Business distress and operational planning

A previous *Labour Bulletin* looked at how companies can avoid a crisis which results in job loss. In this second article in the series **Graham Giles** and **Daan Groeneveldt** examine the dangers of operational planning and budgeting that does not include a human resources element and does not provide relevant information for the mutual benefit of employers and employees.

In identifying problems that may threaten a business it is useful to examine the idea of the employer's 'operational requirements'.

OPERATIONAL REQUIREMENTS

Recently the Labour Appeal Court (LAC) confirmed a judgment from more than ten years ago, that dismissal relating to an employee's dishonesty has everything to do with the employer's operational requirements and it is a sensible operational response. *(Miyambo v CCMA (PPC Ltd) (2010)* and *De Beers Consolidated Mines Ltd v CCMA & others (2000)*. These judgments are important because they focus on business needs, not the employee's misconduct, and they stress that it is not the function of managers to punish employees.

The employer's reason for dismissal, theft in this case, was treated by the LAC as falling within the category of risk management. In other words the LAC saw the need for employers to adopt policies and practices that ensure that all risks in the enterprise are properly managed. Risk management is part of the employer's operational requirements.

The Labour Relations Act (LRA) allows employers to dismiss for a fair reason based on 'operational requirements' or on the employee's conduct or capacity. Clearly the LAC regards dishonesty as a breach of trust as also falling within 'operational requirements'.

The LRA defines 'operational requirements' as 'requirements based on the economic, technological, structural or similar needs of an employer'. Operational requirements are therefore not a closed category. It is difficult to define all circumstances on which it may be fair to terminate employment based on operational requirements.

The following may help in defining circumstances where operational requirements could lead to dismissal:

- Economic needs include 'risk management' and the need for trust in employment relationships.
- Technological needs refer to the introduction of new technology affecting work relationships by making jobs redundant, or by requiring employees to adapt to new technology or a resulting restructuring of the workplace.
- Structural needs relate to the scrapping of posts during restructuring.

Usually 'operational requirement' terminations are not related to employees' actions. The question then arises whether business distress should be accepted as justification for the destruction of jobs.

PLANNING AND HUMAN RESOURCES

Employees have a right not to have their employment terminated unfairly. If employees challenge their terminations, even when lawful with payment of notice pay and severance benefits, employers must still prove that:

- the job losses were operationally justifiable on rational grounds;
- all possible alternatives were considered; and
- employees or their representatives were properly consulted.

When justifying 'dismissals' for reasons of business distress it is not enough for employers to show that previous plans and budgets have been changed. Business failures

seldom happen suddenly and are usually preceded by warning signs. Operational planning and budgeting that does not include a human resource element raises big concerns, particularly if cost cutting includes savings through job destruction.

In this regard, here are some 'top-of-mind' realities:

• People, the most flexible of enterprise resources walk out the door every night. Employees know a lot more about 'coal-face' delivery than they let on and can add great value in a properly managed system. Day-to-day information sharing and follow-up is much more valuable than a day-by-day 'come to work and clock-watch until knock-off time'.

• Managing human resources is a critical business skill and success requirement.

• The worth of any job is the capacity of the enterprise to pay for it.

• The earlier management identifies problems in the enterprise, the greater the opportunities to explore alternatives and decide on the best options.

• Knowing what everyone must do and account for creates a flexible operation that can respond to operational and customer needs and the sustainability of the enterprise.

Below are further reasons for the value of using operational requirements as a business planning tool.

Pay is an emotional issue and it is the first operational cost that accountants prefer to cut in times of distress. Business needs to see pay in the wider context of operational expenses and in some cases use the remedy of offering employees additional incentives to cut costs. If companies measure pay only as a cost what they get in return is only compliance. But if companies measure pay as an investment for mutual benefit, this can yield exciting returns.

LAW: A BLUNT INSTRUMENT

Workplace relations have become increasingly dependent on legal compliance, rather than on a participative approach, causing the loss of flexibility and vibrancy of employees. For enterprises to grow and be sustainable they must be dynamic social organisms which serve 'customers' through the collective knowledge, skill, creativity and cooperation of people working together for mutual benefit. Unfortunately labour law does not promote such essential workplace relations.

Using operational requirements to justify 'no fault' dismissals or any of the economic, technological or structural needs of the business can satisfy the legal requirements for job destruction. But these same elements, when used as the framework for job structuring and development, can also provide useful tools to structure enterprise rescue, survival, profitability and growth.

The use of operational requirements could add a valuable element to human resource planning. HR planning is generally defined as putting the right number of people, doing the right things, in the right place, at the right time, at the right cost to achieve business goals.

HR management (HRM) needs to 'work' for management and employees. Consequently good HRM practices should be transparent, logical and relevant to operational requirements. This way management can interact with employees about workplace circumstances and build a climate of trust and confidence. This is not always the case with 'fair' procedures in labour law.

Managing human resources is a critical business skill and success requirement. It is important to stress that the workforce is not managed by the human resources department but by line management with the assistance, when necessary, of human resource specialists.

Unfortunately the evolution of labour law has created a workplace culture that focuses on costs and compliance, and only line managers' behaviour can reverse this negative impact. In reality labour law only becomes prominent when managers contemplate terminating employment based on the operational needs of the business and they have to comply with sections 189 and 189A of the LRA or annual wage negotiations which involves consultation with the workforce. At these times the level of workplace trust is low.

Recent mass action, at times violent, indicates very low levels of trust. Managements that have such low trust levels should be concerned because this increases operational risk, uncertainty and decreases employee motivation.

Mass action has mainly involved pay negotiations. A foundation of human resource planning is that the worth of any job is the capacity of the enterprise to pay for it. So an alternative to negotiations is to disclose operational requirements involving financial, know-how and structural requirements as a pre-negotiation information base.

Traditionally negotiations begin with the union delivering a list of demands covering a range of issues to the employer who responds by rejecting most of them and makes low counter proposals. From this point the parties start negotiating towards a compromise.

If reaching a compromise is guaranteed, then negotiations are a matter of a time-line. However if there is no guarantee that the parties will reach a compromise and when negotiations breakdown this has serious consequences for workplace relations.

The 2010 'strike season' should trigger a need to change adversarial negotiations and find better ways to bargain than simply flexing muscles. Whilst adversarial bargaining may produce outcomes, these can be lose/lose situations.

William Matlala

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To change this situation, employers and employees need to understand the operational requirements that apply throughout the annual budget and planning cycle. 'Special' circumstances do not suddenly cause business distress or affordability problems during wage negotiations. The parties need to recognise that the definition of operational requirements is a statement of the enterprise's strengths, weaknesses, opportunities and threats. Negotiators therefore need to consider how as stakeholders, they can work within the constraints and opportunities for mutual gain.

This approach supports the reality that knowing what everyone must do and account for in an organisation creates a flexible operation that can respond to operational and customer needs and the sustainability of the enterprise.

In terms of our history, industrial relations is relatively new, but it is one which needs to evolve in tandem with transformation of the workplace. Unfortunately we are in a rut when employers and employees see each other as adversaries in the very environment that sustains their livelihoods. This does not create trust, confidence and the willingness to do the best job.

This means that the reality that the earlier management identifies problems in the business and fixes them, the greater the opportunities to explore alternatives and decide

on the best business options. Unfortunately the reality is that people, who are the most flexible resource, walk out the door every night. A workplace where management holds on to all the problems indicates the reality that pay when measured only as a cost yields the returns of compliance alone.

INFORMATION DISCLOSURE

How do enterprises achieve another reality that pay when measured as an investment, for mutual benefit, yields exciting returns?

Section 16 of the LRA deals with the employer's obligation to disclose relevant information to employees and their representatives so that they can perform their functions. This raises the question of what is *relevant* and why should there be different information for different operational interventions?

Business has many concerns about the disclosure of operational information, but there are techniques to provide information in a way that is relevant to operational activities and which are the focus of negotiations (to be discussed in a future article). Access to relevant information which shows how individuals can influence operational outcomes, is the key to sustainable workplace relationships.

Operational requirements is not a closed category of information.

Consequently the challenge is to define the circumstances and type of information that will enable employees to participate in day-to-day activities, rather than simply following instructions. Armed with this information, employees will grow and share in the success of the enterprise and take advantage of individual development opportunities.

Whilst there are many established information-gathering and evaluation processes, South Africa needs to develop systems that facilitate more general information-sharing rather than just focusing on the specific definition of operational requirements.

As an example, management needs to look at improving HR information systems by using elements of financial management, technological, operational know-how and structural occupational levels that a company requires. It needs this information when analysing and awaiting:
- current operational circumstances;
- organisational structure;
- human resource skill levels;
- human resource cost levels.

If these evaluations are done carefully, it will create decision support systems for all HR planning, review and reporting processes.

It is worthwhile developing this level of HR support information because of the benefits arising from the integration of HRM and business operations. This information system also aligns statutory employment audits, reporting and consultation requirements and HR practices with other operational information systems. And finally, standardises workplace communication and consultation information sets. **LB**

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