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Alternatives to dismissal - contemplating retrenchments post Covid-19

By Johan Botes

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The issue of when an employer should explore alternatives to retrenchment in consultation with their employees has been plaguing employers, trade unions, employees and South African courts for decades. Never has this been more relevant than now, as businesses begin to respond to the impacts of Covid-19 on their operations. In these uncertain times, employers may have no option but to commence with a redundancy process due to operational requirements.

The South African government has not imposed a moratorium on retrenchments during this time. However, it has encouraged employers not to retrench employees, but rather to have recourse to the Temporary Employer/Employee Relief Scheme (TERS). In terms of this scheme, where an employer is unable to pay salaries due to financial stress as a direct result of the pandemic, the company may qualify for the TERS. For an employer to qualify for the temporary relief, it must satisfy a number of requirements, including that it must be registered with the UIF; that it must comply with the application for the financial relief scheme; and that its closure must be directly linked to the Covid-19 pandemic.

That retrenchment consultations are proceeding during the national lockdown is evidenced in the case of *Food and Allied Workers Union (Fawu) v South African Breweries*, where the Labour Court recently decided that video conferencing was an acceptable method for conducting retrenchment consultations.

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If the employer has no alternative but to commence with retrenchments, the heart of the matter is the employer's statutory duty to consult with affected parties when it contemplates dismissals for operational requirements (retrenchments or redundancies). Once the employer contemplates such a dismissal, it is obliged to commence consultations. The reason for the legislated duty is simply that the employer should engage the affected employees before making a final decision to

retrench them. The employees should still be able to persuade the employer that there are other viable alternatives where these exist. The outcome of the consultations should not be a foregone conclusion, which is bound to be the case if the employer only commences engagement after taking a final decision to dismiss.

Alternative options

But does considering retrenchment as one of the options to steady the financial ship equate to contemplating dismissal? May an employer review and explore various options prior to triggering the obligation to commence consultation with affected parties?

The Labour Court has been guarded at expressing a definitive view on when it will regard an employer as having contemplated such dismissals (and thus were obliged to commence consultations). Judgments on this issue range from a duty to commence once it engages with staff on alternatives to retrenchment (including offering voluntary severance packages), to only being obliged to consult once alternatives have been exhausted. The distinction is critical for employers as it determines the latitude it has in approaching staff with alternatives without having to kick-off the formal consultation process with the employees or trade unions.

The Labour Court recently gave guidance on the state of play on this issue. It had to consider the employees' right to strike about a demand that the employer halts a redeployment process pending further consultation with the trade union. The court interdicted the strike. It held that the trade union could refer the dispute to adjudication after any dismissal and was the statutory prohibition on substantive limitations to the right to strike applies.

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Whilst the issues underpinning the threatened strike are of interest in respect of development of the employment law in that regard, our current focus is on the court's reasoning remarks in relation to the employer's duty to consider alternatives prior to issuing the statutory notice inviting parties to consult. The court held that the employer acts in breach of its duties to consider alternatives and, where possible, implement these options.

Employers should be at liberty to explore all alternatives permitted in law and equity prior to engaging employees in the death rattle discussions that are retrenchment consultations. Indeed, employers should be able to show, as the court stated, that all alternatives were explored and that valid reason exist why such alternatives were not implemented.

Voluntary termination

One viable alternative to operational requirements dismissals is to offer financial consideration in return for voluntary

termination. Unless such calls are made in breach of other employer obligations, an employer should be permitted to approach staff and request them to consider an agreed termination in return for payment of some form of compensation. Clearly such a step can and should be capable of challenge where such an agreed termination breaches discrimination or other fair labour practice obligations. An employer may not disregard other employee rights under the guise of exploring alternatives to retrenchment. However, where the employer can avoid the negativity and insecurity induced by mass consultations about proposed redundancies, it should be permitted to explore reasonable lawful alternatives.

In the judgment handed down in 2017, in *ArcelorMittal v Numsa & others*, the court confirmed in the employer's duty to explore and, where practicable, implement viable alternatives. Employers are encouraged to minimise the adverse effect of not only eventual dismissals, but also the process leading up to such terminations.

Post Covid-19, businesses will have to explore creative solutions that will avoid or mitigate the terminations. If there had been any doubt about the dire need for this approach previously, the impact of Covid-19 on businesses has confirmed that all creative alternatives to further job loss must be encouraged. Where reductions are unavoidable, humane ways of parting ways can and should be explored.

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