and fair and will not interfere. The second stage is the implementation of management’s decision. For this exercise to be fair, the guidelines devised by the Industrial Court apply. A retrenched employee must, however, show that the failure to comply with a particular guideline detrimentally affected him.”}\textsuperscript{112} Clearly, no statutory requirements for procedural fairness were prescribed at that time.

In \textit{Chetty v Scotts Select a Shoe},\textsuperscript{113} Landman J found that compliance with the consultation requirements is peremptory and that consultation must take place before dismissal, failing

\begin{footnotesize}
\begin{itemize}
\item[107] See also \textit{Mohamedy’s v Commercial Catering & Allied Workers Union of SA} (1992) 13 \textit{ILJ} 1174 (LAC) at 1179F-H.
\item[108] See also \textit{Attorney General, Eastern Cape v Blom & Others} 1988 (4) \textit{SA} 645 (A) at 668D-E.
\item[109] Supra.
\item[110] Basson \textit{et al supra} 244.
\item[111] (1992) 13 \textit{ILJ} 405 (IC).
\item[112] See headnote.
\item[113] (1998) 19 \textit{ILJ} 1465 (LC).
\end{itemize}
\end{footnotesize}
which the dismissal should be set aside and the position prior to the dismissal should be restored. He also made the comment that a duty is placed on the employer to consult, and that the legislature intended to place a higher duty on the employer to follow procedures when dismissing for operational requirements than when dismissing for other reasons (misconduct and incapacity). This clearly makes sense due to the fact that in a dismissal for operational reasons, the employee is not at fault. However, an employee who is dismissed due to misconduct is clearly at fault and just needs to be given the opportunity to state his case and to defend himself, similar to a criminal hearing.

In *Food & Allied Workers Union & Others v National Sorghum Breweries*, the court ruled that both substantive and procedural fairness must exist when retrenching and that it is impossible to conclude that retrenchment was the only option with those requirements absent.

In *National Entitled Workers Union & Others v Mintroad Saw Mills (Pty) Ltd*, Gon AJ held that when the employer failed to consult the employees, the union was estopped from relying on failure where the union itself had failed to take urgent action and held out that it was prepared to consult if preconditions were met.

An interesting ruling was made by Zondo AJ in *National Education Health & Allied Workers Union v University of Fort Hare*. The University faced financial difficulties such that its survival was at stake. It accordingly gave its workers notice of a meeting to take place for consultation on the proposed restructuring of the University. After the meeting was postponed twice at the request of the union, no agreement could be reached on who should chair the meeting. After the union declared a dispute over this issue, they also refused to participate in consultation. The University decided to continue the consultation process with other affected unions. Shortly thereafter, the University advised the employees by letter that their services had been terminated and gave them one month’s notice. The matter was referred to the Labour Court for adjudication and the court found that the University had taken a decision to retrench on the basis that the union refused to participate in a consultation process. However, the University was still open to persuasion and to consider alternatives, but due to the fact that the union was unable to show that the consultation process was not

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114 (1998) 19 ILJ 613 (LC).
115 (1998) 19 ILJ 95 (LC).
bona fide, a further order to consult would result in a repetition of the consultation process in which the University had already begged the union to participate. The application by the union was accordingly dismissed with costs.

In *Assurance & Banking Staff Assosciation & Others*, Jajbhay AJ ruled that a changed process in the company must be preceded by consultation. In *casu*, the employer argued that the department in which the employees worked had to be restructured because of dissatisfaction with the services rendered by the department and because of fundamental changes to the whole of the company group pending demutualization. The employees refused to take part in the consultation process, which was necessary to enable the company to place the employees within the restructured department, and they were therefore given two months’ notice of termination of their services. The matter was referred to the Labour Court for adjudication. The court found that in such a case, it is the substantive and not the procedural fairness that has to be the ultimate arbiter. Where an employer contemplates restructuring that would have the effect of changing working conditions, the employer generally believes that the business’s survival is dependent on a change to work conditions or practices and procedures. Here there is no immediate attendant need to retrench. The judge concluded that a consequence of such action would be that the employees and their representatives would vigorously oppose such changes to the working conditions. The change process must, therefore, begin with negotiation or consultation. The imperative to dismiss will only arise if consultation fails, and not before. If consultation does fail, and if the employer can show that factors outside its control warrant a particular change, a case for operational requirements dismissal can be made.

The employer must show the operational necessity of restructuring and that it is not merely a change to boost the employer’s financial position.

In *Singh & Others v Mondi Paper*, the judge held that the “[e]mployer [is] not obliged to consult when introducing new technology and reorganizing even if this will lead to redundancy - [the] [e]mployer [is] only obliged to consult before [a] final decision to retrench [has been] taken”.119

119 See headnote at 966I.
In *Makgabo & Others v Premier Food Industries Limited*, Pienaar AJ held that the LRA does not prohibit an employer from choosing its business after consultation on the decision to retrench. This is especially so where the employer is experiencing acts of sabotage and unreasonable losses. The court further also stated that acts of sabotage committed by employees may give rise to a dismissal based on operational requirements.

In *Visser v Sanlam*, Arendse AJ held that the employer is required to consult after announcing its initial intention to out-source part of its undertaking. He also held that consultation serves as a substantive purpose to ensure that the financial decision to retrench is properly and genuinely justifiable by operational requirements or by commercial or business rationale and that a consultation process which spanned a period of three months had achieved that purpose.

The above are only a few cases where, *inter alia*, the timing of the consultation process is discussed. It seems clear that the wording of Section 189 of the LRA is clear when it states that consultation must commence the moment that the employer *contemplates* the dismissal. However, as seen in the above cases, this will be a factual question in each instance.

A further question that arises, is the exact meaning of the word *consultation*. According to Basson *et al* [*Supra* 244] “*the word consultation is not defined in the list of definitions contained in section 213 of the LRA. However, the meaning of the word for purposes of section 189 is regulated in the section itself*”.

In subsection 2 of section 189 of the LRA, it is stated that “*the employer and the other consulting parties must ... engage in a meaningful joint consensus-seeking process and attempt to reach consensus ...*”.

It is clear from the above that the legislature attempted to avoid a consultation process which

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120 (2000) 21 *ILJ (LC).*
121 Labour Court, case number C105/99.
122 My emphasis.
123 *Supra* 244.
is only adhered to for purposes of formalities. The parties need to engage actively in this process and, as Item 3 of the Code\textsuperscript{124} states: “the purpose of consultation is to permit parties in the form of a joint problem-solving exercise, to strive\textsuperscript{125} for consensus, if that is possible”.

According to Basson et al,\textsuperscript{126} “… it must not be a mere sham, a going through the motions. Good faith by the Employer is important in this consultation process”.

The employer needs to keep an open mind with regard to the representations made by the employee party. Importantly, Basson et al\textsuperscript{127} state that the other party (the employee) must also act in good faith and must ensure that its representations are well founded and substantiated.\textsuperscript{128} It must not merely try to prolong consultations and prevent possible dismissals.

It is also apparent that politics have played a major role in the introduction of the so-called duty to consult. Employee participation is promoted. Democracy, in general, is associated with a consultation process. Consultation can allow for a sense of ownership in the workplace for the employees. They need to be consulted before an important decision can be taken by management. But, “[s]hould the parties fail to reach consensus, the final decision remains that of the employer”.\textsuperscript{129}

In Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA,\textsuperscript{130} the advocate who acted for the trade union argued that consultations should amount to “a joint problem-solving exercise with the parties striving for consensus where possible”. “The court, in its response to the advocate’s contention, had the following to say: ‘I agree that consultation, if circumstances permit, should be geared to achieve that purpose, bearing in mind that problem-solving is something distinct from bargaining and that the final decision where consensus cannot be achieved, always remains that of management.’”\textsuperscript{131}

\textsuperscript{124} Supra.
\textsuperscript{125} My emphasis.
\textsuperscript{126} Supra 244.
\textsuperscript{127} Supra 244.
\textsuperscript{128} See also Visser v Sanlam (2001) 22 ILJ 666 (LAC) at 672.
\textsuperscript{129} Basson et al supra 245.
\textsuperscript{130} (1994) 15 ILJ 1247 (A) at 1253F-G.
\textsuperscript{131} Basson et al supra 245.
In order to engage in a joint problem-solving exercise, as stated above, the employees, as already mentioned, will not be able to make sensible suggestions in the consultation process unless they have sufficient information to appraise or challenge the employer’s proposals, or to formulate alternatives. A detailed discussion on this aspect follows hereunder.

Consultation and negotiation are distinguishable from each other, as could be seen in the previous Labour Relations Act. Consultation merely requires the employer to entertain and bona fide consider suggestions from the employees or their representatives.

Negotiation, on the other hand, requires the parties to compromise in an effort to reach agreement; thus there is more of an attempt to reach settlement, which is the preferable outcome.

If one looks at the wording of section 189(2) of the LRA, the legislature requires of the parties to attempt to reach consensus, which it can be argued, goes further than the meaning of consultation in the ordinary sense.

In FAWU v Rainbow Farms Limited, the court described consultation and distinguished the process from negotiation as follows:

“[T]he process of consultation entails the communication of a genuine invitation, extended with a receptive mind, to give advice. The employer must be open to persuasion. Although it may be desirable to reach agreements, failure to do so would not vitiate the consultation process.”

Further, to illustrate the concept that consultation does not mean negotiation, the court set out the distinction between these two concepts in Metal & Allied Workers Union v Hart (Ltd) as follows:

“[T]o consult means to take counsel or seek information or advice, from someone, and does not imply any kind of agreement, whereas to bargain (consult) means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise or agreement.”

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132 Act 28 of 1956.
133 (1994) 5(3) SALLR 39 (IC).
134 (1985) 6 ILJ 478 (IC).
135 My insertion.
It is also apparent that the LRA, according to Grogan, \(^{136}\) “appears to disallow parties to exclude this obligation to consult entirely. If a collective agreement is silent on the obligation to consult, it will be read as if impliedly incorporated it”.

The employee may not be kept *in the dark*.\(^{137}\) If this is the case, the Labour Court will most certainly declare a retrenchment to be unfair.

In *Mohamy’s v Commercial Catering & Allied Workers Union of SA*,\(^{138}\) the court stated the reasons why the employer is not entitled to take the final decision to retrench before consultation:

> “[O]ne of them is that the employees should be given the opportunity to persuade the employer that the retrenchment is unnecessary; that alternative measures are available to the employer; such as reduction in wages or short-time.”

Section 189(1) of the LRA clearly states with whom the employer must consult and a detailed discussion on this aspect is not deemed necessary. In practice, the employer will in the majority of cases consult with the union representatives, who will take instructions from their members. It is not necessary, according to Grogan\(^{139}\) for the union to be formally recognised. The only proviso is that the union must be registered.

The LRA\(^{140}\) only mentions the words *any registered trade union*. It therefore gives preference to collective agreements, provided that a collective agreement may not exclude the consultation process. Of further importance are the words *whose members are likely to be affected* in section 189 of the LRA. It is therefore not necessary for the employer to consult with a union whose members will not be affected.

### 3.1.2 ATTEMPT TO REACH CONSENSUS OVER CERTAIN MATTERS

Section 189(2) of the LRA provides as follows:


\(^{137}\) *Manyaka v Van de Wetering Engineering (Pty) Ltd* case number 129/97 dated 23 October 1997 unreported.

\(^{138}\) *Supra* 164.

\(^{139}\) S189(1)(c).

\(^{140}\) S189(1)(c).
“The consulting parties must attempt to reach consensus on -

(a) appropriate measures –
   (i) to avoid the dismissals;
   (ii) to minimise the number of dismissals;
   (iii) to change the timing of the dismissals; and
   (iv) to mitigate the adverse effects of the dismissals;
(b) the method for selecting the employees to be dismissed; and
(c) the severance pay for dismissed employees.”

Once again, it is important to note that these statutory procedural requirements are not separate from one another, but inter-linked. Emphasis must be placed on the words consulting parties in this section. This implies that the parties must already be in the process of consultation regarding the possibility of retrenchment when they have to comply with the procedural requirement. Item 3 of the Code\textsuperscript{141} states that “[i]n order for this to be effective, the consultation process must commence as soon as a reduction of the workforce, through retrenchments and redundancies, is contemplated by the employer so that possible alternatives can be explored”.

(a) APPROPRIATE MEASURES

• Measures to avoid dismissals

The word avoid in section 189(2) of the LRA implies that the employee party is placed in a position to challenge the merits of the proposed retrenchment.\textsuperscript{142} This is a further indication that the employer is not really entitled to decide alone if economic considerations require retrenchment. In National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd,\textsuperscript{143} the potential merging\textsuperscript{144} of the two phases, namely that the employer can decide alone to retrench and the contrary thereof, was highlighted. The Labour Appeal Court stated that “there was no clear dividing line between the decision to retrench and the implementation of that decision”.\textsuperscript{145}

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\textsuperscript{141} Supra.
\textsuperscript{142} Grogan supra 165.
\textsuperscript{143} (1994) 14 ILJ 1247 (A).
\textsuperscript{144} Grogan supra 166.
\textsuperscript{145} Grogan supra 166.
According to Basson et al.,\textsuperscript{146} a number of alternatives to retrenchment exist that may be tabled for consideration, namely:

- the granting of either paid or unpaid leave;
- the reduction or elimination of overtime (which is regularly seen);
- the reduction or elimination of work on Sundays;
- the transfer of employees to other positions in the same undertaking;
- the spreading of dismissals over a period of time in order to allow time for a natural reduction in personnel numbers to occur;
- the training or retraining of employees to enable them to take up alternative positions in the same undertaking; and
- the reduction of wages.\textsuperscript{147}

According to Grogan,\textsuperscript{148} such measures further may include a moratorium on the hiring of new employees, short-time (which is often seen) and voluntary retirements (which also occur frequently in practice). Obviously the above measures, do not constitute an exhaustive list. Certainly, any reasonable measures to avoid retrenchments will be allowed by the Labour Court.

- **Measures to minimise the number of dismissals**

  "At this stage of the consultation process, the consulting parties are in agreement that the retrenchment is inevitable."\textsuperscript{149}

\textsuperscript{146} Supra 247.
\textsuperscript{147} Mkhize & Others v Kingsleigh Lodge (1989) 10 ILJ 944 I (IC), where the Industrial Court stated that this is a viable alternative to retrenchment.
\textsuperscript{148} Supra 166.
\textsuperscript{149} Basson et al supra 247-248.
This implies that an extensive consultation process would have been held over the previous requirement, namely measures to avoid the dismissals. Only after such measures to avoid the dismissals were unsuccessful, may consultation proceed to this point. Once again, an exhaustive list of these measures cannot be given. It will depend upon the circumstances of each employer, but may include:

- the transfer of redundant employees to other positions or sections in the same undertaking;

- asking employees to volunteer for retrenchment (in practice this is often done when the employer contemplates retrenchments);

- the spreading of dismissals over a period of time in order to allow for a natural reduction in personnel numbers through, for example, resignations; and

- the training or retraining of employees to enable them to take up alternative positions in the same undertaking.

Du Toit et al,\textsuperscript{150} list the following measures in this regard:

- a moratorium on hiring new employees;
- the elimination of overtime;
- voluntary retrenchment;
- extended unpaid leave or temporary lay-off; and
- early retirement and voluntary reductions in working hours.\textsuperscript{151}

It seems as though these measures may overlap with the allowable measures to avoid the dismissals, which will be in order.

\textsuperscript{150} \textit{Supra} 404.

\textsuperscript{151} See also \textit{Manquidi v Continental Barrel Plating (Pty) Ltd} (1994) 15 \textit{ILJ} 400 (IC); \textit{Sage v Fourwinds Transport Co (Pty) Ltd} (1994) 15 \textit{ILJ} 1149 (IC); \textit{Bales v Reckitt & Colman (Pty) Ltd} (1993) 14 \textit{ILJ} 438 (IC).
• **Appropriate measures to change the timing of the dismissals**

Normally, the employer will want the retrenchment(s) to take place as soon as possible in order to save the organisation from further financial losses. The union, on the other hand, will, in practice, negotiate for a longer period for the employees to be employed. The purpose of this requirement is to consider all the relevant issues and to reach consensus on a realistic time, taking into consideration all the circumstances, when the dismissals will commence. According to Grogan,\(^{152}\) “[e]mployees are clearly in a strong position to draw out the consultation process considerably. Even if the union adopts delaying tactics, the onus is still on the employer to act fairly”.\(^{153}\)

• **Measures to mitigate the adverse effects of the dismissals**

In practice, assistance is usually given to the employee by the employer to find new employment, by giving the employee time off without loss of pay. The employee obviously will have to go for interviews, but this will be difficult without the assistance of the old employer. Making an office available to complete job applications and to arrange job interviews, giving a reference to the employee (certificate of service),\(^ {154}\) or giving priority to a dismissed employee if a vacancy arises, are all examples of measures to mitigate the adverse effects of the dismissals. Furthermore, the LRA\(^ {155}\) protects retrenched employees, due to the fact that the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement, constitutes an unfair labour practice. Normally, the agreement will stipulate a time limit; if it does not, the employer will only be bound for an equitable period.\(^ {156}\) The meaning of equitable period will be a factual question linked to the circumstances of each case.

Preference should be given to dismissed employees when re-hiring. The Code of Good Practice\(^ {157}\) states that “the employee may be re-hired after having been asked by the employer, and having expressed within a reasonable time from the date of dismissal a desire to be re-

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152 Supra 167.
155 S186 (2)(c).
156 *National Automobile & Allied Workers Union (currently NUMSA) v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509(A).
157 Item 12(1)(a).
“hired”. Regarding a time limit on preferential re-hiring, the Code states that “[t]he time limit must be reasonable and must be subject to consultation”. 158

Further protection is given to retrenched employees by section 186 of the LRA. It includes the scenario where an employer who retrenches a number of employees for the same or similar reason, offers to re-employ one or more of them but refuses to re-employee others. This conduct by the employer will constitute a dismissal for purposes of the LRA.

In Grogan’s 159 view, it is uncertain what the drafters had in mind with this provision. He then agrees that it seems as though the employer must give time off to employees to look for other employment and so on.

Normally, in practice, re-employment agreements are the subject of consultation between the consulting parties, and might afford some possible assistance to the retrenched employees in future.

Once again, no exhaustive list of such measures can be given. It will depend entirely upon the circumstances of each individual case.

(b) METHOD FOR SELECTING EMPLOYEES TO BE DISMISSED
(SELECTION CRITERIA)

Section 189(2)(b) of the LRA must be read with section 189(7)(b) which provides that “if no criteria have been agreed, criteria that are fair and objective” need to be followed. The method for selecting the employees to be dismissed, is one of the items on which the consulting parties must attempt to reach consensus.

Basson et al 160 argues as follows:

“[F]airness entails that the criterion should not be arbitrary but relevant in that it relates to attributes or conduct of the employees such as length of service, ability, capacity and productivity and the needs of the business. Objectivity entails that the criteria should not depend on the subjective prejudices of the person making the selection.”

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158 Item 12(1)(b).
159 Supra 167.
160 Supra 249.
Once again, the above are not an exhaustive list, but the circumstances of each employer will steer the parties towards the selection criteria to be agreed on and used. The criteria are that selection criteria, if not agreed upon, must be fair and objective.

According to Grogan\textsuperscript{161} “\textit{[t]here is clearly a difference between the two standards [fairness and objectivity]}\textsuperscript{,162} a criterion for selection can be objective but unfair (eg all members of a particular race or trade union)”. In CWIU v Johnson & Johnson (Pty) Ltd\textsuperscript{,163} the Labour Court held that the selection of female employees on the basis that the remaining jobs were suitable only for males was unfair even though the employer later invited the women to apply for the jobs.

Certain selection criteria have crystallised through past cases. In \textit{Channon v University of Fort Hare},\textsuperscript{164} Landman J held that the onus is on the employer to show that it correctly applied selection criteria.

Interestingly, the courts have previously found that where the parties have agreed on selection criteria, selection should proceed accordingly, even if the court considers them to be unfair or subjective, except if they are discriminatory or contrary to the Act in some way.\textsuperscript{165} The principle that the employer need not consult the individual employees selected for retrenchment if consultation has taken place with a bargaining agent as specified in the LRA, was laid down in \textit{Polymer Holdings (Pty) Ltd v Llale}.\textsuperscript{166}

Basson \textit{et al.},\textsuperscript{167} listed the following examples of selection criteria that may be used (mainly where no agreement has been reached on any criteria):

- \textit{Seniority} - commonly known as the “\textit{last in first out}” principle or LIFO.

According to this principle, which is generally proposed by the unions, the employee with the shortest service record must be retrenched before employees with longer service records.

\textsuperscript{161} \textit{Supra} 169.
\textsuperscript{162} My insertion.
\textsuperscript{163} (1997) 9 BLLR 1886 (LC).
\textsuperscript{164} (2000) 21 ILJ 174 (LC).
\textsuperscript{165} See also \textit{Ntsangani v Golden Lay Farms Ltd} (1992) 13 ILJ 1199 (LC).
\textsuperscript{166} (1994) 15 ILJ 277 (LAC).
\textsuperscript{167} \textit{Supra} 250.
This criterion minimises subjectivity. LIFO is also recognized by the Code\(^{168}\) as a fair and objective criterion. But LIFO can also discriminate against employees on the grounds of age or race or gender (in the case of affirmative action employees). Therefore, it cannot as a selection criterion always be used as a fair and objective criterion and sometimes needs to be adapted. LIFO has the potential to cause serious disruption (for example, when followed throughout the entire workforce).

One department may, for instance, be regarded as the *engine room* of a company, driven by newly appointed, but highly skilled, employees. If these employees are dismissed, the company will face serious problems with productivity. It is thus important to take the operational needs of the employer into consideration when deciding on using LIFO as a criterion. The courts will sometimes countenance departures from LIFO to cater for the operational needs of the employer.\(^{169}\) In *Vermeulen v Cabelec Electrical & Mechanical Supplies (Pty) Ltd & Another*,\(^{170}\) the employee argued that his dismissal was unfair due to the fact that the employer did not apply LIFO through the whole of the company, but only in each subsidiary. The employee was one of only two external sales persons employed by the employer. He further argued that the group of companies employed eight external sales persons and if LIFO had been applied throughout the group he would not have been selected. Kennedy AJ held that it had to be taken into account that the extent to which an employer should go to *bump* employees with lesser service in an associate company in order to avoid retrenching, longer serving employees in another subsidiary, is a complex issue. One must take into account issues such as the connection between the subsidiary companies and the extent to which they were managed as a single entity.

The court *in casu* was not persuaded that the employee had made out a case that the application of LIFO throughout the company would have avoided his retrenchment. Once again, this is an example of the court’s willingness to adapt the LIFO principle.

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\(^{168}\) Item 9.

\(^{169}\) See for example *Ntangini & Others v Golden Lay Farms (Pty) Ltd* (1992) 3 *ILJ* 1199 (IC), where the court observed that it would be unreasonable to expect of an employer to replace male employees with females in “heavy work” areas.

\(^{170}\) (1999) 20 *ILJ* 2968 (LC).
The retention of skills is an important example where the court will adapt the LIFO principle. Special skills are always crucial for the continued operation of the business.\textsuperscript{171}

In \textit{Baloyi v M & P Manufacturing},\textsuperscript{172} the court found that where a small employer adopts LIFO together with skills and disciplinary records as selection criteria, it would be seen as a fair and objective criterion.

In \textit{Raad van Mynvakbonde & Andere v Harmony Goudmynmaatskappy Beperk},\textsuperscript{173} the court found that LIFO is not the only fair criterion. The court made this decision after carefully considering practices in other countries.

- \textit{Conduct}

If the employee was at all times made aware that the employer found a certain conduct unacceptable, conduct may be regarded as a fair and objective criterion. This criterion must be based on objectivity, such as attendance records and previous warnings. In this regard, the same principles apply as set out in schedule 8 of the Code of Good Practice, namely that the employee must have contravened a valid or reasonable rule or standard that the employee was aware of. This rule or standard must have been applied consistently by the employer in the past and the employee must have known about the rule (or reasonably ought to have known about it). If not, it can be said that this criterion will be unfair.

- \textit{Efficiency, ability, skills, capacity, experience, attitude to work and productivity}

This is the most common criterion used by employers, since they normally tend to retain skills in the workplace. The more efficient and able the worker, the more likely that he/she will not be selected to be retrenched. The period of employment normally does not play any role here. Even if an employee has only been in employment for a short period of time, he/she may still not be selected, but rather another employee who has been employed for a longer period but does not have the same skills as the worker with the shorter service.

\textsuperscript{171} See also \textit{Benjamin & Others v Plessey Tellumat SA Ltd} (1998) 19 \textit{ILJ} 595 (LC) at 604E-F.
\textsuperscript{172} Labour Court; case number J742/96.
\textsuperscript{173} (1993) 14 \textit{ILJ} 183 (IC).
It is important to note that this criterion must always be applied objectively and must also be able to be tested on that basis.

As is the case with conduct above, this criterion may only be used if the employee knew at all relevant times that the employer considered it to be important. It can be said that an employer will normally expect of an employee to be productive, have skills and be efficient.

In *Numsa v Dorbyl Limited t/a Dorbyl Automotive Technologies*,

the court found that the so-called *vienna test* administered by an independent party was fair and objective. The employer was considering outsourcing its press operations. As an alternative to this, some of the employees could be placed on a new production line that manufactured seal frames for the export market. Workers on this new line would be required to produce more efficiently than workers producing for the South African market. The employer used the selection criterion of whether the employees who had to work on the new lines were *trainable*. The court found this criterion to be objective and fair.

In practice, employers regularly use this criterion due to the fact that it is to the advantage of the production of the business. The main purpose of any business is to make profit. The employer will obviously choose those workers who will be able to make the best profit in the shortest times and in the cheapest manner.

• *Attendance*

As in the conduct criterion, the employer may only use this as a selection criterion if the employee knew that the absence from work was always regarded in a serious light. Once again, the employer cannot suddenly lay down strict rules on this requirement and immediately, based on past attendance records, choose those whose records prove to be the best. Consistency is also of importance when this criterion is used.

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174 Case number P365/99.
• **Bumping**

In *Shangase & Others v BKB Limited*, the Commissioner considered the concept of *bumping* and observed that this concept is not one to be applied automatically. The court also laid down guidelines in this regard, which will not be discussed here in detail.

The meaning of the word *bumping* was considered in *Amalgamated Workers Union of SA v Fedics Food Services*, where the Labour Court referred to Cheadle’s "*Retrenchment - The New guidelines*", which stated the following:

"[T]he LIFO principle is to retain long-serving employees at the expense of those with shorter service in like or less skilled categories of work."

In the *Fedics Food Services* case, Landman J also referred to *Reckitt & Colman (SA) (Pty) Ltd v Bales* and mentioned that *bumping* as a practice has been accepted in the Labour Appeal Court.

The court concluded that the procedures followed in the *Fedics Food Services* case were accordingly fair. The employer in this case conducted a contract catering business. One of its contracts was cancelled and led to the retrenchment of the employees working on that contract. The dismissed employees alleged their dismissal to be unfair due to the fact that there were other employees with shorter service who worked on other contracts. The court held that the employer was in fact justified in not *bumping* employees with shorter service.

• **Early retirement**

This a criterion that is often used, but only on the basis that the employee consents to it. If not, it can be regarded as an automatically unfair dismissal, due to discrimination on the basis of the employee’s age. The employer is likely to want to retain the services of fitter

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175 CCMA arbitration KN21906, dated 21 April 1999.
177 (1985) 6 ILJ 127 at 137.
178 Supra.
179 (1994) 15 ILJ 782 (LAC); (1994) 8 BLLR 32 (LAC).
180 Supra.
181 See Basson et al *supra* 252 for the factors that the court took into consideration.
employees more than those who have reached retirement age. If this criterion has been applied, LIFO is normally applied thereafter.

• **Volunteers**

It also occurs frequently that the employer will ask for any volunteers, *ie* employees who voluntarily want to be retrenched, before applying any selection criteria.

In practice, it is often seen that some of the employees volunteer to be retrenched and then start their own business with the retrenchment package that they have received.

• **Non-residency**

Although the court found in *National Union of Metalworkers of SA & Others v Televisions & Electrical Distributors (Pty) Ltd*\(^{183}\) that this may be a fair criterion, it remains a risk due to the fact that it can also be found to be an automatically unfair dismissal discriminating against certain employees who reside in certain uncommon areas, for example black employees who do not reside near the workplace but in a black neighbourhood miles away from the workplace.

• **Double-income families**

This criterion was held to be *prima facie very commendable and considerate* in *Manquidi & Others v Continental Barrel Plating (Pty) Ltd*,\(^{184}\) where both the husband and wife worked for the same employer. Once again, this may amount to an automatically unfair dismissal as discussed above.

• **FIFO or “first in first out”**

This criterion was held not to be acceptable in *United People’s Union of SA v Grinaker Duraset*.\(^{185}\) It is also contrary to the commonly used LIFO principle. According to *Channon*

\(^{183}\) (1993) 14 *ILJ* 738 (IC).

\(^{184}\) (1994) 15 *ILJ* 400 (IC).

\(^{185}\) (1998) 19 *ILJ* 107 (LC).
it is the employer that bears the onus of showing that it correctly applied selection criteria. The employer needs to prove that the dismissal was a fair one. Not choosing fair selection criteria, can make the dismissal unfair.

(c) SEVERENCE PAY

A detailed discussion on this aspect will follow in Chapter 6, as well as the effect that a transfer of a business has on severance pay. The meaning of alternative employment will also be discussed.

3.1.3 WRITTEN DISCLOSURE OF RELEVANT INFORMATION

Section 189(3) of the LRA states that “[t]he employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information”.

This section must be read with section 16 of the LRA which states as follows:

“Whenever an employer is consulting … the employer must disclose to the … (other party) all relevant information that will allow (the other party) to engage effectively in consultation …”

The required information must be disclosed to the employees in writing. If the information is merely given verbally, the dismissal will be unfair. To be given the information is a right of the employee afforded to him/her by the LRA. The list contained in section 189(3) of the LRA is not exhaustive, hence the wording “but not limited to”. All relevant information must be given and the employees are entitled to request this information.

It might occur that the employee requests information not listed in section 189(3). Whether the requested information is relevant will be a factual question depending upon the circumstances of each case. In Somers v Friedrich-Naumann-Stiftung it was found by MacRobert AJ that even if the employer is of the opinion that there are simply no alternatives to retrenchment, this does not excuse it from its duty to disclose the relevant information.

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186 v University of Fort Hare, (2000) 21 ILJ 175 (LC).
187 See s197 of Act 66 of 1995, as amended.
188 See also SA Commercial Catering & Allied Workers Union & Others v Pep Stores (1998) 19 ILJ 1226 where it is also stated that relevance must be connected to the purpose of disclosure.
189 Labour Court, case number CS85/98.
Section 16(3) of the LRA, stipulates inter alia that “whenever an employer is consulting … the employer must disclose to [the other party] all relevant information that will allow [the other party] to engage effectively in consultation …” In other words all relevant information is basically all the information that the other party needs to effectively engage in consultation. The latter is also a factual question that needs to be determined by the facts of each particular case. According to Grogan AJ in *United People’s Union of SA v Grinaker Duraset*, the other party is not entitled to generalised information unless such is shown to be relevant.

The other party must lay the foundation for the relevance of this information. In *Benjamin & Others v Plessey Tellumat SA Ltd*, the union was of the opinion that it was overwhelmed by information. Basson J found that it was not unfair of the employer to overwhelm the union with information if the union was given enough time to study the information that had been provided.

In *National Union of Metalworkers of SA & Others v Comark Holdings (Pty) Ltd*, the court held that if the reason for retrenchment relates to financial difficulties of the employer, it may be required to make its financial statements available to the other party. If the reason for the retrenchment is not financially based, these statements will not be relevant and it will not be necessary to disclose them to the other party.

The employer, if it accepts that the requested information is relevant, cannot merely withhold it due to the fact that it is unavailable.

It must take whatever steps are necessary to obtain this information. The court further stated that the onus is in fact on the employer to show that the information requested is not relevant.

In *Baloyi v M&P Manufacturing*, Revelas J states that section 189(3) does not prescribe that the information provided must be in strict compliance with what the party requesting the

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194 Labour Court, case number J742/96.
information has stipulated. The test of whether or not there was proper disclosure of information is not a subjective one.\textsuperscript{195}

It is important to note that the employer must prove that, in a dispute concerning the disclosure of information, the information it refuses to give is irrelevant.\textsuperscript{196}

If there is a dispute about which information must be disclosed, any party to the dispute may refer the dispute in writing to the Commission. If the dispute remains unresolved after conciliation, the party who referred the dispute may refer it for arbitration.\textsuperscript{197}

Section 16(5) of the LRA places a limit on the information which must be disclosed. It states as follows:

\textquote{An employer is not required to disclose information –}

\begin{itemize}
\item[(a)] that is legally privileged;
\item[(b)] that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
\item[(c)] that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
\item[(d)] that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.”
\end{itemize}

Each one of these limitations will now be examined:

- **Legally privileged information**

According to Basson \textit{et al},\textsuperscript{198} the Supreme Court has laid down two requirements for a document to be legally privileged. The first is that it must have been obtained for professional legal advice. In order to fulfil this requirement, the document has to have been prepared for that purpose. If it was originally obtained for another purpose and subsequently submitted for legal advice, it will not be regarded as privileged.

\textsuperscript{195} See also \textit{Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union} (1999) 20 ILJ 89 (LAC).
\textsuperscript{196} S189(4)(b) of Act 66 of 1995, as amended.
\textsuperscript{197} S16 of Act 66 of 1995, as amended.
\textsuperscript{198} \textit{Supra} 256.
Secondly, the document must have been obtained in reference to actual pending litigation which is contemplated or anticipated. This latter question is of a factual nature which must be determined upon all the circumstances of the specific case.

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

Any information that will impact negatively upon the employer’s competiveness, will be confidential: for example, trade secrets, price concessions obtained from customers and price reductions which have been negotiated with suppliers of raw material or of components necessary for the production of the employer’s products.

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

If the employee consents to this information being disclosed, the employer may make it available to the other party. Private personal information includes an employee’s medical records which are compiled following regular medical check-ups with the company doctor. In practice, this information will normally be requested by the other party if the subject-matter concerns a specific employee. The employer has a duty to keep personal information of each employee in confidence, hence the protection afforded by the LRA.

Although section 16(5) of the LRA prohibits the employer from disclosing the information as discussed, this information may still be relevant. Section 16(11) is very clear that legally privileged information and information which the employer cannot disclose as a result of any law or court order can never be disclosed. Section 16(6-12) however, provides a mechanism that may create the exception to the general rule.

As discussed above, any party may refer a dispute regarding the disclosure of information to the CCMA for conciliation and, if unresolved, for arbitration. According to Basson J in *Denel Informatics Staff Association & Another v Denel Informatics (Pty) Ltd*, the Labour Court does not have jurisdiction to adjudicate a dispute on the disclosure of information. It must have been referred to the CCMA for conciliation and possible arbitration.

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199 S16(5)(c) of Act 66 of 1995, as amended.
200 S16(5)(d) of Act 66 of 1995, as amended.
201 (1999) 20 ILJ 137 (LC).
In such disputes, the Commissioner needs to decide whether or not the information is relevant. If it is in fact 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. Once again, this is a factual question that needs to be answered within the particular circumstances of each case.

Serious implications may indeed be caused for the employer or employee if such information is disclosed. For this reason, the legislature provided some safeguards. The Commissioner may make an order to limit the harm that the disclosure is likely to cause.

When making such an order, the Commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of section 16 of the LRA at that workplace and may refuse to order the disclosure of information, or any other confidential information which might otherwise be disclosed, for a period specified in the arbitration award. If a dispute further ensues about an alleged breach of confidentiality, the Commissioner may order that the right to disclosure of information in that workplace be withdrawn for a stipulated period. According to Basson et al.\textsuperscript{202} “[t]his represents a fairly serious curtailment of the other party’s right to information as such an order apparently covers all relevant information”.

It is important to note further that the intention of the legislature, according to Relevas J in \textit{O’Doyle v All Circle Screenprint CC},\textsuperscript{203} was not to treat all employees alike. A branch manager for instance, as in the case under discussion, according to the court, will probably have all knowledge necessary on such aspects as the number of employees likely to be affected by a retrenchment. The court concluded on this basis that it would, \textit{inter alia}, be absurd to have selection criteria to apply to the applicant who was the only branch manager in a small company in the process of closing down. Further, the court ruled that section 189(5) and 189(6) of the LRA would also not be applicable.

\textsuperscript{202} Supra 257.
\textsuperscript{203} (1999) 20 \textit{ILJ} 191 (LC).
The applicant could not expect Mr Davies, the representative of the employer, to put in writing a *proposed method* for selecting which employees to dismiss, since the applicant most likely had more knowledge of this fact than Mr Davies.

### 3.1.4 THE EMPLOYER MUST ALLOW THE OTHER PARTY TO MAKE REPRESENTATIONS

Section 189(5) of the LRA states the following:

> “The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections 2, 3 and 4 as well as any other matter relating to the proposed dismissals.”

Surely the purpose of the *consultation process*\(^{204}\) is to allow the other party to make representations.

As in the case of a dismissal for misconduct, the employee party must also be given the opportunity to give reasons why he/she must not be retrenched. This gives effect to the *audi alteram partem* principle.

In practice, this subsection will have the effect that the employee party must make representations with regard to every aspect mentioned in subsection 2. Basson *et al*\(^{205}\) mention that this may include issues such as *the negative socio-economic impact that a mass dismissal would have on the local community*. The content of this non-exhaustive list of subject-matters over which representations may be made, is once again a factual question and must be determined after considering the circumstances of each specific case.

The list is not exhaustive, since the employer must allow representations about any other matter relating to the proposed dismissals. The employer must allow representations about the disclosure of information.

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\(^{204}\) My emphasis.

\(^{205}\) *Supra* 258.
3.1.5 THE EMPLOYER MUST CONSIDER AND RESPOND TO THE REPRESENTATIONS MADE BY THE OTHER PARTY

Section 189(6) of the LRA requires the following:

“(a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with him, the employer must state the reasons for disagreeing;
(b) If any representation is made in writing the employer must respond in writing.”

It will serve no purpose if the other party makes representations and they are not considered by the employer. It is a consultation process which needs the co-operation of both parties. The employer must consider the representations and apply its mind to it. The employer cannot merely look at the representations and simply not consider each of them. It needs to go into an in-depth search in order to respond to them. If the employer then disagrees with the representations, it must state its reasons for disagreeing. The response by the employer must also be in writing if the representation was made in writing.

In Visser v Sanlam,206 Davies AJA mentioned that “[c]onsultation as envisaged in section 189(2) is a continuous process between the parties.” The court further stated in this matter that it is a bilateral process in which obligations are imposed on both parties to consult in good faith and in an attempt to achieve the objects of this section. In Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union,207 the court stated that it is a primary obligation of the employer to attempt to reach consensus.

3.1.6 THE SELECTION OF EMPLOYEES FOR DISMISSAL

According to section 189(7) of the LRA:

“[t]he 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.”

As discussed above, one of the four requirements for substantive fairness of a large-scale

206 (2001) 22 ILJ 666 (LAC) at 671 G.
207 (1999) 20 ILJ 89.
dismissal by a big employer, is that the selection criteria used by the employer must be fair and objective. Even if the parties have agreed on selection criteria, they must still be fair and objective. This requirement will further normally become relevant once the parties have accepted that the dismissal is necessary and unavoidable.

3.1.7 PAYMENT OF SEVERANCE PAY

A detailed discussion on this aspect will be given in Chapter 6.

4. LARGE-SCALE DISMISSAL BY A BIG EMPLOYER

The LRA, and more specifically section 189A thereof, introduced additional requirements for procedural fairness in the case of a retrenchment by a big employer. From the outset, it must be mentioned that a big employer, defined as an employer that employs more than 50 employees, must also comply with the seven requirements for procedural fairness as discussed above. A small employer is defined as an employer who employs 50 or less employees.

Section 189(1) of the LRA also distinguishes between a large-scale dismissal and a small-scale dismissal by a big employer. A large-scale dismissal by a big employer is a dismissal of a stipulated minimum number of employees relative to the size of the employer. In terms of section 189(A)(1)(a), such a dismissal occurs when an employer contemplates dismissing at least:

- 10 employees - if it employs more than 50 but not more than 200 employees;
- 20 employees - if it employs more than 200 but not more than 300 employees;
- 30 employees - if it employs more than 300 but not more than 400 employees;
- 40 employees - if it employs more than 400 but not more than 500 employees; or
- 50 employees – if it employs more than 500 employees.

In terms of section 189(A)(1)(b), a dismissal by a big employer of fewer employees than the prescribed minimum listed above might still constitute a large-scale dismissal. This will be the case if the number of employees to be dismissed, together with the number of employees
that have been dismissed in the past 12 months for operational requirements, is equal to or exceeds the numbers specified above.

The additional requirements introduced by section 189A are, firstly, that either party has the right to ask the CCMA to appoint a facilitator to assist the parties during the consultation process and, secondly, the introduction of a moratorium of 60 days during which the employer may not dismiss.

Each of these requirements will now be discussed:

- **The facilitation route**

In terms of section 189A (3)(a), the employer may ask the CCMA to appoint a facilitator to assist the parties during consultation. Important to note is that only the CCMA may be approached to appoint a facilitator. This request must further be made at the same time as the employer gives notice to the employee of the contemplation of a large-scale dismissal. If the employer does not ask the CCMA to appoint a facilitator, the employee party representing the majority of the employees that the employer contemplates dismissing, may ask for a facilitator to be appointed. This request by the employee party must be made to the CCMA within 30 days of receipt of the employer’s notice of the contemplated dismissal.

Section 189A(4) stipulates that if neither one of the parties has asked for a facilitator to be appointed, they may still agree to ask the CCMA to appoint a facilitator. Section 189A(2)(c) states that the parties may also agree to vary the time periods for facilitation. According to section 189A(5), once the facilitator has been appointed the facilitation must be conducted in terms of the regulations made by the Minister of Labour for the conduct of such facilitations. The Minister, according to Basson et al., may make regulations relating to the time period, and the variation of time periods for facilitation; the powers and duties of facilitators; the circumstances in which the CCMA may charge a fee for appointing a facilitator and the amount of the fee; and any other matter necessary for the conduct of the facilitations.

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208 *My emphasis.*

209 *Supra* 262.
As mentioned above, section 189A(7) prohibits the employer from dismissing before 60 days have elapsed from the date on which the employer gave notice in terms of section 189(3) of contemplating a large-scale dismissal. The legislature, by introducing the moratorium, obviously attempted to limit the adverse effects of the dismissal by postponing the time period when notice of termination of employment may be given. It is also a good warning to the employee that there is a possibility of a retrenchment and accordingly gives the employee the opportunity to consider finding alternative employment. Once the 60 days have elapsed, the employer may give notice of termination of the contracts of employment to those employees that have been selected for dismissal.

It is important to note that the notice may only be given in accordance with section 37(1) of the BCEA,\(^{210}\) which stipulates the following minimum notice periods to be given:

- one week, if the employee has been employed for six months or less;

- two weeks, if the employee has been employed for more than six months but less than a year;

- four weeks, if the employee has been employed for one year or more or is a farm worker or a domestic worker who has been employed for more than six months.

The employer may also make payment in lieu of notice in terms of section 37(1) of the BCEA.\(^{211}\)

Basson et al\(^{212}\) indicate the steps in the process where a facilitator is appointed:

- Section 189(3) notice of contemplated large-scale dismissal.

- Employer requests facilitator in section 189(3) notice or employee party requests facilitator within 15 days of s 189(3) notice; or parties agree to request facilitator after s 189(3) notices or 15 day period.

\(^{210}\) Act 75 of 1997, as amended.
\(^{211}\) Act 75 of 1997, as amended.
\(^{212}\) Supra 263.
• Appointment of facilitator.

• Facilitation.

• Notice of termination of employment contracts in terms of s 37(1) of BCEA.

• **The non-facilitation route**

Basson *et al*[^213] states that if none of the parties request a facilitator, section 189A stipulates that a minimum period of 30 days, calculated from the date on which the employer gave notice in terms of section 189(3) of contemplating a large-scale dismissal, must have elapsed before a dispute about the contemplated dismissal may be referred to the CCMA or a council for conciliation (section 189A(8)(a)). Section 64(1)(a) prescribes a minimum conciliation period at the CCMA or council of 30 days. Section 189(A)(8) provides that the employer may not dismiss until the 30-day conciliation period has elapsed.

This means that the soonest that an employer would be able to dismiss will be after the expiry of both the 30-day periods, *ie* 60 days from the date on which it gave notice in terms of section 189(3) of contemplating a large-scale dismissal.

Once the 60-day period has expired, the employer may give notice of termination of the contracts of employment of those employees that have been selected for dismissal.

Minimum notice must be given as regulated in section 37(1) of BCEA. Alternatively, the employer may make payment in lieu of notice.

The following list outlines the steps in the process where no facilitator is appointed:

• Section 189(3) notice of contemplated large-scale dismissal.
• Consultation in terms of section 189.
• Expiry of 30 days from section 189(3) notice.
• Referral of dispute to CCMA or council for conciliation.

[^213]: *Supra* 263.
• Expiry of 30 days.
• Notice of termination of employment contracts in terms of section 37(1) of BCEA.

5. SUMMARY

Since most disputes that are adjudicated in the Labour Court concern the procedural fairness of retrenchments, it was necessary to discuss this topic in great detail. Many employers, even today, do not have an expert in their employ to advise them on the correct procedures that needs to be followed when retrenching employees. It is submitted that this is also the reason why the Labour Court is adjudicating the number of disputes that it currently does.

If employers are better advised about correct procedures, the above situation could be avoided, especially when big employers contemplate retrenching. This is also, it is submitted, the reason why the LRA has been amended to cater for a facilitation route in order to assist the employer in complying with this complicated set of procedures. Obviously, this will lead to fewer disputes and the amendments are, it is submitted, a great improvement to the previous section 189 of the LRA.
CHAPTER 6
SEVERANCE PAY

1. GENERAL

According to section 189(2)(c) of the LRA, the parties must attempt to reach consensus on severance pay for dismissed employees. This follows the obligations that section 41(2) of the BCEA places on the employer. It specifically states that: “an employer must pay an employee who is dismissed for reasons based on the employer’s 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.”

The above stipulates the minimum severance pay that must be paid to retrenched employees. The requirement to pay severance pay is one of the requirements for procedural fairness of a retrenchment.

The words at least in section 37(2) of the BCEA are an indication that the employer and the employee may consult over this point in an attempt to reach consensus with regard to the severance pay that will be paid. Not less than one week’s remuneration for each completed year of service must be paid.

Section 189(2) (c) of the LRA stipulates that the consulting parties must attempt to reach consensus on, inter alia, severance pay for the dismissed employees. Nothing prohibits the consulting parties from reaching consensus on an amount of severance pay that exceeds the minimum prescribed by section 41(2) of the BCEA.

The question may be asked what severance pay exactly entails. Section 45(5) of the BCEA gives some guidance by stating the following:

“The payment of severance pay in compliance with this section does not affect an employee’s right to any other amount payable according to law.”

214 My emphasis and view.
It is thus safe to state that severance pay does not include any other amount which is payable by law to an employee whose services have been terminated.

Item 10 of the Code of Good Practice\textsuperscript{215} states \textit{inter alia} that “\textit{[t]his minimum requirement does not relieve an employee from attempting to reach consensus on severance pay during the period of consultation. The right of the trade union, through collective bargaining, to seek an improvement on the statutory minimum severance pay is not limited or reduced in any way”}.

According to Du Toit \textit{et al}\textsuperscript{216} \textit{“[c]ontroversy had existed under the previous Act around the question whether employers were under a duty to offer severance pay to retrenched employees. On the one hand there was a view that a failure to pay severance pay constituted an unfair labour practice. On the other hand it was argued that severance pay was a question for collective bargaining”}.\textsuperscript{217}

Du Toit \textit{et al}\textsuperscript{218} correctly state that the collective bargaining subject-issue has the weakness that it does not take into account that, at the point of retrenchment, the retrenched employee has little or no bargaining power. Retrenchees had to be protected by public policy and therefore the current LRA and BCEA have resolved the question of severance pay, as stated above.

Before the current LRA, the Industrial Court sometimes awarded severance pay to retrenched employees.\textsuperscript{219}

It is important to note that the legislature has granted the Minister the discretion to vary the amount by notice in the \textit{Government Gazette}, after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council.\textsuperscript{220}

In the revoked section 196(5) of the LRA, the employer was permitted to seek exemption from the duty to pay severance pay.

\textsuperscript{215} Schedule 8 of Act 66 of 1995, as amended.
\textsuperscript{217} See also Cameron \textit{et al} \textit{The New Labour Relations Act} (1989) 128-129.
\textsuperscript{218} \textit{Supra} 406.
\textsuperscript{219} See \textit{Ntuli v Hazelmore Group} (1998) 9 \textit{ILJ} 709 (IC).
\textsuperscript{220} S196(2) of Act 66 of 1995, as amended (repealed).
This was contrary to the BCEA, which does not permit the Minister to exempt employers from this duty.

One can argue that severance pay is a payment made to the retrenched to make good for the negative effect that retrenchment has on the employee who loses his/her work. It will provide necessities in the difficult time which the employee faces when being retrenched.\textsuperscript{221}

When one looks further at section 41(2) of the BCEA, the word \textit{remuneration} is used. The term \textit{remuneration} is defined in section 213 of the LRA to mean payment in money or in kind, or both in money and in kind. \textit{Payment in kind}, unfortunately, is not defined in the LRA, but according to Basson \textit{et al}\textsuperscript{222} “is commonly understood to include things such as accommodation, meals etc”.

Section 35(5) of the BCEA further gives the Minister the authority to, by notice in the \textit{Government Gazette}, determine whether a particular category of payment forms part of an employee’s remuneration. Further, the word \textit{continue} is also used in section 41(2) of the BCEA and is a definite indication that the service of the employee must have been of a continuous nature with the particular employer. However, section 84 of the BCEA states that for purposes of determining the length of an employee’s employment, \textit{previous employment with the employer},\textsuperscript{223} must be taken into account if the break between the periods of employment is less than one year. This was confirmed in \textit{Insurance & Banking Staff Association obo Aucamp v Old Mutual Life Insurance Co},\textsuperscript{224} where the Commissioner held that sections 41(2) and 84 of the BCEA are not irreconcilable and that previous employment should be taken into account if the break between the periods of employment was less than one year.

An important question arose in the matter of \textit{Borman Katz Attorneys v Brand NO & Others},\textsuperscript{225} namely whether one would also take into account the years of service rendered prior to the coming into operation of the BCEA, when calculating the severance pay payable to an employee.

\textsuperscript{221} My view.
\textsuperscript{222} \textit{Essential Labour Law} Volume 1 (2002) 3\textsuperscript{rd} ed 260.
\textsuperscript{223} My emphasis.
\textsuperscript{224} (2000) 21 \textit{ILJ} 2515 (CCMA).
\textsuperscript{225} (2001) 22 \textit{ILJ} 128 (LC) at 135B.
Allan Rycroft\textsuperscript{226} is of the opinion that “it is arguable, at least, that the legislature did not clearly intend the ...[BCEA, 1997] to have a retroactive effect”. In the Burman Katz Attorneys case,\textsuperscript{227} the Labour Court gave the obvious answer that “[p]arliament is deemed to know the law and it can safely assumed that parliament clearly intended to address the issue of severance pay and to link it to completed years of service served before section 196 of the LRA came into operation”.

In the case under discussion, the years of service that had been completed before the coming into operation of both the LRA and BCEA, were taken into account.

In \textit{EHCWAWU obo Tshabalala \& Others v M \& P Bodies CC},\textsuperscript{228} Maserumule AJ held that employees cannot waive their right to severance pay by the signing of an acknowledgement of acceptance of the money in full and final settlement of all claims rising out of the termination of their services. In this matter, the provisions of section 189 of the LRA were not complied with and the retrenchment was held to be unfair.

In \textit{Gross v Die Sinodale Fonds van die Nederduiste Gereformeerde Kerk \& Another},\textsuperscript{229} the Pension Funds Adjudicator ruled that a severance package does not have any impact on or affect a pension benefit receivable in accordance with the Pension Funds Act 1965.

In \textit{Secker v Beacon Sweets \& Chocolates (Pty) Ltd},\textsuperscript{230} the Commissioner found that “the CCMA has jurisdiction under section 41(1) and (2) to determine any dispute regarding the failure and/or refusal of an employer to pay an agreed severance package, and that section 41 does not restrict the CCMA’s jurisdiction only to determining whether an employee is entitled to the statutory minimum”.

The Commissioner found that the inclusion of the words \textit{at least} in section 41(1) contemplates disputes about payments over and above the statutory minimum, and that the word \textit{entitlement} in section 41(6) is also relevant.

\begin{table}
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\textsuperscript{226} \textit{Severance Pay: The Emerging Legal Issues} (2001) 22 \textit{ILJ} 2131 at 2134. \\
\textsuperscript{227} Supra. \\
\textsuperscript{228} (1999) 20 \textit{ILJ} 1787. \\
\textsuperscript{229} Tribunal of the Pension Funds Adjudication PFA/GA/53/98/NJ, 14 September 1999. \\
\textsuperscript{230} (2000) 21 \textit{ILJ} 2767 (CCMA) at 2768B-C. \\
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“Entitlement derives either from the Act or an agreement, whether collective or individual. The Commissioner expressed the view that, while the CCMA may decide disputes concerning the alleged non-payment of entitlements, it may not usurp the role of the Labour Court in pronouncing on the extra-contractual fairness of severance payments.”

Also in SA Typographical Union obo Van As & Others v Kohler Flexible Packaging (Cape) (A Division of Kohler Packaging Limited), Wagley J ruled that where an employee relies on a collective agreement with regard to severance pay, the collective agreement will stand until it has been cancelled. In certain circumstances it can be shown that the collective agreement is not binding on the parties but in this matter it was held to be binding on them.

2. THE MEANING OF ALTERNATIVE EMPLOYMENT

An employer’s duty to pay severance pay is not absolute. Section 41(4) of the BCEA provides that “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)”.

The question of whether or not the employee’s refusal is unreasonable is a factual one. However, a further question that needs to be answered is whether the alternative employment must also be reasonable. Although it is not specifically stated in the above section of the BCEA, the Code of Good Practice, gives guidance in this regard by stating that “[r]easonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee’s refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the employee’s personal circumstances play a greater role”. In WM Cameron Dow v Price Furniture & Appliance Discounters, the court laid down the principle that such alternative employment must be suitable to that particular employee, taking into account his/her skills, aptitude, experience, wages, hours, responsibility and status. The court also

231 (1997) 10 BLLR 1364 (LC).
233 (1991) 2(2) SALLR 17 (IC).
stated that none of the factors are decisive and that the court must determine whether a reasonable offer had been made to the employee.\(^\text{234}\)

The second element above, being the reasonableness of the employee’s refusal, deals with the employee’s personal circumstances that have caused the employee to refuse the offer. The court must determine why the employee has refused the alternative employment and must consider whether there are acceptable reasons for it, looking at the personal circumstances.

The above two elements are of importance since they will determine whether the employee will receive a retrenchment package or not.

**Alternative employment** and specifically the meaning thereof, has also been discussed in some detail in the past. In *Edworthy v Amalgamated Banks of South Africa Limited & Allied Group Ltd*,\(^\text{235}\) Pienaar M stated that the mere fact that the alternative position offered to the employee entails a reduction in salary or a reduction in grade does not mean that such alternative position does not constitute suitable alternative employment.

In *John Daniël Edward Anderson v Fosesco (Pty) Ltd*\(^\text{236}\) the Court referred to the *life boat* offer principle. This principle was derived from the metaphor of a *sinking ship* used by Van Niekerk SM in *Young & Another v Lifegro Assurance*,\(^\text{237}\) which entails that when an offer of suitable alternative employment has been made by an employer to an employee whose position has become redundant, the employer (the sinking ship) must, under the circumstances, still investigate the matter to offer the best alternative position possible.

The question could be asked whether this is an ideal situation due to the fact that the employee, who is not at fault in the case of a retrenchment, must loses his/her retrenchment package due to alternative employment which is offered but may not be acceptable to the employee.

\(^{234}\) See also *Jacobs v Prebuilt Products (Pty) Limited* (1998) 19 *ILJ* 1100 (IC) at 1105, where the Industrial Court considered the English Employment Protection Consolidation Act of 1978 which has the same requirement.

\(^{235}\) (1994) 5(4) *SALLR* 60 (IC).

\(^{236}\) (1992) 3(9) *SALLR* 17 (IC).

\(^{237}\) (1990) 11 *ILJ* 1127.
It is submitted that the CCMA Commissioners should thoroughly look at the personal circumstances of the employees to determine whether or not the offer constitutes a reasonable offer.

In *Schoeman and Rossouw v Samsung Electronics (Pty) Ltd*, Landman J was of the opinion that an employer needs to survive and to prosper economically. Adaptations will be required for this and the employer will thus need to be flexible in its approaches.

Landman J referred to the position in England where employers had utilised redundancy pay as a means of securing change in the workplace. Payment of redundancy pay is a legitimate means of employers ridding themselves of employees who resist change.

In *Purefresh Foods (Pty) Ltd v Dayal & Another*, a more recent case, Jammy AJ found that the language of section 196(3) is unambiguous. He went on to state that three requirements must be satisfied for section 196(3) of the LRA to apply in its literal sense, namely:

(a) there must be an offer of alternative employment either with the retrenching or another employer;

(b) that offer must emanate from the retrenching employer; and

(c) the offer must be refused and such refusal must be unreasonable.

The second requirement was absent, which had the consequence that the employee was entitled to severance pay.

In *Van Rensburg v Austen Safe Co*, Revelas J stated that the acceptance by the employee of the offer of alternative employment must be unequivocal. If not, the employer may withdraw the offer.

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238 *(1997) 10 BLLR 1364 (LC).*
239 *(1998) 19 ILJ 1590 (LC).*
240 See also *South African Workers Union v Freshmark (Pty) Ltd (CCMA) EC7095.*
241 *(1998) 19 ILJ 158 (LC).*
The repealed section 196(6) of the LRA authorises a party to refer a dispute with regard to the entitlement of severance pay to either a council (if applicable) or to the CCMA. The Labour Court thus has no jurisdiction to decide such an issue, except where it is on review before it or where it is brought simultaneous with a dispute with regard to unfair retrenchment. Where the dismissal is accepted to be fair by the employee, and the only dispute is the payment or not of severance pay, the CCMA must determine this dispute.

In *Sayles v Tartan Steel CC*,\(^\text{242}\) the court found that the employee’s refusal, if offered a position that amounts to a demotion, will probably not be regarded as unreasonable.

Disputes with regard to the payment of severance pay are considered in a serious light due to the fact that severance pay “*is meant to cushion the blow of unemployment, as a gratuity for services rendered, and as compensation for employees who have lost their jobs through no fault of their own.*”\(^\text{243}\)

3. **TRANSFER OF A BUSINESS: THE EFFECT ON SEVERANCE PAY**

It is not the intention to discuss this topic in detail. Surely it can be argued that this topic in itself can be used as the subject of a detailed thesis, especially when the provisions of the Insolvency Act\(^\text{244}\) are taken into consideration. It is however important to state that section 197 of the LRA, which deals with this topic, is important to determine the severance pay that must be paid to the retrenched employees.

In *SA Chemical Workers Union v Engen Petroleum Limited & Another*,\(^\text{245}\) Landman J referred to the rights and obligations in section 197 of the LRA (before the recent amendment) and ruled that severance pay is also considered to be a *right* of the employee.

According to Basson *et al.*,\(^\text{246}\) the common law determines that no employee may be forced to continue his or her contract of employment with the new employer when a business is sold. It is also correctly stated by these authors that the selling of a business or the insolvency thereof

\(^{242}\) (1999) 20 *ILJ* 647 (LC) at 654F-G.

\(^{243}\) Grogan *Workplace Law* (1998) 3\textsuperscript{rd} ed 171.

\(^{244}\) Act 24 of 1936.

\(^{245}\) (1998) 19 *ILJ* 1568 (LC).

\(^{246}\) *Supra* 266.
have caused labour lawyers many problems through the years and that uncertainty was created by the old section 197 of the LRA, being, in short, the following:

- transfers in the normal course of business and transfers due to insolvency were based on similar principles;
- key concepts such as “transfer as a going concern” were not defined;
- it was not expressly stated that employees had the right to have their contracts transferred under such circumstances;
- it did not address the conflict between the Insolvency Act 24 of 1936 and section 197 of the LRA;
- questions arose as to what the rights of the parties actually were in the case of a transfer.

A new section 197 of the LRA has been developed were it deals with:

(a) the transfer of a contract of employment when a business is sold as a going concern and  
(b) the transfer of a contract of employment in the case of insolvency.\textsuperscript{247}

The wording of the above sections is clear and, as already stated, a detailed discussion will not be given in this regard. Basson \textit{et al}\textsuperscript{248} also discuss this subject in some detail.

In summary, it can be stated that when the business, which includes the whole or any part of any business, trade or undertaking or service, is transferred by one employer to another, the new employer is automatically substituted in the place of the old employer, which has the consequence that all the rights and obligations at the time of the transfer of the old employer will be afforded to the new employer. The transfer does further not interrupt an employee’s continuity of employment and an employee’s contract of employment continues with the new employer as with the old employer.\textsuperscript{249} Further, the new employer is also bound by any

\textsuperscript{247} S197A and B of Act 66 of 1995, as amended.  
\textsuperscript{248} Supra chapter 14.  
\textsuperscript{249} S197(2) of Act 66 of 1995, as amended.
arbitration award made in terms of the LRA, the common law or any other law and by any collective agreement binding in terms of section 23 of the LRA.

The Labour Court has the task of examining whether a *transfer of business* has taken place and further, whether it was transferred as *going concern*. One can surely argue that the Labour Court is now obliged to determine issues which do not really fall within its ambit. Many decided cases have already emerged on these two questions, which will not be discussed.

In practice, many employers face the problem that when they purchase a business as a going concern, they will be subjected to all the rights the employees had in terms of their contract with the seller (for example retrenchment packages in accordance with the number of years that the employee was employed by the old employer (seller)). In section 197(7) of the LRA, the legislature attempted to lay down strict principles in order to avoid confusion in the future and surely also disputes.

It *inter alia* states that the old employer must agree with the new employer to a valuation as at date of transfer of the severance pay that would have been paid to the transferred employees of the old employer. One can argue that this provision in the LRA will not take away the right of each employee to, in future, declare a dispute over the severance pay payable.

In other words, the employee surely cannot be bound by this agreement over severance pay by the old employer and the new employer. The purpose of this section, together with section 197(8) of the LRA, is surely to avoid disputes between the old employer and the new employer in the future.

It is important to note the case of *Western Cape Workers Association v Halgang Properties*\(^\text{250}\) where the court ruled that when retrenchment is considered prior to the transfer of the business as a going concern, the retrenchment will only be substantively fair if it is done based on the operational requirements of the old employer, and not those of the new employer.

\(^{250}\) (2001) 22 *ILJ* 1421 (LC).
Further, *Pama & Others v CCMA & Others*\(^251\) deals with the very important concept of *adequate alternative employment*. It was found in the latter case that where an employee of the old employer refuses *adequate alternative employment* with the new employer when faced with retrenchment by the old employer, he/she is not entitled to severance pay. Obviously the same principles as discussed in paragraph 6.2 above with regard to reasonableness of the alternative employment and *unreasonable refusal* thereof, will be followed.

Sections 197A and B of the LRA has been inserted to deal specifically with a transfer of a business due to insolvency. Without discussing this aspect, it is sufficient to state that, as a general rule, when the provisions of section 197A and B of the LRA have been complied with, it has the same effect as section 197, in other words the employee will also have the same rights as discussed above.\(^252\)

It is important to note however, that the parties, referring to the old employer or the new employer or both on the one hand, and the appropriate person or body referred to in section 189(1) of the LRA on the other hand, may agree in writing that the provisions of section 197 will not apply to them.

According to Basson *et al.*,\(^253\) “it is unclear how the new section 197A addresses the concerns raised in respect of insolvency transfers under the old section 197. Does this section mean that a provisional winding-up of the employer, the contract of employment terminate, only to be revived retrospectively in the case of a subsequent transfer with continuity of employment. If so, a host of practical problems arise”.

It accordingly seems that the practical problems and questions will continue to exist and that section 197, as amended, did not really, except for a few aspects, create clarity on the concept of the transfer of a business and accordingly, contracts of employment.

\(^{251}\) *(2001) 9 BLLR 1079 (LC).*

\(^{252}\) See also Basson *et al* *supra* 279-282 for a detailed discussion.

\(^{253}\) *Supra* 282.
CHAPTER 7

THE RIGHT TO STRIKE OVER RETRENCHMENT DISPUTES

1. GENERAL

Prior to the insertion of section 189A in the LRA, employees did not have any right to strike over a retrenchment dispute. The dispute had to be referred for conciliation to the CCMA and accordingly for adjudication to the Labour Court, as will also be discussed in Chapter 8.

Important to note is that section 189A does not afford an unlimited right to strike in this regard. It is only in certain limited circumstances that such action may be taken. Further, this section only applies to employees who employ more than 50 employees and who contemplate retrenching a certain number of employees (depending on the number of employees it employs and taking into consideration also the number of employees that it retrenched in the twelve months preceding the notice in terms of section 189(3) of the LRA). Only these employers may be the target of such strike action. The right to strike is further limited to disputes concerning the substantive fairness of the retrenchment only. This latter provision makes sense due to the fact that most disputes referred to the Labour Court for adjudication concern procedural fairness. Strike action must be limited in some way, albeit through this provision.

This topic strictly falls within the ambit of collective labour law, but is an important amendment to the LRA which may have various and serious consequences.

It is submitted that this amendment opens the gates to a chaotic situation to a great extent, although procedural requirements are prescribed by the LRA. When an employer contemplates retrenching certain employees, it is usually strangled in financial difficulties. If the union or employees are of the opinion that no valid reason exists for the proposed retrenchment, they may embark on strike action. This will accordingly lead to further financial difficulties for the employer. However, section 189A(9) of the LRA states that

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254 S189A.
“[n]otice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in sub-section 7(a) or 8(b)(i).”

It seems as though the legislature attempted to avoid the situation where a strike commences before notice to dismiss has been given by the employer.

Before a strike over a retrenchment may be instituted, certain procedural steps, as stated in section 189A of the LRA, must be followed. These procedures are largely dependent on whether or not one of the consulting parties has requested the assistance of a facilitator to assist the parties during consultation.

2. THE LIMITED NATURE OF THE RIGHT

The effect of this is that the section which deals with the absolute prohibition on strike action will be amended to allow for strike action in regard to retrenchment disputes in certain limited instances. In others, despite the provisions of section 65(1)(c) of the LRA (which prohibit strike action and a lock-out), if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA, employees are now permitted in terms of these recent amendments to strike in opposition to a retrenchment initiative undertaken by an employer, provided that such a strike (or a lock-out) is instituted in accordance with the provisions of section 189A.

The limited nature of this right to strike, is illustrated when the following four instances where such action is allowed are discussed:

- Firstly, where an employer employs less than 50 employees, dismissal for operational requirements remains a non-strikeable option.

- Secondly, where the employer (who employs more than 50 employees) contemplates dismissing more employees than the number of employees stipulated in section 189(1)(a)(i)-(v) of the LRA, a retrenchment becomes a strikeable issue. For example,

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255 My emphasis.
256 See s189(2)(c) of Act 66 of 1995, as amended.
where an employer employs up to 200 employees and it contemplates dismissing at least 10 employees, the retrenchment becomes a strikeable option.

If it employs more than 200 employees but not more than 300 employees and it contemplates dismissing at least 20 employees by reason of operational requirements, a strike will be permitted, and so on. If the employer has retrenched other employees in the 12 months preceding the most recent notice to retrench, those employees are taken into account in determining whether the employer is contemplating dismissing employees in excess of the number of employees stipulated in section 189A(1)(a)(i)-(v) of the LRA. It would therefore appear that the right to embark on strike action over retrenchment is limited to large-scale retrenchments only.

- Thirdly, a dispute over the procedural fairness of the retrenchment remains a non-strikeable issue although the union may decide to refer this dispute (concerning the procedural fairness of the retrenchment) to the Labour Court for adjudication (section 189A(13) of the LRA).

- Fourthly, if the employees have referred the dispute about the fairness of the reason for the retrenchment to the Labour Court for adjudication, it becomes a non-strikeable issue. This point needs further clarification: once the parties to consultation over a retrenchment have exhausted the facilitation or conciliation route provided for by section 189A of the LRA, both consulting parties are afforded certain choices by the Act. The employer may give notice of termination of employment to the union or to the employees who were selected (in other words: notice to retrench - see section 189A(2)(a) of the LRA). The union (which must be a registered trade union), on the other hand, can elect whether to refer the dispute about the substantive fairness of the retrenchment to the Labour Court, or whether to embark on strike action over this issue. Once the election has been made to refer the dispute concerning the reason for the retrenchment (the substantive fairness) to the Labour Court for adjudication, the dispute about the reason for the retrenchment becomes a non-strikeable issue (section 189A(10)(a)(i) of the LRA.

It is submitted that this amendment can do no good for business in South Africa. When one looks at the history of politics and the development of labour legislation in South Africa,
which has democracy as its cornerstone, one can understand to some extent why this right has now been afforded to employees. It will however affect the business negatively, and can do no good for the production of the employer.

Further, the employees who have been proposed for retrenchments, and who tend to loose their employment and consequently an income, will also be affected negatively in that they may be locked-out by the employer. This can do no good for the economy of South Africa. One will have to wait to see what consequences this right will have in future.

The dismissal of strikers will not be discussed in detail in this thesis, due to the fact that an employee who participated in an unprotected strike will be dismissed for misconduct and not operational requirements. However, protected strikers may be dismissed for a reason based on the employer’s operational requirements. The normal procedures must then be followed as set out in section 189 of the LRA. This dismissal must also be substantively fair.

Section 67(5) of the LRA accepts that operational requirements of a business may justify dismissals during an protected strike. According to Du Toit et al\(^\text{257}\) “[t]his provision has been seen by trade unionists as offering employers a thinly-veiled pretext to dismiss strikers”. Du Toit et al\(^\text{258}\) are further of the opinion that the dividing line between the dismissal of a striker due to economic pressure and anger and real operational requirements may sometimes be tenuous. Once again, as discussed earlier in this thesis, the question arises as to what extent the courts will be allowed to examine the employer’s decision to dismiss in these circumstances.

In BAWU v Prestige Hotels CC \(t/a\) Bluewaters Hotel,\(^\text{259}\) the following important comment was made by Combrinck J, “if the respondent wished to justify dismissing the employees engaged in their lawful strike it may have done so on the basis of the operational requirements of the enterprise, if its financial circumstances truly warranted that step. It would then have been required to negotiate bona fide with the appellant on the financial impact of the strike, alternatives to the termination of services of the strikers and related matters. Only if that process proved fruitless would the respondent have been justified to


\(^{258}\) Supra 415.

\(^{259}\) (1993) 14 ILJ 963 (LAC).
terminate the services of the employees. It would then have done so, not on the grounds of misconduct, but for reasons of genuine economic necessity after following a fair procedure.”

Owing to the fact that this aspect may also be the subject of a detailed discussion, which does not fall within the ambit of this thesis, no further discussion will be given on this topic.\textsuperscript{260}

\textsuperscript{260} For a detailed discussion, see Du Toit \textit{et al supra} 411-423.
CHAPTER 8

THE DISPUTE RESOLUTION PROCESS AND THE REMEDIES AVAILABLE TO THE EMPLOYEE IN A DISPUTE OVER AN UNFAIR RETRENCHMENT

1. THE DISPUTE RESOLUTION PROCESS

Section 191 of the LRA makes provision for the dismissed employee to refer the dispute to a Council, if the parties to the dispute fall within the registered scope thereof, or otherwise to the CCMA,261 within 30 days after date of dismissal.

If the 30-day period has expired, the dismissed employee may ask for condonation from the CCMA to refer the dispute after the 30-day period has expired. The LRA requires that good cause be shown by the employee in order to be granted condonation.262

A copy of the referral, normally in the prescribed form,263 must be served on the employer264 and thereafter it must be filed at the Council or CCMA. In practice, the Council or CCMA will then, normally in writing, inform the employee of the date that has been allocated by the Council or CCMA for the conciliation. The Council or CCMA must then attempt to resolve the dispute through conciliation.265 If the employee does not attend this conciliation, it will be removed from the roll of the CCMA or the Council. If the employer does not attend or if the parties do not reach a settlement, the dispute will be declared unresolved and a certificate stating this will be issued.266

In practice, it often happens that the employer is not interested in attending the conciliation. Since it is under no obligation to do so, the dispute will be certified as being unresolved.

The purpose of the conciliation is an attempt to reach a settlement. This process is conducted without any prejudice to the parties and nothing stated or said during this meeting can be used

261 S191(1).
262 S182(2).
263 Form LRA 7.11 in the case of the CCMA.
264 S189(3) of Act 66 of 1995, as amended.
265 S189(4) of Act 66 of 1995, as amended.
266 S189(5).
in an arbitration hearing or in the Labour Court. Section 135 of the LRA states the powers of a Commissioner during conciliation.

Both parties are normally given the opportunity to make opening statements, whereafter the Commissioner will spend time with each party individually to try and negotiate a settlement. The Commissioner usually makes the parties aware of all the risks involved if the matter proceeds to arbitration or adjudication in the Labour Court. If a settlement has in fact been reached, it is normally reduced to writing by the Commissioner and signed by both parties, to which settlement the parties are accordingly bound. If either one of the parties fails to honour the terms of the settlement agreement, the other (innocent) party may apply to the Labour Court to make the settlement agreement an order of court. It is important to note that the Labour Court has concurrent jurisdiction with the High Court in certain matters.267

According to section 191(5)(b)(ii), the employee party may, if the dispute remains unresolved after conciliation, refer the dispute to the Labour Court for adjudication and if referred as such, it must be done within 90 days after the Council or Commissioner has certified that the dispute remains unresolved. This referral form must also be served on the employer party and filed with the Labour Court. A detailed set of rules have been developed for both the CCMA and the Labour Court respectively to deal with the practical issues of dispute resolution. If the dispute is referred after the 90-day period, the employee party may once again make an application for condonation to the Labour Court, which will be granted if good cause has been shown.

According to section 192 of the LRA, the employee must prove that he/she has in fact been dismissed, whereafter the employer must prove that the dismissal was fair, both substantively and procedurally.

Normally the employee party is required to present a statement of case to the Labour Court to set out the issues before the court.

The above is a basic discussion of the dispute resolution process in the case of an unfair retrenchment by a small employer and a small-scale dismissal by a big employer.

A brief discussion follows on the dispute resolution process in the case of a large-scale dismissal by a big employer:

Section 189A regulates this procedure and basically entails the following:

Firstly, a distinction is made between disputes relating to procedural and substantive fairness. In the case of alleged procedural unfairness, application is made to the Labour Court within 30 days (or later if condonation was granted due to good cause shown), whereafter the Labour Court must enrol the application on an expedited basis. The Labour Court is prohibited from granting any order if the union has not given at least four days’ notice to the employer. The court may permit a shorter period of notice in certain instances, namely if:

- the union has given written notice to the employer of the union’s intention to apply for the granting of an order;

- the employer has been given a reasonable opportunity to be heard before a decision concerning the application is taken; and

- the union has shown good cause why a period shorter than four days should be permitted.

The employees may ask for the following order:

- Compelling the employer to comply with a fair procedure.

- Interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure.

- Directing the employer to reinstate an employee until it has complied with a fair procedure.

- For compensation, if any of the three forms of relief above are not appropriate.
The Labour Court may make any appropriate order in terms of section 158(1)(a) of the LRA, except of the disclosure of information due to the fact that the order by the CCMA in this regard is deemed to be final. An appeal may also be lodged against an order made by the Labour Court.

In the case of disputes concerning substantive fairness, the employee has the choice of either approaching the Labour Court for relief or embarking on strike action as discussed above. Once they have made their choice, it is considered final.

If they have elected to strike, they must give notice to the employer as required by section 189A of the LRA. The LRA does not prescribe a time period within which such notice must be given. It is important to note that the employer may only lock-out employees where a strike notice has been issued.

Secondly, strike action is also allowed but must comply with section 66 of the LRA.

If the employees have elected the adjudication route, basically the same process is followed as in the case of a dismissal by a small employer. The matter is accordingly referred for adjudication to the Labour Court, which needs to enrol it on an expedited basis. An appeal may be lodged against an order made by the Labour Court in this regard. In the case of a dismissal of a single employee, this employee may refer the dispute either to arbitration or to the Labour Court for adjudication after conciliation has failed.  

Disputes about severance pay, as mentioned earlier, may be referred to a Council or the CCMA for conciliation, as the case may be, failing which the procedure is the same as in cases of misconduct and incapacity, in other words it is then referred to the CCMA or the appropriate Council for arbitration.

Where the Labour Court needs to adjudicate the dismissal, this aspect can be raised there.

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269 S41 of the Basic Conditions of Employment Act 75 of 1997, as amended.
2. UNFAIR RETRENCHMENT DISPUTES: REMEDIES OF THE EMPLOYEE

Section 193 of the LRA sets out the remedies for the employee in this case. It empowers the arbitrator or Labour Court judge to

(a) order reinstatement of the employee from any date not earlier than the dismissal;

(b) order the employer to re-employ the employee, either in the work employed before the dismissal or in any other suitable work on any terms and from any date not earlier than the dismissal; or

(c) order the employer to pay compensation to the employee.

2.1 REINSTATEMENT AND RE-EMPLOYMENT

In the case of reinstatement, the contractual position of the employee is restored in full. In other words, the employee must be reinstated in the same position he/she previously had and the length of service and seniority will not be affected.

In the case of re-employment, a new relationship between the employee and employer is created which is different from the old one. Seniority may, for instance, be taken away. The LRA only requires that it must be reasonable suitable work.

The above two remedies are seen as the primary remedies according to section 193(2) of the LRA. The Labour Court or arbitrator may also choose not to order reinstatement or re-employment. This is normally done where the parties do not wish to work together anymore. The employee may also have found another job and may not be interested in his/her previous job. If the continued relationship is intolerable, such an order will not be made or where it is not reasonably practicable to reinstate or re-employ the employee, for instance where there was a valid reason for the dismissal due to mechanisation but it is found to be unfair due to the procedures that were not followed.

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270 S193(1)(b).
2.2 COMPENSATION

Section 194 of the LRA deals with compensation that may be awarded to a dismissed employee. In summary, it entails that in the case of procedural and substantive unfairness, compensation may be awarded that is equal to not more than 12 months’ remuneration calculated at the employee’s rate of remuneration on the date of dismissal. However, in the case where a dismissal has been found to be automatically unfair, compensation equal to 24 months’ remuneration may be ordered.

The words *just and equitable* in section 194 of the LRA are important to note. The court will look at the circumstances of each case to determine what compensation will be just and equitable under the circumstances. In *Imperial Transport Services*, the court also considered relevant factors in order to decide what compensation would be suitable.

These factors included the nature of the breach of duty; the possibility that the employee might have remained in employment in a lesser position had proper consultation taken place; the adequacy of the retrenchment package; failure to accommodate the employee in the new structure; the employee’s period of service and the age of the employee.

In *Dhlamini & Others v Faraday Whole Sale Meat Supply*, Jajbhay AJ, where it took more than one year for the dispute to be adjudicated, found that the delay was not due to the fault of the employees and awarded twelve months’ remuneration. If the employees had delayed the matter, the same order obviously would not have been made. In *Scribante v Avgold Limited (Hartebeesfontein Division)*, Damant AJ ruled that the court should not be entitled to take factors such as the following into consideration when making an order for compensation: actual patrimonial loss suffered by the employee; mitigation of harm sustained by the employee and length of time the normal consultation process would have taken.

In *Hooggenoeg Andolusite (Pty) Ltd v National Union of Mine Workers & Others* and *Amalgamated Beverages Industries (Pty) Ltd v Jonker*, the court had to consider whether an

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order for compensation may be made only as an alternative to a reinstatement or re-employment order. In the first case, the court ruled that section 64(9)(c) of the LRA is interpreted to mean that the court may not order both reinstatement and compensation. However, in the second matter above (Jonker case), this view was rejected and the court found that both reinstatement and compensation can be ordered at the same time. This is a subject that has also been under discussion by many authors.

2.3 URGENT INTERIM RELIEF

The above remedies all constitute final relief. Section 158(1)(a)(i) empowers the Labour Court to make any appropriate order, including the granting of urgent interim relief. It thus entitles an employee who wishes to dispute the fairness of a dismissal, to approach the Labour Court for urgent interim relief, in other words, relief pending the finalisation of the dispute.

The employee must prove urgency, a *prima facie* right to which irreparable harm will be suffered if the relief is not granted, no adequate alternative remedy, and that he/she will suffer damage or harm greater than that of the respondent. These are the same requirements as laid down under the common law and the court will also look at such relief, especially the urgency of the matter, in a critical manner. In *Vela & Others v Savo & Others*,\(^\text{276}\) the court refused such an interdict on the basis that it was an abuse of the process by trying to conduct a retrenchment trial by way of urgent interdict.

In *National Education Health & Allied Workers Union v Medicor (Pty) Ltd t/a Vergelegen Medi Clinic*,\(^\text{277}\) Wagley J would have granted interim reinstatement if special circumstances were advanced by the union, but due to the lack thereof, was not prepared to grant it. Normally a dismissed employee will have more merits to apply for the relief under discussion if the dismissal includes the loss of benefits such as reputation in the market place and membership of a medical aid scheme.\(^\text{278}\)

The above has been a brief discussion on the remedies available to dismissed employees.

\(^{276}\) (1998) 19 *ILJ* 916 (LC).
\(^{277}\) (2001) 22 *ILJ* 1839 (LC).
\(^{278}\) In *SA Chemical Workers Union & Others v Sentrachem* (1999) 20 *ILJ* 1597 (LC) at 1601D-E, the court held that exceptional circumstances have to exist before urgent interim relief is granted.
There are obviously many cases which are brought before the Labour Courts on a weekly basis. It is the duty of the court to look at all the special circumstances of each case in order to make an appropriate order.
CHAPTER 9
CONCLUSION

Retrenchments have a statutory nature and require strict compliance by the employer with such statutory requirements, failing which disputes arise that lead to important decisions being made by the Commission for Conciliation, Mediation, and Arbitration and the Labour Court.

Non-compliance with these statutory requirements leads to a situation where the employer must either reinstate/re-employ the employee, or pay compensation where the latter is undesirable or impossible. Owing to the detailed set of rules that has been created by statute and case law, the legislature came to the assistance of big employers by introducing a facilitation route that may be followed when the employer contemplates retrenching employees. The legislature further introduced a moratorium of 60 days during which big employers may not retrench these employees. The introduction of these additional requirements can be regarded as positive amendments to labour legislation and can also minimize the number of unfair retrenchment disputes referred for arbitration or adjudication. Important to note is that the legislature do not require that the facilitation route must be followed. It merely created such a right to both the employer and the employee. Since many bigger employers still do not have labour law experts in their employ to advise them on the correct procedures to be followed, the creation of such a right to follow the facilitation route certainly comes to the assistance of the employer, the employee and dispute resolution bodies in the greater context.

The amendment that has the effect that employees may, in limited circumstances, strike over retrenchment disputes, can be severely criticised. It neither advances business in South Africa nor does it improve the financial situation of the employees entitled to make use thereof. Fortunately, the legislature only afforded this right to employees if the dispute concerns the fairness of the reason for the retrenchment (substantive fairness). It would have created a chaotic and poor economic situation if this right was afforded to employees in cases of non-compliance with procedural requirements, the latter being the reason for most of the dispute-referrals concerning retrenchments in South Africa.
My opinion is that South Africa, in general, has a well-drafted Labour Relations Act which regulates retrenchments and which is based on sound democratic principles. However, grey areas still exist. Fortunately, and in a short period of time, well-founded decisions have been made by arbitrators and judges, which do not only create certainty in labour law in general, but also on this wide topic of retrenchment.
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