The substantive fairness of retrenchments

Anton Roskam and Anushka Singh discuss the substantive fairness of dismissals for operational requirements.

When trade unions challenge the retrenchments of their members in the Labour Court, the inquiry is largely, if not entirely about whether the employer followed a fair procedure or not Seldom do the parties and the Labour Court thoroughly consider the substantive fairness of dismissals for operational requirements

We think it is high time that the trade union movement begins challenging the employer's substantive decisions to retrench instead of only quibbling about the procedural issues We do not believe the actual decision to retrench is, or should be, construed as a matter of pure managerial prerogative. In order to do this the trade union movement must expand the notion of 'substantive fairness'.

Substance and procedure

According to the Labour Appeal Court, 'the court will take great pains ... to ensure that the retrenchment was not simply an exercise to conceal an improper aim'.[1]

The court's attitude seems to suggest that procedural fairness is a factor to be carefully considered when determining whether there is a fair reason for the dismissal. In *Visser v SA Institute for Medical Research* the Labour Court stated that: 'It is, of course, trite that the substantive fairness of a retrenchment dismissal is usually intricately linked to the procedural fairness of such dismissal because it is primarily by way of the exhaustive consultations that are envisaged by section 189 of the Act that the economic rationale, that is, the (fair) reason for the dismissal, is established'.[2]

The court's promise to:

- 'take great pains' to ensure that the retrenchment does not conceal an improper aim and
- to ascertain the substantive fairness of the dismissals from whether the procedural requirements envisaged in section 189 were complied with, is often of cold comfort to workers who face the prospect of the unemployment line

They require more than a review of management's motive. They require a thorough interrogation and implementation of alternatives that do not lead to job losses. This means that the Labour Courts should not shy away from their responsibilities to interrogate the possible alternatives to retrenchment.

Column contributed by Cheadle, Thompson and Haysom

Operational requirements

Operational requirements are defined as economic, technological, structural or similar needs [3] The Labour Court has interpreted the concept of operational requirements very broadly and warned against interfering in the business decisions of employers. In *Hendry v Adcock Ingram*[4] the court stated that:'If the employer can show that a good profit is to be made in accordance with sound economic rationale and it follows a fair process to retrench an employee as a result thereof it is entitled to retrench When judging and evaluating an employer's decision to retrench an employee this court must be cautious not to interfere in the legitimate business decisions taken by employers who are entitled to make a profit and who, in doing so, are entitled to restructure their business.'

While interpreting the concept of operational requirements very broadly, the Labour Courts interpret the notion of substantive fairness very narrowly. This attitude is based on the idea that the decision to retrench is a managerial prerogative. The Labour Court is unwilling to second guess an employer's decision.

In *SACTWU & others v Discreto*[4] the Labour Appeal Court chose to limit the scope of the inquiry into substantive fairness The court stated that:'The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgement on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day).'[5]

Commercial rationale

These statements seem to be the most direct and honest representation of the ideological leaning of many of the judges of the Labour Court. Evidently the Labour Court has made use of the concept of the commercial rationale of the employer. The notion of commercial rationale is, however, a double-edged sword. Workers too have commercial objectives It should come as no surprise, but their commercial objectives include not losing their jobs. And so, from the workers' perspective, it makes no commercial sense to shed jobs to increase the profits of employers.

Fairness is the concept that is used to balance the competing interests of the employer and the workers. The fact that the operational reason is justifiable commercially and from the employer's point of view may not however mean that the retrenchment is substantively fair.

Because of the court's reluctance to interfere with management's business decisions, all the employer is required to show is that there was an operational requirement and that it justifies the decision to dismiss.

Undermining substantive fairness

The effect of the court's thinking is to conflate the test for substantive fairness with the test for whether there is an operational requirement or not. This means that as soon as the employer is able to show that there is an economic, technological or structural reason for the retrenchments, the substantive decision to retrench is properly and genuinely justifiable.

It is correct that courts should not be able to simply step into the shoes of the manager or board of directors and make decisions for them. The court should not be able to interfere with the legitimate

Unions have expressed dissatisfaction with section 189 of the LRA.

business decisions of the employer. We could not have our economy run by and from the courts. But as long as the courts are willing to assume that the decision to dismiss is fair if an operational requirement exists that is rationally connected to the dismissals, the court is, in essence, excluded from questioning the fairness of the decision. This is especially problematic where the employees or their trade union representatives have proposed viable alternatives to retrenchment.

Why have the courts emphasised the procedural instead of the substantive and reduced the substantive to checking whether there is an operational requirement rationally connected to the dismissals?

Perhaps the reason lies in the fact that much of what is said about dismissals for operational requirements in the LRA is in fact couched in procedural language. Section 189 of the LRA is largely procedural, although from the procedure one may pick up some of the substantive requirements. The Code of Good Practice on dismissals for operational requirements, which has now been incorporated into schedule 8 of the LRA, only refers to procedural requirements.

It is when seen in this context that Acting Judge Brassey's comments in the case *Sikhosana & others v Sasol Synthetic Fuels* [6] are so refreshing. 'There is, for instance, no provision [in section 189] stating that non-compliance with the section makes a dismissal for operational requirements unfair nor any provision stating the converse – ie that compliance with the section makes the dismissal fair ...Section 189 has nothing expressly to say on matters of fairness.' [7]

'A court determining the fairness of a retrenchment must consider, in addition to the matters for which the section provides, whether the employer really needed to retrench, what steps he took to avoid retrenchment, and whether fair criteria were employed in deciding whom to retrench Compliance with section 189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment.The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness.'[8]

This reading of the LRA has important implications:The test for the fairness of a dismissal for operational requirements must evaluate both the procedural and the substantive. Section 189 is only a guide to assist in this evaluation.The factors contained in section 189 are not conclusive.The courts should in addition to these factors, consider whether the employer really needed to retrench, what steps it took to avoid retrenchment, and whether fair criteria were employed in deciding whom to retrench.

This case clearly supports a more in-depth approach when determining the fairness of dismissals for operational requirements.The Labour Court is encouraged to examine substantive fairness beyond the inquiry of whether there is an operational requirement that justifies retrenchment.

If the Labour Court is willing to scrutinise the employer's reasons for deciding to retrench its employees, it will go a long way in ensuring that employers act in good faith and sincerely engage with employees before making the decision to retrench.

Testing substantive fairness

We believe that if the substantive fairness of the dismissals for operational reasons is adjudicated upon, the substantive fairness of the dismissals must be evaluated on the basis of all relevant criteria. It is not possible to reduce all these factors to writing at present.They will develop through the Labour Court's judgements over time, as the Labour Court is confronted with new cases. It is undesirable to limit the notion of fairness and hinder its development.

However, here are at least some factors that we believe should be considered:

Operational requirement

- ❑ Is there an operational requirement?
- ❑ Is the operational requirement genuine?
- ❑ Is there a rational and justifiable connection between the operational requirement and the dismissals?

Necessity

- ❑ Were the dismissals necessary?
- ❑ Would the continued existence of the employer's enterprise be threatened if there were no (or fewer) retrenchments?

Fault and foreseeability

- ❑ Was the operational requirement giving rise to dismissals the fault of the employer?
- ❑ Was the employer able to foresee the operational reasons for the dismissals?
- ❑ Did the employer take any steps to prevent these operational reasons?

Alternatives

- ❑ Were there any reasonable alternatives?
- ❑ Were there any less restrictive and less disadvantageous means of achieving the employer's purpose?

Minimising the harm

- ❑ Did the employer take any steps to minimise the disadvantage or harm caused to the dismissed employees?
- ❑ Were those steps reasonable?

Courts should consider the impact of the retrenchments on employers and employees.

Impact

- What was the impact of the dismissal on the employees and the employer?

The 'operational requirement' factors are those the courts already consider.

Necessity

We do not think that the mere factor of 'making more profit', as the Labour Court has previously found, is a good enough reason to justify the substantive fairness of a dismissal for operational requirements The dismissal should be operationally necessary, which means that the enterprise's future should be threatened

Necessity itself is a relatively extensive concept. It does not mean that retrenchments can only take place if a company is about to go under. If a company is to lose its international competitive edge, it may be necessary to introduce new technology that means that workers lose their jobs But then the company would have to show that the necessity of introducing this technology.

Alternatives

Perhaps the most important factor is establishing whether there were alternatives that would have saved jobs or minimised the disadvantage or harm caused by the dismissals

Of course, not all alternatives will be the classic 'win-win scenario', that is, satisfying the profit motive of the employer and saving the jobs of the workers Inevitably, and at least to some extent, the judge will be called upon to weigh up the possible compromises The alternatives cannot be rejected purely because they may translate into fewer profits for the employer. The judge should balance this with other factors, including the loss of jobs. If, for example, there was an alternative that meant fewer profits but satisfied the employer's need to remain globally competitive and also saved jobs, the dismissal should be substantively unfair?

Similarly, the employer' failure to enter into a re-employment agreement or co-operate sufficiently with the Department of Labour in developing a social plan for the dismissed workers should point to substantive unfairness.

Experts

Where it is difficult for the Labour Court to determine these factors factually it should be able to draw on experts to assist it in its evaluation.The CCMA should have a list of experts upon which it and the Labour Court are able to draw upon.

To leave this up to the parties to organise is not an efficient way of dealing with this problem.Also, experts are usually expensive and beyond the financial reach of many trade union or worker litigants.

Fault and forseeability

These factors contemplate the situation where management may be required to compensate workers if the need to retrench is as a result of management's poor business practices.

One of the great frustrations of workers arises when they see the enterprise being run badly by incompetent managers who do very little to rectify the problems. In some instances workers actually warn management of the consequences or approach government for assistance to ensure that the enterprise is managed properly. In these cases, the operational reasons for the dismissals are forseeable and the fault of management and the employer. In the absence of them doing anything about it, the dismissals must surely be unfair.

These factors will encourage employers and their management to be proactive and act early to avoid retrenchments rather than allow the business to deteriorate to a point where retrenchments are inevitable.

Impact of the dismissals

Some argue that the impact of the dismissals on the employees and the employer should also be a factor that the courts consider. They argue that it would put the dismissals in perspective. If the employees obtained alternative employment immediately afterwards, then the unfairness of their dismissals is less than for employees who could not secure alternative employment. This may be the case. However, the impact of the dismissals is important in determining the nature of the relief that employees should be awarded The relief may include whether to re-instate or re-employ the workers and how much compensation should be awarded to them.

Balancing the scales

These factors are not a checklist.They should be considered as a whole.The failure to enter into a re-employment agreement may in a particular context not in and of itself render a dismissal unfair. The scales will have to be balanced in each case. ★

Endnotes

1 Mörester Bande v NUMSA (1990) 11 ILJ 687 (LAC) at 689A-B
2 (1998) 19 ILJ 1616 (IC) at page 1618
3 Section 213 of the LRA
4 [1998] 12 BLLR 1228 (LAC)
5 at 1230G
6 (2000) 21 ILJ 619 (IC)
7 at 654H-J
8 at 655F-G This view was cited with approval in Fletcher v Elna Sewing Machine Centres (Pty) Ltd (2000) 21 ILJ 603 (IC)

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