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Your Rights in Retrenchment Proceedings (Operational Requirements Process)

Given our country's current economic situation, recession, meaning that there is a negative growth rate, many employers are forced to implement retrenchment proceedings (Operational Dismissals).

I presented this paper at the SASOHN Pretoria Chapter Conference on 20 July 2017. It was well received and clearly answered a need, consequently I have written it up for the website.

The labour relations laws in South Africa are codified; that means they are set out in terms of codes and clear processes which derive from other law and case law. Thus we find issues relating to retrenchment processes, more correctly known as operational dismissal, in both the Labour Relations Act at S189 and also in a Code of Good Practise. In the course of this article I will mention two cases which are relevant.

S189 as set out below, sets out very clearly the requirements of the employer when it wishes to consult on operational requirements. The first thing to note is the word 'contemplates' in S189 (1). The dictionary meaning of this is 'thinks of'. So when an employer is 'thinking of' operationally dismissing it is obliged to consult. This means that it should not be presenting a finalized decision.

In respect of S189 (1) (d), please note that there is no restriction on who the representatives are at a retrenchment or operational requirement consultation. My interpretation of this is that you can have other people to assist you, not merely fellow employees or shopstewards as is the case in disciplinary action.

At S189 (2) note that the employer is required to engage in a 'meaningful joint consensus-seeking process'. This means that the employer must consult with the intent to reach an agreement. This was set out in Johnson Johnson v CWIU 1997. So, it is not sufficient for the employer to merely go through the moves in what is described as formula approach. They have to in fact consult meaningfully. The subject matter of the consultation is dealt with at S189 (2) (a((b) (c)

Labour Relations Act 66 of 1995

189 Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements,* the employer must consult-

- *(a)* any person whom the employer is required to consult in terms of a *collective agreement,*
- *(b)* if there is no *collective agreement* that requires consultation-
  - (i) a *workplace forum,* if the *employees* likely to be affected by the proposed *dismissals* are employed in a workplace in respect of which there is a *workplace forum;* and
  - (ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals;*
- *(c)* if there is no *workplace forum* in the workplace in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *'trade union'* whose members are likely to be affected by the proposed *dismissals;* or
- *(d)* if there is no such *trade union,* the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and 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.*

In terms of S189 (3) the employer must issue, please note 'a written notice' which gives relevant information starting with and importantly, the reasons for the proposed dismissals. So the employer is required to explain their motives, and also alternatives, in depth. This has its origins in Mohammed v SACCAWU 1992. Also note that the provisions of this

section require everything to be in writing. Thus on the record; verbal statements do not suffice. The rest of the section spells out what the further subjects are which need to be dealt with in writing.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(a) the reasons for the proposed *dismissals;*
(b) the altematives that the employer considered before proposing the, *dismissals,* and the reasons for rejecting each of those alternatives;
(c) the number of *employees* likely to be affected and the job categories in which they are employed;
(d) the proposed method for selecting which *employees* to dismiss;
(e) the time when, or the period during which, the *dismissals* are likely to take effect;
(f) the severance pay proposed;
(g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;
(h) the possibility of the future re-employment of the *employees* who are dismissed;
(i) the number of *employees* employed by the employer; and
(j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.

In terms of the need to access information, employees can rely on S16 of Labour Relations Act which is set out below. Whilst the Act strictly says that this is information which should be given to a union, my view is that employees and representative bodies may ask for this if it is substantively necessary to give meaningful shape to the consultations.

16 Disclosure of information

5) An employer is not required to disclose information-

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

Also note S189 (4) (b) that the employer is required to prove why information that it refused to disclose is not relevant. This places a very heavy burden on the employer.

(4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(b) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, *the* onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

S189 (5) makes it clear that the employer must allow the other consulting parties to make representations. This section means that the employer cannot really rush the process. Very importantly; in the event that the consulting party makes representations, if the employer does not agree with them they are required to state their reasons for disagreement in writing.

My advice to persons being consulted in respect of possible operational dismissal is that all their submissions should be given to the employer in writing as this will oblige the employer to respond in writing.

(5) 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.*

(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

S189 (7) deals with selection criteria. Please note that these must be fair and objective or agreed. It is possible to agree selection criteria where this does not happen the most objective criteria recognised is LIFO (last in, first out). However, it has been stated that an organisation is not required to commit organisational suicide by retrenching skilled persons, so issues such as skill if objectively demonstrated can be used as selection criteria which are more important than LIFO. For example, if two employees to be operationally dismissed

have identical service, the employer may elect to keep the one with more skill. Also, an employee with more skill and shorter service may be preferentially retained. This is recognised in case law.

(7) The employer must select the *employees* to be dismissed according to selection criteria-
(a) that have been agreed to by the consulting parties; or
(b) if no criteria have been agreed, criteria that are fair and objective.

Much of the confusion around what processes employers are required to follow, is occasioned by the fact that the act differentiates between retrenchments by small scale employers and retrenchments by large scale employers, and large scale retrenchments by large scale employers.

This is set out at S189A below. In the event of a retrenchment in your organisation, please refer to this section.

189A Dismissals based on operational requirements by employers with more than 50 employees
(1) This section applies to employers employing more than 50 *employees* if-
(a) the employer contemplates dismissing by reason of the employer's *operational requirements,* at least-
(i) 10 *employees,* if the employer employs up to 200 *employees;*
(ii) 20 *employees,* if the employer employs more than 200, but not more than 300, *employees;*
(iii) 30 *employees,* if the employer employs more than 300, but not more than 400, *employees;*
(iv) 40 *employees,* if the employer employs more than 400, but not more than 500, *employees;* or
(v) 50 *employees,* if the employer employs more than *500 employees;*

Also note the provisions of S189A (3) (j) which is the number of employees that the employer has retrenched during the preceding 12 months. These employees are included in the quantum at 189A.

Sixty days consultation before notice

In effect if an employer falls into an operational process that falls into S189A, they have to consult for 60 days before they are entitled to give notice to employees to be retrenched.

Facilitation

An interesting aspect of the S189A process is that the CCMA can be called upon to run a facilitation process whereby the CCMA Commissioner is sent as a facilitator. They ensure that the law is adhered to and effectively mediate between the two parties. I believe that this is a very effective process and advise my clients to utilise it. In terms of my private practise I also do private facilitations for employers who are involved in small scale operational dismissal processes because I believe that facilitation by a knowledgeable and experienced person gives the fairest outcome.

Consensus and the Enhanced Severance Voluntary package

Prior to implementing a formal operational requirements process, employers will often call for voluntary retrenchments. I believe that this is an appropriate process because if people are inclined to leave it, gives them an opportunity to do so, and it saves the employment of other employees.

A few words on this however are important. One should not agree to be retrenched on a voluntary basis due to the fact that you may then not be able to claim UIF. If you find yourself in this situation, request the employer to retrench you and immediately sign a settlement agreement. The voluntary retrenchment is usually accompanied by an enhanced severance package; the employee signs a contract in the form of a settlement or consensual agreement, which means that they will not litigate against the employer. In effect the employer purchases the employee's right to litigate against them.

The issue in respect of the UIF Act is that a person may only claim Unemployment Insurance if they are retrenched or if they leave service as a consequence of the conduct of the employer .i.e. if you are dismissed. If you resign you are not entitled to claim UIF.

There could be an argument that a voluntary termination is in fact a form of resignation, thus it is important to follow the prescriptions of the Labour Relations Act, and to ensure that you are retrenched. In this situation the proceedings need not be too onerous as long as you are dismissed or retrenched for operational reasons. The employer takes comfort from the fact that there is an immediate settlement agreement and the employee leaves with an enhanced severance package in excess of what their legal entitlement is.

In terms of retrenchment, you may be required to work your notice period, though it is often more common for employers to release employees to seek work and pay them during the notice period. There is no obligation in the Labour Relations Act to re-employ retrenched employees, though in certain industries such as Metal Industries, this protection does exist.

In the event that you find yourself in a difficult situation facing retrenchment, please do not hesitate to direct any queries that you may have to me via the SASOHN office.

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30 August 2017