WHO TO CONSULT DURING A RETRENCHMENT EXERCISE?

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During a contemplated retrenchment exercise, an employer has a legal obligation to consult with parties that might be affected by the retrenchment based on operational requirements of the employer. However, the pertinent question of who must be consulted arises frequently and has been debated extensively by our courts, particularly whether an employer has an obligation to consult with individual employees in the process of contemplated dismissals.

INTRODUCTION

In this light, section 189(1) of the Labour Relations Act 66 of 1995 **("LRA")** defines who should be consulted during the process of retrenchment, the section provides as follows:

(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 enquired 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 such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

COURT'S DECISION

The question of whether an individual employee must be consulted in a retrenchment exercise once more came before the Labour Court in a recent case of *Ketse v Telkom SA SOC LTD* [1]

In this case, the applicant alleged that he is a consulting party as contemplated in Section 189 (1) of the LRA. In early 2014, the employer, (respondent) underwent a restructuring exercise and the applicant was going to be affected by the proposed restructuring. He attended a consultation in Durban where he was told to apply for alternative positions within the employer, of which all the applications he made were not successful. On 1 October 2014, the applicant received a letter terminating his services.

On application to the Labour Court, the applicant alleged that the termination of his services was premature as he was not consulted according to Section 189A (13) of the LRA. The respondent contended that the applicant has no *locus standi* to bring the matter before the court as he

1 (2015) 4 BLLR 435 (LC)

is not a consulting party. The court was faced with the task of determining whether the applicant is a consulting party for the purposes of Section 189(1) of the LRA.

The LRA has been held to be strictly majoritarian, in that it gives absolute primacy to collective bargaining as opposed to individualism. A good example of this application is the operation of Closed Shop Agreements provided for by the LRA.

It is therefore trite that the hierarchical structure of Section 189(1) is intentional[2], in that it places collective agreements at the top of the hierarchy of consultations and individual employees at the bottom of the hierarchy.

There is a myriad of decisions that have tackled this issue of consultations during an anticipated retrenchment. The applicant sought to rely on the decision of *Aviation Union of South Africa v South African Airways*[3], which held that an interpretation that takes away the rights of employees should not be preferred. However, despite this decision, the general direction taken by our courts is that the hierarchical structure is intentional and there is no need to divert from the principle that recognises hierarchy of consultations created by Section 189 (1) of the LRA.

The court dealt with whether the applicant is a consulting party in this matter very succinctly, the court held that there is no obligation on the employer to consult with an individual employee who will be affected by the contemplated restructuring, if there is a collective agreement or registered trade union. The court, in arriving at its decision, considered the LAC decision of *Aude SA (Pty) Ltd V NUMSA (2011) JOL 27732 (LAC)*. This decision, according to the court, clarified the position and quoted, with approval, the following paragraph of the Aude judgment:

"Where an employer consults in terms of agreed procedures with a recognised representative trade union in terms of a collective agreement which requires the employer to consult with it over retrenchments, such an employer has no obligation in law to consult with any other union or any individual employee over the retrenchment."

The court, however, cautioned against the impossibility of an employer consulting with individual employees during a retrenchment exercise. It held that every case must be determined on its own merits and facts. However, the general consensus in our Labour Courts is that if the identified consulting parties outlined in Section 189 (1) (a-c) are not applicable in the workplace, then the employer will have a legal obligation to consult with individual employees.[4]

2 See *Sikhosana and Others v Synthetic Fuels(2000) 1 BLLR 101 (LC)* : SA Municipal Workers Union and Another v SA Local Government Association and others
3 (2012) 3 BLLR 211 (CC)
4 See SACCAWU and Another v Amalgamated Retailers (2002) 1 BLLR 95 (LC)

CONCLUSION

The fundamental underlying principle in this decision is that an employer has no legal obligation to consult with individual employees if there is a collective agreement or registered trade union in the workplace.

Such finding by the court is an addition to the authority of the primacy afforded to collective bargaining by the LRA as opposed to individual employees. The LRA is unapologetically and strictly majoritarian, this is evident from the fact that majority of its drafters have a trade union background. This was done to avert a position of abuse of trade unions that occurred in the pre-democratic dispensation. Therefore the LRA will always, in its present form, protect the interests of the majority employees in the collective bargaining sphere.

Therefore, it follows from this decision that the retrenchment enquiry should start at the beginning of Section 189 (1) an employer will ask himself whether there is a collective agreement that governs the consultation process during an anticipated retrenchment. If the answer is in the negative, the employer will follow the hierarchical order to identify the relevant consulting party applicable in the workplace

In a situation where there is a recognised trade union, as is the case in the decision under discussion, the employer is under no obligation to consult with individual employees once he has consulted with the registered trade union. Henceforth, employers should guard against the exercise of repetitive consultations when there is no legal obligation to do so.

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