

When you are allowed to retrench

Article by C&A Labour Law

You might think that you are only allowed to retrench your employees when the company is doing badly. In fact, there are many reasons why a company could retrench such as:

- ✓ Your shareholders insist that you must cut costs and show better profit.
- ✓ You, can with a reasonable investment in new technology or by acquiring a new machine, operate with fewer staff and make more money.
- ✓ You can, with a reasonable investment in new technology and a reduction in your workforce, make more money in the medium and longer term.
- ✓ Your business is doing badly and you can't afford to keep on so many employees.
- ✓ You have lost a major customer and with the reduced business you can't afford to keep on your full workforce.
- ✓ One division of your business or product line is not doing well enough and you want to close it down, which will mean you don't have jobs for the staff who work in that area of the business.

If you use one of the above mentioned reasons for retrenchment and you can prove that it is in fact the case, the retrenchment will be substantively fair.

It is important to keep in mind that if you decide to retrench, there is a certain procedure to follow according to the *LRA section 189* in order to make the retrenchment procedurally fair.

If the retrenchment process was either substantively or procedurally unfair the company could lose the case should it go to the CCMA or Bargaining Counsel or the Labour Court for this matter. If this happens the company would end up paying a large amount of money for compensation.

In the case of Mokoena v Power Man (2005, 10 BALR 1047) the employee, an electrician, was retrenched after the division he worked in was closed down.

However, the employer failed to prove that there was a need to close down the division and retrench the employee.

The employer also failed to follow procedures for retrenchment. In addition,

the employer was unable to explain why it had employed new electricians shortly before the employee's retrenchment and why the new employees had not been retrenched instead of Mokoena.

Thus, in this case, the employer managed to infringe all three fairness criteria of procedure, fair reason and fair criteria for retrenchment.

The arbitrator ordered the employer to pay the employee eight months' salary in compensation.

In the case of Esterhuizen v Aluminium Granulated Products cc (2009, 10 BALR 981) the employer claimed that the arbitrator did not have jurisdiction to hear the matter because the employee was not the only one to be retrenched.

However, the arbitrator dismissed this claim because no evidence had been led in this regard. In this case the employer was found to have failed to follow a fair retrenchment procedure and had also unfairly found the employee guilty of misconduct.

The arbitrator therefore found the retrenchment and the misconduct dismissal were unfair and ordered the employer to pay the employee R255 150 in compensation.

If your company is suffering financially and you think of retrenchment, why not get a legal advisor to do the retrenchment for you. These people are familiar with the law and know exactly what to do in order to ensure that the retrenchment process is fair.

If you look at the procedure you have to follow, one of the most important steps is to consult. Now, you know you must consult **BUT** who must you consult with, when should you start consulting, what must you consult about, what should you do if the trade union refuses to consult etc. these are all factors that you as an employer are unsure about.

In the case of Numsa v Ascoreg (CLL Vol 12, July 2008) the Labour Court found that the employer could consult directly with the employees when the union refused to consult.

However, the employer will need proof of the union's refusal, as consultation with employees instead of their union is forbidden under normal circumstances.

The trade union may be purposely delaying the consultation process

If a court finds that the union unreasonably delayed the consultation process by making unreasonable demands or failing to participate in consultations, the courts may well refuse to find against the employer, despite the implementation of retrenchments without proper consultations.

If you have read through the above mentioned case study of Numsa v Ascoreg, you would notice that if you as an employer do everything according to legislation, the court would not have a reason to find against you.

One mistake could cost the company a large amount of money, say for instance you have notified the Trade Union about the consultation and that they refuse to consult. If you don't have proof of that you could end up losing the case although all the other procedures were followed correctly.

For further advice please do not hesitate to contact our offices for assistance and a thorough consultation.

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