Under the guise of retrenchments...

Anton Roskam investigates the restructuring mechanism that declares all jobs redundant and invites employees to apply for jobs on the new structure.

In recent years, a number of employers have cottoned onto the idea of making employees apply for their jobs during the process of restructuring an enterprise. The employer abolishes the existing posts and then creates new ones. The new posts may be similar to the old ones, completely new or a mix of functions contained in one or more of the old posts. In essence, the employer restructures its organogram. Existing employees are then required to apply for the posts on the new structure. Employees who are not successful are retrenched.

Workers' fears

In the event the employer proposes this kind of restructuring model workers' fears are numerous and often well founded. They fear that the employer will, under the guise of a restructuring and retrenchment exercise, dismiss workers that the employer perceives as performing poorly; has difficult personalities, has effective trade union representatives, has not fitted into the culture of the enterprise, and a host of other reasons that have very little to do with whether an employee should be selected for retrenchment or not.

Alluring for employers

This model is alluring for employers. Restructure, hold a few consultation meetings and pay a severance package and not only has the employer solved its operational requirements, but in the process it has solved its problems with employees whom it believes were not performing optimally, were the 'bad eggs', caused personality clashes or were trouble makers. The employer has therefore, successfully sidestepped these issues and the normal procedures associated with them. The operational requirements process is cheap and, from the employer's point of view, effective.

But is it fair and lawful? As is often the case in labour law the answer is not clear-cut. However, the employer should be extremely wary of this approach and in general workers should resist this idea. If the employer proceeds with this process then workers should at least try to put in place mechanisms that prevent abuse. Section 189(7) of the Labour Relations Act (LRA) requires the employer to consult about selection criteria. The section also

Column contributed by Cheadle, Thompson and Haysom

states that if no agreement is reached on selection criteria then the employer must implement criteria that are fair and objective.

The mechanism of selecting employees for retrenchment on the basis that they were unsuccessful with their applications for the posts on the new structure is often neither fair nor objective. The mechanism was the subject of a private arbitration referred to as Grieg v Afrox Limited (2001) 22 ILJ 2102 (ARB).

The facts of the case involved a situation in which all positions in certain departments were declared redundant and all employees in those posts were invited to apply for the newly created posts. Those that were unsuccessful in being appointed were retrenched. This meant that employees were selected for appointment rather than selected for retrenchment, although the net effect was the same.

In this case the employer stated that each new job had its pre-decided job requirements. The employer looked for what value the person could add to the company in the future; in the words of the employer it looked for 'corporate fit'. (At 2109 ILJ)

Procedurally unfair

The arbitrator, Prof Rycroft, held that it was inconceivable that the employer would not be relying on each applicant's track record and reputation within the company because the only indicator of future value was past performance. In so doing, the arbitrator held that the dismissal crossed over from being a retrenchment, which is a no-fault dismissal, to one based on performance, which is entirely or at least is partly the fault of the employee.

The applicants were not given notice of any allegations of poor performance or a perceived lack of corporate fit and therefore, they had no opportunity to defend themselves. This was procedurally unfair.

The arbitrator referred to the case of Makgabo & others v Premier Food Industries Ltd (2000) 21 ILJ 2667 (LC) at 2675G in which the court warned that an employer should not be allowed to abuse a retrenchment process to penalise employees for misconduct or substitute it for a disciplinary hearing. Similarly, Prof Rycroft held that a retrenchment exercise could not be used to get rid of those employees who had not performed to the required standard.

Substantively unfair

The arbitrator also found the dismissal to be substantively unfair because the employer had failed to show that:

- there was an objective process of selection;
- functions of the old job were redundant;
- the new position was anything more than a modified version of the dismissed employee's old job; and
- save the employee from dismissal by alerting him or her to other possible positions and suggesting that he or she apply for the position.

Redundancy

The arbitrator also had some insightful comments about this kind of restructuring model. Firstly, is it correct to say that all the previous jobs are redundant? According to Prof Rycroft unless the employer is moving or closing down that cannot be an accurate description of the changes that the employer seeks to make. Prof Rycroft pointedly stated that it is difficult to imagine that the chief executive officer's (CEO's) position was ever redundant. He concluded that by modifying a job or its responsibilities does not make the job redundant because jobs

are constantly being redefined and adapted. (At 2110 I - 2111A)

Abuse

Secondly, the arbitrator warned that it was difficult not to see the device of making all jobs redundant as a means of avoiding the basic purpose of retrenchment law, namely the protection of employees from dismissal over which they have no control and for which they are not at fault. Prof Ryeroft went on to state that the mechanism was open to abuse 'because jobs can be redefined in a way that deliberately excludes existing employees, whilst in reality the functions performed by employees are not redundant but simply allocated to another person'. Prof Ryeroft noted that the '... mechanism all too easily lends itself to retrenching employees who are perceived to be 'dead wood' or 'difficult' but who would be difficult to dismiss by means of an ordinary disciplinary hearing.

What must the employer show?

Ryeroft stated that if an employer pursues such a mechanism then it must be able to show that its eventual selections are objectively justifiable. The employer will also have to show that the criteria are objective and do not result in random exclusion of employees. To satisfy the requirement that selection criteria be fair, Prof Ryeroft held that the employer has to go out of its way to link employees to the new jobs that are similar to the old ones.

The criteria to appoint people to jobs are vague, involve assessments of the employee and his or her past performance. They therefore, tend to be subjective. The Code of Good Practice on Dismissal states that '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.'

Union response?

What should unions do if an employer insists on such a mechanism and perhaps even states that it will ensure that the selections are objectively justifiable and that the criteria or appointment will be objective and fair?

There are a number of possibilities: the union should, for the reasons identified by Prof Ryeroft in the Grieg arbitration, place on record that it does not believe that the process and selection criteria are fair, objective and allow employees an adequate opportunity to defend themselves. The union should insist on observers in the interviews and in the employer's forums where decisions are taken as to who should be appointed to the post to check that these processes are fairly and objectively conducted.

The observers could be independent persons whom the union trusts or union members or officials. Appropriate confidentiality agreements could be concluded provided that they did not prevent the observer from testifying in grievance proceedings lodged by unsuccessful applicants. The union should insist on written records of all proceedings. It is important to note that procedural checks and balances will not guarantee that abuse does not take place. It is very difficult sometimes to prove a spurious motive that is crafted in acceptable language. Therefore, it is far better to use objective criteria such as last in first out (LIFO).

Rycksen is an attorney and a director of Cheadle Thompson & Haysom Inc.