Disclosure of information

Henry Ngcobo and Nikki Howard show how unions can strengthen their position in disputes relating to the disclosure of information.

The LRA grants unions a number of organisational rights. One of these rights (found in Section 16 of the LRA) is the union's right to information during consultation or collective bargaining. Section 16 tries to balance unions' needs for relevant information (to fulfil their functions) with employers' needs to keep information secret.

In this article we discuss:

- how Section 16 of the LRA is being applied in practice;
- how trade unions can strengthen their position in disputes relating to the disclosure of information, particularly in the context of collective bargaining and proposed retrenchments.

Section 16

Sections 16(2) and (3) of the LRA require an employer to disclose to a trade union all relevant information that will allow the trade union to:

- effectively perform the functions of shopstewards;
- engage effectively in consultation or collective bargaining.

If employers and unions are to engage in a realistic, intelligent and informed basis they must have factual information.

Unions and employers often contest what and how much information is needed for intelligent collective bargaining. Unions and employees think that they need full disclosure of information in order to assess their own position and the employer's position. On the other hand, many employers consider disclosure of information as invading their privacy and prerogative. These different views are evident in disputes about whether an employer should be compelled to disclose particular information.

Relevant information

It is very important to look at the 'relevance' of the information that the union wants, because a union is only entitled to relevant information.

When an adjudicator (for example, a judge/arbitrator/commissioner) decides whether information is relevant or not, he/she will look at what the union wants the information for. The adjudicator will use an objective test to decide whether information is relevant or not. In

Column contributed by Cheadle, Thompson and Haysom

SACCAWU and others v Pep Stores (1998) 19 ILJ 1226 (LC) 1237D-E, Judge Landman held that 'relevance... is directly connected to the purpose of disclosure. The purpose for which the disclosure of the information is required will determine whether or not certain information is relevant or irrelevant.' In this case the judge rejected an argument by the union that the information is relevant if the party requesting it thinks that it will be relevant.

Relevant information includes:

- the information the employer has considered in putting forward its proposals;
- the information that would enable the union to develop its own alternatives.

In NUMSA and others v Comark Holdings (Pty) Ltd, (1997) 18 ILJ 516 (LC), Judge Mlambo expressed the view that in order to enable employee representatives to fulfil their duty of seeking alternatives through meaningful and effective consultation, it is necessary that they be given an opportunity to consider:

- information which, in the employer's view, suggests that there are no alternatives to retrenchment;
- other information which the employer has not considered to be relevant but which might well be.

The union must prove that the information they are requesting is relevant to the issue that they are consulting on or negotiating. It is not enough to establish that the information may be relevant to the issues (NUMSA/Nissan South Africa Manufacturers (Pty) Ltd [1999] 4 BALR 494 (IMMSA) at 501G-I).

In the NUMSA/Nissan South Africa Manufacturers case, the arbitrator held that the party demanding the information must prove that the information they want is relevant. This means that the union or employees usually have to prove, on a balance of probabilities, that the information they want will be relevant to the issue they are negotiating or consulting on. The problem with this approach is that it is often extremely difficult for a union to prove that the information is relevant when the union does not have the information in its possession.

Before requesting information, unions should identify what they want to achieve in performing their functions in a given situation. (For example, the union may decide it needs the information to look for alternatives to retrenching; or it may decide that it needs the information to check whether the company really is making a loss). Once the union has identified its objective, it will be easier to identify what information it needs.

Because a union has to prove that the information it wants is relevant, it is important for the union to clearly motivate why it needs the information to perform its functions. In order to do this, the union must understand the connection between the information it wants and the function it is performing. If the employer refuses to disclose the information requested on the basis that it is irrelevant, the union should request a detailed motivation as to why the information is irrelevant.

The importance of making the connection between the information requested and the purpose for which it is required is illustrated by the judgments in a number of Labour Court cases. The Labour Court has held that an employer does not have to disclose financial information if the employer says that it is retrenching – but not for financial reasons.

In Hendry v Adcock Ingram (1998) 19 ILJ 85 (LC), Judge Revelas J found that: 'If the respondent can show that by cutting operational costs and excluding some of its business areas, it can make better profits instead of losses, I do not see the

need for furnishing other written information relating to the financial justification, for example financial reports and the like.' (at 93C-D)

In Upusa v Grinaker Duraset, (1998) 19 ILJ 107 (LC) Acting Judge Grogan stated: 'When asked to explain the relevance that such a figure [the respondent's bank balance] would have had, he [the applicant's representative] suggested that the respondent could not have fairly retrenched if it had reserves of 'millions'. But that is not the test where the employer does not plead poverty – which the respondent never did in this case. As mentioned above, its explanation was simply that the retrenchees' positions had become redundant due to a reduction of work.' (at 117D- F)

In Van Rensburg v Austen Safe Co (1998) 18 ILJ 158 (LC), Revelas J again found that: 'The applicant's post became redundant as a result of a change in business focus, not because the respondent was financially destitute. That was never the respondent's case. Therefore the respondent is not obliged to provide the applicant with an explanation as to its business errors in the past.' (at 169F)

These cases look at the reasons for the retrenchment when deciding whether the information that the union requested was relevant. In these cases the financial information may have been relevant to:

- the company's ability to implement alternatives the union wanted to propose;
- the severance packages the employer was in a position to pay.

If unions make clear what information they need and why they need the information, it will be more difficult for employers to claim that the information is irrelevant. For example, a union would be in a stronger position if it says that it needs a company's financial statements to assess what severance packages a company can pay, than if it says it needs the company's financial statements to consult on retrenchments.

Unions must therefore clearly define exactly what they need the specific information for, if they are going to prove that the information they need is relevant. It is harder to determine relevance where the problem/purpose is not well defined, or where the parties believe that there are different causes to the problem.

Information and retrenchments

Section 189 of the LRA states that certain procedures must be followed when an employer contemplates dismissing one or more employees for reasons based on operational requirements. The first step to follow is consultation. During the consultation the parties must attempt to reach agreement on a number of issues that are listed in Section 189(2).

It is obvious that there cannot be adequate consultation over proposals if one of the parties does not have all the facts. In the retrenchment context, the union or the employees will not be able to make rational proposals or formulate alternatives, unless they have sufficient information to assess or challenge the employer's proposals. In appreciation of this fact, Section 189(3) requires an employer to supply in writing all relevant information, which must include but is not limited to:

- the reasons for the proposed dismissals;
- the alternatives considered by the employer;
- the reasons why such alternatives cannot be used;
- the number of employees and the number of employment categories to be affected;

Employers do not often want to disclose information that the union wants.

- the proposed methods of selecting retrenchees;
- any assistance which the employer proposes to give the retrenched employees;
- the possibility of future re-employment of employees who are being retrenched.

Employers often approach the disclosure of this information in checklist style, making empty statements on each of the issues on which they have to disclose information. This approach represents an attitude of minimal compliance. Employers are often mainly concerned with setting up a record that on the face of it appears to be in compliance with the LRA but is meaningless in substance.

The union can ask the employer to disclose more information on why it is proposing the dismissals – the union may ask the employer to substantiate the reasons it has given for the proposed dismissals. This may amount to evidence that the retrenchments are in fact not necessary, and may involve disclosure of financial statements or an independent audit.

No disclosure

Even if information is relevant, sub-Section 16(5) of the LRA provides that an employer is not required to disclose information which:

- is legally privileged;
- if disclosed, might contravene a prohibition imposed on the employer by law or an order of court;
- is confidential and, if disclosed, may cause substantial harm to the employer or employee;
- is private personal information about an employee, unless the employee consents to disclosure.

Section 16 therefore recognises that total disclosure of confidential information could damage the employer's enterprise, the union and its members, and/or the

relationship between the union and the employer. However, this does not mean that all confidential information cannot be disclosed.

In terms of Section 16(4), if the information the employer is required to disclose is confidential, the employer must inform the union in writing that the information is confidential. This is to alert the union to the fact that the information must not be disclosed to outside parties. Employers often appear to believe that all they have to do is claim that the information is confidential to avoid having to disclose the information to the union or employees. But, if the employer is to justify non-disclosure, it must go further. The employer must also prove that the disclosure will cause substantial harm to it or an employee. Harm to a third party does not qualify as a justification for non-disclosure.

Employers often claim that they do not have to disclose information because the information is confidential. If the employer refuses to disclose information on this ground, the union should demand that the employer explain fully:

- ❑ why the information is confidential;
- ❑ what substantial harm will be caused by disclosing the information.

Disputes

When a trade union requests information, an employer will often refuse to disclose the information on the grounds that the information the union wants is not relevant or is confidential.

If a dispute arises as to what information should be disclosed the dispute may be referred to the CCMA. The CCMA must attempt to conciliate the dispute but if this fails the dispute may be referred to arbitration.

The commissioner hearing the dispute must first decide whether the information requested is relevant or not. If the information is relevant and the employer claims that he/she by law does not have to disclose the information, the

Checklist for information disclosure

- ❑ Identify your objective/ purpose.
- ❑ Identify the information you need to perform your functions.
- ❑ Work out why the information is relevant to what you are doing.
- ❑ Ask for the information as soon as possible.
- ❑ Motivate why you need the information.
- ❑ If you do not know what information the employer has, ask for all the documents relating to the issue.
- ❑ Request the information in writing or confirm a verbal request in writing.
- ❑ When you get the information, read it and check whether you have all the information you need.
- ❑ If you need more information, immediately ask for it.
- ❑ If you do not understand the information, ask the employer to explain it or consult experts appointed by the union.
- ❑ If the employer refuses to disclose information ask for a detailed written explanation why he/she will not disclose the information.
- ❑ If the employer claims that the information is confidential, ask him/her to explain in writing why the information is confidential and what substantial harm will be caused to the employer or to an employee if the information is disclosed.
- ❑ If the employer refuses to disclose the information you requested, immediately refer the dispute to the CCMA or follow the procedure in a collective bargaining agreement relating to disputes about information disclosure.

Ditsela facilitates a course on information skills for negotiations.

commissioner must then proceed to the next stage of the enquiry. The employer has to prove that he/she does not have to disclose the information because the information falls into a protected category (that is a category of Section 16(5)).

But the enquiry will not end if the employer proves that the information is confidential and that its disclosure will cause substantial harm. The commissioner still has to weigh up the harm to the employer or employee against the harm that the failure to disclose is likely to cause to the union's ability to perform its functions in terms of the LRA. If the commissioner decides the balance of harm favours disclosure, he or she may order the disclosure on terms that limit the harm.

In summary, to rely on confidentiality as a basis of non-disclosure, the employer must establish:

- ❑ that the information is confidential;
- ❑ that its disclosure will cause substantial harm to the employer or an employee;
- ❑ that the harm of disclosure outweighs the harm to the union if it is unable to perform its functions properly.

Do not delay

Unions should be extremely wary of using the process of requesting information as a delaying tactic. The Labour Court and the Labour Appeal Court, have on numerous occasions made it clear that they will not be sympathetic to trade unions and employees who do not engage in negotiation and consultation processes with employers in good faith. In such instances, the employer often implements its retrenchment programme without consulting the union or employees, and the courts have found the employers' conduct here, to be fair in the circumstances. ★

This article draws heavily on material that Nikki Howard had developed for the Ditsela course on information skills for negotiations. Henry Ngcobo is a candidate attorney at Cheadle Thompson & Haysom Attorneys Nikki Howard is an attorney at Cheadle Thompson & Haysom Attorneys.