Dismissals for operational requirements (retrenchments) (Part 2)

This is the second of a three part discussion on dismissals for operational requirements, generally known as retrenchments. In Part I, we dealt with the meaning of the term “operational requirements”. In this part the focus is on the requirements for the substantive fairness of a dismissal for operational requirements. In Part 3 in the next issue of Vector we will deal with the procedural fairness of a dismissal for operational requirements.

The statutory requirements for a fair dismissal for operational requirements

The requirements for a dismissal for operational requirements are regulated in sections 188, 189, 189A of the Labour Relations Act, ’95, as amended, as well as the Code of Good Practice on Dismissals Based on Operation Requirements.

Section 188 clearly indicates the three grounds on which an employer can dismiss an employee, namely, conduct capacity and operational requirements.

Section 188 provides as follows:
(1) a dismissal that is not automatically unfair, is unfair if the employer fails to prove-
(a) that the reason for the dismissal is a fair reason-
(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.
(2) Any person considering whether or not the reason for a dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act”.

Dismissal as a result of the conduct of the employee relates to the worker’s behavior.

Dismissal as a result of the capacity of the employee relates to the employee’s inability to do the work, which may be due to incompetence or medical reasons.

Dismissals for operational requirements are no-fault dismissals because they are not related to the employee’s conduct or capacity, but to the operational requirements of the business.

Section 188 requires a dismissal to be both substantively and procedurally fair. Substantive fairness refers to the existence of a reason for the dismissal, e.g. the operational requirements of the business. This requirement ensures that the employer does not dismiss the employees arbitrarily - the dismissal must be justified or substantiated.

Procedural fairness relates to the dismissal being effected in accordance with a fair procedure.

Thus, section 189A is applicable for dismissals by large employers or in instances where a stipulated number of employees is being dismissed for operational requirements relative to the size of the organization as provided above.

A dismissal by a large employer of fewer employees than the prescribed minimum listed above might nevertheless constitute a large-scale dismissal 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
189A (19) In any dispute referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the dismissal of the number of employees specified in subsection (1), The Labour Court must find that the employee was dismissed for a fair reason if:

(a) The dismissal was to give effect to a requirement based on the employer’s economic, technological, structural or similar needs;

(b) The dismissal was operationally justifiable on rational grounds;

(c) There was a proper consideration of alternatives; and

(d) Selection criteria were fair and objective.

dismissal, is equal to or exceeds the numbers specified above.

The substantive requirements for a fair dismissal for operational requirements

The substantive fairness of a dismissal for operational is defined in section 189A (19):

The four requirements for substantive fairness (operational requirements dismissal)

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

The reason for the dismissal must be for operational requirements and for no other reason, e.g. the reason must not be a camouflage for another reason such as misconduct or incapacity.

2. The dismissal was operationally justifiable on rational grounds

It is not sufficient for the reason to be based on the employer’s operational requirements only, but it must also be justifiable and the justification must be on rational grounds. Rational grounds are those reasons that are founded in reason or logic. The rationality test is an objective test that measures that acceptability of the reasons for the dismissal against that which would generally be considered acceptable reasons. In Van Rensburg v Austen Safe Co (1998) 19 ILJ 158 (LC) and in SA Clothing & Textile Workers Union & Others v Discreto - A Divisions of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC), the respective courts agreed that the reasons for the retrenchments need not be the best reasons, but rather reasons that would be objectively defensible because of their foundation in reason or logic.

3. There was a proper consideration of alternatives

Proper consideration of alternatives entails more than just merely considering the alternatives proposed by both the employer and the employees during the consultation. It entails that the employer must apply its mind and give defensible reasons for dismissing all these alternatives and finally deciding that dismissal was the only option. The employer must in essence convince the Labour Court that dismissal was the measure of last resort.

4. Selection criteria were fair and objective

This requirement applies both to the procedural and substantive fairness of a dismissal for operational reasons. Where the parties cannot reach consensus on the method to select the employees for retrenchment, the employer must use the criteria that are fair and objective.

Conclusion

In the next part we will deal with the procedural requirements for a fair dismissal for operational requirements.


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