

**UNIVERSITY OF THE  
WESTERN CAPE  
FACULTY OF LAW**

**COURSE**

Coursework LLM in Labour Law

**RESEARCH TOPIC**

Examining the interplay between dismissals for operational requirements and automatically unfair dismissals in terms of section 187(1)(c) of the LRA

Research paper presented in partial fulfilment of the requirements for the degree of MPhil (Structured) in the Department of Mercantile and Labour Law, University of the Western Cape

**SUPERVISOR:** Mr Pieter Koornhof

**NAME:** ANTHONY RALPH DE CAIRES

**STUDENT NO:** 9192917

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## DECLARATION

I declare that Examining the interplay between dismissals for operational requirements and automatically unfair dismissals in terms of section 187(1)(c) of the LRA, that it has not been submitted before any degree or examination in any other university and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Anthony Ralph De Caires

January 2016

Signed.....



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This work is dedicated to the memory of my deceased father, Abraham Delis, a caring stepfather and an inspiration to the working class.

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## KEYWORDS

Operational requirements

Automatically unfair

Interplay

Economic needs

Restructuring

Dismissal

Mutual interest



## **ABBREVIATIONS**

<b>Abbreviation</b>	<b>Explanation</b>
CCMA	Council for Conciliation Mediation and Arbitration
EAT	Employment Appeal Tribunal
FWA	Fair Work Act
FWR	Fair Work Regulations
ILO	International Law Convention
LRA	Labour Relations Act
S	Section
SS	Subsection
The Code	The Code of Good Practice on Dismissals based on Operational Requirements
TULCRA	Trade Union and Labour Relations (Consolidated) Act

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# CHAPTER ONE

## 1.1 INTRODUCTION

In his seminal work 'Future Shock', American futurist Alvin Toffler made an important observation:

“Change is not merely necessary to life, it is life.”<sup>1</sup>

Used in a different context by the futuristic Author, this quote serves to highlight that life is all about variation and that the changes we are faced with, especially in law, are not necessary for our lives; but are part of our lives. Change develops the shortcoming in law; hence it advances us to keep pace with the times.

An important change to the definition of section (s) 187(1)(c) of the Labour Relations Act (LRA) 66 of 1995, one of the categories of an automatically unfair dismissal, has been effected by the Labour Relations Amendment Act 6 of 2014. Section 187(1)(c) has been amended from where the reason for the dismissal of an employee was “to compel the employee to accept a demand in respect of any matter of mutual interest between employer and employee” to where the reason for the dismissal of an employee is “a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer.”<sup>2</sup>

The aforementioned change is aimed at correcting the interpretation of the initial version of s 187(1)(c) by the courts (which were to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the employer over a matter of mutual interest).<sup>3</sup> It further appears to protect the integrity of the process of collective bargaining, in that employers in a collective relationship context will no longer be able to force a change in terms and conditions of employment without the express agreement of the employees.

Collective bargaining is regarded as the process whereby employers and organised groups of employees seek to reconcile conflicting goals through mutual accommodation.<sup>4</sup> In *Metal & Allied Workers Union v Hart Ltd*,<sup>5</sup> it was held that to bargain means to haggle and wrangle so as to arrive at some agreement on terms of give and take, whereas to consult does not imply any kind of agreement. The Constitution of the Republic of South Africa categorically states that every trade union, employer's organisation and the employer has the right to engage in collective bargaining.<sup>6</sup>

In terms of s 188(1)(a)(ii) of the LRA, the employer may dismiss an employee for a fair reason based on its operational requirements.<sup>7</sup> The question that arises is, when it can be said that in dismissing employees, the employer is exercising his right to dismiss for operational requirements as opposed to where the reason for the

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<sup>1</sup> See Quotation at [www.alvintoffler.net/?fa=galleryquotes](http://www.alvintoffler.net/?fa=galleryquotes) (last accessed 15 February 2016)

<sup>2</sup> Section 187(1)(c) of the 1995 Labour Relations Act and the Labour Relations Amendment Act 6 of 2014

<sup>3</sup> Grogan J *Workplace Law* 11 ed (2014) 214

<sup>4</sup> Grogan J *Workplace Law* 10 ed (2009) 343

<sup>5</sup> (1985) 6 ILJ 478 (IC) at 493 H-J

<sup>6</sup> Section 23(5) of the Constitution of the Republic of South Africa, 1996

<sup>7</sup> Section 188(1)(a)(ii) of the LRA 66 of 1995



dismissal of an employee is “a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer which is contrary to the provisions of s 187(1)(c)? The aforementioned sections appear difficult to settle with each other,<sup>8</sup> or so I thought.

Matters of mutual interest are said to include matters such as the terms and conditions of employment, wages, overtime and leave.<sup>9</sup> Before, where the employer, for example, negotiates with the employees for a proposed shift change contrary to the terms and conditions of their employment contract and they refuse to accept the change, the employer may dismiss them for a fair reason based on its operational requirements.<sup>10</sup> The proviso was that the dismissal does not violate the prohibition in s 187(1)(c) of the LRA, namely “to compel the employee to accept a demand of mutual interest”. In *National Union of Metalworkers of SA (NUMSA) & others v Fry’s Metals (Pty) Ltd (Fry’s Metals)*,<sup>11</sup> it was stated that a dismissal that is final and not conditional on acceptance of the demand can never be regarded as a reason “to compel the employee to accept” that demand and is therefore not in violation of s 187(1)(c).

When the employer proposes a change to the terms and conditions of employment which is refused by the employees, such a refusal gives rise to a dispute of interest between the employer and the employees. According to Rycroft and Jordaan, disputes of interest concern the creation of fresh rights which must be resolved through collective bargaining, mediation and as a last resort through peaceful industrial action.<sup>12</sup>

Thompson indicates that although an operational requirement dismissal falls outside the arena of collective bargaining, since it is regarded as a rights issue, a debate over the operational requirements of the business is essentially an interest issue and not a legal one, which must begin in the bargaining arena.<sup>13</sup> Since dismissal is not a permissible form of leverage in the bargaining process, the courts will have to determine when the dispute had permissibly migrated from a bargaining domain (where matters of mutual interest cannot legitimately trigger dismissals) to a legal/right domain (where the employer is permitted to dismiss for operational reasons).<sup>14</sup> The Supreme Court of Appeal has held that the “migration of issues” does not form the basis of our statutory structure and, therefore, s 187(1)(c) cannot be interpreted as if the legislation proceeds from that premise.<sup>15</sup>

Under the Labour Relations Amendment Act 6 of 2014, s 187(1)(c) provides that “a dismissal is automatically unfair if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer.” The question that needs to be answered now is whether it would still be permissible for the employer to invoke operational requirements to dismiss employees without being in conflict with the prohibition in s 187(1)(c), where the employer had proposed a shift change as an alternative to retrenchment and it was refused by the employees? Furthermore, will it be possible at all to dismiss employees for operational requirements upon the refusal of a mutual interest demand, whether the dismissal is final or not?

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<sup>8</sup> Thompson C ‘Bargaining Business Restructuring and the Operational Requirements Dismissal’ (1999) 20 *ILJ* 755

<sup>9</sup> Van Niekerk et al *Law @ Work* 3<sup>rd</sup> (2015) 258

<sup>10</sup> See section 188(1)(a)(ii) of the LRA 66 of 1995

<sup>11</sup> (2005) 26 *ILJ* 689 (SCA) at 708 F

<sup>12</sup> Rycroft & Jordaan *A Guide to SA Labour Law* (Juta 1992) 169

<sup>13</sup> Thompson C ‘Bargaining Business Restructuring and the Operational Requirements Dismissal’ (1999) 20 *ILJ* 760

<sup>14</sup> Thompson C ‘Bargaining Business Restructuring and the Operational Requirements Dismissal’ (1999) 20 *ILJ* 760

<sup>15</sup> *NUMSA and others v Fry’s Metals (Pty) Ltd* (2005) 26 *ILJ* 689 (SCA) at 707 H-I

The problem this research seeks to address is, whether the effect and purpose of the amendment of s 187(1)(c) are to abolish the principles as set out in Fry's Metals and to determine whether the court had correctly interpreted the intention of the legislator. The purpose is to establish if the employer will now be precluded from dismissing employees for operational reasons, even if the real reason for the dismissal is not the refusal to accept a mutual interest demand but objective criteria which causes an immediate threat to the survival of the business and which justifies dismissal.

It is submitted that the amendment significantly widens the scope of s 187(1)(c) in that it presents new challenges to the employer in differentiating between automatically unfair dismissals for refusing to accept the changed terms and conditions of employment and a legitimate dismissal based on the grounds of the employer's operational requirements. The significance of the study is to bring clarity to the question of when will it be fair for an employer, in the course of restructuring his business, to dismiss any of his employees who refuse to accept the proposed changes to the terms and conditions of their employment.

The LRA 66 of 1995 permits employers to dismiss employees for 'operational requirements'.<sup>16</sup> Section 213 of the LRA defines "operational requirements" to mean: requirements based on the economic, technological, structural or similar needs of the employer.<sup>17</sup> There are many considerations that might induce employers to dismiss employees for operational reasons. Considerations such as a drop in demand for products or services; the introduction of new technology; reorganisation and the introduction of more productive and cost efficient work methods are but some considerations which might tempt employers to resort to a retrenchment exercise.<sup>18</sup>

Section 189 of the LRA sets out the employers' obligation to consult against the right to dismiss employees on the basis of the employers' operational requirements, including that an employer who contemplates dismissing employees based on operational requirements is required to consult the person(s) whose dismissal is contemplated.<sup>19</sup> The consultation process envisaged in s 189(1) must be "a meaningful joint consensus-seeking process" in that it must attempt to reach consensus on several items which includes measures to avoid dismissals; minimising the number of dismissals; changing the timing of the dismissal; and the mitigation of the adverse effects of the dismissal.<sup>20</sup> The consultation process must include discussions on the method for selection of the employees to be dismissed and the severance pay of those employees to be dismissed.<sup>21</sup>

Furthermore, the consultation process is initiated by s 189(3), which requires the employer to issue a written notice inviting the person(s) whose dismissal is contemplated to the consultation.<sup>22</sup> The employer must make a full and adequate disclosure on relevant information which must include the reasons for the proposed dismissals; the alternatives considered before the proposal to dismiss; the reasons for rejecting each of the alternatives; the number of the employees likely to be effected and their job categories of employment; the proposed method for selecting

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<sup>16</sup> Section 189 and 189A of the LRA 66 of 1995

<sup>17</sup> Labour Relations Act 66 of 1995

<sup>18</sup> Grogan J 11 ed (2014) 318

<sup>19</sup> See *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 at 2625 E-H

<sup>20</sup> Section 189(2)(a) of the LRA 66 of 1995

<sup>21</sup> Section 189(2)(b)-(c) of the LRA 66 of 1995

<sup>22</sup> Section 189(3) of the LRA; See also Van Niekerk et al (2015) 322

the employees to be dismissed; the severance pay that is proposed; the assistance proposed by the employer to the employees likely to be dismissed; the possibility of future re-employment of the dismissed employees; the number of employees the employer employs; and the number of employees dismissed for reasons based on operational requirements in the preceding twelve months.<sup>23</sup>

The employee(s) to be dismissed must be selected according to criteria that have been agreed to by the parties. Where no criteria have been agreed, the criteria that are “fair and objective” must be agreed upon.<sup>24</sup> The employer must allow the person whose dismissal is contemplated an opportunity to make representations about the subject matter of the consultation.<sup>25</sup> He must further consider and respond to representations and where denied, reasons must be provided therefor.<sup>26</sup>

Furthermore, the Act distinguishes between large and small scale dismissals based on operational requirements.<sup>27</sup> Whereas a small scale retrenchment is regulated by s 189 and refers to retrenchments by employers employing less than 50 employees, large-scale retrenchments are regulated by s 189A.<sup>28</sup> Section 189A makes provision for facilitation to assist the parties engaged in consultation and imposes minimum time periods for the consultation to take effect.<sup>29</sup> In addition, s 189A provides for the employee to participate in a strike and for the employer to lock out.<sup>30</sup> Furthermore, this section also provides for direct access to the Labour Court where the employer does not comply with a fair procedure, provided that the proceedings are initiated within 30 days from the date of dismissal.<sup>31</sup>

Section 23 (1) of the Constitution of the Republic of South Africa 1996 guarantees a fundamental right in respect of labour relations by providing that “everyone has the right to fair labour practices.” The 1995 LRA gives effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices.<sup>32</sup> In *Edcon v Steenkamp and Others*,<sup>33</sup> Edcon sought a declaration that s 189A(2)(a) read with s 189A(8) of the LRA, as interpreted in the *De Beers Group Services (Pty) Ltd v Num* [2011] 4 BLLR 319 (LAC) and *Revan Civil Engineering Contractors and Others V NUM* [2012] 33 ILJ 1846 (LAC) is unconstitutional and in violation with s 23. In the aforementioned cases, it was held that where the employer issues notices of termination before the period referred to in s 189A (8)(b) has elapsed, the ensuing dismissals are invalid and of no force or effect.<sup>34</sup> The court held that the interpretation of s 189A(2)(a) read with s 189A(8) as set out in these cases were wrong and erroneous and that non-compliance therewith does not lead to an invalid dismissal.<sup>35</sup>

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<sup>23</sup> Section 189(3)(a)-(j) of the LRA 66 of 1995

<sup>24</sup> Section 189(7)(a) and ((b) of the LRA 66 of 1995

<sup>25</sup> Section 189(5) of the LRA 66 of 1995

<sup>26</sup> Section 189(6)(a) of the LRA 66 of 1995

<sup>27</sup> Van Niekerk et al (2015) 313

<sup>28</sup> Van Niekerk et al (2015) 313

<sup>29</sup> Section 189A(2)(c) to (7) of the LRA 66 of 1995

<sup>30</sup> Section 189A (9)-(12) of the LRA 66 of 1995

<sup>31</sup> Section 189A(13)-(17) of the LRA 66 of 1995

<sup>32</sup> See s 185 of the LRA 66 of 1995

<sup>33</sup> 2015 (4) SA 247 (LAC) (3 March 2015) at para 25

<sup>34</sup> *Edcon v Steenkamp and Others* 2015 (4) SA 247 (LAC) (3 March 2015) at para 24

<sup>35</sup> *Edcon v Steenkamp and Others* 2015 (4) SA 247 (LAC) (3 March 2015) at para 56

The right not to be unfairly dismissed and subjected to unfair labour practices is contained in s 185 of the LRA 6 of 1995. Naturally, this means that employers resorting to dismissals in order to effect necessary changes to conditions of employment in the workplace may, therefore, only do so provided that the dismissals are fair and a fair procedure is followed.<sup>36</sup> In cases involving unfair dismissals, the first question to be established is whether a ‘dismissal’ had actually occurred.<sup>37</sup> In this regard, section 186 of the LRA 66 of 1995 sets out the varying forms of dismissal, including that an employer has terminated the employment relationship with or without notice.

An employee claiming to have been dismissed under this s 186(1)(a) would usually have a contract of employment with his employer which was terminated at the instance of his employer.<sup>38</sup> However, the term ‘contract of employment’ has been deleted from the original version of s 186(1)(a). Therefore, the existence of a valid contract of employment is no longer a requirement for this dismissal.<sup>39</sup> The only requirement is that an employment relationship must have existed which was terminated at the instance of the employer.<sup>40</sup> A decision by an employee to resign or a consensual termination between the employer and an employee does not constitute a dismissal at the instance of the employer.<sup>41</sup>

## 1.2 LOCK-OUT DISMISSALS

In terms of s 1 of the 1956 LRA, a contract of employment could be terminated at the instance of the employer to induce or compel any person under his employment to agree with any demands concerning terms and conditions of employment.<sup>42</sup> Employers could, therefore, within the context of a lock-out dismissal dismiss their employees who refuse to accept proposed changes to their conditions of service, for example, a proposed shift change or a cut in salary, pending an acceptance of the proposed changes by the employees at a later stage.<sup>43</sup> The purpose of this form of dismissal, which was allowed within the context of a lock-out dismissal, was to induce or compel an employee to comply with the employer’s demands.<sup>44</sup> It was conditional in that it was coupled with an offer of re-employment which implied that as soon as the employees accept the employer’s proposals they would be reinstated.

The LRA 66 of 1995 then introduced a lock-out which allowed employers only to physically exclude their employees from the workplace, but not to dismiss them, for the purpose of compelling their employees to accept a demand in respect of any matter of mutual interest between them.<sup>45</sup> A lock-out under s 213 of the LRA 66 of 1995 reads as follows:

‘Lock-out’ means the exclusion by an employer of employees from the employer’s workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and

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<sup>36</sup> Grogan J (2014) 189

<sup>37</sup> Grogan J (2014) 164

<sup>38</sup> Grogan J (2014) 165

<sup>39</sup> See *Member of Executive Council, Department of Health v Odendal and others* (2009) 30 ILJ 2093 (LC) at 2112 H-I

<sup>40</sup> Grogan J (2014) 166

<sup>41</sup> Grogan J (2014) 168

<sup>42</sup> See Grogan J (2014) 486

<sup>43</sup> Van Niekerk et al (2012) 248

<sup>44</sup> Van Niekerk et al *Law @ Work* (2012) 423

<sup>45</sup> See s 213 of the LRA 66 of 1995

employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.'

In *Schoeman v Samsung Electronics (Pty) Ltd*,<sup>46</sup> the court held as follows:

“An employer in the private sector needs to be able to survive and prosper economically. To do this, the employer must meet changed market circumstances and be competitive. To meet the changes of the market, adaptations are required. An employer needs the flexibility to deploy, reasonably quickly and efficiently, the resources at the employer's disposal. Various options are open to an employer to achieve this. One of them is the lock-out route which is used to compel acceptance of a demand...An employer may not dismiss an employee in order to compel acceptance of a demand.”

Therefore, if the employees simply refuse to accept a proposed change in their conditions of service without being compelled thereto by the employer, there is nothing to preclude the employer from dismissing the employees for a reason related to its operational requirements.<sup>47</sup>

### 1.3 LABOUR RELATIONS AMENDMENT ACT 6 OF 2014

It is submitted that on the literal interpretation of s 187(1)(c), the aforementioned section signifies that dismissals will be automatically unfair even where the employees are given an alternative to dismissals, as contained in the consultation requirement of s 189(3), but refuse to accept the alternatives. The employer will, therefore, have to be careful when suggesting alternatives to dismissals, although previous court decisions have recognised changes to terms and conditions of employment based on operational requirements as being fair where such changes resulted in dismissals for refusal thereof.<sup>48</sup>

Whilst s 187(1) (c) precludes employers from dismissing employees if the reason for the dismissal is the refusal of the employee to accept a demand in respect of a mutual interest demand between them and the employer, the employer may rely on s 188 (1)(a)(ii) which permits a dismissal on the grounds of operational requirements on the basis that he is not forcing the employees to accept a change, but rather that his operational requirements justify dismissal.

In *Fry's Metals*,<sup>49</sup> the court drew a distinction between a dismissal based on operational requirements and a s 187 (1)(c) dismissal. It interpreted s 187(1)(c) of the 1995 Act to protect employees from being dismissed if the purpose of the dismissal was to compel them to accept a demand on a matter of mutual interest and the dismissal was of a temporary nature, whereas an operational requirement dismissal in terms of s 188(1)(a)(ii) on the other hand is permanent.<sup>50</sup>

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<sup>46</sup> (1999) 20 ILJ 200 (LC) at para 18-19

<sup>47</sup> Van Niekerk et al (2015) 258

<sup>48</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 152 H-J

<sup>49</sup> (2003) 24 ILJ 133 (LAC) at 147 G-H

<sup>50</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 144 H and 146 B-C

The Labour Appeal Court held that s 187(1)(c) only applies to dismissals that are subject to being withdrawn by the employer upon the employees' acceptance of the employer's demand.<sup>51</sup> A dismissal that is final and not subject to being withdrawn falls outside the ambit of this section.<sup>52</sup> According to the court, a dismissal contemplated by s 187(1)(c) is temporary as it is subject to being withdrawn when the employees accept the employers demand.<sup>53</sup> The main aim of this section is not really to dismiss the employees but instead to induce them to comply with the employer's demand.<sup>54</sup> Dismissals that are effected for operational requirements in terms of s 188(1)(a)(ii) on the other hand are permanent and it is intended to replace workers who are not prepared to work under the terms and conditions of employment demanded by the operational requirements of the business with those willing to do so.<sup>55</sup>

Thompson states ... "after *Fry's Metals* we have a situation where a temporary dismissal to compel acceptance with a mutual interest demand must be branded as automatically unfair and countered with the strongest remedies available at law while a permanent dismissal for the same reason but without justification (in other words, not a dismissal defensible under ss188/189) is treated as a lesser industrial offence with lesser remedies."<sup>56</sup>

The *Fry's Metals* judgement appears to be irregular in that it produces an unhappy industrial relations outcome.<sup>57</sup> It appears that employers are now obliged to take final and irrevocable action rather than limited action.<sup>58</sup>

#### 1.4 EVALUATING CONSULTATION PROCESSES IN SOUTH AFRICA TO THAT OF FOREIGN JURISDICTIONS

In assessing the employer's obligation to consult against the right to dismiss employees on the basis of the employer's operational requirements the South African (SA) courts have held that the employer was obliged to consult before dismissal of its members for operational requirements.<sup>59</sup> Section 189(1) of the LRA 66 of 1995 requires that the consultation process commences when the employer contemplates dismissing one or more employees based on operational requirements and not when the decision to dismiss has already been determined. The issue on consultation merits further investigation, in particular, as to the stance taken in foreign jurisdictions. This will be addressed properly via relevant case law and legislation in chapter four.

In United Kingdom (UK), for example, s 188(1) of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992 provides that "an employer proposing to dismiss as redundant an employee a description in

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<sup>51</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 147 H

<sup>52</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 147 E

<sup>53</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 147 H-I

<sup>54</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 146 E-D

<sup>55</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 147 I-J

<sup>56</sup> Thompson C 'Bargaining over Business Imperatives: The Music of the Spheres after *Fry's Metals*' (2006) 27 *ILJ* 728

<sup>57</sup> Thompson C 'Bargaining over Business Imperatives: The Music of the Spheres after *Fry's Metals*' (2006) 27 *ILJ* 723

<sup>58</sup> Thompson C 'Bargaining over Business Imperatives: The Music of the Spheres after *Fry's Metals*' (2006) 27 *ILJ* 728

<sup>59</sup> See *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 at para 27



respect of which an independent trade union is recognised by him shall consult representatives of the Union about the dismissal in accordance with this section.”

The Fair Work Act 2009 (FWA) in Australia, on the other hand, makes provision for a consultation clause to be included in modern awards and enterprise agreements to regulate consultation processes between employers and employees.<sup>60</sup> Such a consultation clause includes terms that require employees to consult with employees about major changes that are likely to have a significant effect on their employment.<sup>61</sup> The parties can choose the modern award, the enterprise agreement or the model consultation term in the Fair Work Regulations (FWR) 2009 – Schedule 2.3 to be applicable to the employment situation.<sup>62</sup>

Regulation 2.09 of the FWR 2009 – Schedule 2.3 states that the model consultation term applies if the employer has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees; or proposes to introduce a change to the regular roster or ordinary hours of work of employees.<sup>63</sup>

Furthermore, s 389(1) of the Fair Work Act 2009 provides that a dismissal will be a case of genuine redundancy if the person’s employer no longer required the person’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise; and the employer has complied with any modern award or enterprise agreement that applied to the employment to consult about the redundancy. In *Ventyx Pty Ltd v Mr Paul Murray*,<sup>64</sup> the court found that the employer did communicate the redundancies in terms of the award provision for the purposes of s 389(1)(b) of the FWA. The court further found the employer had made the applicant’s employment redundant in terms of s 389 of the FWA.<sup>65</sup>

In the UK the word ‘propose’ to dismiss is used in the consultation clause of s 188 of TULCRA as opposed to ‘contemplates’ dismissal as indicated in s 189(1) of the LRA 66 of 1995, and imposes a limitation with regard to the timing of the dismissal.<sup>66</sup> When dismissals are ‘contemplated’, they are envisaged as a possibility and occur at an earlier point in time than when they are proposed.<sup>67</sup> The word ‘propose’ to dismiss occurs thus at a later stage than the word ‘contemplates’ dismissal when there is more certainty.<sup>68</sup> In SA the obligation to consult when ‘dismissals are contemplated’, therefore envisages an earlier state in time than ‘proposing to dismiss’ and a ‘definite decision to dismiss’ as in the case of the UK and Australian respectively.

Secondly, the requirement of a ‘meaningful joint consensus-seeking process’ in s 189(2) of the LRA envisages that the consultation must be an exhaustive joint problem solving process between the employer and the consulting

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<sup>60</sup> See s 139(1)(j), s 145A and s 205 of the Fair Work Act 2009

<sup>61</sup> Manufacturing and Associated Industries and Occupations Award 2010 at 21

<sup>62</sup> See s 139, s 205 and s 258 of the Fair Work Act 2009

<sup>63</sup> Fair Work Regulations 2009 – Schedule 2.3

<sup>64</sup> [2014] FWCFB 2143 at para 39

<sup>65</sup> In *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 158

<sup>66</sup> See *UK Coal Mining Ltd v National Union of Mineworkers* ([2008] IRLR 4) at para 36

<sup>67</sup> *UK Coal Mining Ltd v National Union of Mineworkers* ([2008] IRLR 4) at para 37

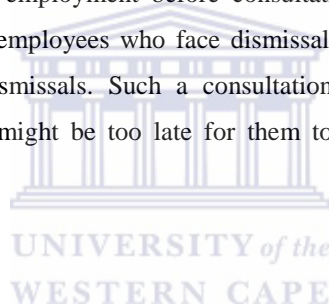
<sup>68</sup> *UK Coal Mining Ltd v National Union of Mineworkers* ([2008] IRLR 4) at para 37

parties.<sup>69</sup> This requirement goes further than consultation in the ordinary sense<sup>70</sup> and is absent in the consultation processes of both UK and Australia. In Australia, the model consultation term applies when a “definite decision” is reached. This is particularly controversial as a ‘definite decision’ to introduce a change consisting of a termination of employment implies that the consultation is approached with a fixed outcome in mind.<sup>71</sup>

In SA, the consultation procedures appear controversial only in so far as it affects small businesses, in that the same consultation processes are applied for all employees. In Australia, the FWA provides for some exemptions or specific requirements pertaining to dismissals in businesses with less than 15 employees, referred to in the Act as “small business employer.”<sup>72</sup>

## 1.5 CONCLUSION

Compared to SA and the UK, Australia’s law on consultation requirements appears less protective of employees and appears to represent a strong bias towards preserving employer prerogative in respect of the scope of employees who enjoy protection against unfair dismissal. This is particularly so in the light that consultation in Australia is required to take place when a “definite decision” is reached.<sup>73</sup> A “definite decision” to introduce a change consisting of a termination of employment before consultation had taken place would imply that the consultation is futile.<sup>74</sup> It appears that employees who face dismissals would therefore not be able to make any meaningful proposals to avoid the dismissals. Such a consultation places employees, whose dismissals are contemplated, at a disadvantage as it might be too late for them to make any meaningful proposals to avoid dismissals.



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<sup>69</sup> *National Union of Metal Workers of South Africa & others v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC) at 524 D

<sup>70</sup> See Grogan J (2014) 323

<sup>71</sup> See *UK Coal Mining Ltd v National Union of Mineworkers* ([2008] IRLR 4) at para 86

<sup>72</sup> Section 23 of the FWA

<sup>73</sup> Section 389(1) of the FWA 2009

<sup>74</sup> See *UK Coal Mining Ltd v National Union of Mineworkers* ([2008] IRLR 4) at para 86



## CHAPTER TWO

### 2.1 INTRODUCTION

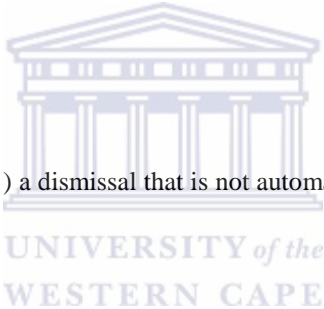
Dismissals based on the operational requirements of the employer's business are categorised as "no fault" dismissals.<sup>75</sup> The reason for this is that the termination of employment is linked to the employer's constraints and needs rather than any act or omission on the part of the employee.<sup>76</sup> Therefore the law is more prescriptive, in terms of substance and procedure than in the case of a dismissal for misconduct or incapacity.<sup>77</sup> The Act and, in particular, the relevant Code of Good Practice also have placed particular obligations on the employer towards ensuring that employees to be dismissed for operational requirements are treated fairly.

The court, in *General Food Industries Ltd v Food and Allied Workers Union*,<sup>78</sup> summarized the position as follows:

"The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that – even though reasons to retrench employees may exist - they will only be accepted as valid if the employer can show that all viable steps have been considered and taken to prevent the retrenchments or to limit these to a minimum."

### 2.2 JUSTIFICATION

Section 188 of the LRA provides that "(1) a dismissal that is not automatically unfair, is unfair if the employer fails to prove –

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- (a) that the reason for a dismissal is a fair reason -
    - (i) related to the employee's conduct or capacity; or
    - (ii) based on the employer's operational requirements and
  - (b) that the dismissal was effected in accordance with a fair procedure."

Section 188 of the LRA thus recognises dismissals for operational requirements as an acceptable norm provided that the statutory requirements for an employer to justify dismissal in terms of s 188(1)(a)(ii) namely to prove that the reason for a dismissal was a fair reason and that it was procedurally fair in terms of s 188(1)(b) are complied with. Non-compliance with the latter sections will result in the dismissal to be substantively and procedurally unfair. For operational requirements dismissals, however, to be substantively and procedurally fair, an employer will also have to comply with the procedures as laid down in s 189 of the LRA and the Code of Good Practice on Dismissals based on Operational Requirements (the Code).<sup>79</sup>

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<sup>75</sup> Schedule 2 of the Code of Good Practice on Dismissal based on Operational Requirements

<sup>76</sup> Van Niekerk et al (2015) 313

<sup>77</sup> Van Niekerk et al (2015) 313

<sup>78</sup> [2004] 7 BLLR 667 (LAC) at para 55

<sup>79</sup> See GN 1517 in GG 20254, dated 16 July 1999

### 2.3 THE MEANING OF ‘OPERATIONAL REQUIREMENTS’

Part II of the International Law Convention (ILO) 158 deals with the termination of employment for economic, structural or similar reasons. Part II states the following: ‘Technological reasons’ refers to the introduction of new machinery or technological innovations that affect working relationships by rendering jobs redundant or by requiring employees to adapt working conditions to new technologies, even where this may necessitate a change in their terms and conditions of employment. ‘Structural reasons’ include circumstances in which an enterprise transforms itself into new working groups or combines with others. ‘Economic reasons’ relate to the financial security of an enterprise and include factors which impact on the business profitability such as the state of the market and the economy or a drop in demand for services. This instrument was followed as a guideline by our courts under the 1956 Act and is now incorporated into s 213 of the LRA.<sup>80</sup>

As indicated above, s 213 of the LRA defines “operational requirements” to mean: requirements based on the economic, technological, structural or similar needs of the employer.<sup>81</sup> This definition is according to a wide variety of writers of labour law and case law an expansive definition. It is said to be reconcilable with the approach taken by labour courts that retrenchment is acceptable whether aimed at stemming losses or increasing profits.<sup>82</sup> According to Darcy Du Toit, the definition is ‘broad enough to include every conceivable business consideration that might lead an employer to consider dismissal in the context of restructuring’.<sup>83</sup> Van Niekerk argues that the expansive definition of operational requirements has permitted the courts over the years to include in this category dismissals for incompatibility and a refusal to accept changed conditions of employment consequent upon the need to reorganise work as well as dismissals at the behest of a third party.<sup>84</sup> Furthermore, the courts have held that all that is required is a bona fide economic rationale – in other words, the retrenchment must be aimed at effecting savings.<sup>85</sup>

The Code notes that it is difficult to define all the circumstances that might legitimately form the basis of a dismissal in these circumstances.<sup>86</sup> The Code further suggests that economic reasons are those that relate to the financial management of the enterprise, technological reasons refer to new technology that affects work relationships, and structural reasons relate to the redundancy of posts consequent to and on the restructuring of the employers enterprise. In *Morapane v Gilbeys Distillers & Vintners (Pty) Ltd & Another*,<sup>87</sup> the Labour Court stated that the codes provide guidelines but do not give rise to rights.

I will now attempt to analyse the provisions of the Code as well as the courts’ interpretation of the components of the definition of ‘operational requirements’.

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<sup>80</sup> Grogan J *Dismissal* 1 ed (2010) 340

<sup>81</sup> Labour Relations Act 66 of 1995

<sup>82</sup> *Food and Allied Workers Union & others v SA Breweries Ltd* (2004) 25 ILJ 1979(LC) at 1980 E-F

<sup>83</sup> Du Toit ‘Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond’ (2005) 26 *ILJ* 602

<sup>84</sup> Van Niekerk et al (2015) 314

<sup>85</sup> *De Vries & andere v Lanzerac Hotel & andere* (1993) 14 ILJ 432 (IC) at 435-6

<sup>86</sup> GN 1517 in GG 20254, dated 16 July 1999

<sup>87</sup> (1998) 19 ILJ 635 (LC) at 640 E & H

## 2.4 Economic needs

As indicated above, the Code suggests 'economic reasons to be those that relate to the financial management of the enterprise'. This interpretation of economic needs is very wide and suggests that dismissals based on operational will include those economic reasons relating to the financial management of the enterprise.<sup>88</sup> Neither the Act nor the Code gives guidance as to what economic reasons will constitute an economic need. In *Chemical Workers Industrial Union & others V Algorax (Pty) Ltd (Algorax)*,<sup>89</sup> the respondent was unhappy about the costs at which it was conducting its business and introduced a shift system to bring the costs down. The court held that it should intervene where it is clear that certain measures could be taken to avoid job losses or where it is clear that the dismissals were not a measure of last resort.<sup>90</sup> An employer may therefore only resort to dismissing employees for operational requirements as a measure of last resort.

However, in *Fry's Metals*,<sup>91</sup> the court in dealing with the proposition that an employer may not dismiss for operational reasons to increase profits in order to ensure the survival of the business, held the following: '[That] argument has no statutory basis in our law. This is so because all that the Act refers to, and recognises, in this regard is an employer's right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the context of a business the survival of which is under threat and a business which is making profit and wants to make more profit.'

In the case of *Mazista Tiles v NUM*,<sup>92</sup> the Labour Appeal Court deliberated that even though Mazista Tiles had indeed continued to make profits this had not precluded the company from retrenching the employees. This is so because employers are entitled to restructure and retrench if this is necessary to become even more competitive and more profitable. The court held that the appellant could, therefore, dismiss the employees for operational requirements under s 189, for rejecting its proposal on changing the terms and conditions of employment.<sup>93</sup>

In *Van Rooyen & others V Blue Financial Services (SA) (Pty) Ltd*,<sup>94</sup> the court held that a fair procedure demands that the parties engage in a meaningful joint consensus-seeking process. The obligation is to consult over alternative employment and to take steps to accommodate affected employees in that employment is more onerous in circumstances where the rationale for a proposed retrenchment is to improve profitability.<sup>95</sup> Although the courts are in general in favour of an approach that an employer may dismiss for operational reasons to increase profits it does not mean that the employer may do so at will and disregard the fairness test for operational requirements.<sup>96</sup>

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<sup>88</sup> Van Niekerk et al (2015) 314

<sup>89</sup> (2003) 24 ILJ 1917 (LAC) at 1923 E & H

<sup>90</sup> *Chemical Workers Industrial Union & others V Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1940 E

<sup>91</sup> (2003) 24 ILJ 133 (LAC) at 148 D-E

<sup>92</sup> (2004) 25 ILJ 2156 (LAC) at 2174 E-F

<sup>93</sup> *Mazista Tiles v NUM* (2004) 25 ILJ 2156 (LAC) at 2174 F

<sup>94</sup> (2010) 31 ILJ 2357 (LC) at 2741 I

<sup>95</sup> *Van Rooyen & others V Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2357 (LC) at 2744 I-J

<sup>96</sup> *Van Rooyen & others V Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2357 (LC) at 2744-5 J

## 2.5 Technological needs

Item I of the Code refers to “technological reasons” as follows:

“Technological reasons are the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace.”

‘Technological needs’ refers to the introduction of new technology, such as more advanced machinery, mechanism or computerisation that leads to the redundancy of employees.<sup>97</sup> The technological needs of the employer were considered in the following cases:

In *Hlongwane & Another v Plastix (Pty) Ltd (Hlongwane)*,<sup>98</sup> the applicant’s job had become redundant as a result of the fact that there was no one within the respondent who had the necessary expertise to train the first applicant to use a particular engraving machine. The court distinguished between retrenchment and redundancy and held that retrenchment occurs when the employer terminates the employees’ employment as they have become in excess due to an economic downturn. The employees then lose their jobs but not necessarily permanently.<sup>99</sup> Redundancy means that an employee becomes redundant as a result of, for instance, the introduction of new machinery or technology or the restructuring of the business. In this instance the employment of the employee is lost permanently.<sup>100</sup>

The court further held that this particular matter is a case of redundancy, which places a greater duty on the employer to assist the employee than in the case of retrenchment. ‘The reasons, therefore, are as follows: First, it is the employer’s own action that caused the redundancy in that he either bought new machinery or restructured the business. Secondly, the employer is in control of the situation and need not make hasty decisions. Time is not a factor as in the case of retrenchment where a delay would severely prejudice the employer. Thirdly, in the case of redundancy, the employee will lose his job permanently.’<sup>101</sup>

In *Singh & Others v Moni Paper*,<sup>102</sup> the applicants’ positions had become redundant as a result of the introduction and implementation of an integrated business information system, SAP. The purpose of this system was to absorb the manual work which previously had been carried out by the applicants. Other aspects of their work were comfortably absorbed into other functions where there was now spare capacity following the implementation of SAP.<sup>103</sup> The court held that the decision to retrench the applicants was substantively fair in that it was based on the

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<sup>97</sup> Basson et al *Essential Labour Law* (2005) 226

<sup>98</sup> (1990) 11 ILJ 171 (IC) 173 at par E- F

<sup>99</sup> *Hlongwane & Another v Plastix (Pty) Ltd* (1990) 11 ILJ 171 (IC) at 175 J-176 A

<sup>100</sup> *Hlongwane & Another v Plastix (Pty) Ltd* (1990) 11 ILJ 171 (IC) at 176 A

<sup>101</sup> *Hlongwane & Another v Plastix (Pty) Ltd* (1990) 11 ILJ 171 (IC) at 176 B-D

<sup>102</sup> (2000) 21 ILJ 966 (LC) at 970 A

<sup>103</sup> *Singh & Others v Moni Paper* (2000) 21 ILJ 966 (LC) at 970 C

operational requirements of the respondent, but that the selection of the applicants was not affected in accordance with a fair procedure.<sup>104</sup>

In terms of *Hlongwane*, it would appear that there is, therefore, a greater onus on the employer to assist the employee with internal factors such as the introduction of new technology, which is caused by the employer's own actions than with external factors such as a downturn in the economy, which is caused by factors beyond the control of the employer.

## 2.6 Structural needs

Item I of the Code refers to "structural reasons" as follows:

"Structural reasons are the redundancy of posts consequent to a restructuring of the employer's enterprise."

Restructuring can be attributed to internal and external factors such as a financial loss suffered by a business due to a weak business model or a downturn in demand for products and are thus economically motivated. In cases of internal factors, the restructuring of the business model or structure of the business is normally identified as the sole cause of the poor financial performance, hence the need to restructure.

In *Van Rooyen and others v Blue Financial Services (South Africa) (Pty) Ltd*,<sup>105</sup> respondent identified the structure of the regional manager position as the sole significant cause of the poor sales performance. The applicants were therefore subsequently informed that the efficiency, productivity and relevance of all positions had been considered and that the restructuring process was to be commenced with the regional managers.<sup>106</sup> The purpose was to streamline the existing structure, and to reduce the number of regional manager posts. The applicants, therefore, had to undergo assessment, and the outcome of those assessments would determine their eligibility for appointment to the new posts.<sup>107</sup>

The employer disregarded fairness tests for operational requirements in that it had taken a decision to retrench, which was unfair to the applicants. The court held that the employer failed to consult on alternatives and, therefore, the dismissal was procedurally unfair.<sup>108</sup>

## 2.7 Similar needs

Section 213 of the Act defines operational requirements also to mean "similar needs of the employer" which constitutes a reason for dismissal provided that the test for fairness has been complied with.

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<sup>104</sup> *Singh & Others v Moni Paper* (2000) 21 ILJ 966 (LC) at 984 H

<sup>105</sup> (2010) 31 ILJ 2735 (LC) at 2738 A

<sup>106</sup> *Van Rooyen and others v Blue Financial Services (South Africa) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) at 2738 B-C

<sup>107</sup> *Van Rooyen and others v Blue Financial Services (South Africa) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) at 2738 D

<sup>108</sup> *Van Rooyen and others v Blue Financial Services (South Africa) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) at 2745 J

In *Tiger Food Brands Ltd t/a Albany Bakeries v Levy No & Others*,<sup>109</sup> the Labour Court noted that the Code attempted to define what is meant by the economic, technological and structural needs of the employer but did not attempt to define the all-encompassing phrase ‘or similar needs of the employer’. The court viewed a narrow interpretation of the definition of operational requirements as inappropriate and held that the phrase ‘or similar needs of the employer’ relates to the needs of the employer that have some resemblance of economic, technological or structural needs.<sup>110</sup> In this case, the applicant feared for the safety of its manager after having received a threatening cell phone message.<sup>111</sup> The court held that the inability of the employer to manage its business due to a threat to the management, affects the economic viability of the enterprise and if the reasons for the proposed retrenchment did not fit into the basket of economic reasons, they had a resemblance to economic reasons.<sup>112</sup>

## 2.8 CONCLUSION

The term ‘similar needs’ is very broad and the Code does not attempt to define the all-encompassing term for the ‘similar needs of the employer’. It will, therefore, be impossible to provide an exhaustive list of what constitutes ‘similar reasons for dismissal’. However, in circumstances where the survival or well-being of the business is threatened it may be fair to dismiss an employee for a reason related to the ‘similar needs of the employer’ since it affects the economic viability of the enterprise.<sup>113</sup>



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<sup>109</sup> (2007) 28 ILJ 1808 (LC) at 1831 F & A

<sup>110</sup> *Tiger Food Brands Ltd t/a Albany Bakeries v Levy No & Others* (2007) 28 ILJ 1808 (LC) at 1824 I

<sup>111</sup> *Tiger Food Brands Ltd t/a Albany Bakeries v Levy No & Others* (2007) 28 ILJ 1808 (LC) at 1831 A-B & D

<sup>112</sup> *Tiger Food Brands Ltd t/a Albany Bakeries v Levy No & Others* (2007) 28 ILJ 1808 (LC) at 1834 F-G & 1836 C

<sup>113</sup> *Tiger Food Brands Ltd t/a Albany Bakeries v Levy No & Others* (2007) 28 ILJ 1808 (LC) at 1834 F-G

## CHAPTER THREE

### 3.1 INTRODUCTION

The right to fair labour practices is unambiguously proclaimed and regulated in the LRA 66 of 1995.<sup>114</sup> Section 185 of the LRA specifically protects the right of the employee not to be unfairly dismissed or subjected to unfair labour practice.

The concept of fairness (although in the context of a labour discrimination complaint) is described by *Willis JA in Woolworths (Pty) Ltd v Whitehead*<sup>115</sup> as follows: “[127] Fairness, particularly, in the context of the LRA, requires an evaluation that is multi-dimensional. One must look at it not only from the perspective of prospective employees but also employers and the interest of society as a whole. Policy considerations play a role. There may be features in the nature of the issue which call for restraint by a court in coming to a conclusion that a particular act of discrimination is unfair.”

### 3.2 SUBSTANTIVE FAIRNESS

The two requirements for a fair dismissal as laid down in s 188 of the LRA are namely, substantive fairness and procedural fairness. It does this by requiring that the reason for a dismissal must be fair and that the dismissal must be effected in accordance with a fair procedure.<sup>116</sup>

In terms of the first requirement, the question whether or not an employer's dismissal for operational reasons is substantively fair is according to the courts a factual one.<sup>117</sup> First, the employer must prove that the proffered reason for the dismissal is one based on the operational requirements of the business.<sup>118</sup> In other words, he needs to prove that the reason for the dismissal was based on economic, technological, structural or similar needs of an employer as defined in s 213 of the LRA.

Secondly, the employer has to prove that the operational requirements actually existed; that it was the real reason for the dismissal and that the proffered operational reason is not a cover-up for another reason for the dismissal of the employees.<sup>119</sup> In *SA Chemical Workers Union & others v Toiletpak (Pty) Ltd & others*,<sup>120</sup> where a transfer of business by Toiletpak Manufacturers necessitated the dismissal of employees for operational reasons, the Industrial Court held that the real reason for the transfer was Toiletpak Manufacturers' was a stratagem in order to rid itself of a number of employees whom it suspected of misconduct.

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<sup>114</sup> Grogan J 11 ed (2014) 188

<sup>115</sup> 2000 (3) SA 529 (LAC) at 559 F

<sup>116</sup> Basson et al (2005) 235

<sup>117</sup> Basson et al (2005) 236

<sup>118</sup> Basson et al (2005) 236

<sup>119</sup> Basson et al (2005) 236

<sup>120</sup> (1988) 9 ILJ 295 (IC) at 299 A & E; 305 G & 306 D



The requirements for substantive fairness have always been controversial.<sup>121</sup> Despite the fact that s 188 of the LRA 66 of 1995 provides that the employer must establish a fair reason for dismissal, the courts were initially disinclined to subject the employer's rationale for retrenchment to extensive scrutiny.<sup>122</sup>

A series of Labour Court and Labour Appeal Court cases followed in which different formulations have been suggested for the test to be employed when determining the substantive fairness of a dismissal based on the employer's operational requirements such as "a bona fide reason to retrench", "a commercial rationality to retrench", "a measure of last resort" and "proportionality". The different formulations assisted in the test for substantive fairness to become more established.

The differing views of our courts when considering the substantive fairness of a decision to dismiss employees for operational reasons is evident from the case law below:

In *National Union of Metalworkers of SA V Atlantis Diesel Engines (Pty) Ltd*,<sup>123</sup> the court stated that 'fairness to retrench goes further than bona fides and the commercial justification to retrench but that it is concerned, first and foremost, with the question whether the termination of the employment is the only reasonable option in the circumstances. It has become trite for our courts to state that the termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons.'

In *SA Clothing & Textile Workers Union & others v Discreto-A Division of Trump & Springbok Holdings*,<sup>124</sup> the Labour Appeal Court held that the function of the Labour Court is not to second-guess the commercial or business efficacy of the employer's ultimate decision. When determining the rationality of the employer's decision it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision.

In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*,<sup>125</sup> the court stated that "The word "fair" [in section 188] introduces a comparator that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

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<sup>121</sup> Van Niekerk et al (2015) 315

<sup>122</sup> Van Niekerk et al (2015) 315

<sup>123</sup> (1993) 14 ILJ 642 (LAC) at 643 B-C

<sup>124</sup> (1998) ILJ 1451 (LAC) at 1455 A-C

<sup>125</sup> (2001) 22 ILJ 2269 (LAC) at 2269 I-2270 A



In *Algorax*,<sup>126</sup> the council for the employees on an appeal submitted that the dismissal of the appellants was automatically unfair as contemplated by s 187(1)(c) of the LRA. The dismissal of the appellants in this matter followed a refusal by them to accept a proposal made by the respondent to change their straight day shift to a rotating shift which entailed also working at night as well as on a Saturday and Sunday. It was submitted on behalf of the appellants that the issue of whether the appellants should agree to the rotating shift proposed by the respondent was a matter of mutual interest between the employer and the employee as contemplated by s 187(1)(c).<sup>127</sup>

The court held that where an employer seeks to reduce costs in his business and demands that his employees agree to work short time, that employer has genuine operational requirements justifying the working of short-time but, without the employees consent; he is not entitled to require them to work short-time.<sup>128</sup> He may, however, dismiss the employees for operational requirements in order to get rid of them permanently and employ a new workforce that will be prepared to work in accordance with the needs of his business.<sup>129</sup> He, therefore, will be dismissing his old workforce as the contracts of employment he has with them no longer properly serve his operational requirements. However, the employer could also decide that for certain reasons, such as the employees' skills and experience, he does not want to get rid of his workforce permanently but wishes to retain them and for that reason dismisses them not for the purpose of employing others in their positions permanently but to compel them to agree to accept his proposals. Such a dismissal the court held is not permitted and consequently automatically unfair as was the situation in this case.<sup>130</sup>

The court further held that it has to determine the fairness of a dismissal objectively when seized with a dispute about the fairness of a dismissal. The court must answer the question whether a dismissal was fair or not and not defer it to the employer for the purpose of answering that question.<sup>131</sup> It, therefore, cannot, for example, say that the employer thinks it is fair and, therefore, it is or should be fair.<sup>132</sup>

The court held that the employer has chosen a solution that result in dismissals of a number of employees when there is obviously a clear way in which he could have addressed the problems without any employees losing their jobs or with fewer job losses.<sup>133</sup> Consequently, the court should therefore not hesitate to deal with the matter on the basis that the employer uses a solution which preserves jobs, rather than one which causes job losses, especially a so-called no-fault dismissal which is regarded as a death penalty in the field of labour and employment law.<sup>134</sup>

In the case of *Mazista Tiles v NUM*,<sup>135</sup> the court held that the employees were dismissed for a fair reason based on the employer's operational requirements and consequently such a dismissal was substantively fair. In this case the employer considered restructuring its business due to fierce competition in the industry in order to regain the lost

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<sup>126</sup> (2003) 24 ILJ 1917 (LAC) at para 35

<sup>127</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1929 A

<sup>128</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1929 B-C

<sup>129</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1929 E

<sup>130</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1929 I

<sup>131</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1939 G-H

<sup>132</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1939 J

<sup>133</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1939 J

<sup>134</sup> *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at 1940 A-B

<sup>135</sup> (2004) 25 ILJ 2156 (LAC) at para 58

market and to remain competitive.<sup>136</sup> As part of the restructuring, he proposed a revision of the benefits and conditions of employment by terminating both the feeding scheme and hostel accommodation he provided to his employees.<sup>137</sup>

The court held that where a dismissal for operational requirements is directly linked to the employees' rejection of the proposals to changing terms and conditions of service, the continuing existence of the employees' jobs is irrelevant to the determination whether or not there was a fair reason for dismissal as such dismissal would have been necessary by virtue of the changing business requirements and not that the jobs themselves were redundant.<sup>138</sup> The employer may, therefore, dismiss employees who reject such proposals and replace them with new employees who are prepared to work in accordance with the needs of the business provided that the requirements of s 189 are complied with.

In *Fry's Metals*,<sup>139</sup> the employer suggested ways of increasing productivity. The company had planned to introduce certain changes in the workplace which included a change in the shift system allowance to increase productivity and enhanced job security.<sup>140</sup> The employer then subsequently dismissed the workers that refused to accept the intended changes asserting that the dismissals were necessitated by economic health and environmental factors.<sup>141</sup> The Labour Appeal Court found that the dismissals were final and were not meant to compel the employees to accept the proposed changes.<sup>142</sup>

The Supreme Court of Appeal held that s 187(1)(c) only applies to dismissals that are subject to being withdrawn by the employer upon the employees' acceptance of the employer's demand.<sup>143</sup> A dismissal that is final and not subject to being withdrawn falls outside the ambit of this section.<sup>144</sup> According to the court, a dismissal contemplated by s 187(1)(c) is temporary as it is subject to being withdrawn when employees accept the employers demand.<sup>145</sup>

### 3.3 PROCEDURAL FAIRNESS

In terms of the second requirement for a fair dismissal, the question whether or not an employer's dismissal for operational reasons is procedurally fair will depend on whether the employer complied with all the requirements for a fair procedure as set out in s 189.<sup>146</sup> The employer must prove on a balance of probabilities that the procedure followed was in accordance with the provisions of s 189.<sup>147</sup> The requirements for a procedurally fair dismissal that the employer must comply with as set out in s 189, in short, are as follows:

<sup>136</sup> *Mazista Tiles v NUM* (2004) 25 ILJ 2156 (LAC) at para 3

<sup>137</sup> *Mazista Tiles v NUM* (2004) 25 ILJ 2156 (LAC) at para 10

<sup>138</sup> *Mazista Tiles v NUM* (2004) 25 ILJ 2156 (LAC) at para 54

<sup>139</sup> (2003) 24 ILJ 133 (LAC) at 137 F

<sup>140</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 137 G & 138 B-C

<sup>141</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 149 F-G

<sup>142</sup> *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* (2003) 24 ILJ 133 (LAC) at 152 J

<sup>143</sup> *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 C-D

<sup>144</sup> *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 F

<sup>145</sup> *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 E

<sup>146</sup> *South African Chemical Workers Union and others v Afrox Ltd* (1998) 19 ILJ 62 (LC) at 73 E

<sup>147</sup> Grogan J (2014) 319

- The employer must consult with the person(s) whose dismissal is contemplated;<sup>148</sup>
- The consultation must be “a meaningful joint consensus-seeking process” in that it must attempt to reach consensus on appropriate matters;<sup>149</sup>
- The employer must make written disclosure of relevant information, which includes, inter alia, the reasons for the proposed dismissals and the alternatives considered before the proposal to dismiss;<sup>150</sup>
- The employer must allow the person whose dismissal is contemplated an opportunity to make representations;<sup>151</sup>
- He must further consider and respond to representations and where denied, reasons must be provided therefore;<sup>152</sup>
- The employee(s) to be dismissed must be selected according to agreed criteria by the parties;<sup>153</sup> and
- The employer must disclose the severance pay that is proposed.<sup>154</sup>

Failure by the employer to comply with any one of the above-listed requirements during a retrenchment exercise for operational requirements will render such retrenchment exercise procedurally unfair. Once the employer contemplates retrenching its employees, it is required under s 189(1) of the Act to initiate a consultative process with the employees likely to be affected by the dismissals or their representatives. Section 189(2) of the Act envisages the consultative process to be a ‘meaningful’ joint consensus-seeking process which implies that the employer should make a genuine attempt to reach consensus on the issues prescribed by s 189(2) and not merely go through the motions.<sup>155</sup> In *Atlantis Diesel Engines*,<sup>156</sup> the court held that the word ‘contemplate’ ‘simply means that an employer, who senses that it might have to retrench employees in order to meet his operational objectives, must consult with the employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reasons for it.

In large scale retrenchments, s 189A of the LRA provides for additional requirements for procedural fairness of which the main requirements include the duty by the employer not to retrench employees during a strike and to submit to facilitation by the Council for Conciliation, Mediation and Arbitration (CCMA) or accredited agency during the consultation process.<sup>157</sup> Either one of the parties can request the CCMA to appoint a facilitator. Furthermore, s 189A introduces a moratorium of 60 days during which the employer may not dismiss and which starts from the date on which notice was given in terms of section 189(3).<sup>158</sup> Section 189A applies to employers with more than 50 employees, but at least 10 employees must be earmarked for retrenchment.<sup>159</sup>

<sup>148</sup> Section 189(1)(a)-(d) of the LRA 66 of 1995

<sup>149</sup> Section 189(2)(a) of the LRA 66 of 1995

<sup>150</sup> Section 189(3)(a) and (b) of the LRA 66 of 1995

<sup>151</sup> Section 189(5) of the LRA 66 of 1995

<sup>152</sup> Section 189(6)(a) of the LRA 66 of 1995

<sup>153</sup> Section 189(7)(a) of the LRA 66 of 1995

<sup>154</sup> Section 189(3)(f) of the LRA 66 of 1995

<sup>155</sup> Basson et al (2005) 240

<sup>156</sup> (1993) 14 ILJ 642 (LAC)

<sup>157</sup> Section 189A(1)(a)(i) of the LRA 66 of 1995; Grogan J (2014) 342

<sup>158</sup> Section 189A(7)(a) of the LRA 66 of 1995

<sup>159</sup> Grogan J (2014) 319

The principles of procedural fairness have been laid down by our courts in numerous decisions. Section 189 requires consulting parties to reach consensus on various matters specified.<sup>160</sup> Consultation is therefore not one-sided.<sup>161</sup> In *Food and Allied Workers Union & others v SA Breweries*,<sup>162</sup> SA Breweries anticipated that in its pursuit of a World Class Manufacturing (WCM) strategy that such strategy could lead to job losses. It, therefore, attempted to negotiate a ‘Workplace Change Agreement’ with the union nationally. When negotiations failed the company decided to abandon its continued negotiations with the union and refused a request by the unions to afford them a month to study the company’s business plan and formulate a response.<sup>163</sup> The company then immediately thereafter started a process of restructuring each brewery and set about implementing its proposal before the union presented its counter-proposal. It then purported to consult with the union in circumstances where the reversal of the situation was virtually impossible.<sup>164</sup> The court held that the procedural unfairness of the company in this matter was of a serious nature. Not only the model of restructuring but also the entry level for the new job specifications had been fixed nationally by the company in a unilateral fashion.<sup>165</sup> Also, the selection criteria for retrenchment in the collective agreement between the parties were completely ignored by the company.<sup>166</sup>

Section 189(1) further requires the employer to consult over dismissals with any person whom the employer is required to consult in terms of a collective agreement.<sup>167</sup> If there is no collective agreement requiring consultation, the employer must consult with a workplace forum if the employees likely to be affected by the proposed dismissals are employed in a workplace where there is a workplace forum and any trade union whose members are likely to be affected by the proposed dismissals.<sup>168</sup> If there is no workplace forum, the employer must consult with any registered trade union.<sup>169</sup> In *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa*,<sup>170</sup> the employer was engaged in a consultative process for retrenchment of hourly paid workers in terms of s 189 of the Act with NUMSA. Apart from the retrenchment exercise Aunde SA intended to re-employ the workers afresh on minimum level rates of pay and conditions of service prescribed by the bargaining council’s main agreement.<sup>171</sup> NUMSA opposed this proposal but the other consulting union for the monthly salaried employees, UASA, accepted the proposal.<sup>172</sup> As NUMSA had ceased to enjoy the majority membership, Aunde SA then concluded a recognition agreement with UASA acknowledging UASA as the sole bargaining representative of Aunde SA.<sup>173</sup> The latter agreement was followed by a signed agreement with UASA which provided that the hourly paid employees would be retrenched and re-employed on new terms and conditions.<sup>174</sup> When NUMSA wanted to continue consulting, it was told by Aunde SA that its membership had dropped to below a majority in the

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<sup>160</sup> Grogan J (2014) 324

<sup>161</sup> Grogan J (2014) 324

<sup>162</sup> (2004) 25 ILJ 1979 (LC) at 1984 I – 1985 B

<sup>163</sup> *Food and Allied Workers Union & others v SA Breweries* (2004) 25 ILJ 1979 (LC) at 2028 A-G

<sup>164</sup> *Food and Allied Workers Union & others v SA Breweries* (2004) 25 ILJ 1979 (LC) at 2029 G-H

<sup>165</sup> *Food and Allied Workers Union & others v SA Breweries* (2004) 25 ILJ 1979 (LC) at 2031 B-C

<sup>166</sup> *Food and Allied Workers Union & others v SA Breweries* (2004) 25 ILJ 1979 (LC) at 2031 C

<sup>167</sup> Section 189 of the LRA 66 of 1995

<sup>168</sup> Section 189 of the LRA 66 of 1995

<sup>169</sup> Section 189 of the LRA 66 of 1995

<sup>170</sup> (2011) 32 ILJ 2617 (LAC) at 2619 F-G

<sup>171</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2619 G

<sup>172</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) 2619 I & 2619 B

<sup>173</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2621 G-I

<sup>174</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2622 F-G

bargaining unit.<sup>175</sup> The Labour Court recorded in its judgement that the crisp issue for determination was whether the appellant had a duty to consult with the respondent (NUMSA) after it lost its majority membership and after the appellant had signed a recognition agreement with UASA.<sup>176</sup> The Labour Court concluded in its judgement that although Aunde SA and UASA had a recognition agreement this agreement in itself however, did not regulate the consultation process in the case of a retrenchment. Therefore, in the absence of a retrenchment procedure in the recognition agreement Aunde SA was obliged to consult with NUMSA before the dismissal of its members for operational reasons.<sup>177</sup> The Labour Court consequently found that the appellant's failure to consult with the respondent rendered the retrenchment of the respondent's members procedurally unfair.<sup>178</sup> The current appeal failed as the court found no basis to interfere with the decision of the Labour Court.<sup>179</sup>

The requirements for procedural fairness regulated in s 189 are also applicable in the case of large-scale retrenchments by the employer.<sup>180</sup> Consequently, the employer has to comply with the requirements for procedural fairness regulated in both s 189 and s 189A in the case of large-scale retrenchments.<sup>181</sup> In *National Union of Mineworkers & others v Revan Civil Engineering Contractors & Others*,<sup>182</sup> a limited retrenchment has grown into a larger retrenchment and the provisions of s 189A had come into operation. This is a matter where three associated companies namely Requad, Revan Plant and Revan Civils initially set about retrenching 31 and then a further 39 employees. The reason for this was that the third respondent (Requad), a company with BEE credentials, had over a period of 12 months experienced a 'drastic reduction' in the amount of tenders available from the government and the private sector and, therefore, had to scale down its activities. This position of Requad resulted in a knock on effect to Revan Plant and Revan Civils whose activities were closely related to that of Requad.<sup>183</sup> As a result, both Revan Plant and Revan Civils also had to scale down their activities. However, the financial situation of the companies worsened to such an extent that a further 39 names had to be added to the initial list of potential retrenchees. Each company gave notices of dismissal to their employees and engaged in consultations as envisaged by s 189. This course of action was contested by the applicants in the Labour Court whereupon the employers made two concessions namely: that s 189A applied to the entire retrenchment exercise and that LIFO (last in, first out) as a selection criterion should have been applied across all the companies.<sup>184</sup> It was submitted by the union that the dismissals were unlawful and invalid in terms of s 189A as it is common cause that no facilitator had been appointed and the notices of termination had been given prematurely. The court did not accept the argument of the union but nonetheless found some of the dismissals to be procedurally unfair.<sup>185</sup> On appeal, the union argued that all the retrenchments were invalid for non-compliance with the provisions of s 189A. The employers in return argued that the appeal courts did not have "jurisdiction" to hear the matter because of the terms of s 189A(18).<sup>186</sup> Section 189A(18) reads as follows: "The Labour Court may not adjudicate a dispute about the procedural fairness

<sup>175</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2623 H-I

<sup>176</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2624 A

<sup>177</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2623 H-I

<sup>178</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2624 A

<sup>179</sup> *Aunde South Africa (Pty) Ltd v National Union of Metal Workers of South Africa* (2011) 32 ILJ 2617 (LAC) at 2624 B-C

<sup>180</sup> Basson et al (2005) 261

<sup>181</sup> Basson et al (2005) 261

<sup>182</sup> (2011) 32 ILJ 2167 (LC) 2624 D

<sup>183</sup> *National Union of Mineworkers & Others v Revan Civil Engineering Contractors & others* (2011) 32 ILJ 2167 (LC) at 2628 H

<sup>184</sup> *NUM & Others v Revan Civil Engineering Contractors & others* (2011) 32 ILJ 2167 (LC) at 2174 A & 2176 G

<sup>185</sup> *NUM & Others v Revan Civil Engineering Contractors & others* (2011) 32 ILJ 2167 (LC) at 2177 B & 2180 C

<sup>186</sup> *Revan Civil Engineering Contractors & others v NUM & others* (2012) 33 ILJ 1846 (LAC) at 1848 A-B



of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of s 191(5)(b)(ii)". The court held that 'unless there has been a valid dismissal the court may not intervene on the basis that the dismissal was unfair and s 189A(18) is not intended to disturb this principle'.<sup>187</sup> The court further held that the dismissals were invalid for being in breach of the provisions of s 189A of the LRA.<sup>188</sup>

### 3.4 CONCLUSION

Although our Labour Courts have not always been consistent in formulating what test to be employed when determining the substantive fairness of a dismissal based on the employer's operational requirements, it appears from the Labour Appeal Court's decisions in BMD, Algorax and other cases that the approach taken by our courts reflect the test of a 'commercial rationality to retrench' in our law today. The approach suggests that the court's function is merely to determine whether or not the decision has been correct. As indicated above in *National Union of Metalworkers of SA V Atlantis Diesel Engines (Pty) Ltd*,<sup>189</sup> 'What is at stake is not the correctness of the decision to retrench, but the fairness thereof. Fairness in this context goes further than the bona fides and the commercial justification to the decision to retrench. It is concerned first and foremost with the decision whether the termination of employment is the only reasonable option in the circumstances.'

Our courts have recognised an employee's right to restructure for reasons of profitability and efficiency as opposed to reasons which threaten the financial stability of the business. It, therefore, appears to have abandoned the element of 'necessity' as required in the test for a measure of last resort.

Furthermore, in a market driven economy there can be no objection, in principle, to retrenching employees to increase profit margins which are, in fact, a duty owed to shareholders. Such retrenchment must, however, comply with a fair reason for retrenchment and must be effected in accordance with a fair procedure as required by s 188 of the Act.

Du Toit correctly summarises the position arrived at by our courts as follows:

- (a) "To be valid, a dismissal for operational reasons must be (i) based on an 'operational requirement' as defined in s 213 of the LRA and, within this framework, (ii) for a fair reason.
- (b) A fair reason for dismissal is not limited to efforts to save a business but may be related to any legitimate business objective, including bona fide attempts at improving its efficiency, profitability or competitiveness.
- (c) However, not every reason related to a legitimate business objective will be fair. Dismissal will only be substantively fair if it represents 'a measure of last resort', or is necessary', to achieve the objective in question. The employer must show, in other words, that in pursuing that objective 'all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum'.<sup>190</sup>

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<sup>187</sup> *Revan Civil Engineering Contractors & others v NUM & others* (2012) 33 ILJ 1846 (LAC) at 1849 A-B

<sup>188</sup> *Revan Civil Engineering Contractors & others v NUM & others* (2012) 33 ILJ 1846 (LAC) at 1849 E

<sup>189</sup> (1993) 14 ILJ 642 (LAC) at 643 B-C

<sup>190</sup> Du Toit 'Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond' (2005) 26 ILJ 612

## CHAPTER FOUR

### 4.1 INTRODUCTION

The International Labour Conference (ILO) adopted the first instrument specifically dealing with termination of employment in the form of a Recommendation in 1963 (No 119).<sup>191</sup> The requirement of consultation originates from the aforementioned Recommendation.

The Termination of Employment Convention (No 158) was subsequently adopted to supplement Recommendation 119.<sup>192</sup> The guidelines in Convention 158 has been observed in judgements delivered by the judiciary and industrial courts of member states that ratified the convention as well as those states that did not do so.<sup>193</sup> In South Africa (SA), Australia and United Kingdom (UK), the courts have sought to refer to the Convention's legal reasoning as a point of reference as well as on the grounds that it enshrines principles of good industrial relations practice.<sup>194</sup>

Article 13(1)(b) of the Convention, in particular, requires that an employer contemplating termination for reasons of an economic, technical, structural or similar nature hold consultations with the worker's representatives as early as possible, on measures to mitigate the adverse effects of any terminations on the workers concerned, such as finding alternative employment. Article 13(1)(a) further requires that the representatives concerned must be provided in good time with relevant information, including reasons for terminations, the number and categories of workers likely affected and the period over which the terminations are intended to be carried out.

### 4.2 THE OBLIGATION TO CONSULT REGARDING DISMISSALS BASED ON OPERATIONAL REQUIREMENTS: EVALUATING SOUTH AFRICA TO THAT OF FOREIGN JURISDICTIONS

The obligation to consult, in regard to operational requirement dismissals, in SA is comprehensively regulated by s 189 and s 189A of the LRA.<sup>195</sup> Section 189 of the LRA was discussed on page 3 and 4 above.

Section 189(1) requires that the consultation process commences when the employer contemplates dismissing one or more employees based on operational requirements and not when the decision to dismiss has already been determined. In *4Seas Worldwide (Pty) Ltd v the Commission for Conciliation Mediation & Arbitration and Others*,<sup>196</sup> Coppin AJA confirmed that in a retrenchment dispute the employer bears the onus to prove that a fair process was followed before dismissing the respondent. This would include proving that the redundancy of the employment and the termination of her contract was not a *fait accompli* and that the alleged process followed was not a sham. In *Super Group Trading (Pty) Ltd v Janse van Rensburg*,<sup>197</sup> Landman AJA stated the following:

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<sup>191</sup> Article 2-4 of the Convention. See Le Roux PAK, Van Niekerk A *The SA Law of Unfair Dismissal* 1ed (1994) 235

<sup>192</sup> Note on Convention No 158 and Recommendation No. 166 concerning termination of employment iii

<sup>193</sup> Note on Convention No 158 and Recommendation No. 166 concerning termination of employment 19

<sup>194</sup> Note on Convention No 158 and Recommendation No. 166 concerning termination of employment 19

<sup>195</sup> Van Niekerk et al (2015) 321

<sup>196</sup> Case No: CA 15/2011 para 23 (unreported judgement deliver on 13 November 2013)

<sup>197</sup> (JA50/09) [2012] ZALAC 7 (25 April 2012) at para 5

“If the decision to make a post redundant is set in stone and not open to revision or discussion then the aim of the consultation has been thwarted before it has begun. If the decision to retrench a certain person has been pre-decided, consultation about whether this person should be chosen is a sham. What remains is consultation on the mitigation of retrenchment.”

### 4.3 THE UNITED KINGDOM

#### 4.3.1 Background

The UK is considered as the country that had the most significant influence on developing the SA society and its legal framework.<sup>198</sup> South Africa was for many years a British colony and, even though, SA has other official languages, English is regarded as the medium language generally used in business and the courts.<sup>199</sup> The UK is regarded as SA’s second-largest trading partner in the European Union and many traditions in the SA legal systems stem from the UK.<sup>200</sup>

#### 4.3.2 The Law

In the UK, the duty to consult, in regard to operational requirement redundancies, are regulated by s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The most relevant parts of s188 for the purposes of this evaluation are the following:

- When an employer proposes to dismiss as redundant 20 or more employees within a period of 90 days or less, the employer is required to consult with the trade union representative of the employee(s) who may be affected by the proposed dismissals or the measures taken in connection with the proposed dismissals.<sup>201</sup>
- The consultation shall be undertaken by the employer who must attempt to reach consensus with the representatives, which shall include measures of avoiding the dismissals; reducing the numbers of employees to be dismissed; and mitigating the consequences of the dismissal.<sup>202</sup>
- The consultation process is initiated by s 188(4) which requires the employer to disclose in writing to the trade union representatives the reasons for his proposals; the numbers and descriptions of employees whom it proposes to dismiss as redundant; the total number of employees of any such description employed by the employer at the establishment in question ; the proposed method of selecting the employees to be dismissed;

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<sup>198</sup> Smith P and van Eck BPS “International perspectives on South Africa’s unfair dismissal law” 2010 *Comp. & Int’l L.J.S.* Afr. 54

<sup>199</sup> Smith P and van Eck BPS “International perspectives on South Africa’s unfair dismissal law” 2010 *Comp. & Int’l L.J.S.* Afr. 54

<sup>200</sup> Hahlo & Kahn “The Union of South Africa: Development of its laws and Constitution (1960) 443

<sup>201</sup> Section 188(1) of TULRCA

<sup>202</sup> Section 188(2) of TULRCA



and the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.<sup>203</sup>

- The employer must in the course of the consultation process consider any representations made by the trade union representatives, and reply to those representations and, if he rejects any of those representations, state his reasons, therefor.
- Where there are special circumstances which render compliance not reasonably practicable, the employer shall take steps towards compliance as are reasonably practicable.<sup>204</sup>

In *UK Coal Mining Ltd v National Union of Mineworkers*,<sup>205</sup> UK Coal informed the employee representatives that the mine would be closing and that the reason for the proposed redundancies was special circumstances as a result of being forced to cease production for safety reasons. The tribunal held that there was no obligation to consult about the reason for the closure, but as UK Coal chose to give information about the reason for closure that information should have been true and given in good faith.<sup>206</sup> Furthermore, the tribunal found that there was no credible evidence that the reason for the dismissals was safety and the misleading evidence consequently involved a breach of s 188(4)(a).<sup>207</sup> On appeal, the Employment Appeal Tribunal (EAT) held that UK Coal had failed to comply with the duty to consult by giving a deliberately misleading reason for the closure, which affected the nature of the consultation.<sup>208</sup> The court had to decide whether the limitation in the word “proposed” when contrasted with the word “contemplated” prevents the consultation obligation extending to consultations over closures leading to redundancies. It subsequently held that it does not prevent the consultation.<sup>209</sup> The court further held that the difference between proposed and contemplated will impact on the point in time at which the duty to consult arises. In the case of the word “proposed” it will not be when the closure is mooted as a possibility but only when it is fixed as a clear intention.<sup>210</sup> The court further held that it is the proposed dismissals that are the subject of consultation, and not the closure itself. Therefore, if an employer planned a closure but believed that redundancies would nonetheless be avoided, there would be no need to consult over the closure itself.<sup>211</sup> Furthermore, the court held that the true reason for the dismissal was the economic difficulties facing the employers.<sup>212</sup>

The approaches in the UK and SA are fairly similar, in terms of reaching consensus on certain items, the initiation of the consultation process and representation made to representatives. The similarities in the consultation processes in SA and the UK is perhaps due to the profound influence the English law had on our legal system. However, there are differences of which the following are noticeable. First, as indicated in chapter one, the words

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<sup>203</sup> Section 188(4)(a)-(e) of TULRCA

<sup>204</sup> Section 188(7) of TULRCA

<sup>205</sup> [2008] IRLR 4 at para 18

<sup>206</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 48

<sup>207</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 49

<sup>208</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 61

<sup>209</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 86

<sup>210</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 86

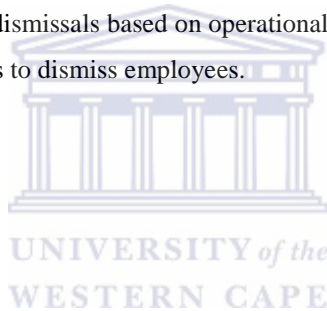
<sup>211</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 87

<sup>212</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 90

“contemplates” in s 189(1) of the LRA envisages an earlier state in time than the words “proposing” under S 188(1) of the UK Act and will impact on the point in time at which the duty to consult arises.<sup>213</sup> The word “proposing” in s 188(1) is regarded as less compatible as it envisages consultation only after a proposal has been made whereas the word “contemplates” in s 189 of the LRA envisages an earlier state in time.<sup>214</sup>

Secondly, s 188 imposes a bar on the consultation process in that it requires consultation only in the situation where the employer is proposing to dismiss as redundant 20 or more employees.<sup>215</sup> It is therefore safe to say that in a situation where the employer proposes a redundancy of fewer than 20 employees those employees will be targeted by the aforementioned exclusion. In comparison, s 189(1) of the LRA provides that the employer must consult when he contemplates dismissing one or more employees for reasons based on operational requirements.

Thirdly, the requirement in s 189(2) of the LRA that the consulting parties to engage in a ‘meaningful joint consensus-seeking process’ and attempt to reach consensus, implies that the consulting parties must do more to reach consensus than in a normal consultation process in the case of the UK which merely provides in s 188(2) that the employer must attempt to reach consensus.<sup>216</sup> As a result of the aforementioned, it is submitted that the consultation criteria regarding a ‘meaningful joint consensus-seeking process’ in SA is more extensive in respect of the consultation processes regarding dismissals based on operational requirements than in the UK and, therefore, makes it more challenging for employers to dismiss employees.



## 4.4 AUSTRALIA

### 4.4.1 Background

In Australia, there are three time periods governed by different but related legislative provisions and which coincides with the changes government can be distinguished by, namely: the Workplace Relations Act 1996, the Workplace Relations Amendment (Work Choices) Act 2005 and the current Fair Work Act 2009 (FWA).<sup>217</sup>

Under the Work Choices Act the protection from large sectors of the eligible workforce was removed by the introduction of the 100 employee exemption which led to the loss of many jobs by businesses which had reduced their workforce due to the new laws.<sup>218</sup> Furthermore, the Work Choice Amendments introduced a “genuine operational reasons” exclusion that barred a claim of unfair dismissal where reasons of an economic, technical, structural or similar nature were claimed.<sup>219</sup>

<sup>213</sup> *MSF v Refuge Assurance plc* [2002] IRLR 324 at para 42

<sup>214</sup> *UK Coal Mining Ltd v National Union of Mineworkers* [2008] IRLR 4 at para 78

<sup>215</sup> Section 188(1) of TULRCA

<sup>216</sup> Basson et al (2005) 240; Section 189(2) of the LRA

<sup>217</sup> International Labour Office Geneva, “Termination of Employment Instruments” 18-21 April (2011) 22

<sup>218</sup> International Labour Office Geneva “Termination of Employment Instruments” (2011) 23

<sup>219</sup> International Labour Office Geneva, “Termination of Employment Instruments” (2011) 23

In the lead up to the 2007 election, the Rudd Labour Government gave priority to ripping up Work Choices and providing 'cooperative workplace relations' that balanced 'flexibility' to employers and 'fairness' to employees.<sup>220</sup> It restored the balance by abolishing the 100 employee exemption and replacing the "genuine operational reasons" with the 'redundancy exemption'.<sup>221</sup> Whilst still in the infancy stage, the FWA was met with tacit approval by both employer and worker groups.<sup>222</sup> The FWA is the product of extensive consultation with businesses, the union movement and the wider community and deliberated drafting, thus providing an opportunity for a 'period of stability' in Australia's industrial development.<sup>223</sup>

#### 4.4.2 The Law

The FWA makes provision for a model consultation term to apply if the parties to the enterprise agreement did not include their own consultation term. The model consultation term is then taken to be the term of the agreement.<sup>224</sup>

The most relevant parts of the model consultation term as contained in regulation 2.09 of the Fair Work Regulations (FWR) are as follows:

- Where the employer has made a definite decision to introduce major changes in production, programme, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees he must notify the employees of the change.<sup>225</sup>
- Significant effects include termination of employment; major changes in composition; operation or size of the employer's workforce or to the skills required of employees; or the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or the alteration of hours of work; or the need to retrain employees; or the need to relocate employees to another workplace; or the restructuring of jobs.<sup>226</sup>
- The employer must discuss, as soon as practicable after making its decision, with the employees the introduction of the change; the effect the change is likely to have on the employees; measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and for the purposes of the discussion provide, in writing, to the relevant employees all relevant information about the change including the nature of the change proposed and information about the expected effects of the change on the employees.<sup>227</sup>

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<sup>220</sup> Waug B, Centre for Employment & Labour Relations Law "Trade Unions and the Freedom of Association" – A Comparative analysis of Work Choices and Fair Work Act (2009) 4

<sup>221</sup> Stern E, From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 70-1

<sup>222</sup> Waug B, Centre for Employment & Labour Relations Law "Trade Unions and the Freedom of Association" – A Comparative analysis of Work Choices and Fair Work Act (2009) 4

<sup>223</sup> Floyd L, "Fair Work Laws : Good Faith Bargaining, Union Right of Entry and the Legal Notion of " Responsible Unionism (2009) 37 *ABLE* 255

<sup>224</sup> Section 205(2) of the FWA

<sup>225</sup> Clause 1(a) and 2(a) of regulation 2.09 of the FWR

<sup>226</sup> Clause 9(a)-(g) of regulation 2.09 of the FWR

<sup>227</sup> Clause 5(a)-(b)(ii) of regulation 2.09 of the FWR

Part 3-6 Division 2 of the FWA imposes a requirement on an employer who proposes to terminate the employment of 15 or more employees for reasons of an 'economic, technological, structural or similar nature' to provide written notice of the proposed dismissals to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).<sup>228</sup> The employer is also required to provide trade unions with a notice of the proposed terminations and reasons for them; the number of employees likely to be affected; the period over which the employer intends to carry out the dismissals and an opportunity to consult on measures to avert or minimise proposed dismissals and to mitigate the adverse effects of the proposed dismissals.<sup>229</sup>

Furthermore, s 389 of the FWA 2009 provides as follows:

- A dismissal will be a case of genuine redundancy where the employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise;<sup>230</sup> and the employer has complied with any modern award or enterprise agreement that applied to the employment to consult about the redundancy;<sup>231</sup> and
- A person's dismissal will not be a case of genuine redundancy where it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise;<sup>232</sup> or the enterprise of an associated entity of the employer.<sup>233</sup>

In terms of the aforementioned section, employees whose jobs have been made redundant because their job is no longer required can now further argue that the process was unfair either because the employer had not complied with an obligation to consult as contained in the applicable modern award or enterprise agreement or because they could have been reasonably redeployed.<sup>234</sup>

In *Ventyx Pty Ltd v Mr Paul Murray*,<sup>235</sup> Mr Murray was dismissed on the grounds of redundancy. His dismissal was rejected by the Deputy President as a case of genuine redundancy.<sup>236</sup> The Deputy President made a series of findings on jurisdiction issues, one of which she held that Ventyx was not absolved of its obligation to discuss the proposed changes with employees who were covered by the award (that applied to Mr Murray's employment).<sup>237</sup> She did not accept the submissions made by Ventyx that it was only practicable to discuss the decision of redundancy once the individual had been identified and security issues could be addressed. The award provided that the discussions must commence as early as practicable after a definite decision has been made by the

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<sup>228</sup> Section 530(1) of the FWA

<sup>229</sup> Sections 531(2)(a) & 531(3)(a) of the FWA

<sup>230</sup> Section 389(1)(a) of the FWA

<sup>231</sup> Section 389(1)(b) of the FWA

<sup>232</sup> Section 389(2)(a) of the FWA

<sup>233</sup> Section 389(2)(b) of the FWA

<sup>234</sup> Stern E, From 'Valid Reason' to 'Genuine Redundancy' Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 98

<sup>235</sup> [2014] FWCFB 2143 at para 1

<sup>236</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 7

<sup>237</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 25

employer.<sup>238</sup> The Deputy President found that there was no opportunity for Mr Murray to change the decision made by Ventyx to either downsize the consultancy business or to make him redundant.<sup>239</sup>

Furthermore, the Deputy President held that the requirement to discuss the change with the affected employees was not a discussion as such but an announcement of Ventyx's intention to make the change. She further found that Ventyx failed to give prompt consideration to matters raised by the employees in relation to the changes.<sup>240</sup> Lastly, she concluded that it would have been reasonable for Ventyx to redeploy Mr Murray in its enterprise or an associated entity.<sup>241</sup>

On appeal the court, however, held that the award provision is intended to apply to security concerns and the need to manage a global review process as faced by Ventyx. Therefore, without having evidence-based reasons to reject Ventyx explanation as to why it preceded in the manner it did, the Deputy President fell into error.<sup>242</sup> It held that the Deputy President fell into error when she reformulated the obligation under the award to mean the employer was obliged to give an employee an opportunity to change its decision.<sup>243</sup> Furthermore, it held that in the absence of a properly evidenced finding that there was a position to which Mr Murray could have been re-deployed, that the Deputy President was not jurisdictionally positioned to determine whether it would have been reasonable in all the circumstances to redeploy Mr Murray.<sup>244</sup> The court held, however, that the Deputy President was correct in concluding that Ventyx failed to give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.<sup>245</sup>

Failure to consult is merely one of the factors the court takes into consideration in deciding whether the consultation processes are complied with. Failure to provide information requested by an employee is also a factor the court has to take into consideration. In *Australian Licenced Aircraft Association v Qantas Airways Limited*<sup>246</sup>, Qantas contravened the terms of the Fair Work Act following the introduction by Qantas of a new system for the maintenance of aircraft known as Maintenance on Demand. This contravention relates to Qantas' failure to consult with the applicant and failing to provide the applicant with information concerning details of leave. Shortly before the first contravention occurred, Qantas had determined upon the introduction of Maintenance on Demand that thirty positions would be made redundant. The court held that despite the ambiguities in communications between Qantas and the applicant that the redundancies were a foregone conclusion, regardless of the consultation process that would occur.<sup>247</sup> The court further held that even though the Australian Aircraft Engineers Association approached the consultations in a negative manner, that Qantas had breached the workplace determination to genuinely consult with the applicant in regard to the decision to make thirty positions redundant.<sup>248</sup>

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<sup>238</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 26

<sup>239</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 40

<sup>240</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 63

<sup>241</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 75

<sup>242</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 38-9

<sup>243</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 46

<sup>244</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 87

<sup>245</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 73

<sup>246</sup> (No.2) [2013] FCCA 592

<sup>247</sup> *Australian Licenced Aircraft Association v Qantas Airways Limited* (No.2) [2013] FCCA at para 89

<sup>248</sup> *Australian Licenced Aircraft Association v Qantas Airways Limited* (No.2) [2013] FCCA at para 89

The aforementioned information regarding the leave was required by the union to assist it in the consultation process. The court held the relevant information which should have been provided was not provided; hence there was a breach of the workplace determination (clause 47.2.3).<sup>249</sup> The court subsequently ordered Qantas to pay \$41,250 in penalties for breaching its consultation obligations and for failing to provide information required for effective consultation.<sup>250</sup>

When evaluating the consultation requirements in SA with that of Australia, the following differences mentioned below are relevant:

In Australia, the obligation to consult and to redeploy in terms of s 389 is a key part of the definition of a genuine redundancy under the FWA.<sup>251</sup> The obligation to consult in regard to the selection process of the employees to be dismissed (for the purpose of procedural fairness) is, however, not part of the redundancy process in Australia.<sup>252</sup> According to Stern, this was a deliberate decision on the part of the Rudd Government rather than an oversight and is evident in the Explanatory Memorandum to the Fair Work Bill 2008.<sup>253</sup> Stern further indicates that “there is nothing meaningful in establishing a balanced ‘flexibility’ to employers and ‘fairness’ to employees that continues the former Work Choices Act of absolving employees from the need to conduct a fair selection process”.<sup>254</sup> In comparison to Australia, both SA and the UK require that the parties consult about the selection criteria and that the parties agree to the criteria.<sup>255</sup> Section 189(7)(b) of the LRA further provides that if the selection criteria have not been agreed upon, then the criteria that are fair and objective should be selected.

In addition, the employer and the other consulting parties are further required to engage in a ‘meaningful joint consensus-seeking process’ and attempt to reach consensus.<sup>256</sup> This implies that they must do more to reach consensus than in a normal consultation process.<sup>257</sup> In comparison, in terms of s 389(1)(2) of the FWA, the position in Australia is that the employer is to consult about the redundancy. The consultation criteria regarding a ‘meaningful joint consensus-seeking process’ in SA is thus more extensive in respect of dismissals based on operational requirements than in Australia in that both the consultation parties are required to engage meaningfully in the consultation process to reach consensus. As a result hereof, it will be more challenging for employers to dismiss employees in SA than in Australia.

Furthermore, as indicated in chapter one, in Australia consultation only takes place where the employer has made a ‘definite decision’ to introduce major changes which include operational requirement redundancies.<sup>258</sup> In SA consultation takes place when the employer ‘contemplates’ dismissing employers based on operational

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<sup>249</sup> *Australian Licenced Aircraft Association v Qantas Airways Limited* (No.2) [2013] FCCA at para 157

<sup>250</sup> *Australian Licenced Aircraft Association v Qantas Airways Limited* (No.2) [2013] FCCA at para 18-9

<sup>251</sup> Stern E, From ‘Valid Reason’ to ‘Genuine Redundancy’ Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 99

<sup>252</sup> Stern E, From ‘Valid Reason’ to ‘Genuine Redundancy’ Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 99

<sup>253</sup> Stern E, From ‘Valid Reason’ to ‘Genuine Redundancy’ Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 99

<sup>254</sup> Stern E, From ‘Valid Reason’ to ‘Genuine Redundancy’ Redundancy Selection: A Question of (Im)balance *UNSW Law Journal* (2012) 101

<sup>255</sup> Sections 189(2), 189(3)(d), 189(7)(a) of the LRA & s 188(4) of TULRCA

<sup>256</sup> Section 189(2) of the LRA 66 of 1995

<sup>257</sup> Basson et al (2005) 240; Section 189(2) of the LRA 66 of 1995

<sup>258</sup> Section 1(a) of regulation 2.09 of the FWR & s 389(1) of the FWA



requirements. The words ‘definite decision’ is less compatible than the word ‘contemplates’ in that the obligation to consult must be fixed, whereas in the case of the word ‘contemplates’ consultation takes place when it is envisaged as a possibility.

A ‘definite decision’ to introduce a change consisting of a termination of employment does not require an employer to provide an opportunity for the employee to change (or avoid) the definite decision it has made.<sup>259</sup> Instead, it requires the employer only to discuss certain prescribed matters such as those relating to the introduction and likely effects of the change itself.<sup>260</sup> In addition, a definite decision to introduce a change consisting of a termination of employment before consultation was to commence would in a sense amount to a “fait accompli” as the consultation is approached with a fixed outcome in mind.<sup>261</sup> In comparison, the situation in SA is different in that the consultation includes means of avoiding or minimising dismissals.<sup>262</sup>

In light of the aforementioned, it is submitted that the consultation requirements relating to operational requirement dismissals in SA are more extensive than that of the UK and Australia in that it not only provides for a joint consensus seeking consultation but are more geared towards a process of a fair dismissal for the employee.

#### 4.5 CONCLUSION

A comparative analysis of the obligation to consult, relating to operational requirement dismissals, in SA with that of Australia and the UK, reveals that the consultation requirements in SA are more extensive than in Australia and the UK.

Under SA law, it is necessary for the consulting parties to engage in a ‘meaningful joint consensus-seeking process’ and attempt to reach consensus, which implies that the consulting parties must do more to reach consensus than in a normal consultation process in the case of the UK and Australia which merely provides that the employer must attempt to reach consensus and to consult about the redundancy respectively.

Furthermore, in SA the obligation to consult when ‘dismissals are contemplated’ envisages an earlier state in time than ‘proposing to dismiss’ and a ‘definite decision to dismiss’ as in the case of the UK and Australian respectively. This is in line with Article 13(1)(b) of the Convention, which requires that an employer contemplating termination for reasons of an economic, technical, structural or similar nature for consultations to be held with the worker’s representatives as early as possible.

Compared to SA, Australian and UK law on consultation requirements appears to be less compatible for the following reasons: In the UK consultation is only required where the employer is proposing to dismiss as redundant 20 or more employees, whereas in SA consultation is required where one or more employees are contemplated for

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<sup>259</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 45

<sup>260</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 45

<sup>261</sup> *Ventyx Pty Ltd v Mr Paul Murray* [2014] FWCFB 2143 at para 47

<sup>262</sup> Section 189(2) (i)-(ii) of the LRA 66 of 1995

dismissal. Furthermore, in Australia there is no obligation to consult on the selection criteria for dismissals of employees as in the case of SA.

As a result of the aforementioned, it is submitted that it will be more challenging for employers in SA to prove that a dismissal is potentially fair than in the case of Australia and the UK.

## CHAPTER FIVE

### 5.1 INTRODUCTION

Once dismissal has been established by the employee, in terms of s 192(1) of the LRA, the employer must prove that the dismissal is fair.<sup>263</sup> In *County Fair Foods (Pty) Ltd v OCGAWU & another*,<sup>264</sup> the court ruled as follows:

“If the employer relies on operational requirements to show the existence of a fair reason to dismiss, he must show that the dismissal of the employee could not be avoided. That is why both the employer and the employee or his representatives are required by s 189 of the Act to explore the possibilities of avoiding the employee’s dismissal.” This ruling was further reinforced by the decision in *Algorax*,<sup>265</sup> where the court held that it should intervene where it is clear that certain measures could have been taken to avoid or minimise job losses or where it is clear that the dismissals were not resorted to as a measure of last resort.

According to Grogan, the dividing line between dismissals effected for permissible reasons and automatically unfair dismissals may sometimes blur.<sup>266</sup> In the case of an automatically unfair dismissal the employer will have to prove that the reason for the dismissal did not fall within the scope of s 187(1)(c).<sup>267</sup> Grogan indicates that an employer can never raise an acceptable defence in the case of a s 187(1)(c) dismissal other than those set in the Act.<sup>268</sup>

### 5.2 DISMISSALS BASED ON THE EMPLOYER’S OPERATIONAL REQUIREMENTS AND S 187 (1)(C) OF THE LRA

In *Fry’s Metals*,<sup>269</sup> the court rejected the view that matters of mutual interest must be resolved by a bargaining process where dismissals are contemplated due to operational requirements.<sup>270</sup> The court concluded that there is a difference between a dismissal which is defined in s 186(1) and a dismissal which is contemplated by s 187(1)(c).<sup>271</sup> According to the court, the difference relates to whether the dismissal is effected in order to compel the employees to agree to the employer’s demand which would result in the dismissal being withdrawn or whether

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<sup>263</sup> Section 192(2) of the LRA;

<sup>264</sup> [2003] 7 BLLR 647 (LAC) at 656 F

<sup>265</sup> (2003) 24 ILJ 1917 (LAC) at para 70

<sup>266</sup> Grogan J (2014) 209

<sup>267</sup> Grogan J (2014) 209

<sup>268</sup> Grogan J (2014) 208

<sup>269</sup> (2005) 26 ILJ 689 (SCA) at 707 G

<sup>270</sup> *NUMSA & others v Fry’s Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 707 G-I

<sup>271</sup> *NUMSA & others v Fry’s Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 A-B



it is effected finally so that the employer may replace the employees permanently with employees who are prepared to work under the terms and conditions of the employer.<sup>272</sup> The court reasoned that, in the case of a s 187(1)(c) dismissal, the dismissal is conditional and even reversible if the employee accepts the employer's demand.<sup>273</sup> It further reasoned that as such a s 187(1)(c) dismissal is not a final dismissal [as in the case of the meaning of a dismissal under s186(1)].<sup>274</sup> Similarly, in *Algorax*<sup>275</sup> the court endorsed the interpretation adopted in the *Fry's Metals* (Labour Appeal Court) case that s 187(1)(c) relates to a dismissal that is not final but conditional in nature.

The point to consider above is what the intention of the legislator in relation to the content of s 187(1)(c) was, and whether the legislator intended for a dismissal under s 187(1)(c) to constitute a conditional dismissal subject to withdrawal once the employer's demand was complied with.

Grogan points out that the 'ironical result of the aforementioned judgements was that the employer perpetrated an automatically unfair dismissal by offering to reinstate or re-employ workers who refuse to accept a demand, but did not do so by simply dismissing workers for the same reason'.<sup>276</sup> In addition, he indicated that that it 'seems somewhat strange that the legislature should have categorised conditional dismissals in the context of collective bargaining as automatically unfair, but excluded final dismissals occurring in the same context .... The final dismissal is the fulfilment of the threat that provides the compulsion inherent in the conditional dismissal'.<sup>277</sup>

According to Cohen, 'this anomaly could have been avoided if the Labour Appeal Court had adopted a purposive interpretation' in accordance with s 3 of the LRA, which provides that the provisions of the Act are to be interpreted to give effect to its primary objects; in compliance with the constitution and in compliance with the public international law of the Republic.<sup>278</sup> Furthermore, Cohen indicates that no conflict between s 187(1)(c) and s 189 need arise, provided that the employer is able to prove on the facts that the purpose of the proposed changes and the resultant dismissals is motivated by operational requirements and not an ulterior motive.<sup>279</sup>

Section 187(1)(c) of the LRA 66 of 1995 has now been amended by the Labour Relations Amendment Act 6 of 2014 to render it automatically unfair if the reason for the dismissal is a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer. A literal interpretation of the aforementioned amendment means that a dismissal will be automatically unfair if the employees refuse to accept a proposed amendment to the terms and conditions of their employment. Employers are therefore restricted to change the terms of conditions of employment without the consent of the employees. The dismissal is automatically unfair,

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<sup>272</sup> *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 C-D

<sup>273</sup> *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 F-G

<sup>274</sup> *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) at 708 F-G

<sup>275</sup> (2003) 24 ILJ 1917 (LAC at para 36-7

<sup>276</sup> Grogan J (2014) 216

<sup>277</sup> Grogan J 'Chicken or Egg - Dismissals to Enforce Demands' Employment Law April 2003 vol 19(2) at 11

<sup>278</sup> Cohen T 'Dismissals to Enforce Changes to Terms and Conditions of Employment Automatically Unfair or Operationally Justifiable?' 25 *Indus. L.J.* Juta 1883 (2004) 1892

<sup>279</sup> Cohen T 'Dismissals to Enforce Changes to Terms and Conditions of Employment Automatically Unfair or Operationally Justifiable?' 25 *Indus. L.J.* Juta 1883 (2004) 1896

simply, because the employer has made a demand which the employees have refused to accept irrespective whether the dismissal or threat of dismissal was intended to induce the employees to comply with the demand.<sup>280</sup>

According to Grogan, the amendment was aimed at correcting the unexpected manner in which the courts interpreted the initial version of s 187(1)(c).<sup>281</sup> This perhaps raises the question whether or not the Fry's Metals Supreme Court of Appeal decision has undermined the effect of the bargaining process where an interest dispute arises.

Furthermore, the LRA sets out several primary objects to promote collective bargaining: In terms of s 1(c) of the LRA, the primary object is to provide a framework within which the employees and the employers can collectively bargain to determine terms and conditions of employment and other matters of mutual interest. Furthermore, s 1(d) of the LRA provides for the promotion of orderly collective bargaining as well as collective bargaining at sectoral level.

However, should the bargaining process be followed and the parties fail to reach consensus, a delay in implementing the proposed changes to the terms and conditions of employment of the business could result in the business not operating effectively or even a collapse of the business. A lock-out will therefore not assist under the circumstances.

Van Niekerk and others (Van Niekerk) argues the amendment has the effect of precluding employers from using dismissal as an economic weapon.<sup>282</sup> According to Van Niekerk, the employer cannot simply in the course of a dispute resort to a dismissal, only because the employees refuse to accede to his demands.<sup>283</sup>

Van Niekerk further states that the employer is not precluded from dismissing his employees for a reason related to its operational requirements if the true intention is to replace the employees with those who are willing to work according to the new changes.<sup>284</sup> The real reason for the dismissal is therefore not the employees' refusal to accept the employers' demand but is motivated by the economic need of the employer.<sup>285</sup> Furthermore, Van Niekerk alleges that the line between a s 187(1)(c) dismissal and an operational requirement dismissal will always be a fine one and it's up to the courts to determine where it should be drawn.<sup>286</sup>

### 5.3 CONCLUSION

In light of the aforementioned, it is submitted that the possible solutions to interpreting s 187(1)(c) of the Labour Relations Amendment Act are as follows:

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<sup>280</sup> Grogan J (2014) 214

<sup>281</sup> Grogan J (2014) 214

<sup>282</sup> Van Niekerk et al (2015) 258

<sup>283</sup> Van Niekerk et al (2015) 258

<sup>284</sup> Van Niekerk et al (2015) 258

<sup>285</sup> Van Niekerk et al (2015) 258

<sup>286</sup> Van Niekerk et al (2015) 258

It is suggested that where the employer wishes to introduce a change in respect of any matter of mutual interest in the workplace and the employees refuse to accede to his demands, that the parties try and reconcile the matter through collective bargaining in the case of a dispute. The employer will then have recourse to consider a lock-out where collective bargaining had failed. It would not be fair to simply dismiss the employees because they refuse to accede to his demands. This is in line with s 1(c) of the LRA, which primary object is to provide a framework within which employees and employers can collectively bargain to determine terms and conditions of employment and other matters of mutual interest.

Where there is an immediate danger that the business will collapse if changes to terms and conditions of employment are not implemented, following a failed bargaining process, the employer will be justified in retrenching its employees based on the operational requirements of the business. The proviso is that the employer is able to prove on the facts that the purpose of the proposed changes and the resultant dismissals is motivated by operational requirements and not an ulterior motive.<sup>287</sup> The employer is therefore dismissing the employees, not because they refused to accept a demand, but because of the economic needs of the employer.<sup>288</sup>

In circumstances where the changes to the terms and conditions of employment involve an economic dispute in that the business is making a profit and the employer want to increase its profit margin it is submitted that the economic dispute is resolved through collective bargaining, failing which could follow the route of strikes and even lock-outs.

It is further submitted that s 187(1)(c) does not prevent employers from dismissing employees who refuse to accept a demand if the effect of that dismissal is to save other workers from retrenchment.<sup>289</sup>

Lastly, it would appear to be a safer approach for the employer, who wishes to change the terms and conditions of his employees in circumstances where the viability of the business is threatened, to treat the matter as a retrenchment exercise from the start and replace the workers permanently with those who are prepared to work under the terms and conditions to meet the employer's requirements.<sup>290</sup>

TOTAL WORD COUNT = 16693 WORDS

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<sup>287</sup> Cohen T 'Dismissals to Enforce Changes to Terms and Conditions of Employment Automatically Unfair or Operationally Justifiable?' 25 *Indus. L.J.* Juta 1883 (2004) 1896

<sup>288</sup> Van Niekerk et al (2015) 258

<sup>289</sup> Grogan J (2014) 217

<sup>290</sup> *NUMSA v Fry's Metals* (2005) 26 ILJ 689 (SCA) at 708 D

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