

Negotiating retrenchments

a toolbox

Ask any organiser what they dislike doing as part of their union work – they'll say dealing with retrenchments. Ask any shopsteward what they find very difficult to deal with – they'll say dealing with restructuring and retrenchments.

While certain victories can be recorded in the fight against retrenchments and for quality jobs, countless defeats can also be pointed to. Formal employment has plummeted (see Makgetla's article on p 16) and demoralisation has increased significantly.

Unionists feel they are losing the battle against retrenchments. If unions and labour service organisations (LSO) are to successfully challenge retrenchments in a manner that saves quality jobs and builds organisation, a number of issues should be considered, including:

- challenging the notion that there is no alternative to the emerging dominant order which prioritises competitiveness, privatisation and private accumulation in the hands of a few;
- challenging government policies which promote privatisation and deregulation, as well as an industrial strategy which does not focus on job creation and development,
- increasing union power at the workplace and at national level;
- challenging labour law and broader

Tanya van Meelis identifies three tools that may be used to strengthen labour's position when dealing with retrenchments.

policy that does not act in favour of the working class,

- building unionists' capacity to utilise the existing LRA (flawed as it may be) and mobilise workers to challenge retrenchments.

The *Labour Bulletin* has carried numerous articles that address the above issues. This article points to some specific areas unionists regard as being problematic (specifically at the level of the workplace) and identifies three tools that can be used to strengthen unionists' positions. These tools must be seen in the context of building power and organisation and specific strategies to achieve these goals. What should also happen at the same time, and which is not focused on in this article, is an engagement at the broader political and ideological level on the areas identified above.

Information

Most unionists stress the need for information when dealing with a retrenchment. Nelson Mthombeni, head of

collective bargaining for CEPPWAWU advises 'Ask for information This is a difficult area because management does often not want to give information By asking for information you help yourself to challenge management. In one company, just by asking for information, the company reviewed its position about the retrenchments In the end we had only three forceable retrenchments and 60 voluntary retrenchments, instead of the 200 that the company originally proposed'

Many organisers cite access to relevant information from employers as a problem. The challenges in this regard are numerous:

- unionists may not always know what information to ask for;
- employers are reluctant to give information or refuse to give information;
- unionists may not always be sure how best to interpret the information – specifically financial information

The challenges are addressed in a course facilitated by Ditsela that aims to enhance unionists' abilities to access and interpret information The first section of the course explores various sources of information, why its important for unionists to look to the shopfloor for new information and to verify information from management, what kinds of information unionists need to gather to build a case that is in the interests of workers etc.

The second section of the course focuses on enhancing unionists' understanding of how best to use section 16 of the LRA. It goes through section 16 in detail, gives case law on section 16 (as well as a critique) and provides a checklist for unionists to use when employer p 32)

The third part of the course focuses on enhancing unionists' understanding of reading financial statements and extracting

information that will strengthen workers' positions in challenging retrenchments

Striking and retrenchments

Many unionists feel frustrated because they cannot strike over consultative issues, including retrenchments. They feel that they are not able to yield power against employers when it is needed most, and they are not able to call workers to action to defend themselves and build the organisation In an article entitled 'Restructuring and job security', published in the *Bulletin* vol 24 no 6 in December 2000, Anton Roskam and Doris Tshepe investigated, from a legal point of view, possible ways to counter-act the job losses that result from business restructuring They argue that unions can strike over consultative issues: 'protected strikes may take place about all matters that are of mutual interest between the employer and employee except matters covered by section 65 of the LRA'. The exceptions include workers not being able to strike if the party has the right to refer the matter for adjudication (ie to arbitration or the Labour Court) or if the matter is regulated by an agreement.

Roskam and Tshepe argue that if unions are careful about how they declare and process disputes, they can take strike action in certain cases. They argue that unions need to:

- identify early on in the process of engagement the issues that would be organisationally best to mobilise their membership;
- carefully define the dispute so that workers are not precluded by section 65 of the LRA from embarking on strike action;
- process the disputes timeously so that if there is a need to exercise power the union is able to call out a strike within a short a time as possible.

Check list: when an employer refuses to give you information

The following checklist was compiled by Nikki Howard of Cheadle Thompson & Haysom Inc and is handed out to participants on the Ditsela course on information skills. Nikki Howard and Henry Ngcobo also published an article in the *Labour Bulletin* (vol 23 no 6 December 1999) which provides more detail on how unionists should approach section 16 of the LRA

When an employer refuses to provide information:

1. Identify the information you require in order to perform your functions
2. Work out why the information is relevant to the issues or functions you are performing
3. Ask for the information as soon as possible after the issues are discussed or the function you need to perform arises.
4. Motivate why you need the information and explain why the information will enable you to perform the functions you need to perform.
5. If you do not know what information the employer has, ask for all the documents relating to the issue on which you require the information.
6. Request the information in writing or confirm a verbal request in writing.
7. When the employer provides information read it carefully to see whether the employer is being completely honest and open.
8. If the employer provides information and it is clear from the information provided that you need further information, immediately request further information.
9. If you do not understand the information, request that the employer provide an explanation of the information or consult experts appointed by the union to advise you on the implications of the information.
10. If the employer refuses to disclose the information, immediately request a detailed explanation as to why the information cannot be disclosed.
11. If the employer refuses to disclose information because it is not relevant ask the employer to explain in writing why the information is not relevant.
 - If you believe that the information you require is relevant explain why to the employer. Explain that if the employer does not disclose the information to the union, the union intends referring the dispute to the CCMA, or using the dispute procedure (if there is one with the company) for disputes about disclosure of information.
12. If the employer refuses to disclose information because it is confidential *and* if disclosed will cause substantial harm to the employee, ask the employer to explain these reasons in writing and specify what harm will be caused to the employer or employee if the information is disclosed.
 - Depending on the employer's response, inform the employer that the union's view is that the information is not confidential or that the information will not cause substantial harm.
 - Point out that even if the information is confidential, failure to disclose it will harm the union's ability to perform its functions.
 - If the information is confidential and could cause harm, offer to discuss ways to ensure that no harm is caused by disclosure.
 - Depending on the employer's response, inform the employer that the union intends referring the dispute to the CCMA, or using the dispute procedure (if there is one with the company) for disputes about disclosure of information.
13. If the employer still refuses to disclose the information, immediately refer the dispute to the CCMA or follow the procedure in a collective agreement relating to disputes about disclosure of information.

The kinds of issues that workers can strike about include

- job security collective agreements;
- re-employment collective agreements;
- severance packages,
- private internal dispute resolution procedures,
- preferential tenders for retrenched workers;
- a ban on outsourcing, casualisation, alternative arrangements relating to outsourcing and casualisation that protect workers' terms and conditions of employment, benefits, bargaining arrangements and health and safety conditions etc.

Roskom and Tshepe also propose that unions consider trying to negotiate a collective agreement around job security. When management refuses to sign the collective agreement unions may call for strike action in support of the collective agreement. Collective agreements of this nature are complicated and difficult to draft but should include:

- what should be contained in a notice of possible restructuring and retrenchment;
- when management should inform unions of their intention to restructure,
- the information that should be disclosed to the union;
- resources, including the provision of expert consultants that will be put at the union's disposal (at management's expense) to analyse the information;
- alternatives to retrenchment that must be considered by management before proposing the possible restructuring and retrenchments;
- legitimate reasons for dismissals for operational requirements, including what constitutes a substantively fair dismissal,
- when it is appropriate to outsource, if ever;

- the process of bargaining and disclosure of information that must take place before transferring employees in terms of section 197 of the LRA;
- the minimum conditions upon which transfers in terms of section 197 may take place;
- a dispute resolution process;
- the terms of re-employment of dismissed workers;
- severance packages and contributions to medical aids and housing subsidies for workers who are dismissed and remain unemployed,
- work security and training funds for employees who are retrenched

Enhancing knowledge

A key tool to use to help fight retrenchments is building unionists' knowledge on the area including: Why are companies retrenching? What is globalisation and what impact is it having on workers? How do you build workers' unity and solidarity in the face of divisions caused by retrenchments? What negotiation tactics and strategies can be used? What alternatives are there? etc.

One way of enhancing knowledge in these areas and promoting a sharing of experiences from unionists is through union education. This is posed as something quite distinct from a general education one could receive through a university correspondence course (as an example) since union education specifically aims to, among other things, identify the impact of the changes in the economy etc on workers and attempts to build the capacity of unionists specifically to deal with threats to the working class. Union education is thus not only technical, but it is also political and has a strong emphasis on building working class organisation. Its methodology is strongly participative and functions to draw out

knowledge, experience and creativity that unionists already have instead of viewing them as passive recipients of knowledge they should, like empty vessels, receive.

One well-known and successful provider of union education is Ditsela (the Development Institute for Training, Education & Support for Labour: a joint COSATU and FEDUSA project). Jerry Malatji, a programme officer at Ditsela who is currently modifying existing courses for improvements, identified the difficulties unionists have when dealing with restructuring and retrenchments: 'Unionists are very frustrated because what companies plan to do, they do. The law is not assisting unionists stopping retrenchments.

Organisers and shopstewards are not very good at countering managements' proposals. They are engaging on the issues at a late stage because the companies bring them on board late, and also experience pressure from members . to negotiate packages quickly so that they can go with a high package. But unions should know that going for high packages as the first thing is tantamount to loss'

Given these and other problems unionists are experiencing around retrenchments, Ditsela is improving existing courses and developing new components in courses These will further examine globalisation, where restructuring and retrenchments come from, trends, tactics to be used, deciphering the language management uses and the like. Malatji emphasises: 'The aim of the course is to link globalisation to the workplace We are not necessarily coming with solutions, but a way of understanding the challenges facing labour more We need to understand the animal before we decide which tactics to use.'

While Ditsela facilitators may not be

posing step-by-step solutions now, discussion among participants usually involves a rich sharing of information and experience which provides participants with ideas and some do's and don'ts. This knowledge gained from experience is very valuable. Malatji, Mthombeni and Osborn Galeni of NUMSA share examples of this knowledge.

Mthombeni's advice is: 'The best thing is organising to fight for information and ensuring that shopstewards are well versed and do their own research in the factory. Only then can you begin to challenge management effectively.'

Galeni's advice includes.

- analyse the situation, even if you have to delay the process to do so A proper analysis will allow you to find the loopholes;
 - do not rush the process;
 - consult broadly, with what management is saying and what your membership is saying, in order to strategise effectively.
- Malatji's advice includes:
- do not let management or workers push you into discussing voluntary packages first;
 - identify the brains behind the restructuring;
 - do research to understand the exact circumstances;
 - recognise that company's approaches differ and mould your strategy accordingly;
 - give workers detailed information, but do not entertain the question of money in the initial meetings;
 - play a central role - make management feel that the union is important and cannot be ignored;
 - do not fall into the trap that you can stall retrenchments by not co-operating, otherwise you go back into the process when it is far advanced and have no power. ★