

RETRENCHMENT IN TERMS OF SECTION 189A OF THE LRA

INTRODUCTION

Section 189A – “Dismissals based on operational requirements by employers with more than 50 employees” was introduced to supplement section 189 – “Dismissals based on operational requirements” to provide in the case of “large scale” retrenchments, minimum time periods for consultations prior to dismissal, the possibility of independent facilitation of the consultative process and the possibility of industrial action as opposed to adjudication by the Labour Court following the consultative process if the dismissals are still in dispute.

Sections 189A and 189 need to be read in conjunction with one another and the process commences in terms of section 189 (3) which reads as follows-

“The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to –

- (a) The reasons for the proposed dismissals;
- (b) The alternatives the employer considered before proposing the dismissals, and the reasons for rejecting them;
- (c) The number of employees likely to be affected and the job categories in which they are employed;
- (d) The proposed method for selecting which employees to dismiss;
- (e) The time when, or the period during which, the dismissals are likely to take effect;
- (f) The severance pay proposed;
- (g) Any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) The possibility of the future re-employment of the employees who are dismissed;
- (i) The number of employees employed by the employer, and
- (j) The number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

MEANING OF OPERATIONAL REQUIREMENTS

Section 213 of the LRA defines operational requirements as meaning –
“Requirements based on the economic, technological, structural or similar needs of the employer.”

WHEN DOES SECTION 189A APPLY?

Section 189A (1) states – “This section applies to employers employing more than 50 employees if –

- (a) The employer contemplates dismissing by reason of the employer’s operational requirements, at least –
 - i. 10 employees, if the employer employs up to 200 employees;
 - ii. 20 employees, if the employer employs more than 200, but not more than 300 employees;
 - iii. 30 employees, if the employer employs 300, but not more than 400 employees;
 - iv. 40 employees, if the employer employs more than 400, but not more than 500 employees, or
 - v. 50 employees, if the employer employs more than 500 employees.
- (b) The number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer’s operational requirements in the 12 months prior to the employee issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).”

NOTE:

For the purpose of calculating the ratio of proposed retrenchments and previous retrenchees in the past 12 months against the total number of employees employed, the total workforce of the employer must be determined.

For example, a large retailer or bank with a chain of retail outlets or banking branches throughout South Africa, would constitute a

single workforce and the total number of employees would represent the total headcount throughout South Africa.

On the other hand, if a national chain of retail outlets comprises a series of independent franchise operations throughout the country, each franchise represents an independent employer, and the total headcount is restricted to the franchise in question. Equally, subsidiaries of a holding company operating in different sectors of the economy may be viewed as independent employers and the total headcount of the subsidiary in question is relevant rather than the sum total of all subsidiaries of the holding company.

CONSULTATION / FACILITATION

Section 189A provides the parties with the option of whether or not the consultative process is facilitated by an independent third party.

Section 189A (3) reads –

“The Commission must appoint a facilitator ... to assist the parties engaged in consultations if –

- (a) The employer has in its notice in terms of section 189 (3) requested facilitation; or
- (b) Consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.”

NOTE:

Parties do not have to appoint a facilitator from the CCMA, but the appointed facilitator is governed by the Regulations for the conduct of facilitation in terms of section 189A which is the subject of a separate information sheet.

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PROCEDURE FOLLOWING CONSULTATION/ FACILITATION

Section 189A (7) reads –

“If a facilitator is appointed ... and 60 days have elapsed from the date notice was given in terms of section 189 (3) –

- (a) The employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the Basic Conditions of Employment Act, and
- (b) A registered trade union or the employees who have received notice of termination may either –
 - i. Give notice of a strike ..., or
 - ii. Refer a dispute ... to the Labour Court”

NOTE:

Section 189A (8) deals with circumstances where a facilitator is not appointed, and provides for a 30-day period from the issuing of a notice in terms of section 189 (3) for the purpose of consultation before referring a dispute to a council or the Commission for conciliation in terms of section 64 (1) – “Right to strike and recourse to lock-out.” Once the 30-day period in terms of section 64 (1) has lapsed the parties have the same rights as those given to parties following the 60 day facilitation period.

NOTE:

Section 189A (2) (d) states –

“A consulting party may not unreasonably refuse to extend the period of consultation, if such an extension is required to ensure meaningful consultation.”

PROCEDURAL FAIRNESS

Section 189A (13) states –

“If an employer does not follow a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

- (a) Compelling the employer to comply with a fair procedure;
- (b) Interdicting or restraining the employer from, dismissing an employee prior to complying with a fair procedure;
- (c) Directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) Make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.”

NOTE:

Section 189A (18) prohibits the Labour Court adjudicating a dispute about the procedural fairness of a dismissal pertaining to this section of the Act, and while the amendments to the LRA have seen the deletion of section 189A (14) which included criteria for substantive fairness such as whether or not the dismissal was operationally justifiable on rational grounds and whether there was proper consideration of alternatives. The deletion does not have the purpose of abandoning such criteria, but seeks to allow the courts to develop the jurisprudence in this area in the light of the circumstances and facts of each case and to articulate general principles applicable to all retrenchment cases.

RELEVANT LEGISLATION / CODES / RULES

- Labour Relations Act 66 of 1995 as amended,
- Basic Conditions of Employment Act 75 of 1997 as amended
- Code of Good Practice on Dismissal Based on Operational Requirements.