



# NEDLAC CODE OF GOOD PRACTICE REGARDING DISMISSALS BASED ON OPERATIONAL REQUIREMENTS SCHEDULE 8 OF THE LABOUR RELATIONS ACT, 1995

Insert into Schedule 8 of the Labour Relations Act immediately after section 11, a new section 12 - 12 Operational requirements

- (1) This Act defines a dismissal based on the operational requirement's of the employer's undertaking as one that is based on the economic, technological, structural or similar needs of an employer. This is not a closed category and it is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.
- (2) Dismissals for operational requirements have been categorised as 'no fault' dismissals - in other words, the employee is not responsible for the termination of employment, the effective cause of the termination is one or more external or internal factors related to the employer's business needs. For this reason, together with the human cost of retrenchment, this Act places particular obligations on an employer; most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that those employees to be dismissed are treated fairly.
- (3) The obligations placed on an employer are largely procedural. Primarily, they comprise a duty to consult with the required party before a final decision to dismiss is taken, the fair selection of employees to be dismissed and the payment of severance pay.
- (4) The purpose of consultation is to permit the parties, in the form of a joint problem-solving exercise, to strive for consensus where that is possible. The matters on which consultation is necessary are listed in section 189(2). This section requires the parties attempt to reach consensus on, amongst other things, appropriate measures to avoid dismissals. In order for this to be effective, the consultation process must commence as soon as it is clear that a reduction of the workforce is likely so that possible alternatives can be explored. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.
- (5) This Act also provides for the disclosure of information by the employer on matters relevant to the consultation. Although the matters over which information for the purposes of consultation is required are specified in section 189(3), the list in that section is not a closed one. If considerations other than those that are listed are relevant to the proposed dismissal, they should be disclosed to the consulting party.

- (6) The period over which consultation should extend is not defined in this Act. The circumstances surrounding the consultation process are relevant to a determination of a reasonable period. Proper consultation will include: the opportunity to meet and report back to employees; the opportunity to meet with the employer; and to request, receive and consider information. The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. On the other hand the parties who are entitled to be consulted have a duty to cooperate during the consultation process. It should be used as an opportunity to reach consensus, and not as a delaying tactic.
- (7) If one or more employees are to be selected for dismissal from a number of employees, this Act requires that the criteria for their selection must be either agreed with the consulting party or be fair and objective criteria.
- (8) Criteria that infringe a fundamental right protected by this Act when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other discriminatory ground. Criteria that are on the face of it neutral should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.
- (9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. However, depending on the circumstances, other selection criteria may also be fair. The less capable these criteria are of measurement against objective standards other than the opinion of the person making the selection, the less likely they are to be fair. The less objective the proposed criteria for selection, the more important the obligation to consult over selection criteria becomes. For this reason, length of service (applied in the form of LIFO or 'last in, first out') is commonly applied, on its own or in combination with other criteria. Exceptions to the general rule, for example the right to retain employees with special skills, are often recognised.
- (10) Employees dismissed for reasons based on the employer's operational requirements are entitled to severance pay of at least one week's remuneration for each completed year of continuous service with the employer. If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the right to severance pay is forfeited. Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee's refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the employee's personal circumstances play a greater role.
- (11) Section 196 of this Act requires an employer to pay severance pay equal to at least one week's remuneration for each completed year of continuous service unless the employer has been exempted from the provisions of section 196. This minimum requirement does not relieve an employer from attempting to reach consensus on severance pay during the period of consultation.
- (12) Employees dismissed for reasons based on the employers' operational requirements should be given preference where the employer again hires employees with comparable qualifications, subject to:
- the employee having expressed within a reasonable time from the date of dismissal a desire to be re-hired, and
  - the right of the employer to limit preferential re-hiring to specified but reasonable period of time.

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