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THE RETRENCHMENT PROCESS IN TERMS OF SECTION 189 OF THE LRA

It is clear from the wording in section 189 of the Labour Relations Act 66 of 1995 ("the LRA") that this section permits employers to dismiss employees based on their operational requirements on condition that this is done in both a substantive and procedurally fair manner. As such the employer's operational requirements will also constitute a valid and fair reason for dismissal.[1]

The employer's operational needs must be distinguished from the other reasons for dismissal namely misconduct and incapacity. In the case of misconduct and incapacity, the reason for the dismissal originates with the employee in that, for instance, the employee is found guilty of misconduct, or the employee is incapable of doing the work for which he was employed. In the case of dismissal for operational requirements, the reason for the dismissal has its origin in the employer's needs and operations. The term "operational requirements" is defined in section 213 of the LRA as "operational requirements" means requirements based on the economic, technological, structural, or similar needs of an employer.'[2]

A dismissal based on operational requirements is thus seen as a form of dismissal due to no fault of the of the employee. It is a process whereby the employer reviews its business needs to increase profits or limit losses, which leads to reducing its employees. The employer must give fair reasons for making the decision to retrench and follow a fair procedure when making such a decision or the retrenchment may be considered unfair and may be referred to the CCMA on this basis.

Section 189 of the LRA therefore provides an overview of the procedure to follow by employer's who are considering the process of dismissals based on their operational requirements. Like all dismissals, retrenchments must be both procedurally and substantively fair.

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[1] Basson et al. *The New Essential Labour Law Handbook 6th Edition (2017)* 167.
[2] Basson et al. *The New Essential Labour Law Handbook 6th Edition (2017)* 167-168.

The procedure to be followed in terms of section 189 of the LRA can briefly be explained as follow:

The first step in the process of retrenchment is the process of consultation as required by the provisions of the LRA. It is important to remember that this consultation is a process and not a once-off meeting with all the potentially affected employees.

Section 189(1) of the LRA provides that, before retrenching, employers must consult any person whom the employer is required to consult in terms of any collectiveagreement that may be in force. If there is no collective agreement, meetings shouldbe held with all employees that could be affected by the proposed retrenchment.

Section 189(2) of the LRA states that the consulting parties must attempt to reach consensus on the following matters: the possibility of avoiding the dismissal i.e. alternatives to dismissal; appropriate measures to minimize the dismissals; measures to change the timing of the dismissals; appropriate measures to mitigate the effects of retrenchment; the method for selecting the employees to be dismissed; and the amount of severance pay payable to the dismissed/retrenched employees.

Section 189 (3) of the LRA requires the employer to disclose in writing to the employees or their unions (where applicable) all relevant information including but not limited to: the reasons for the proposed retrenchment; alternatives to dismissal that were considered and the reasons why these were rejected; the number of employees likely to be affected; proposed method of selection of employees being considered for dismissal; severance pay due and payable to the dismissed employees; assistance that the employer will be offering to the dismissed employees; the possibility of future re-employment with the current employer and this notice also serves as an invitation to consult between the parties, which is generally the most important steps in any retrenchment process.

The employer must then allow the affected employees the opportunity to make representations in relation to the proposed retrenchment, oral or written. If the employee makes representations in writing, the employer must respond in writing.

Section 189(7) of the LRA provides that employers may select employees to be retrenched according to the criteria they have agreed upon by the consulting parties. If no criteria have been agreed upon, that the selection must be fair and objective, the

LIFO (“last in, first out”) principal is often applied but is not the only principal.

The employer must issue notices to the employees, who have been selected to be retrenched, after the consultation process has been completed.

Employees are entitled to receive severance pay only if they are retrenched for operational requirements. The requirements regarding severance pay are set out in section 41 of the Basic Conditions of Employment Act (“BCEA”). Section 41 of the BCEA provides that an employer must pay an employee who has been dismissed for operational requirements “severance pay equal to at least one week’s remuneration for each completed year of service with that employer”. The employer must then pay the retrenched employee the following payments: severance pay; any outstanding leave due (up to date of dismissal); and notice pay (either in terms of the BCEA or as per employment contract).

It is evident from the above information that the retrenchment process can be both stressful and daunting to employers and employees alike. Therefore, if you need any guidance or assistance with a possible retrenchment process or if you feel that you have been unfairly dismissed and want to refer the matter to the CCMA, we at Malan Lourens Viljoen Inc. will be more than happy to assist you with your retrenchment matter.

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