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johanette RHEEDER incorporated
Labour, Civil, Commercial and Privacy Law Attorneys

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Strikes and Retrenchment

Strikes and Retrenchment - both will result in "*no work, no pay*".

By Johanette Rheeder - Director JRA Attorneys

While countries around the world are still staggering from attempts to recover from COVID, we have seen our fair share of war and economic turbulence around the world. In our country, we are no stranger to a struggling economy, with ever growing unemployment and fuel hikes that leave employees staggering for employment and wage hikes.

In our public sector workers are insisting on a 6.5% through the PSA and an even more optimistic 10% by Cosatu. How much of this will be achieved from the ever-constrained government coffers and the current wage offer of 3% will have to be seen.

Many believe that the heart of the problem is that the government gave too generous adjustments to civil servants for the decade, and we've now run out of money at a time when our citizens are going through severe struggles to make ends meet.

It will be no surprise if we see our fair share of strikes emanating from low wage offers and employer considering more and more retrenchments to curb costs. SA Post Office (Sapo) workers have just been informed that the struggling entity will start with large-scale retrenchments after Treasury projected that the number of Sapo employees would shrink with 40%.

These projections will likely result in large scale retrenchments being called and consulted on, and may also, result in strike action to prevent the mass retrenchment from being implemented. Importantly, procedural strikes are Constitutionally protected and retrenchment, which is a no fault dismissal is protected by strict procedural requirements, however, it is often those procedures where the employer lacks!

Before, however, an employee can be retrenched certain procedural and substantive requirements as set out in section 189 or 198A ***must*** be met. The architectural foundation on which the edifice of our law relating to retrenchments is built, is the *saving of jobs by taking sufficient steps to avoid dismissals*. Failing to comply with the procedures as set out in these sections may cost an employer dearly, as it will not amount to sufficient steps taken to avoid dismissal. Employers sometimes underestimate the procedural element in retrenchment consultations.

Due to the *no-fault dismissal* principle, a proper procedure is invaluable to a fair retrenchment. The Labour Appeal Court (LAC) had to consider the effect of procedural irregularity on substantive fairness in the *Mbekela* judgement of 2021[1].

In this case, the employee was employed as a technical support manager during January 2016 and dismissed in September 2016, ostensibly for

[1] Mbekela v Airvantage (Pty) Ltd (JA²/²⁰) [²⁰²¹] ZALAC ⁴⁷ (²⁶ November ²⁰²¹)

operational reasons. At the Labour Court the issues in dispute were the existence of a dismissal, and if there was a dismissal whether such dismissal was substantively and procedurally fair. The Labour Court found that there was indeed a dismissal, found that the notice she signed was in fact an acknowledgement of receipt, and that the dismissal was substantively fair but procedurally unfair, for the want of a proper consultation. It ordered the four months' remuneration as compensation. The employee took the matter on appeal.

Considering the procedure followed by the employer, it appears that the employee was called to a brief meeting, during which the employee's impending retrenchment was discussed. The employee was unresponsive and did not engage. At the end of this meeting, she was given a document entitled "Notice of Contemplating Retrenchment" (the first notice). She was then offered a mutual separation agreement that included payment of three months' salary and a waiver of debt which was rejected. After the rejection of the mutual separation agreement, she was given an amended notice (the second notice) which included a term, waiving her debt with regard to the tuition fees. After she obtained advice, she requested the employer to inform her, *inter alia*, about the selection criteria followed and the measures taken to avoid her retrenchment. The employer replied *inter alia*, that she signed the retrenchment letter and cannot accommodate her.

Section 189 of the LRA obliges an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements, to consult with such employee or employees. The consultation should take place before a definitive decision to dismiss is made. The reason being that the parties must endeavour, during the consultation, to jointly reach consensus on *inter alia* the measures, if any, to *avoid* the impending dismissal.

The employer is furthermore obliged to issue a ***written notice*** inviting the employee to consult with it and it should disclose to the employee all relevant information so that the employee can meaningfully engage with the employer. The consultation is not a one-way communication where one speaks and the other listens. The employee should be given the opportunity to make representations and the employer must consider and respond to the representations made by the employee. If the employer disagrees with the employee's representations, the employer must state the reasons for the disagreement. It is only after consultations have been exhausted, that the employer should retrench.

In order for this to happen, the employer must give the employee enough time and opportunity to digest the information, obtain advice and ask questions in subsequent meetings.

Only after consultations have been exhausted the employer must decide whether to proceed with retrenchment or not. The loss of jobs to retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that, even though reasons to retrench employees may exist, they will only be accepted as valid if the employer can show that all viable alternatives have been considered and taken to prevent the retrenchment or to limit this to a minimum2.

When the employer decides to retrench, it becomes the court's duty to determine the fairness of the dismissal objectively. In making that determination, the court must always be mindful of the fact that "the resort to dismissal especially a so-called no-fault dismissal, which some regard as a death penalty in the field of labour and employment law, is meant to be a measure of last resort[3].

Where it is clear that no steps were taken in order to avoid a dismissal such dismissal would be without a fair reason.

The LAC found that "It is difficult to discern how a dismissal which could have been avoided but

[2] *General Foods Industries Ltd v FAWU* (2004) 7 BLLR 667 (LAC).

[3] Chemical Workers Industrial Union v Algorax (2003) 24 ILJ 1917 (LAC) at para 70.

was not can only impact procedural fairness. Substantive and procedural fairness issues, with regard to retrenchments, may and do often overlap. They are, in most cases, interlinked. Whether a failure to follow a particular procedure would lead to substantive unfairness depends on the facts and circumstances of each case.

Substantive and procedural fairness in retrenchment should not be evaluated in silos. A court should also consider whether the failure to jointly consider ways to avoid the dismissal rendered it not only procedurally but also substantively unfair, even in circumstances where there is a genuine rationale to retrench.

Of importance is the finding of the LAC that even if there was a fair rationale to retrench the employee, that no proper attempt was made to allow her to give input about her own destiny in an attempt to avoid her dismissal. She was given the notice after the respondent purportedly consulted with her. When she was unresponsive during the meeting, she was not given information on which to make an informed decision. The employee was therefore confronted with a *fait accompli*. The dice was cast. The employer's mind was made up before it even gave the appellant an opportunity to make representations.

Therefore, the disregard for the employee's rights was so egregious that the LAC could not find that alternatives to dismissal was indeed considered. This is so, because the employer did not give her the opportunity to make representations and she was awarded 12 months compensation. □

Johanette Rheeder - Director