Negotiating retrenchments?

The labour movement has called for negotiations instead of consultation when it comes to retrenchment. Anton Roskam and Doris Tshepe debate some of the difficult issues associated with this call.

At COSATU's special congress in August, a popular call was made time and again. The call was for retrenchments to be made a matter for negotiation rather than consultation.

The call arises because the labour movement has been unable to halt the avalanche of retrenchments that South Africa is experiencing. But what does this call really mean? Will the overwhelming number of dismissals for operational reasons be significantly reduced by changing the process in Section 189 of the LRA from one of 'consultation with the aim of reaching consensus' to one involving negotiation?

Section 189 of the LRA

Section 189 of the LRA sets out the procedures that an employer must follow before it may dismiss for operational reasons. The procedures involve consultation with a view to reaching consensus on:

- the need to retrench;
- appropriate measures to avoid or minimise the adverse effects of the retrenchment;
- the number of workers to be retrenched;
- the criteria for selecting workers to be retrenched;
- other issues that are incidental to the retrenchment, such as severance packages.

Retrenching is too easy

Changing Section 189 will not solve South Africa's employment problems. This is an economic problem. But there is a perception in the union movement that dismissal for operational reasons is far too easy. Employers fail to fully canvass the possible alternatives to job losses. They take little, if any, responsibility for the social costs associated with the dismissals. Employed workers must, however, bear the brunt of stretching their meagre wages to cover more and more unemployed dependants. Sometimes the retrenchments are purely motivated by extracting greater profits rather than saving an ailing business. The Labour Court has accepted this as a legitimate reason for retrenching.

Column contributed by Cheadle, Thompson and Haysom

Workers are also frustrated with a Labour Court that is reluctant to weigh up the alternatives to retrenchment and only checks to see whether the retrenchments can be justified in some commercial way.

Moreover, consultations are often a farce with employers merely 'going through the motions'. Unions are disempowered in that process, lacking information and expertise.

A typical scenario

Let us consider a common retrenchment example. A multinational company wants to retrench 500 employees. It says that this is necessary in order to be globally competitive. It has hired a management consultancy firm that evaluates the company's production processes. The consultants advise the company that it can increase productivity and profits by contracting out, introducing new technologies and widening the ambit of certain workers' responsibilities and profits. But this means 500 must go.

The management consultants have produced a 1 000-page report. It has used 'experts' from all over the world. The whole exercise has cost the company R5-million. The consultants have purportedly involved some of the shopstewards in the process of developing the report.

The company now wants to consult the union about alternatives to the retrenchments. If the union does not have any viable alternatives, the company proposes to pay one week's pay for each completed year of service. The company wants the consultation process to be completed in two weeks. Does this sound familiar?

The union's predicament

In this scenario the union feels completely helpless. The shopstewards, who have been 'involved' in the consultancy firm's process, do not have the expertise and training to counter its bias. They feel that they have been hoodwinked and therefore remain silent. The union, unlike the company, does not have the resources to hire consultants.

But there remains an overwhelming feeling in the pit of the workers' stomachs that if the company were to take less profits, 500 workers and their families would not be joining the unemployment lines. They are also engulfed with an overwhelming sense that whatever alternatives the union suggests the company will reject because it has already decided to retrench. The union therefore has the distinct impression that the company intends to simply 'go through the motions' when it says that it wants to consult.

Faced with this predicament, the union emphasises procedure over substance during the consultations. In most cases it cannot call a strike about business decisions like the decision to contract out, as workers fear that this may lead to further job losses. Sometimes, in desperation, it seeks an interdict because it believes that the company is not consulting in good faith. But to prove this is extremely difficult.

In light of the fact that this scenario is so widespread, it is no wonder that the labour movement has called for a review of the process of retrenchment. Negotiations as opposed to consultations are perceived to be a way of empowering unions in their dialogue with management.

Negotiation – the solution?

How would a union be empowered if the process were one of negotiation instead of consultation? If the union and the company deadlock during a process of negotiations about retrenchments, then what will happen? The company may act

unilaterally and retrench the workers. When the retrenchments are challenged in the Labour Court the company will argue that its unilateral action was substantively fair because the retrenchments were for a valid reason. It will argue that its unilateral action was procedurally fair because the retrenchments took place after negotiations between the union and the company broke down. There is no difference in substance between this and Section 189 of the LRA as it presently stands.

Negotiation means consent

In reply, some argue that negotiations require agreement between the parties. Consultation allows the employer to act unilaterally (ie without the union's consent). They argue that if the union were required to give its consent before the company could retrench, the union would be empowered.

But this is too simplistic. If this were the case, all the union and the designated retrenchees would need to do is to withhold their consent and retrenchments could not take place. The only way the employer could compel agreement from the union would be to lockout the workers. Lockouts are hardly a practical way of resolving the question of the need to retrench, especially where the company is in financial difficulties.

Besides, the requirement that the union must agree to the retrenchment before they may take place seems like an unrealistic demand. It is doubtful whether an employer, including government in its capacity as employer, would give workers a blanket veto to its ability to make decisions about retrenchments.

Withholding consent

Perhaps a more sophisticated argument is that the union would not be able to withhold its consent unreasonably. But what would constitute an unreasonable refusal to agree? It would be unreasonable for the union to withhold its consent where there is a valid reason for the retrenchment (ie there were valid operational requirements), where there is no viable alternative and where the company had conducted negotiations in good faith.

But this is the same as asking whether the company's dismissals for operational reasons were fair; that is, that the company has valid reasons and that it has pursued consultations with the view to reaching consensus with the union. This is precisely what Section 189 provides.

Take the above scenario for example. What in essence is the difference between:

- the parties consulting with each other with a view to reaching consensus and the union being able to challenge the substantive and procedural fairness of the retrenchments; and,
- the parties negotiating with each other and the company being able to challenge the unreasonableness of the union withholding its consent to the retrenchments?

The reasonableness or fairness of each will be decided by considering whether there is a valid reason for the dismissal and whether the parties genuinely attempted to reach an agreement.

The effect of making the process one of negotiations instead of consultation would therefore be purely semantic. There would be little change in practice.

Organisational consequences

Another issue that the labour movement needs to be wary of is the organisational problems that may arise when a union is required to agree to the dismissal of some of its members.

Imagine that the company in the above

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scenario is facing financial difficulties and the retrenchment of 500 workers is necessary to prevent the company from closing down altogether. However, the relationship between management and the workers is at an all time low, and the workers refuse to agree to anything proposed by management. The union will be in a difficult situation, being extremely vulnerable to accusations that it is 'in bed' with management when it proposes that workers agree to the retrenchment of the 500 workers.

Debating semantics?

Is the call for negotiations instead of consultation a meaningless semantic charge? Will it merely have the effect of rearranging the deckchairs on the *Titanic?* We believe that this need not be the case.

The union's call for negotiations instead of consultation arises out of their frustration from being disempowered in the process as presently set out in Section 189. There is also a genuine feeling that alternatives for retaining jobs are not being fully explored.

If this situation persists it can only increase industrial conflict. The solution therefore is to design and implement a more empowering process of effective dialogue between the employer and the union.

Legislative solution?

Must the problem be resolved by amending the LRA? Not necessarily. There is nothing prohibiting unions from campaigning for collective agreements with employers that outline a more empowering process.

Another possible way of resolving the problem would be to establish workplace forums that define the issue of enterprise restructuring and job losses arising from

operational requirements as issues for joint decision-making.

There should also be a concerted attempt on the part of union lawyers to fundamentally shift the Labour Court's conservative thinking on the issue of retrenchments. However, changing the attitudes of judges may not be the most effective way of tackling the problem. In fact, as lawyers well acquainted with the conservative nature of the legal profession, we would advise the labour movement not to place too many of its eggs in this basket.

The best way to tackle this problem is through developing coherent organisational programmes and resourcing and training union organisers.

Possible solutions

Obviously, a redefined process of engagement, whether it is contained in a collective agreement or a redrafted Section 189, could have the effect of enhancing the organisational capacity of the union. What could that process be? We have some thoughts that are embryonic in their development.

The strike weapon

Unions should use the strike weapon more creatively. Obviously this is not always possible, especially where the employer is already in financial difficulties. But in some instances it is possible. We believe that a union could engage in a protected strike over demands that an employer not contract out and take less profit. This would have the effect of saving jobs.

A union can strike over higher severance pay. Strikes of this nature will increase the cost of retrenchments and persuade employers to engage more meaningfully in the retrenchment dialogue.

Third party intervention

It is often too late to find a solution once the retrenchments have taken place. If any intervention is to take place, it must occur before the dismissals take effect. The problem with the process of consultation as envisaged by Section 189 is that management remains in control of both the *process* of dialogue and its *content*. By removing control of the process from management and conferring it on a third party, like a mediator, unions will be able to contribute more meaningfully.

We believe that structuring a third party intervention (like mediation) into the process of dialogue may be beneficial because it will generally:

- encourage a joint problem-solving approach to the management-labour dialogue rather than adverserialism;
- facilitate the building of consensus;
- promote interest-based bargaining, which is more conducive to joint problem-solving than positional bargaining;
- make it costly for parties who deviate from constructive engagement.

Creative solutions that address the business' operational needs and workers' job security are often possible. Third party intervention may unleash the parties' creativity, empower the union and facilitate parties to consider viable alternatives.

Disputes about disputes

A mediator may be able to more readily solve disputes about disputes. These disputes, which often bedevil dialogue about retrenchment, shift the parties' attention from the real solutions and consume the process of dialogue. For example, there are often disputes about disclosure of information. A mediator may be able to persuade the parties to co-operate or order compliance. He or she

should be able to subpoena documents and witnesses.

Mediator's role and powers

We think that the mediator's role should include the following:

- ❑ investigating the employer's reasons for the possible retrenchments;
- ❑ investigating the union's or workers' submissions;
- ❑ facilitating the parties reaching consensus on all aspects of the proposed retrenchments, taking into account:
  - the operational requirements of the business
  - the need to save jobs
  - the need to ensure that workers are not dismissed for unfair reasons;
- ❑ speedily resolving disputes relating to, for example, disclosure of information and any other incidental dispute relating to the retrenchments;
- ❑ providing an advisory award where appropriate.

Advisory arbitration

The advisory arbitration award, if it went against the employer, might have a sobering effect on the employer. This may prevent unfair and unnecessary retrenchments. The employer would need to think twice about its prospects of success if the dismissals were to be challenged in the Labour Court.

We believe that the advisory award should go further than considering whether the company's reasons for retrenching are 'justifiable', which is all the Labour Court is prepared to do. It should also enquire into the suitability of viable business alternatives that take into account the enterprise's business requirements and the need to retain jobs.

This process may also compel the employer to consider more thoroughly the interests of workers.

The mediator or arbitrator would need to be someone who enjoys the confidence of both parties. It could be a CCMA commissioner, a person appointed by a bargaining council or a private mediator or arbitrator.

The arbitration need not be advisory in nature. But we anticipate that it will be difficult to persuade employers to subject their business decisions, which they traditionally consider to be part of their managerial prerogative, to binding arbitration proceedings. Moreover, once the dispute is the subject of arbitration proceedings, workers will not be able to strike about the business decision that gives rise to the retrenchments, and they may have given up their right to challenge their dismissals in the Labour Court. Whether the arbitration is binding upon the parties or advisory in nature is a tactical question.

Last gasp

There are a number of ways that unions may ensure more genuine and creative dialogue with employers when it comes to retrenchment. One of these ways is to amend the procedures set out in Section 189 of the LRA. Another would be for unions to campaign for these procedures in collective agreements between themselves and the employer. The two are not mutually exclusive.

The debate about the content of the process must continue. It is up to the labour movement to force employers to engage in a more constructive process of dialogue that will result in fewer job losses. ★

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