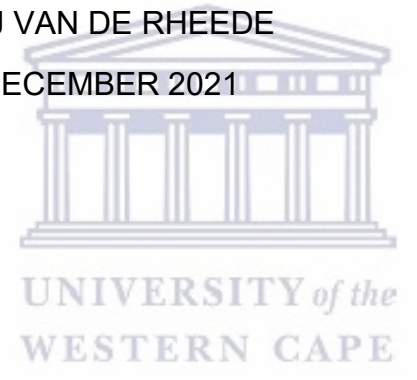
TO WHAT EXTENT DOES THE LAW GOVERNING DISMISSALS BASED ON OPERATIONAL REQUIREMENTS PROTECT EMPLOYEES?

A MINI-THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF M.PHIL: LABOUR LAW IN THE DEPARTMENT OF MERCANTILE AND LABOUR LAW, UNIVERSITY OF THE WESTERN CAPE.

NAME:	ELMIEN LOVELL
STUDENT NUMBER:	3910491
DEGREE:	MPHIL IN LABOUR LAW
SUPERVISOR:	DR J VAN DE RHEEDE
DATE:	01 DECEMBER 2021



http://etd.uwc.ac.za/

PLAGIARISM DECLARATION

I declare that 'To what extent does the law governing dismissals based on operational requirements protect employees?' is my own work, that it has not been submitted before for 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.

Signature: EC Lovell Date: 1 December 2021

UNIVERSITY of the
WESTERN CAPE

Signature: Dr J Van De Rheede Date: 1 December 2021

http://etd.uwc.ac.za/

ACKNOWLEDGEMENTS

Firstly, I would like to thank God the Almighty who gave me the strength and ability to further my studies and who empowered me to complete this Master Program. I would like to express my gratitude and appreciation to my supervisor, Dr Jeannine Van de Rheede who guided and advised me with all the patience in the world through this research process. Finally, I would like to thank my loving husband, Ismail, my children, Ishmael and Amy and my mother, Louisa Arendse for their infinite support, encouragement and patience towards me during the time of writing this thesis.

http://etd.uwc.ac.za/

LIST OF ABBREVIATIONS

ACC	Accident Compensation Corporation
BC	Bargaining Council
BCEA	Basic Condition of Employment Act 75 of 1997
CA	Court of Appeal
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
EC	Employment Court
ECA	Employment Contracts Act, 1991
ERA	Employment Relations Act, 2004
IC	Industrial Court
ILO	International Labour Organization
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
LRA OF NZ	Labour Relations Act 1987
LIFO	Last In, First Out
NEDLAC	The National Economic Development and Labour Council

UNIVERSITY of the
WESTERN CAPE

http://etd.uwc.ac.za/

Table of Contents

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

UNIVERSITY of the WESTERN CAPE

http://etd.uwc.ac.za/

ABSTRACT

Retrenchments or dismissals based on operational requirements are defined as requirements based on economic, technological or similar needs of an employer.[1] In terms of the Labour Relations Act 66 of 1995, a dismissal based on operational requirements is a permissible ground for dismissing an employee.[2] However, research shows that some employers who choose to dismiss their employees use such dismissals to conceal the real reason for dismissing some of their employees.

The Labour Relations Act 66 of 1995 places an obligation on the employer to consider every alternative prior to the decision being taken to retrench the employees and to ensure that the retrenchments are substantively and procedurally fair.[3] It is therefore crucial to ensure that dismissals on the grounds of operational requirements are done for this reason and that in the event of this being the case, that the dismissals are both substantively and procedurally fair. The objective of this study is to determine the extent to which the South African law governing dismissals based on operational requirements protects employees. This is done by examining legislation, journal articles and case law. The law in South Africa is compared to the legal position in New Zealand, in order to determine whether the South African law governing dismissals based on operational requirements should be amended and/or supplemented.

UNIVERSITY of the
WESTERN CAPE

KEYWORDS

Collective Agreement, Consultation, Dismissals, Fair Procedure, Large-scale and Small-Scale Retrenchments, Operational Requirements, Remedies, South Africa, Substantive Fairness, The Labour Relations Act 66 of 1995

[1] Section 213 of the Labour Relations Act 66 of 1995.
[2] Section 188 of the Labour Relations Act 66 of 1995.
[3] Section 189 of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

Retrenchments or dismissals based on operational requirements are recognised as a permissible ground to dismiss employees in terms of the Labour Relations Act 66 of 1995 (LRA).[4] Operational requirements are defined as requirements based on the economic, technological, or similar needs of an employer.[5] According to the Code of Good Practice: Dismissals based on Operational Requirements,[6] such a dismissal has been categorised as a "no-fault" dismissal since the employee is not responsible for the termination of the employment.[7]

The LRA provides that every employee has the right not to be unfairly dismissed.[8] The LRA[9] also provides the procedures to be followed by an employer who intends to dismiss employees on the basis of operational requirements and regulates the manner in which courts may intervene with the employer's substantive conclusion to dismiss.[10]

During 2019, the economy of South Africa collapsed into a third recession since 1994. By the end of June 2019, a number of employees were retrenched by their employers.[11] In the 4th quarter of 2019, the economy of South Africa declined by 1.4%.[12] Retrenchments can be devastating for those who are affected by it.[13] Mechanisms should exist to minimise the impact that retrenchments have on employees and their dependents.

---

[4] Section 188 of the Labour Relations Act 66 of 1995.
[5] Section 213 of the Labour Relations Act 66 of 1995.
[6] Item 1 of the Code of Good Practice on Dismissal Based on Operational Requirements of the Labour Relations Act 66 of 1995.
[7] Item 2 of the Code of Good Practice on Dismissal Based on Operational Requirements of the Labour Relations Act 66 of 1995.
[8] Section 185 of the Labour Relations Act 66 of 1995.
[9] Sections 189 and 189A of the Labour Relations Act 66 of 1995.
[10] Van Niekerk A *Unfair Dismissa*l 4 ed (2008) 93.
[11] De Villiers J 'Retrenchment tracker: South Africa's big corporate job losses in 2019 - so far' available at *https://www.businessinsider.co.za/total-number-of-job-losses-south-africa-retrenchment-corporate-job-losses-2019-6* (accessed 15 June 2020).
[12] 'Stats SA' available at *http://www.statssa.gov.za/?p=13049* (accessed 15 June 2020).
[13] To be retrenched is more than just the loss of an income. It intensely influences the perception of self-identity. The pressure to find work are likely to cause stress and anxiety.

http://etd.uwc.ac.za/

1.2 PROBLEM STATEMENT

The LRA, provides that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer is required to consult with the parties prescribed by the LRA.[14] According to the Labour Appeal Court (LAC), the primary obligation of a retrenching employer is to consult with the employee parties when it contemplates dismissing employees for operational reasons and to disclose relevant information to the employee parties to enable the employee parties to prepare for the consultation.[15] The LRA also requires employers to provide the consulting party(ies) with an opportunity to make representations with regard to any matter on which the parties are consulting.[16] The Labour Court (LC) held that the consultation should commence prior to the final decision to retrench has been taken.[17] Research has shown that some employers arrange the consultation with their employees after the decision for retrenchment has been taken[18] thereby failing to comply with the LRA.[19]

According to the South African Labour Guide: Discipline and Dismissals, some employers take advantage of dismissals based on operational requirements by using such dismissals to conceal the real reason for dismissing employees.[20] Research has shown that, in circumstances where it is established that there are employees who fail to adhere to the work performance standards, some of their positions suddenly become redundant.[21] Research also shows that instead of assessing the employees and giving them a fair opportunity to meet the required standards, some employees are retrenched.[22] Research shows further that in circumstances where the employer is unable to dismiss an employee based on misconduct, that the employee is

[14] Section 189(1)(a) of the Labour Relations Act 66 of 1995.
[15] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others* (1999) 20 ILJ 89 (LAC) 27.
[16] Section 189(2) of the Labour Relations Act 66 of 1995. Also see *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others* (1999) 20 ILJ 89 (LAC) 27.
[17] *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers* (1994) ZASCA 183 8.
[18] See *Goldfields Trust (Pty) Ltd. & Another v Stander and Others* (2002) 9 BLLR 797 at 806A-C (2002) 9 BLLR 797 (LAC), where Zondo JP concluded that the consultation process that took place did not comply with the requirements of section 189 as the final decision of the respondents was taken before the consultation process was initiated.
[19] Section 189(1) of the Labour Relations Act 66 of 1995.
[20] *Num v DB Contracting North CC* (2013) 34 ILJ 971 (LC) par 11; *Decision Surveys International (Pty) Ltd v Dlamini and Others* (1999) 5 BLLR 413 (LAC) 27.
[21] *SA Mutual Life Insurance vs IBSA & others* (2001) 9 BLLR 1045 (LAC) 17.
[22] *SAA v Bogopa & Others* (2007) 11 BLLR 1065 (LAC) 61.

http://etd.uwc.ac.za/

dismissed by the employer based on operational requirements instead.[23] This is the case despite the existence of the provisions contained in the LRA governing dismissals based on operational requirements.

1.3 RESEARCH QUESTION

This study answers a main research question: To what extent does the South African law governing dismissals based on operational requirements protect employees?

This study answers the sub-questions below:

a) Chapter 2: How is it possible that employees in South Africa are dismissed based on operational requirements in circumstances where this is not the real reason for the dismissal?
b) Chapter 3: How does the South African law governing dismissals based on operational requirements compare to that in New Zealand?
c) Chapters 3 and 4: Should the South African law governing dismissals based on operational requirements be amended and/or supplemented to protect employees?

UNIVERSITY of the
WESTERN CAPE

1.4 AIMS OF THE STUDY

This study aims to determine the extent to which the South African law governing dismissals based on operational requirements protects employees. To make this determination, the South African legislative framework governing dismissals based on operational requirements will be discussed and analysed. The LRA distinguishes between small-scale retrenchments[24] and large-scale retrenchments[25]. Small-scale retrenchments are regulated by section 189 of the LRA while large-scale retrenchments are regulated in terms of section 189A of the LRA. This research will analyse the provisions governing both small-scale and large-scale retrenchments.
This study will compare the South African legislative framework governing dismissals based on operational requirements with that in New Zealand in order to determine

[23] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC).
[24] Section 189 (1) of the Labour Relations Act 66 of 1995.
[25] Section 189A (1)(a) of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

whether the South African law governing dismissals based on operational requirements should be amended and/or supplemented. New Zealand was selected since both South Africa and New Zealand are members of the International Labour Organisation (ILO) and are required to adhere to the standards of the ILO.[26] Both countries saw the lack of efficacy of market forces in ensuring transformation and has thus enacted statutes[27] to correct imbalances. Similar to South Africa, the government in New Zealand consists of three branches: the executive, the legislature and the judiciary. Similar to South Africa where dismissals based on operational requirements are governed by the LRA, in New Zealand such dismissals are governed by the Labour Relations Act 1987 and the Employment Relations Act 2000.[28]

1.5 SIGNIFICANCE OF THE STUDY

This study is important because it aims to determine what can be done to avoid dismissals based on operational requirements taking place in circumstances where operational requirements is not the real reason for the dismissal. The study is important to employees in order for employees to be made aware of the ways in which they are protected at present and whether there are any shortcomings of the current legislative framework governing dismissals based on operational requirements. It is also pivotal to determine the extent to which the South African law governing dismissals based on operational requirements protects employees and in circumstances where additional protection is required, to establish whether the law should be amended and/or supplemented.

1.6 LITERATURE REVIEW

The LRA provides that if no selection criteria is agreed upon between parties in circumstances where the employer selects employees to be dismissed based on

[26] New Zealand a founding member of the ILO in 1919 and South Africa was re-admitted in 1994 after the country withdrew in 1964 due to political pressure.

[27] New Zealand introduced the Employment Relations Act 2000 (NZ) and later in 2004 the Bill. South Arica introduced The Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 1997 (South Africa), the Employment Equity Act 1998 (South Africa).

[28] Section 189 and 189A of the Labour Relations Act 66 of 1995. Section 184(5)(a)(1) of the Labour Relations Act 1987 of New Zealand. Section 103A of the Employment Relations Act 2000. Section 4 of the Employment Relations Act 2000.

http://etd.uwc.ac.za/

operational requirements, the employer should use a fair and objective criteria.[29] Manamela conducted research which provides information on the fair and objective selection criterion. Although Manamela's research[30] is of significant value, this research contains a comparison between the law governing the selection criterion in South African and the selection criterion provided by the legislation in New Zealand to establish whether there are any differences or similarities exist in the respective jurisdictions when an employer selects employees to be dismissed based on operational requirements.

Manamela provides valuable information on retrenchments in South Africa. The LRA place an obligation on the employer to ensure that the dismissal based on operational requirements are both substantively and procedurally fair.[31] Even though Manamela's research[32] on the right reason for dismissals based on operational requirements is of great significance, this research will make a comparison between the statutory provisions in South Africa and the statutory provisions in New Zealand to determine whether there are any lessons South Africa can learn from New Zealand's legislation governing the substantive and procedural fairness of dismissals based on operational requirements.

New Zealand's Employment Relations Act 2000 (the ERA),[33] places an obligation on employers to consult and to disclose information, before the decision of redundance is made. Mitchell conducted research on the consultation process in New Zealand.[34] While Mitchell's research is important in that additional information is provided with regard to the law that relates to the consultation process in New Zealand, this research will compare the law in South Africa and the law of New Zealand to determine how employees are protected in the respective countries.

[29] Section 189(7)(b) of the Labour Relations Act 66 of 1995.
[30] Manamela ME 'Selection Criteria: The Dismissal of Employees Based on Operational Requirements' 2007 19 *SA Merc LJ* 106.
[31] Section 189A of the Labour Relations Act 66 of 1995.
[32] Manamela T 'When the lines are blurred – a case of misconduct, incapacity or operational requirements: are all dismissals going operational?' 2019 40 1 *Orbiter* 103.
[33] Section 4 (1A) of the Employment Relations Act 2000.
[34] Mitchell DH 'The burgeoning of Fairness in the Law Relating to Redundancy' 1995 *Auckland University Law Review* 907.

http://etd.uwc.ac.za/

1.7 THE SUGGESTED ANSWER TO THE PROBLEM

This research may reveal that the South African law governing dismissals based on operational requirements fails to protect employees adequately. This may be due to the provisions contained in the LRA having to be amended and/or supplemented.

1.8 METHODOLOGY

This thesis adopts a desktop methodology that consists of an analysis of primary and secondary sources. The primary sources used in this mini-thesis include the Constitution, legislation and case law. The Constitution is used since legislation enacted should give effect to the Constitution and statutes are used in order to determine the ways in which employees are protected at present. Case law will be analysed to ascertain the manners in which the provisions contained in statutes are applied.

Secondary sources such as journal articles, textbooks and internet resources are also examined. The opinions of academics and professionals in the field of labour law as outlined in textbooks and journal articles are discussed and add value as far as this research is concerned.

UNIVERSITY of the
WESTERN CAPE

1.9 CHAPTER OUTLINE

Chapter 1 of this thesis, being the current chapter, contains *inter alia* the problem statement, the research question, the literature review and methodology that will be used in completing the research. Chapter 2 consists of a discussion on the South African legislative framework governing dismissals based on operational requirements. The aforementioned chapter contains *inter alia* a discussion on substantive fairness, procedural fairness, the distinction between small-scale and large-scale retrenchments and relief and remedies.

Chapter 3 contains a discussion on the law governing dismissals based on operational requirements in New Zealand. This chapter compares the law governing dismissals based on operational requirements in New Zealand to the law governing dismissals based on operational requirements in South Africa. The last chapter being chapter 4 consists of the conclusion and the recommendations.

http://etd.uwc.ac.za/

CHAPTER 2

THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK GOVERNING DISMISSALS BASED ON OPERATIONAL REQUIREMENTS

2.1 INTRODUCTION

In terms of section 23(1) of the Constitution 'everyone has the right to fair labour practices'.[35] The Termination of Employment Convention, 1982 (The Convention) is an International Labour Organisation (ILO) Convention that was adopted in 1982 and has so far been ratified by some 36 countries including South Africa. [36] In terms of this Convention countries are required to stipulate justifiable reasons on which an employee can be dismissed.[37] The Constitution of South Africa,[38] requires South Africa to give effect to this Convention and to the other ILO Conventions.[39]

The ILO recognises operational requirements as a ground for dismissal[40] and provides that the employment of a worker shall not be terminated unless there is a valid reason for such a termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.[41]

The LRA[42] was enacted to give effect to section 23 of the Constitution. The LRA provides that:

'(1) dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) That the reason for dismissal is a fair reason -

i) Related to the employees conduct or capacity;

ii) Based on the employer's operational requirements;

(b) That the dismissal was affected in accordance with a fair procedure.'[43]

[35] Section 23(1) of the Constitution of the Republic of South Africa, 1996.
[36] Termination of Employment Convention 158, 1982.
[37] Good Practice Note 'Managing Retrenchment' (2005) 4 11.
[38] Constitution of the Republic of South Africa, 1996.
[39] Section 39 of the Constitution of the Republic of South Africa, 1996.
[40] Termination of Employment Convention 158, 1982.
[41] Termination of Employment Convention 158, 1982; ILO Termination of Employment Recommendation 166, 1982.
[42] Labour Relations Act 66 of 1995.
[43] Section 188 of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

Dismissals based on operational requirements occur when the employer contemplates dismissing employees due to economic, technological, or similar needs of the employer.[44] Dismissals for misconduct take place where an employee breaks the rules, which usually originates from the terms of the contract or from general standards and practices that are accepted as applicable, within the workplace.[45] Dismissals for incapacity on the other hand lies in the inherent inability of the employee to perform the work for which he/she was employed to do, to the employers standards of quality and quantity.[46]

The LRA makes provision for dismissals based on operational requirements,[47] however also places obligations on the employer to consider every possibility prior to the decision to retrench and to ensure that the dismissal is both substantively and procedurally fair.[48] Viable reasons for employers dismissing one or more employees on the ground of operational requirements are first, economic reasons that concern the financial administration of the business.[49] Secondly, technological reasons affects the employment of the employee by making current vacancies superfluous or by forcing employees to adjust to the new technology.[50] Thirdly, structural reasons correlate to the redundancy of the job/role following the restructuring of the employer's business.'[51]

UNIVERSITY of the
WESTERN CAPE

The purpose of this chapter is to analyse the legislation governing dismissals based on operational requirements in South Africa. This will be done to determine the extent to which South African law governing dismissals based on operational requirements protects employees and aims to determine how it is possible for employers to dismiss employees based on operational requirements when this is not the real reason for the dismissal.

[44] Section 213 of the Labour Relations Act 66 of 1995.
[45] Grogan J *Dismissal* (2010) 143.
[46] CCMA *Candidate Commissioner Training 2019: Module 5 – Managing Dismissals and Unfair Labour Practice Disputes* 259.
[47] Section 188 of the Labour Relations Act 66 of 1995.
[48] Section 189 of the Labour Relations Act 66 of 1995.
[49] General Notice 1517 'Government Gazette 20245' (1995).
[50] General Notice 1517 'Government Gazette 20245' (1995).
[51] General Notice 1517 'Government Gazette 20245' (1995).

http://etd.uwc.ac.za/

This chapter contains a discussion on substantive fairness, procedural fairness and the distinction between small-scale and large-scale retrenchments. The relief and remedies available to employees and the employer's election to dismiss an employee on the grounds of operational requirements as opposed to misconduct or incapacity is also discussed.

Small-scale retrenchments are governed by the provisions contained in section 189 of the LRA, while large-scale retrenchments are governed by the provisions contained in section 189A of the LRA.[52] Section 189 and section 189A of the LRA have been created so that retrenchments do not take place that can be avoided.[53]

2.2 DISMISSALS BASED ON OPERATIONAL REQUIREMENTS: SUBSTANTIVE AND PROCEDURAL FAIRNESS

Dismissals based on operational requirements should be both substantively and procedurally fair. [54] The substantive component of dismissals based on operational requirements concerns the real reason for the dismissal and the procedural aspect of dismissals deals with the procedure that was followed by the employer in effecting the dismissal. Substantive fairness will be discussed first which will be followed by a discussion on procedural fairness.

UNIVERSITY of the
WESTERN CAPE

2.2.1 Substantive Fairness

A dismissal based on operational requirements must be necessary.[55] It is important to understand what the role of the court is in determining whether a dismissal based on operational requirements is substantively fair. The word "fair" introduces a comparator, that is a reason which must be fair to both parties affected by the decision.[56] The courts must ensure that there is a viable basis for the decision that

[52] See para 1.4 above.
[53] The Labour Relations Act 66 of 1995.
[54] Section 188 of the Labour Relations Act 66 of 1995.
[55] Employers must be in a dire state before the commencement of the retrenchment process as it should be the last resort.
[56] *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 7 BLLR 705 (LAC) 19. See also *CWIU and Others v Algorax (Pty) Ltd* (2003) 11 BLLR 1081 (LAC) 69 – 70.

http://etd.uwc.ac.za/

has been taken since they are permitted to scrutinise the decision that has been taken to ensure it was fair to the employees selected to be retrenched.[57] Fairness is grounded on an assessment, bearing in mind all applicable facts of the case.[58] These and other factors must be compared on the necessities of justice and then an assessment must be made when identifying the fairness of a dismissal.[59] The application of this test must be based upon the principles of equity.[60] Thus the extent by which fairness is assessed must be equally between the welfare of the employer and that of the worker.[61] In *NUMSA v Atlantis Diesel Engines*,[62] the LAC held that:

> 'fairness in this context goes further than a *bona fide* and commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances.'[63]

Du Toit is of the view that the court must not just accept that

> 'the employer's decision to dismiss was fair or not. The court must determine the fairness of the dismissal itself and must not think twice to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic.'[64]

In *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*,[65] the LAC held that

UNIVERSITY of the
WESTERN CAPE

> '…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.'[66]

---

[57] *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 7 BLLR 705 (LAC) 19. See also *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) 69 – 70.
[58] Makan K *When is dismissal an appropriate sanction for misconduct? And who has the last say?* (unpublished LLM thesis, University of the Western Cape, 2009) 61.
[59] Makan K *When is dismissal an appropriate sanction for misconduct? And who has the last say?* (unpublished LLM thesis, University of the Western Cape, 2009) 61.
[60] Makan K *When is dismissal an appropriate sanction for misconduct? And who has the last say?* (unpublished LLM thesis, University of the Western Cape, 2009) 62.
[61] Makan K *When is dismissal an appropriate sanction for misconduct? And who has the last say?* (unpublished LLM thesis, University of the Western Cape, 2009) 62.
[62] *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC) 409.
[63] *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC) 409 476.
[64] Du Toit D 'Business Restructuring and Operational Requirements Dismissal: Algorax and Beyond' (2005) 26 *ILJ* 595 600.
[65] *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*(2001) 22 ILJ 2264 (LAC).
[66] *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union* (2001) 22 ILJ 2264 (LAC) 19.

http://etd.uwc.ac.za/

The LAC also reasoned that 'showing deference to the employer's decision to retrench will amount to the court abdicating its role and allowing the employer to decide whether its own conduct is fair or not, a role clearly assigned to the courts.'[67] Du Toit stated

> '... though the notion of employers being free to dismiss workers "merely to increase profit" may seem to open the floodgates to dismissal virtually at will, the causal nexus between a dismissal and the employer's operational needs must still pass the test of fairness. The real question remains: will it be fair in the given circumstances to dismiss employees in order to increase profit or efficiency?'[68]

Nawej and van Eck proposed that if the reason for retrenchment is to increase profits, that those reasons should be re-evaluated very critically.[69] Also that if the employers is able to meet an extraordinary validation and examination, then the reason for the retrenchment could be accepted.[70]

In *National Union of Mineworkers and Another v Black Mountain Mining (Pty) Ltd*[71] the LAC held that

> 'An employer must first establish on a balance of probabilities that the dismissal of the employee contributed in a meaningful way to the realisation of that need. In my view, dismissals for operational requirements must be a measure of last resort, or at least fair under all of the circumstances. A dismissal can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons.'[72]

It may be important to insert a provision in the LRA which requires courts to examine the content of the reasons given by the employer for dismissing the employee based on operational requirements in order to ensure that the dismissal is fair.

---

[67] *Chemical Workers Industrial Union v Algorax* (2003) 24 ILJ 1917 (LAC) 23.
[68] Du Toit D 'Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond' (2005) 26 *ILJ* 606.
[69] Nawaj K & van Eck S 'Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments' (2016) *PER/PELJ* 19 27.
[70] Nawaj K & van Eck S 'Automatically Unfair and Operational Requirement Dismissals: Making Sense of the 2014 Amendments' (2016) *PER/PELJ* 19 27.
[71] *National Union of Mineworkers and Another v Black Mountain Mining (Pty) Ltd* (CA22/2012) (2014) ZALAC 78 11.
[72] *National Union of Mineworkers and Another v Black Mountain Mining (Pty) Ltd* (CA22/2012) (2014) ZALAC 78 16.

http://etd.uwc.ac.za/

2.2.2 Procedural Fairness

The LRA requires that dismissals based on operational requirements should not only take place for a fair reason, but that a fair procedure should be followed. To ensure that all possible alternatives to dismissal are explored and that the employees are treated fairly, the LRA[73] places particular obligations on employers.[74] The employer is required to provide a retrenchment notice to the employee parties in which the employer communicate all the appropriate information.[75] The employer is also required to consult with the employee parties at which time the employee parties should be provided with an opportunity to make representations with regard to matters discussed and where the employer disagrees with suggestions made by the employee parties, the employer is required to provide reasons for disagreeing.[76] The procedural obligations which the LRA places on employers are discussed below.

2.2.2.1 Retrenchment Notice

The LRA provides that the employer is required to disclose all relevant information to the other party in writing.[77] Murphy AJ highlighted in *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare,*[78] that

> 'a critical, if not the most central ingredient of the consultation process, is the requirement of written notice and the disclosure of information.[79] Effective consultation requires employees to have an opportunity to prepare for consultation by being given sufficient advance notice, an agenda and adequate information. Without this, the joint consensus-seeking process mandated by the legislature is hardly likely to be "meaningful". .. The failure of employers to fulfil this obligation meaningfully, invariably leads to disputes, misconceptions, a breakdown in trust and the delegitimizing of the joint consensus-seeking process mandated by the statute.'[80]

The LRA provides that a written notice should be given to the employees, inviting them to consult with the employer.[81] The notice should contain the information set out below:

---

[73] Labour Relations Act 66 of 1995.
[74] Van Niekerk A *Unfair Dismissal* 4 ed (2008) 93.
[75] Section 189(3) of the Labour Relations Act 66 of 1995.
[76] Section 189(5) & (6) of the Labour Relations Act 66 of 1995.
[77] Section 189(3) of the Labour Relations Act 66 of 1995.
[78] *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare* (2005) 26 ILJ 889 (LC).
[79] *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare* (2005) 26 ILJ 889 (LC) 890.
[80] *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare* (2005) 26 ILJ 889 (LC) 890.
[81] Section 189(3) of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

a) 'reasons for the proposed retrenchments;
b) the alternatives which the employer has considered before deciding on retrenching employees and the reasons why the considered alternatives were not accepted by the employer;
c) the number of employees likely to be affected by the retrenchments and the job categories within which they are employed;
d) the proposed method for selecting employees to be dismissed;
e) the time periods during which the retrenchments are likely to take place;
f) the severance packages proposed;
g) any assistance which the employer would be willing to offer affected employees;
h) whether there is any possibility of employees who are dismissed being reemployed by the employer in the future;
i) the total number of employees employed by the employer; and
j) the number of employees which the employer has retrenched in the preceding 12 months.'[82]

The written notice should contain information relating to the possibility of 'future re-employment of the employees who are dismissed.'[83] However, should the same employer open a new branch and recruit and appoint new employees instead of transferring the retrenched employees to the new branch, the retrenchment may be regarded as unfair.[84]

UNIVERSITY of the
WESTERN CAPE

After receiving their notices, employees should be given a reasonable period of time to consider the information as set out in the notices. If a dispute on whether or not information is relevant, comes before the LC or arbitrator, it will be the duty of the employer to prove that the undisclosed information is irrelevant.[85]

The provisions in the LRA discussed above, protects employees. The fact that the LRA requires employers to forward the prescribed information to the employee parties in advance and that the LRA sets out the specific information which employers should disclose to employees is beneficial to employees since it provides the employee

[82] Section 189(3) of the Labour Relations Act 66 of 1995.
[83] Section 189(3)(h) of the Labour Relations Act 66 of 1995.
[84] See *Airey and Others v GE Security (Africa)* (C218/06) [2008] ZALC 132 68 were the LC agreed that substantive unfairness arose because the company did not reappoint the three engineers within the new structure. The court can order the employer to reinstate the retrenched employees, or pay them hefty compensation, and in addition pay all their legal costs.
[85] Section 189(4) of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

parties with access to the required information to enable them to prepare for the consultation and provides legal certainty with regard to the information that employees are entitled to.

2.2.2.2 Consultation

The purpose of the consultation is to have some influence from both parties on the final decision taken by both the employer and the employee or union.[86] The consultation is a means to determine by way of a meaningful joint consensus-seeking process whether there is any practical and viable basis for changing the in-principal decision to dismiss.[87]

The LRA provides in Section 189(1) that 'when an employer contemplates dismissing one of more employees for reasons based on the employer's operational requirements the employer must consult…'[88] If the employer or union participates in the consultation as soon as possible, they can play a meaningful role.[89] Rycroft states that according to the LRA, if all the relevant parties participate in the process, the employer discloses all the necessary information, full disclosure is made by the employer and the conversation between the parties are well-motivated and sensible, than consultation can be meaningful.[90] The employer should notify the workforce of the possibility of retrenchment as soon as management has decided in principle to adopt a policy which may conceivably result in retrenchment.[91]

If a consultation does not take place before the decision to retrench has been made, then no measure to prevent or to minimise the termination can be taken.[92] In such a

[86] Rubin N *Code of International Labour Law*: *Law, Practice and Jurisprudence* (2005) 1(2) 536.
[87] Peer Y 'Small scale retrenchments – What obligations do employers have? A South African perspective' available at *https://www.globalworkplaceinsider.com/2015/02/small-scale-retrenchments-what-obligations-do-employers-have-a-south-african-perspective/* (accessed 23 February 2021).
[88] Section 189(1) of the Labour Relations Act 66 of 1995.
[89] Grogan J *Dismissals* 2 ed (2014) 440. Also see article 13(1)(b) of the Convention.
[90] Rycroft A 'Employer and Employee Obligations with regard to Alternatives to Retrenchment' (2015) 36 *ILJ* 1775.
[91] Du Toit et el *Labour Relations Law: A Comprehensive Guide* 6th ed (2015) 487. Also see *Johnson & Johnson Pty Ltd v CWIU* (1999) 20 ILJ 89 (LAC) 45 were the judge state that 'There is no provision to this effect in s 189, but it appears to be obvious that the period of the consultation process must be of sufficient duration to enable the parties each to put their respective proposals on the table, to consider them, and to enter into a joint process to try and reach consensus. The specific demands of each.'
[92] See para 2.2.2.2.2 below.

http://etd.uwc.ac.za/

case, employers also run the risk of making incorrect decisions, breaching legal rules and collective agreements and alienating workers.[93] Often workers can provide important insight and alternative ways for carrying out the process to minimise impact on the workforce and the broader community.[94] There were a few cases where the courts ruled that consultation was not necessary until after management had taken the decision to retrench, a decision that fell firmly within managerial privilege.[95] Consultation was then required only in relation to the implementation of that decision. However, in *NUMSA v Comark Holdings (Pty) Ltd*,[96] the LC held that

> 'the employer's act of taking the final decision to retrench before affording the union an opportunity to make representations on the need for retrenchment, although it had given the union an undertaking that it would do so, rendered the whole consultation process fatally flawed. Furthermore, the employer's failure to disclose the information requested by the union disempowered the union and rendered any participation by it in any further processes meaningless.'[97]

In *NUMSA v Atlantis Diesel Engines*,[98] the LAC held that:

> 'when examining the consultation process, the courts' function is to pass judgement on whether the final decision was verifiable and not to second guess the commercial or business effectiveness of the employer's final decision. The court must investigate whether the requirements for the consultation, according to the LRA, have been followed. Also, if followed, whether the final decision reached by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process.'[99]

[93] International Finance Corporation of the World Bank Group 'Good Practice Note – Managing Retrenchment' available at *https://www.ifc.org/wps/wcm/connect/e417f063-41a3-45d8-8c2d-bc08d058e857/Retrenchment.pdf?MOD=AJPERES&CVID=jkD10-G* (accessed 23 February 2021).
[94] International Finance Corporation of the World Bank Group 'Good Practice Note – Managing Retrenchment' available at *https://www.ifc.org/wps/wcm/connect/e417f063-41a3-45d8-8c2d-bc08d058e857/Retrenchment.pdf?MOD=AJPERES&CVID=jkD10-G* (accessed 23 February 2021).
[95] See *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC) 407; *Transport & General Workers Union v City Council of the City of Durban* (1991) 12 ILJ 156 (IC) 159; *Karbusicky v Anglo American Corporation of SA Ltd* (1993) 14 ILJ 166 (IC) 167.
[96] *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC).
[97] *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC) 517.
[98] *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC).
[99] *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC) 409.

http://etd.uwc.ac.za/

The purpose of the obligation to consult is that both parties will be in a position to provide and propose important views on the decision to retrench, however this obligation is not always complied with by employers since there are a few judgments where the courts held that the consultations were not required until after management makes a decision.[100] This approach was found to be fatally flawed by the LAC and hardly likely to be meaningful, should the law not be applied. The consultation can only be meaningful if both parties enter into a joint process to try and reach consensus. It is the duty of the court to investigate whether the requirements for the consultation have been met.[101] The obligation to consult provides protection to employees, however courts should ensure that this obligation is complied with by employers in all circumstances.

2.2.2.2.1 Consulting Parties

The employer is required to consult with any person with whom the employer is required to consult in terms of a collective agreement.[102] If there is no such agreement, the employer should consult a workplace forum established in the workplace where the affected employees work.[103] If no such forum exists, the employer should consult with a registered trade union whose members may be affected.[104] If no such union exists, then the employer should consult the affected employees directly or consult the employees' nominated representative.[105] In *Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others*,[106] Jafta J stated that 'other levels may not be undertaken if there was no consultation at the first level.'[107]

[100] See *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 *ILJ* 405 (IC) p 407; *Transport& General Workers Union v City Council of the City of Durban* (1991) 12 *ILJ* 156 (IC) p 159; *Karbusicky v Anglo American Corporation of SA Ltd* (1993) 14 *ILJ* 166 (IC) p 167.
[101] Labour Relations Act 66 of 1995.
[102] Section 189(1)(a) of the Labour Relations Act 66 of 1995.
[103] Section 189(1)(b)(i) of the Labour Relations Act 66 of 1995.
[104] Section 189(1(c) of the Labour Relations Act 66 of 1995.
[105] Section 189(1)(d) of the Labour Relations Act 66 of 1995.
[106] *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* (CCT181/18) (2020) ZACC 1 53.
[107] *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* (CCT181/18) (2020) ZACC 1 53.

http://etd.uwc.ac.za/

In the matter between *Telkom SA Soc Limited v Van Staden and Others,*[108] the LAC held that since Telkom held thorough consultations with the Unions, 'Telkom had no obligation to consult the individual respondents who were likely to be affected by the process.'[109]

Employers often make decisions without consulting with the appropriate parties, however the LRA prescribes the parties with whom the employer is required to consult where retrenchments are likely to take place. The fact that the LRA makes provision for all the relevant parties with whom the employers should consult, provides additional protection to employees.

2.2.2.2.2 Subject Matter of Consultation

The final decision to retrench rests with the employer, however prior to such a decision being taken, the employer and the other consulting parties are required to consult on the specific topics mentioned in the LRA. Section 189(2) of the LRA provides that

> '(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus seeking process and attempt to reach consensus on –
>
> (a) appropriate measures –
>
> (i) to avoid the dismissals;
>
> (ii) to minimise the number of dismissals;
>
> (iii) to change the timing of the dismissals;
>
> (iv) to mitigate the adverse effects of the dismissals;'[110]

The LRA requires the parties to consult on measures to avoid, alternatively minimise the number of dismissals.[111] Consulting on measures to avoid dismissals allows employees to challenge the merits of the proposed dismissals.[112] There is an obvious conflict between the requirement that employees are allowed to suggest ways to avoid the dismissals and the employer's right to make the final decision to dismiss.[113]

---

[108] *Telkom SA Soc Limited v Van Staden and Others* (JA68/2018) (2020) ZALAC 52; (2021) 42 ILJ 869 (LAC).
[109] *Telkom SA Soc Limited v Van Staden and Others* (JA68/2018) (2020) ZALAC 52; (2021) 42 ILJ 869 (LAC) 3.
[110] Section 189(2) of the Labour Relations Act 66 of 1995.
[111] Section 189(2)(a)(i) and (ii) of the Labour Relations Act 66 of 1995.
[112] Grogan J *Workplace Law* 13 ed (2020) 277.
[113] Grogan J *Workplace law* 13 ed (2020) 277.

http://etd.uwc.ac.za/

Section 189(2)(a)(iv) of the LRA places a statutory duty on consulting parties to consider ways to mitigate the adverse effects of the dismissals. Section 189(3) of the LRA provides content to this measure since it requires the employer in the written notice to consider the time when or the period during which, the dismissals are likely to take effect, any assistance that the employer proposes to offer to the employees likely to be dismissed and the possibility of the future re-employment of the employees who are dismissed.

Employees may use the consultation process to 'change the timing of the dismissals.'[114] Although the courts are not supportive of deliberate hinderances by unions,[115] if more time is needed to consult, the employer should agree to it.[116] If the consultation procedure is hastened it can become insufficient.[117] Therefore, in order for the consultation to be meaningful, sufficient time for disclosure, consideration and dialogue must be allowed. [118]

Section 189(2) of the LRA protects employees where the parties engage in a meaningful joint consensus seeking process. Often workers can provide and propose important alternative ways to avoid or minimise the number of dismissals or minimise the impact of the dismissal on the workforce and the broader community.[119] The fact that the LRA sets out the specific topics which should form the subject matter of the consultation provides protection to employees.

[114] Section189(2)(a)(iii) of the Labour Relations Act 66 of 1995.
[115] Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 462.
[116] Section 189(6)(a) of the Labour Relations Act: The employer must consider and respond to the representations made by the other consulting party, and if the employer does not agree with them, the employer must state the reasons for disagreeing.
[117] *Broll Property Group (Pty) Ltd v Du Pont & Others* (2006) 27 ILJ 269 (LAC): The court held that if consultation is 'woefully deficient' it may render dismissal substantively unfair.
[118] Meaningful in terms of Section 189 (2) of the Labour Relations Act 66 of 1995.
[119] International Finance Corporation of the World Bank Group 'Good Practice Note – Managing Retrenchment' available at *https://www.ifc.org/wps/wcm/connect/e417f063-41a3-45d8-8c2d-bc08d058e857/Retrenchment.pdf?MOD=AJPERES&CVID=jkD10-G* (accessed 23 February 2021).

http://etd.uwc.ac.za/

2.2.2.2.3 Selection Criteria

Consulting parties should attempt to agree on a method for selecting employees for retrenchment.[120] If no selection criteria is agreed upon, the LRA provides that the criteria must be 'fair' and 'objective'.[121] In *Bemawu on behalf of Mohapi & Another v Clear Channel Independent (Pty) Ltd*, the LC held that[122]

> 'the consulting parties also have a duty in terms of the law to seek consensus regarding selection criteria for choosing those employees whose employment is to be terminated due to the employer's operational requirements…….. If no consensus is reached regarding the selection criteria the employer is required to apply a selection criterion that is objective and fair.'[123]

A fair and objective selection criteria cannot simply be applied by the employer.[124] The employer must first attempt to reach agreement with regard to the selection criteria.[125] Since the consultation process is envisaged as a mechanism through which the consulting parties play a meaningful role, failure to attempt to reach agreement on selection criteria can render the dismissals unfair.[126] In *Mthombeni v Air Traffic & Navigation Services Ltd*,[127] the LC held that

UNIVERSITY of the
WESTERN CAPE

> 'as there is no evidence in this case that there was an attempt to reach consensus on the criteria for dismissal, it is therefore incumbent on the respondent to show that the criterion used in dismissing the applicant was fair. An employer who fails to reach agreement regarding selection criteria will compound the unfairness flowing from the criteria used.'[128]

---

[120] Grogan J *Workplace law* 13 ed (2020) 286. Also see *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* (CCT181/18) (2020) ZACC 1 21.
[121] Grogan J *Workplace law* 13 ed (2020) 286.
[122] *Bemawu on behalf of Mohapi & Another v Clear Channel Independent (Pty) Ltd* (2010) 31 ILJ 2863 (LC).
[123] *Bemawu on behalf of Mohapi & Another v Clear Channel Independent (Pty) Ltd* (2010) 31 ILJ 2863 (LC) 34.
[124] *CEPPWAWU obo Gumede v Republican Press* (2005) ZALC 21 where the LC state that the requirement of fairness and objectivity applies for both the criteria and to the way in which they were applied.
[125] *Mweli and Another v MTN Group Management Services (Pty) Ltd* (JS 610/16) (2019) ZALCJHB 119 9.
[126] Grogan J *Workplace Law* 13 ed (2020) 274.
[127] *Mthombeni v Air Traffic & Navigation Services Ltd* (2008) 29 ILJ 188 (LC).
[128] *Mthombeni v Air Traffic & Navigation Services Ltd* (2008) 29 ILJ 188 (LC) 83.

http://etd.uwc.ac.za/

In the matter between *Mweli and Another v MTN Group Management Services (Pty) Ltd*,[129] Moshaona J held that

> 'the LRA is designed in such a way that it would not countenance a situation where an employer seeks to avoid agreeing on and/or applying a selection criterion.' Furthermore, that 'objectivity and fairness at this stage entails amongst others consistency and transparency. If no satisfactory evidence is led that the criteria was applied consistently and transparently, then the court must conclude that the criterion was not fair and objective on application. Such equally renders the dismissal that follows to be substantively unfair.'[130]

According to the Code of Good Practice on Dismissals based on Operational Requirements (OR Code) a selection criterion must be agreed upon by the consulting parties, however where the parties are unable to agree, a fair and objective criteria must be used.[131] Criteria will be regarded as unfair where it violates a basic right of employees that is protected by the LRA, such as where employees are selected on the basis of union membership or pregnancy. Before applying a criterion that may be neutral on the face of it the criterion should cautiously be tested to ensure that no inequitable effects are present.[132] Length of service, skills and qualification are recognised as a fair and acceptable criteria. The use of the LIFO principle is also seen as fair and objective.[133] The LIFO principle may be adapted but it should not be used to undermine an agreed criterion.[134]

In the matter between *Benjamin & others v Plessey Tellumat SA Limited*,[135] the employer deviated from the LIFO criterion. The judge concluded that an employer may deviate from the LIFO criterion only in situations where other objective criteria is

[129] *Mweli and Another v MTN Group Management Services (Pty) Ltd* (JS610/16) (2019) ZALCJHB 119.
[130] *Mweli and Another v MTN Group Management Services (Pty) Ltd* (JS610/16) (2019) ZALCJHB 119 22.
[131] Item 7 of the Code of Good Practice on Dismissals based on Operational Requirements of the Labour Relations Act 66 of 1995.
[132] Item 8 of the Code of Good Practice on Dismissals based on Operational Requirements of the Labour Relations Act 66 of 1995.
[133] Item 9 of the Code of Good Practice on Dismissals based on Operational Requirements of the Labour Relations Act 66 of 1995.
[134] Item 9 of the Code of Good Practice on Dismissals based on Operational Requirements of the Labour Relations Act 66 of 1995.
[135] *Benjamin & others v Plessey Tellumat SA Limited* (1998) 3 BLLR 272.

http://etd.uwc.ac.za/

applied such as critical skills retention, and where the employer provides an acceptable reason for the deviation.[136]

In *SAA v Bogopa & Others*,[137] the LAC held that

> 'If there were more employees than there were positions, the appellant could have and should have used fair and objective selection criteria, including LIFO, to select those employees who would be kept in its employment by being appointed to certain positions and those who would not be appointed and would ultimately be dismissed unless they were appointed to other positions outside the department but within the appellant.'[138]

The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible, in advance, which give due weight both to the interest of the undertaking establishment or service and to the interests of the workers.[139]

In *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd*,[140] the LAC states that

> 'an employer and union are free to agree upon selection criteria that is subjective. When agreed selection criteria is subjective, the employer does not act unfairly in using such selection criteria to select the employees to be dismissed. Indeed, the employer may be acting unfairly if the employer departed from the agreed selection criteria simply because they are or may be subjective or may include a certain element of subjectivity.'[141]

It is concerning that the employer and employee parties are free to agree to a selection criterion that is subjective, and the courts only interfere to verify that it has not been used to get rid of employees for grounds inapplicable to operational requirements.[142]

[136] *Benjamin & others v Plessey Tellumat SA Limited* (1998) 3 BLLR 272 32.
[137] *SAA v Bogopa & Others,* (2007) 11 BLLR 1065 (LAC) 1086.
[138] *SAA v Bogopa & Others* (2007) 11 BLLR 1065 (LAC) 1086 63.
[139] Ruben N *Code of International Labour Law: Law, Practice and Jurisprudence* (2005) 1(2) 536.
[140] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC).
[141] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC) 85.
[142] Levy E 'Is South African Labour Law on operational requirement dismissals unduly onerous for employers?' (2016) 37 *IJL* 1566.

UNIVERSITY of the WESTERN CAPE
http://etd.uwc.ac.za/

Manamela suggests that the criteria should not be subjective but appropriate in that they link to qualities or behaviour of the employee such as 'length of service, ability, capacity, productivity and the needs of the business' and not depends on the subjective influences of the decision maker.[143] Bumping is an example of such a criterion. By means of bumping the retention of more experience employees at the loss of less experience employees in circumstances where the former can do the work that the latter is employed to do.[144] Thus, with bumping, the employer will try to keep the more senior staff members who are willing to be transferred to a lower potion employed, at the expense of the junior staff members.[145] The LAC points out two main viewpoints of bumping namely horizontal bumping, 'where the affected employee is bumped into a position of equal or similar status' and vertical bumping, 'where the affected employee is bumped into a position which is either of a lower status or entails a lower salary within the organisation.'[146]

Another example of an appropriate criterion is where the employers give the employees the opportunity to re-apply for their positions. Though, when employees are placed in re-opened positions, the placing of employees in the re-opened positions must be administered justly and without bias and the employer should give reason for his/her decisions.[147] A third example of this criterion was determined by the court in *FAWU and others v Ruto mills (Pty) Ltd*, where the LC stated that performance can be used as a criterion for selection in certain circumstances.[148] In such a case, the employer could prove that poor performance had resulted in a genuine and serious operational need to meet production targets.[149] The criteria must be applied objectively by, for example, conducting performance evaluations over a few months.[150]

UNIVERSITY of the WESTERN CAPE

[143] Manamela ME 'Selection criteria: The dismissal of employees based on operational requirements' (2007) 19 *SA Merc LJ* 106.
[144] Manamela ME 'Selection criteria: The dismissal of employees based on operational requirements' (2007) 19 *SA Merc LJ* 106.
[145] Slier, K 'Everything you need to know about bumping' available at *https://blog.seesa.co.za/index.php/2018/10/15/everything-you-need-to-know-about-bumping/* (accessed 09 May 2022).
[146] *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC) 349.
[147] Van der Sandt A 'Dismissal based on an employer's operational requirements as per the Labour Relations Act' available at *https://www.serr.co.za/dismissal-based-on-an-employers-operational-requirements-as-per-the-labour-relations-act/* (accessed 24 February 2021).
[148] *FAWU and others v Ruto mills (Pty) Ltd* (CLL) unreported case no 17/06 (January 2008).
[149] *FAWU and others v Ruto mills (Pty) Ltd* (CLL) unreported case no 17/06 (January 2008).
[150] *NUM and Others v Anglo American Research Laboratories (Pty) Ltd* (2005) 2 BLLR 148 (LC) 7. Individual performance appraisals were done from June to June each year.

http://etd.uwc.ac.za/

In the matter between *Telkom SA Soc Limited v Van Staden and Others,*[151] the LAC held that

> 'since the selection criteria for retrenchment were not the subject of an agreement between Telkom and the four trade unions, such criteria were required to be fair and objective. Telkom proposed in its section 189(3) notice that after an employee had not been placed, retrenchment would follow. It was apparent from the notice that it was the fact of not having been placed into an alternative position that placed an employee at risk of selection for retrenchment.'[152]

Furthermore, the LAC held that 'Telkom was not obliged to propose further selection criteria for retrenchment after the placement process had ended.'[153] The LAC thus found that Telkom had followed a fair procedure.

The law governing the selection criteria provides protection to employees. As opposed to a subjective criterion that depends on the subjective influences of the decision maker, a criterion that is appropriate and that is based on attributes or conduct of the employee such as length of service, ability, capacity, productivity and the needs of the business must be used. However, research shows that there are still employers who select employees of their choice as opposed to attempting to reach joint consensus. In *Mthombeni v Air Traffic & Navigation Services Ltd*,[154] the LC confirmed that

> 'there are employers who do not attempt to reach consensus about the selection criteria, and it is therefore incumbent on the respondent to show that the criterion used in dismissing the applicant was fair. The court must find such a case unfair flowing from the criteria used.'[155]

[151] *Telkom SA Soc Limited v Van Staden and Others* (JA68/2018) (2020) ZALAC 52; (2021) 42 ILJ 869 (LAC).
[152] *Telkom SA Soc Limited v Van Staden and Others* (JA68/2018) (2020) ZALAC 52; (2021) 42 ILJ 869 (LAC) 18.
[153] *Telkom SA Soc Limited v Van Staden and Others* (JA68/2018) (2020) ZALAC 52; (2021) 42 ILJ 869 (LAC) 18.
[154] *Mthombeni v Air Traffic & Navigation Services Ltd* (2008) 29 ILJ 188 (LC).
[155] *Mthombeni v Air Traffic & Navigation Services Ltd* (2008) 29 ILJ 188 (LC) 83.

http://etd.uwc.ac.za/

2.2.2.2.4 Severance Pay

Severance pay, is the last issue in respect of which parties are obliged to consult.[156] The LRA places an obligation on employers to suggest severance pay in their written notice to consulting parties.[157]

In South Africa, employees who are dismissed based on operational requirements are entitled to severance pay of at least one week's remuneration for each completed year of continued service with the employer.[158] South Africa's value of statutory severance pay is relatively low, however, the amount is in accord with Article 12 of the Termination of Employment Convention 158, which states that it is determined on the 'length of service and level of wages.'[159] If however, an agreed amount for severance pay is in excess of the statutory minimum, the employer is required to pay that amount.[160]

Selected employees who unreasonably refuse to accept a reasonable offer of alternative employment will not be entitled to severance pay.[161] Selected employees are entitled to their notice pay as well as outstanding wages and accrued leave.[162] Employees who are transferred in terms of the LRA[163] from one employer to another employer, without interruption in service, may not apply for severance pay from the transferring employer.[164] In circumstances where an employee finds another work on his or her own, the employer would not be excused from paying severance pay.[165]

The law relating to severance pay protects the employees in South Africa since the employee will have a means of income whilst he/she is seeking alternate employment.

[156] Section 189(2)(c) of the Labour Relations Act 66 of 1995.
[157] Section 189(3)(f) of the Labour Relations Act 66 of 1995.
[158] Section 41(2) of the Basic Conditions of Employment Act 75 of 1997.
[159] Levy E 'Is South African Labour Law on operational requirements dismissals unduly onerous for employees?' (2016) 37 *ILJ* 1552 1568.
[160] Levy E 'Is South African Labour Law on operational requirements dismissals unduly onerous for employees?' *(2016)* 37 *ILJ* 1552 1570.
[161] Section 41(4) of the Basic Conditions of employment Act 75 of 1997. Also see schedule 11 of the Code of Good Practice on Dismissals Based on Operational Requirements.
[162] Section 40 of the Basic Conditions of Employment Act 75 of 1997.
[163] Section 197(4) of the Labour Relations Act 66 of 1995.
[164] *McDonald & another v Shoprite Checkers* (2005) 26 ILJ 168 (CCMA) 174.
[165] *McDonald & another v Shoprite Checkers* (2005) 26 ILJ 168 (CCMA) 174.

http://etd.uwc.ac.za/

2.2.2.2.5 Representations

As far as representations is concerned, section 189 (5) and (6) of the LRA provides -

> '(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed dismissals.
>
> (6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
>
> (b) If any representation is made in writing the employer must respond in writing.'[166]

The LRA, requires the employer to allow the other party to make representations and to consider and respond to the other party. [167] This process should lay the foundation for the parties to engage meaningfully to avoid any dismissals and to address the employers' operational needs. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others,*[168] the LC held that

> 'the primary obligation of a retrenching employer is to initiate the consultation process when it contemplates dismissal for operational reasons. It must disclose relevant information to the other consulting party and allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting. And that the employer must consider these representations and, if it does not agree with them, it must give reasons to that effect.'[169]

The provisions contained in the LRA relating to representations protect employees since it places obligations on employers to respond to representations made by the employee parties and to provide reasons in circumstances where the employer disagrees with proposals that are made by the employee parties. These obligations aim to ensure that the employer takes the representations made by the employee parties seriously.

---

[166] Section 189 (5) and (6) of the Labour Relations Act 66 of 1995.
[167] Section 189(5) and (6) Labour Relations Act 66 of 1995.
[168] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others* (1999) 20 ILJ 89 (LAC).
[169] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others* (1999) 20 ILJ 89 (LAC) 27.

http://etd.uwc.ac.za/

2.2.2.3 Outplacement Support

Outplacement support is also an element of procedural fairness. The International Termination of Employment Convention 1982 provides that 'employers who are contemplating terminations based on the grounds of redundancy should ensure they have support mechanisms in place to mitigate the adverse effects of any terminations on the affected employees.' [170] South Africa ratified this Convention and does require from its employers to provide outplace services to the affected employees.[171]

Outplacement assistance is required to support affected employees, by providing practical tools, specialist insights and psychological support to redirect them with the job market.[172] Affected employees are protected by these services since this program assists employees in overcoming any feelings of rejection and hopelessness. It also provides the employees with the confidence to obtain a suitable position at a different place of employment.[173]

2.3 LARGE-SCALE RETRENCHMENTS

Separate rules have been promulgated to be applied to large-scale retrenchments with the introduction of section 189A. As far as large-scale retrenchments are concerned, the LRA makes provision for dismissals based on operational requirements by employers with more than 50 employees if-

(1) (a) the employer contemplates dismissing by reason of the employer's *operational requirements*, at least -

(i) 10 *employees*, if the employer employs up to 200 *employees*;

(ii) 20 *employees*, if the employer employs more than 200, but not more than 300, *employees*;

(iii) 30 *employees*, if the employer employs more than 300, but not more than 400, *employees*;

(iv) 40 *employees*, if the employer employs more than 400, but not more than 500, *employees*; or

[170] C158 Termination of Employment Convention 1982, article 13 (1) (b).
[171] Section 189(2)(a)(iv) of the Labour Relations Act 66 of 1995.
[172] Gordhan H 'Is South Africa lagging behind in supportive retrenchment polices?' available at *Is South Africa lagging behind in supportive retrenchment policies? - HR Pulse* (accessed 24 August 2021).
[173] Agodi E 'Why leaders should provide support during retrenchments' available at *Why leaders should provide support during retrenchments - CHRO South Africa* (accessed 24 August 2021).

http://etd.uwc.ac.za/

(v) 50 *employees*, if the employer employs more than 500 *employees*; or

(b) the number of *employees* that the employer contemplates dismissing together with the number of *employees* that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).'[174]

With large-scale retrenchments the employees may strike to dissuade the employer from retrenching the employees and either the employer or the employees may compel the other party to submit to facilitation by the CCMA.[175] With large-scale retrenchments, the employer is requested by the LRA to provide employees with notice of termination of employment.[176] Furthermore, employees may take part in a strike and employers on the other hand may lock out employees.[177] The time periods for facilitation or consultation may be adjusted if agreed upon by consulting parties[178] and if such extension is required to guarantee a significant consultation, irrationally decline by a consulting party is not permissible.[179] The commission must assign a facilitator if asked for by the employer,[180] or if asked for by the consulting parties.[181]

With large-scale retrenchments, a facilitator must be appointed by the commission within 15 days of the notice.[182] After a facilitator is appointed and the facilitation has failed, the employer may after 60 days have lapsed from the date on which notice was given in terms of section 189(3), give notices to terminate the contracts of employment.'[183] 'If a facilitator is not appointed a party may not refer a dispute to a council or commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3).'[184] The LRA also provides for a registered

[174] Section 189A (1) of the Labour Relations Act 66 of 1995.
[175] Section 189A (2)(3) of the Labour Relations Act 66 of 1995.
[176] Section 189A(2)(a) of the Labour Relations Act 66 of 1995.
[177] Section 189A(2)(b) of the Labour Relations Act 66 of 1995.
[178] Section 189A(2)(c) of the Labour Relations Act 66 of 1995.
[179] Section 189A(2)(d) of the Labour Relations Act 66 of 1995.
[180] Section 189(3) of the Labour Relations Act 66 of 1995.
[181] Section 189A(3)(a)(b) of the Labour Relations Act 66 of 1995.
[182] Section 189A (3) of the Labour Relations Act 66 of 1995.
[183] Section 189A (7)(a) of the Labour Relations Act 66 of 1995.
[184] Section 189A (8)(a) of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

trade union or the employees who have received notices of termination to either give notice of a strike[185] or refer a dispute to the Labour Court.[186]

The main difference between large-scale and small-scale retrenchment is that with large-scale retrenchments as opposed to small-scale retrenchments, the LRA makes provision for the appointment of a facilitator by the commission. The time period within which the employee's services who are likely to be affected may be terminated is an additional difference between a large-scale and small-scale retrenchment. With small-scale retrenchments, the employer may provide the selected employees with termination notices as soon as possible after the consultation process has been completed. On the other hand, with large-scale retrenchments, the employer must keep in mind that after service of the 189(3) notice, a 60-day period must lapse before the employer can provide selected employees with termination notices. A final difference is that employees who form part of small-scale dismissals are not provided with the same protection as those in large-scale dismissals since small-scale employees may not strike to dissuade the employer to retrench, which is allowed with large-scale retrenchments.[187]

2.4 RELIEF AND REMEDIES

UNIVERSITY of the
WESTERN CAPE

With large-scale retrenchments, the LRA provides for a period of consultation of 30 days before a dispute over retrenchment may be referred for conciliation, followed by a maximum period of conciliation of 30 days. Where a process of facilitation is adopted, a statutory 60-day period for consultation (or longer if rationally justified) is required.[188]

Section 41(6) of the BCEA provides that any dispute with regard to an entitlement to the statutory severance pay may be referred to a bargaining council (BC) if there is one in the industry or otherwise to the CCMA.[189] The employee must prove that all parties to the dispute have been served.[190] Such a dispute must be resolved through

[185] Section 189A (7)(b)(i) of the Labour Relations Act 66 of 1995.
[186] Section 189A (7)(b(ii) of the Labour Relations Act 66 of 1995.
[187] Section 27 of the Constitution of the Republic of South Africa, 1996.
[188] Section 189A(7) and (8) of the Labour Relations Act 66 of 1995.
[189] Section 41(6) of the Basic Conditions of Employment Act 75 of 1997.
[190] Section 41(7) of the Basic Conditions of Employment Act 75 of 1997.

http://etd.uwc.ac.za/

conciliation.[191] Unresolved disputes may be referred to arbitration.[192] The LC adjudicating a disagreement may verify the amount of severance pay which the dismissed employee is eligible to.[193]

The LRA provides, with both large-scale and small-scale retrenchments, that if the LC or an arbitrator uncovers that a dismissal is unfair, the employer may be directed by the LC or the arbitrator to reinstate the employee.[194] Reinstatement occurs from the date of dismissal and not a day earlier.[195] Furthermore, the employer can be directed to re-employ the employee in the same position prior to the employee's dismissal or in other credibly appropriate position. Re-employment may occur on any terms and from the date of dismissal and not a day earlier.[196] The employer may also be directed to pay compensation to the employee.[197]

With large-scale and small-scale retrenchments, where the employee successfully proves that the dismissal based on operational requirements was unfair, the LC must require the employer to reinstatement or re-employ the employee[198] unless either one of four situations exist: 'the employee does not wish to be reinstated or re-employed;'[199] or 'the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;'[200] or 'it is not reasonably practicable for the employer to reinstate or re-employ the employee;'[201] or 'the dismissal is unfair only because the employer did not follow a fair procedure.'[202]

UNIVERSITY of the WESTERN CAPE

[191] Section 41(8) of the Basic Conditions of Employment Act 75 of 1997.
[192] Section 41(9) of the Basic Conditions of Employment Act 75 of 1997.
[193] Section 41(10) of the Basic Conditions of Employment Act 75 of 1997.
[194] Section 193(1)(a) of the Labour Relations Act 66 of 1995.
[195] Section 193(1)(a) of the Labour Relations Act 66 of 1995.
[196] Section 193(1)(b) of the Labour Relations Act 66 of 1995.
[197] Section 193(1)(c) of the Labour Relations Act 66 of 1995.
[198] Section 193(2) of the Labour Relations Act 66 of 1995.
[199] Section 193(2)(a) of the Labour Relations Act 66 of 199.
[200] Section 193(2)(b) of the Labour Relations Act 66 of 1995.
[201] Section 193(2)(c) of the Labour Relations Act 66 of 1995.
[202] Section 193(2)(d) of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

2.5 THE EMPLOYER'S ELECTION TO DISMISS AN EMPLOYEE ON THE GROUND OF OPERATIONAL REQUIREMENTS AS OPPOSED TO ON THE GROUND OF MISCONDUCT OR INCAPACITY

Research shows that despite the provisions contained in the LRA, some employers use operational reasons to get rid of employees who should have been dismissed on other grounds.[203] This chapter aims to determine how it is possible that employees are dismissed based on operational requirements when this is not the real reason for the dismissal.

Retrenchments must be validated and should come 'as a measure of last resort'.[204] In circumstances where the real cause for the dismissal is misconduct or incapacity, employers should not be allowed to use the ground of operational requirements to dismiss the employee.[205] In the matter of *Wolfaardt v IDC,*[206] Landman J held that

> '…the employer must not use the restructuring as an exercise to dismiss employees on a no-fault basis where the employer cannot dismiss them by reason of misconduct or incapacity. This does not apply only where the employer uses restructuring as a sham or stratagem but also where the employer cannot show that the non-employment is fair, e.g. where the employees are not afforded an opportunity to deal with perceptions of their incapacity.'[207]

UNIVERSITY of the
WESTERN CAPE

The employer is required to prove that the dismissal provided in fact existed and that it was the real reason for the dismissal and not a disguise for another reason for dismissal of the employees.[208] In *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*,[209] the employer retrenched employees, because the employer was unable to prove that the employees in question participated in violent acts against

[203] *Num v DB Contracting North CC* (2013) 34 ILJ 971 (LC) 11; *Decision Surveys International (Pty) Ltd v Dlamini and Others* (1999) 5 BLLR 413 (LAC) 27.
[204] *Gumede v Richdens (Pty Ltd t/a Richdens Foodliner* (1984) 5 ILJ 84 (IC) 93 where it was stated that 'employers have often retrenched workers in order to get rid of them in this way rather than to follow the inconvenient procedures of conducting disciplinary hearings for alleged misconducts.'
[205] Manamela T 'When the lines are blurred- a case of misconduct, incapacity or operational requirements: are all going operational?' (2019) 40 1 *Orbiter* 103.
[206] *Wolfaardt v IDC* Case number J869/00 handed down on 01 August 2002 (LC).
[207] *Wolfaardt v IDC* Case number J869/00 handed down on 01 August 2002 (LC) 25.
[208] Basson et al *Essential Labour Law* 4 ed (2005) 151.
[209] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC).

http://etd.uwc.ac.za/

non-strikers.[210] While the LC accepted that employers are allowed to retrench, because of misconduct, this is only allowed when it is impossible to hold disciplinary hearings and when the dismissal serves as an operational requirement.[211] However, where misconduct is the real reason, the retrenchment process cannot be resorted to.[212] The LC held that the dismissals were unfair, because neither of the aforementioned two requirements were met.[213] In addition the LC held that

> 'any contention that such a disguise was to benefit the employees should be rejected out-rightly that an employer cannot dismiss employees for operational requirements simply because of the difficulties involved in proving misconduct, or as in this case, proving poor work performance. It can further not be correct for employers to disguise the real reason for a dismissal as there are consequences that flow from that dismissal.'[214]

The aforementioned case confirms that in certain cases where employers are unable to comply with the requirements that govern dismissals based on misconduct or incapacity that they choose to retrench the employees instead. The law relating to dismissals based on misconduct and incapacity is discussed below in order to compare how the law relating to the aforementioned forms of dismissals compares to the law governing those based on operational requirements.

UNIVERSITY of the
WESTERN CAPE

2.5.1 Dismissals for Misconduct

When an employer dismisses an employee due to misconduct, the employer must ensure that the dismissal is substantively and procedurally fair.[215] To determine the substantive fairness the employer should comply with the Code of Good Practice: Dismissals.[216] According to the Code of Good Practice: Dismissals (Dismissals Code)

> 'any person who is determining whether a dismissal for misconduct is unfair should consider —

[210] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) 23.
[211] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) 66.
[212] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) 66.
[213] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) 69.
[214] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) 50.
[215] Item 7(b)(iv) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[216] Item 7 of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not—

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal with an appropriate sanction for the contravention of the rule or standard'

In order for an employee to be dismissed for misconduct, the employer should prove on a balance of probabilities that the misconduct was committed by the employee.[217] In order to justify a dismissal, the employer is required to prove that a rule or standard existed (whether it was in writing, oral or obvious), that the rule was valid or reasonable and that the rule or standard was consistently applied.[218] The employer is also required to prove that the employee concerned was aware of the rule, however it is enough for the employer to prove that the employee ought to have had knowledge that the conduct in question was prohibited.[219] In addition, the employer should prove that dismissal was appropriate under the circumstances.[220] The Dismissals Code also provides that other than the severity of the offence, other factors should also be taken into consideration in order to determine whether a dismissal is appropriate under the circumstances such as: the personal circumstances of the employee which include the length of service, previous disciplinary record and other personal circumstances.[221] It is also important to consider the nature of the job and the circumstances under which the misconduct occurred.[222]

In the event of a dismissal for misconduct the dismissal of an employee should not only be substantively fair, but also procedurally fair. To determine the procedurally fairness of the dismissal, the Dismissals Code is relevant.[223]

[217] Item 7(a) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[218] Item 7(b)(iii) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[219] Item 7(b)(ii) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[220] Item 7(b)(iv) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[221] Item 3(5) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[222] Item 3(5) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[223] Item 4 of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

As far as procedural fairness is concerned the Dismissals Code requires that a pre-hearing investigation be conducted.[224] The employee should be notified of the charges in a language which the employee understands, and the employer should provide the employee with notice of the charges for the purposes of enabling the employee to prepare for the hearing.[225] The employer is also required to ensure that the hearing takes place without unreasonable delays and that the employee be allowed to call and cross-examine witnesses.[226] While the employee is entitled to representation, this does not always entitle the employee to legal representation.[227] There is also a requirement that minutes should be kept of the proceedings and that the presiding officer's decision should first be made with regard to the employee in question's guilt and thereafter on the appropriate sanction to impose.[228] In the matter between *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River),*[229] the LC held 'that an employer cannot dismiss employees for operational requirements simply because of the difficulties involved in proving misconduct.'[230]

The discussion above illustrates that with dismissals based on misconduct, the employer is required to comply with more requirements than what is expected from employers in the case of dismissals based on operational requirements. The first requirement which is onerous is that the employer is required to conduct an investigation to determine whether there are grounds for the dismissal by the employer. The second onerous obligation which is placed on employers prior to dismissing an employee for misconduct is that a hearing should be held where both parties should be allowed to state their respective cases. The aforementioned obligations are more onerous than what is required in the case of dismissals based on operational requirements, because in retrenchments even though an employer is required to consult with the employee parties and required to provide prescribed information to the employee parties these requirements are easy to comply with than those which should be complied with to dismiss employees based on misconduct. In

[224] Item 4(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 6 of 1995.
[225] Item 4(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 6 of 1995.
[226] Item 4(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[227] Schedule 8 of the Labour Relations Act 66 of 1995 does not make provision for legal representation at internal disciplinary hearings.
[228] Grogan J *Dismissal* 2 ed (2014) 294.
[229] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River)* (2010) 9 BLLR 903 (LC).
[230] *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River)* (2010) 9 BLLR 903 (LC) 66.

http://etd.uwc.ac.za/

addition, with dismissals based on misconduct the decision to dismiss is made by a presiding officer, while with dismissals based on operational requirements the ultimate decision to dismiss lies with the employer.

2.5.2 Dismissals for Incapacity

There are two instances where employers are allowed to dismiss employees for dismissal based on incapacity. First for poor work performance and secondly in circumstances of ill-health or injury. The law governing dismissals for poor work performance and ill-health or injury is discussed below.

2.5.2.1 Poor work performance

Before an employer dismiss an employee for poor work performance, the employer should first consider the provisions contained in the Dismissals Code.[231] The Dismissals Code provides that to determine whether a dismissal for poor work performance is unfair the relevant person should consider 'whether or not the employee failed to meet a performance standard.'[232] In circumstances where the employee in question failed to meet the required performance standard such a person should consider whether or not 'the employee was aware, or could reasonably be expected to have been aware, of the required performance standard';[233] 'the employee was given a fair opportunity to meet the required performance standard';[234] 'and whether dismissal was an appropriate sanction to impose for the employee's failure to meet the required performance standard'.[235]

In order to established the cause for the poor work performance, the employer is compelled to investigate.[236] As soon as the cause for the poor work performance is established the employer is required to outline the measures to be adopted to enable

[231] *IEA obo Birc v RGC Engineering Sales Division (Pty)* (2008) 7 BALR 677 (CCMA) Ltd where the Commissioner found the dismissal substantively and procedurally unfair since the employer was ignorant of the requirements of the Code of Good Practice: Dismissal.
[232] Item 9(a) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[233] Item 9(b)(i) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[234] Item 9(b)(ii) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[235] Item 9(b)(iii) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[236] Grogan J *Dismissal* 2 ed (2014) 381.

http://etd.uwc.ac.za/

the employee to achieve his or her targets or the standards that the employer has laid down.[237] The employer should do what is required of him/her to assist the employee and provide the employee with reasonable time to improve.[238]

2.5.2.2 Ill-health

According to the Dismissals Code: 'Any person determining whether a dismissal arising from ill health or injury is unfair should consider—

(a) whether or not the employee is capable of performing the work; and
(b) if the employee is not capable –
    (i) the extent to which the employee is able to perform the work;
    (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
    (iii) the availability of any suitable alternative work.'[239]

There are a number of factors that should be taken into consideration before a decision is made to dismiss an employee as a result of ill-health or injury, such as the nature of incapacity, the seriousness of the incapacity, the cause of incapacity, the likelihood of recovery and improvement and the extent to which the employee's duties might be adapted.[240] It is important for the employer to consider the period of absence and its effect on the employer's operations and other employees.[241] An additional factor that should be taken in consideration is the employees work record and the length of services.[242] If the employee was injured at work, then specific thought should be given to the employee since the employer has a responsibility to assist the incapacitated employee.[243]

UNIVERSITY of the WESTERN CAPE

[237] Grogan J *Dismissal* 2 ed (2014) 382.
[238] *Mohamed v Nampak Management Services (*2004) 1 BALR 919 (CCMA). Also see Grogan J *Dismissal* 2 ed (2014) 380.
[239] Item 11 of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[240] Item 10(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[241] Item 10(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[242] Grogan J *Dismissal* 2 ed (2014) 400. Also *See NUMSA obo Appel v Golden Arrow Bus Services (Pty) Ltd* (2007) JOL 20171 (DRC) 3.
[243] Item 10(4) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

As far as procedural fairness is concerned the employer is required to investigate the degree to which the employee is unable to do his/her job.[244] The employer may also consider the possibility of securing an interim replacement for the ill or injured employee.[245] With the investigation 'the employee should be given the opportunity to state his or her case in response and be assisted by a trade union representative or follow employee.'[246]

A dismissal can only be permissible in instances where the employee's duties cannot be adjusted so that the employee is capable of fulfilling those duties and where no other position is available.[247] A lower position, with a lower salary may be offered to the employee and should the employer accept this lower position, then the lower salary will apply.[248]

It is evident from the aforementioned discussion that more requirements should be complied with by an employer who is required to dismiss an employee based on incapacity than what is required from an employer in the case of a dismissal based on operational requirements. As far as incapacity is concerned the employer must first investigate whether the incapacity or injury is temporary or permanent and also where the injury or ill-health is temporary, the employer should investigate the extent of the injury or ill-health. The employer should also determine which possible alternatives exist short of dismissal in circumstances where the employee's absence from work could be for a period that is unreasonably long. The employer is also required to determine how he/she can accommodate the incapacitated employee and if the duties of the employee can be adjusted.

The above research shows that it is easier to dismiss employees based on operational requirements than to dismiss an employee on the grounds of misconduct or incapacity since the procedure that should be followed by employers in the case of dismissals based on misconduct and incapacity could cost the business considerable effort, time

[244] Item 10(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[245] Item 10(1) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[246] Item 10(2) of the Code of Good Practice: Dismissal of the Labour Relations Act 66 of 1995.
[247] *NUMSA obo Appel v Golden Arrow Bus Services (Pty) Ltd* (2007) JOL 20171 (DRC). Also see Grogan J *Dismissal* 2 ed (2014) 402.
[248] Grogan J *Dismissal* 2 ed (2014) 401.

http://etd.uwc.ac.za/

and money. However in the case of dismissals based on operational requirements, the employer is only required to prove that other possibilities were explored prior to the decision to retrench and that the employer followed a fair procedure (provided the employee parties with a retrenchment notice, consulted with the relevant parties on the required subject matter, allowed the employee parties to make representations what is, as well as to provide outplacement support service).[249] The requirements which an employer should comply with in the case of dismissals based on operational requirements are easier to comply with than what is in the case of dismissals based on misconduct and incapacity and in addition, the final decision to dismiss an employee in the case of retrenchments rests with the employer.

The LAC held in the matter between *SA Mutual Life Assurance v IBSA,*[250] that

> 'where the evidence showed that the employer was actually dissatisfied with performance of certain members of the department and chose not to initiate proper disciplinary inquiries but rather to restructure as a means of dismissing those employees with whom it was dissatisfied, does not constitute an operational requirement under section 213. The employer also did not show that their jobs were redundant.'[251]

If the employer can prove that the misconduct of the employee affected the economic feasibility of the business or it prevents the employer from making profit because of the losses suffered, the employer can dismiss the employee on grounds of operational requirements.[252] The misconduct itself cannot account for an economic reason for dismissal but when the misconduct affects the economic feasibility of the business, it can account for a valid reason to dismiss for operational requirements.[253] Therefore, all the facts and circumstances with regards to the matter should be thoughtfully judged by both the employer and the courts to guarantee that the retrenchment is rationally justifiable.[254]

[249] Section 189 and 189A of the Labour Relations Act 66 of 1995.
[250] *SA Mutual Life Assurance v IBSA* (2001) 9 BLLR 1045 (LAC).
[251] *SA Mutual Life Assurance v IBSA* (2001) 9 BLLR 1045 (LAC) 16-17.
[252] Manamela T 'When the lines are blurred- a case of misconduct, incapacity or operational requirements: are all going operational?' (2019) 40 1 *Orbiter* 105.
[253] Manamela T 'When the lines are blurred- a case of misconduct, incapacity or operational requirements: are all going operational?' (2019) 40 1 *Orbiter* 105.
[254] Manamela T 'When the lines are blurred- a case of misconduct, incapacity or operational requirements: are all going operational?' (2019) 40 1 *Orbiter* 116.

http://etd.uwc.ac.za/

2.6 CONCLUSION

The first objective of this chapter was to determine the extent to which the law governing dismissals based on operational requirements protects employees. The LRA requires that a dismissal based on operational requirements should be both substantively and procedurally fair.[255] As far as substantive fairness is concerned it may be important to insert a provision in the LRA which requires courts to examine the content of the reason provided by the employer for dismissing the employee based on operational requirements.

The obligation to consult does protect employees however, research has shown that there are still employers who do not enter into a joint consensus-seeking process prior to the decision to dismiss employees based on operational requirements.

The LRA places an obligation on an employer to provide a written notice to the employee parties, disclosing all relevant information.[256] This provision in the LRA protects employees because this allows the employee parties to receive all relevant information that they are entitled to in advance to enable employee parties to prepare for the consultation. The employee parties are also entitled to an opportunity to make representations and the employer is required to respond to such representations. This provides protection to employees because by the employer being required to respond to the representations the process is more transparent.[257] The LRA prescribes the parties with whom the employer should consult where retrenchments are likely to take place.[258] The fact that the LRA makes provision for all the relevant parties with whom the employers should consult, provides further protection to employees.

The consultation process must be a joint consensus-seeking process in order to determine how to avoid the dismissals, to minimise the number of dismissals, or to change the timing of the dismissals, and to mitigate the adverse effects of the

[255] See para 2.1 above.
[256] See para 2.2.2.1 above.
[257] Section 189(5) of the Labour Relations Act 66 of 1995.
[258] See para 2.2.2.2.1 above.

http://etd.uwc.ac.za/

dismissals can be determined.[259] The fact that the LRA sets out the specific topics that should form the subject matter of the consultation provides additional protection to employees.

Another vital part of the process is selection and the relevant selection criteria to be applied.[260] Should the consulting parties fail to reach consensus with regard to the selection criteria for choosing those employees whose employment is to be terminated due to the employer's operational requirements, the employer is required to apply a selection criterion that is objective and fair.[261] The LRA protects the employees since it provides that there must first be an attempt to reach consensus on the selection criteria to apply and if no consensus can be reached that a fair and objective criteria should be used.[262]

Selected employees are entitled to severance pay of at least one week's remuneration for each completed year of continued service with the employer.[263] Although the rate of statutory severance pay is comparatively low in South Africa, it is a means of income for retrenched employees, while they are seeking alternative employment.

There are a few differences between small-scale and large-scale retrenchments. The first difference is that in comparison to small-scale retrenchments with large-scale retrenchments a facilitator may be appointed by the commission. Secondly with large-scale retrenchments employees may strike to dissuade the employer from retrenching the employees which is not the case with small-scale retrenchments. This shows that employees subjected to small-scale dismissals are not given the same protection as those in large-scale dismissals since employees engaged in small-scale retrenchments may not strike, which is allowed with large-scale retrenchments. By providing enforcement provisions and remedies to employees who are dismissed, the LRA ensure that employees are protected even further.

[259] Peer Y 'Small scale retrenchments – What obligations do employers have? A South African perspective' available at *https://www.globalworkplaceinsider.com/2015/02/small-scale-retrenchments-what-obligations-do-employers-have-a-south-african-perspective/* (accessed 23 February 2021).
[260] Ruben N *Code of International Labour Law: Law, Practice and Jurisprudence* (2005) 1 (2) 536.
[261] *Bemawu on behalf of Mohapi & Another v Clear Channel Independent (Pty) Ltd* (2010) 31 ILJ 2863 (LC) 34.
[262] See para 2.2.2.2.3 above.
[263] See para 2.2.2.2.4 above.

http://etd.uwc.ac.za/

The second objective of this chapter is to determine how is it possible that employers are dismissing employees based on operational requirements when this is not the real reason for the dismissal. The above research shows that there are still employers who, despite the provisions contained in the LRA,[264] use operational reasons to dismiss employees who should have been dismissed on other grounds.

Research shows that where employers are unable to dismiss an employee based on misconduct or incapacity that it's easier to dismiss their employees based on operational requirements. With dismissals based on misconduct, the employer is required to comply with more requirements than with a dismissal based on operational requirements, such as conducting of an investigation, notifying the employee of the allegations, conducting a hearing where the employee should be provided with an opportunity to state his/her case. In addition to the aforementioned procedural aspects which should be followed, the employer is also required to meet the substantive requirements set out in the Dismissals Code. These include but are not limited to proving that the employee contravened a rule or standard, that the employee was aware or could reasonably have been expected to be aware of the rule or standard and that the dismissal was appropriate under the circumstances. In the case of dismissals for poor work performance the employer is required to prove that the employee actually failed to meet the performance standard despite the training, guidance and counseling that was provided to the employee. With dismissals based on incapacity the employer is first required to determine if the incapacity or injury is temporary or permanent and the extent of the incapacity or injury to determine whether the period of absence from work will be long. The employer is also required to determine in which manner the incapacitated employee should be accommodated in the place of work. The above processes can be time consuming and place a high level of strain on the employer.

It can thus be concluded that the reasons for employers electing to dismiss employees based on operational requirements as opposed to misconduct or incapacity are because the procedures to follow in dismissing employees for misconduct or incapacity

[264] Sections 189 and 189A of the Labour Relations Act.

http://etd.uwc.ac.za/

are more onerous and time-consuming than is the case with dismissals based on operational requirements.

Chapter 3 consists of a discussion and an analysis of the law governing dismissals based on operational requirements in New Zealand to determine the extent to which employees in New Zealand are protected in comparison to South Africa and whether the laws in South Africa governing dismissals based on operational requirements should be amended and/or supplemented to provide additional protection to employees.

http://etd.uwc.ac.za/

CHAPTER 3

NEW ZEALAND'S LEGISLATIVE FRAMEWORK GOVERNING DISMISSALS BASED ON OPERATIONAL REQUIREMENTS

3.1 INTRODUCTION

Chapter 2 revealed that the law governing dismissals based on operational requirements does provide protection to employees. The employer is required by the LRA to ensure that a dismissal based on operational requirements is both substantively and procedurally fair. The LRA provides that a joint consensus-seeking consultation process should be conducted, with parties as prescribed by the LRA. In addition, the LRA provides that the employer is required to provide a written notice to the employee parties which should set out prescribed information. The LRA also provides that the parties are required to attempt to agree on the criterion to be used for selection failing which, a fair and objective criteria should be used and outlines the severance pay that should be paid to selected employees.

Chapter 2 also shows that employers dismiss employees based on operational requirements when this is not the real reason for the dismissal. Employers are required to comply with more onerous requirements when dismissing employees based on misconduct and incapacity than on the ground of operational requirements. It may be valuable to insert a provision in the LRA that courts should examine the content of the reasons provided by the employer for dismissing the employees for operational reasons. With dismissals based on operational requirements, the employer is required to prove that the reason for the dismissal provided in fact exists and that it is the real reason for the dismissal.

The purpose of this chapter is to analyse the legislation governing dismissals based on operational requirements in New Zealand. New Zealand is a founding member of the ILO and is expected to adhere to and give effect to Conventions 87[265] and 98[266]

[265] The Freedom of Association and Protection of the Right to Organise Convention (1948) 87 is an International Labour Organization Convention, and one of eight conventions that form the core of international labour law, as interpreted by the Declaration on Fundamental Principles and Rights at Work.
[266] The Right to Organise and Collective Bargaining Convention (1949) 98 is an International Labour Organization Convention. It is one of eight ILO fundamental conventions. Its counterpart on the general principle of Freedom of Association and Protection of the Right to Organise Convention (1949) 87.

http://etd.uwc.ac.za/

and other ILO Conventions.[267] The ILO recognises operational requirements as a ground for dismissal[268] and also provides that the employment of a worker shall not be terminated unless there is a valid reason for such a termination, connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.[269]

In contrast to South Africa, New Zealand has no single constitutional document. [270] Yet, another improvement was identified in the governance of New Zealand's employment relations system, with the inauguration of the Employment Relations Act 2000 (ERA). The objective of the ERA[271] is 'to restore the extent of authority and accordingly equality and fairness to a more uniformly steady position, [272] by ensuring that the employment relationship was treated attentive rather than as a basic contractual economic exchange.'[273] The constitution of New Zealand is referred to as an uncodified constitution or unwritten constitution. It is defined as the sum of laws and principles that determined the political governance of New Zealand.[274] The first Act that formally gave legislative recognition to the importance of redundancy law is the Labour Relations Act 1987, (LRA of NZ).[275] Besides providing a definition of redundancy,[276] it approved strike action for disagreements relating to procurement of redundancy agreements.[277]

UNIVERSITY of the
WESTERN CAPE

In New Zealand "redundancy" is defined, as

> 'a situation where a worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer.'[278]

---

[267] Hayward K 'Ho do New Zealand Labour Standards Comply with The International Labour Organisation's Conventions and Recommendations: Implemented after 1980 and the Introduction of Neo-Liberalism' (2013) 21 *WLR* 158.
[268] Termination of Employment Convention 158, 1982.
[269] Termination of Employment Convention 158, 1982; ILO Termination of Employment Recommendation, 166, 1982.
[270] McDowell M et al *The New Zealand Legal System* 3 ed (2002) 101.
[271] Employment Relations Act 2000.
[272] See the Employment Relations Bill 2000 No 8-1 Explanatory Note 1,1.
[273] See the Employment Relations Bill 2000 No 8-1 Explanatory Note 1,1.
[274] Eichbaum C et al *Public Policy in New Zealand - Institutions, processes and outcomes* (2005) 32.
[275]Szakats A & Mulgan M *Dismissal and Redundancy Procedures* 2 ed (1990) 227.
[276] Section 184 of the Labour Relations Act of 1987.
[277] Hughes J *Labour Law In New Zealand* (1990) 6851-6853.
[278] Section 184(5)(a)(1) of the Labour Relations Act 1987.

http://etd.uwc.ac.za/

When the employer decides to make a position redundant, the decision should have nothing to do with the employee who is occupying that position, since it is the position itself that is made redundant.[279] Redundancy is an exceptional state of affairs, it is a "no-fault" dismissal since those affected have committed no wrong,[280] yet the consequences of redundancy on the employment relationship are severe. In accord with the no fault concept of redundancy, notably, the definition evidently reflects that it is the need for the position that is disappearing rather than the need for the employee in person.[281]

In the matter between *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW*,[282] the Court of Appeal (CA) stated that

> 'Redundancy is a difficult area of labour law as it is of industrial relations. It raises consideration of economic efficiency, individual autonomy and social justice. The employees affected have done no wrong. They are to be regarded as competent and loyal. As we have come to see in recent years, redundancy may have a devastating and lasting social and economic impact on them and their families. But the employer is also in a difficult situation. In the circumstances that the employer faces the employees are considered to be surplus to the requirements of the business. That may be due to a decrease in business activity, perceived advantages of greater mechanization and technological change, deployment of capital resources in different ways, or reorganization of business operations with a view to enhancing profitability or reducing losses either generally or in selected areas.'[283]

This chapter contains a discussion on substantive fairness, procedural fairness and the relief and remedies that are available to employees. This chapter compares the laws governing operational requirements in South Africa to that in New Zealand. This will be done in order to determine whether South Africa can learn from the legislative framework in New Zealand in order to ascertain whether the South African legislative provisions should be amended and/or supplemented.

[279] Raman A 'Redundancy in New Zealand: Procedural Fairness and Remedies' available at *https://www.nzinitiative.org.nz/reports-and-media/reports/power-in-employment-relationships/document/58* (access 12 April 2021).
[280] *Aoraki Corporation Limited v McGavin* (1998) 1 ERNZ 601 25.
[281] Szakats A & Mulgan M *Dismissal and Redundancy Procedures* 2 ed (1990) 193 & 212.
[282] *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* (1991) 1 NZLR 151 (CA).
[283] *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* (1991) 1 NZLR 151 (CA) 157.

http://etd.uwc.ac.za/

3.2 DISMISSAL BASED ON OPERATIONAL REQUIREMENTS: SUBSTANTIVE AND PROCEDURAL FAIRNESS

Redundancy is not an uncommon term in New Zealand's employment relations environment.[284] It is tantamount to restructuring, organisational reviews, downsizing, delaying, right-sizing, re-engineering, retrenchment and redesigning,[285] which explains the course the business is initiating in order to attain an objective.[286] These objectives can be determined by either market constraints, such as a deterioration in production, or alternatively by decisions made by management, such as the imbedding of new technology.[287] The ERA provides substantive justification (actual decision of the employer to make an employee's position redundant) [288] and procedural justifications (the statutory procedures that an employer should comply with)[289] that should be complied with before an employer contemplates dismissing employees based on redundancy. Substantive fairness will be discussed first, which is followed by the law governing procedural fairness.

3.2.1 Substantive Fairness

The prerogative of the employer to make positions redundant, is accepted by the common law however the decision to do so must be legitimate and carried out in just and admissible manner.[290] In *The New Zealand Nurses Union v Air New Zealand,*[291] Colgan J noted that 'by definition a redundancy situation is a subjective assessment as it turns on the "needs of the employer".'[292] Thus, in order to determine if a redundancy situation has in fact took place, it must be proved that the employer has terminated the employees' employment,[293] due to a decrease in business activity, perceived advantages of greater mechanisation and technological change, deployment of capital resources in different ways, or reorganization of business

[284] Mackey K 'Organisational Downsizing and Redundancies: The New Zealand Workers' Experience' (2004) 29 1 *NZJERS* 63.
[285] Mackey K 'Organisational Downsizing and Redundancies: The New Zealand Workers' Experience' (2004) 29 1 *NZJER* 63.
[286] Szakats A & Mulgan M *Dismissal and Redundancy Procedures* 2 ed (1990) 193.
[287] Szakats A & Mulgan M *Dismissal and Redundancy Procedures* 2 ed (1990) 193.
[288] Section 103A of the Employment Relations Act 2000.
[289] Section 4 of the Employment Relations Act 2000.
[290] *G N Hale and Son Ltd v Wellington Caretakers etc IUW* (1991) 1 NZLR 151 156.
[291] (199) 3 ERNZ 548.
[292] *The New Zealand Nurses Union v Air New Zealand* (199) 3 ERNZ 548 567.
[293] *Wood v Christchurch Golf Club Incorporated* (2000) 1 ERNZ 756 6.

http://etd.uwc.ac.za/

operations with a view to enhancing profitability. Since 'redundancy is a misfortune not a privilege', the employees have no right to desire to be made redundant.[294]

Research has shown that the New Zealand judiciary has always been in favour of the concept of employer power, especially in redundancy cases.[295] To determine the real legitimacy of redundancy and the assurance that the dismissal is substantially justified, the court has emphasised this managerial right and primarily refused to dispute an organisation's decision. Richardson J held that[296]

> '… the right of the employer to manage its business, which is specifically recognised in many awards and agreements is not made subject and should not be construed as being subject to the further fetter that it is exercisable only in those redundancy situations where the business has to close its doors, or its economic survival compels it to dismiss those workers. If for genuine commercial reasons the employer concludes that a worker is surplus to its needs, it is not for the courts or the unions or workers to substitute their business judgment for the employers.'[297]

In the matter between *GN Hale & Son Ltd v Wellington Caretakers etc IWU,*[298] all five members of the court emphasised the right of employers to manage their business[299] and were united in ruling that a worker does not have a right to constant employment if the employer can prove that the business is more effective without him.[300] Furthermore, the court supports the power of the managerial prerogative as far as substantive justification of termination for redundancy is concerned.[301] Richardson J stated that 'if there is a genuine reason for redundancy, it is not the judiciary's role to "substitute their business judgment for the employer's".'[302] Cooke P stated that

[294] *NZPSA v Land Corporation* (1991) 1 ERNZ 741 759.
[295] This is clearly evidenced in the case of *G N Hale & Son Limited v Wellington, etc, Caretakers, etc,* IUW 27(1) (1991) 1 NZLR 151.
[296] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151.
[297] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151 156.
[298] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151.
[299] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151 156.
[300] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151 155.
[301] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151 156.
[302] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151.

http://etd.uwc.ac.za/

> '…. this court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall.'[303]

In *Northern Distribution Union v BP Oil New Zealand Ltd*,[304] the court held that 'in the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances'.[305] In *Air New Zealand v V,* Couch J held that 'in cases of dismissal, it requires the court to objectively review all the actions of an employer up to and including the decisions to dismiss'.[306] Therefore, to ensure that the information depended on for making decisions is accurate, and that redundancy is what a fair and reasonable employer would do in all circumstances, employers will need to apply extra vigilance in composing business explanation for restructuring proposals.[307] 'A fair and reasonable employer in all circumstances will meticulously examine, contemplate and espouse any alternatives to redundancy, if any.'[308] In the matter between *Brake v Grace Team Accounting Ltd*,[309] it was held that

> '…the characteristics of the defendant, its actions and how it acted, I find they were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. For all these reasons I find that the defendant has failed to discharge the burden of showing that the plaintiff's dismissal for redundancy was justified.'[310]

After challenging the Employment Court's (EC) decision at the CA, the CA ruled that

> 'the employer acted precipitously and did not exercise proper care in its evaluation of its business situation, and it made its decision about the employee's redundancy on a false premise. So it never turned its mind to what its proper business needs were but

[303] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* 27(1) (1991) 1 NZLR 151 155.
[304] *Northern Distribution Union v BP Oil New Zealand Ltd* (1992) 3 ERNZ 483 (CA).
[305] *Northern Distribution Union v BP Oil New Zealand Ltd* (1992) 3 ERNZ 483 (CA) 487.
[306] *Air New Zealand v V* (2009) ERNZ 185 37.
[307] Three60 Consult 'New Law for Redundancy Dismissals' available at *https://www.three60consult.co.nz/ourblog/law-redundancy-dismissals/* (accessed 15 April 2021).
[308] Three60 Consult 'New Law for Redundancy Dismissals' available at *https://www.three60consult.co.nz/ourblog/law-redundancy-dismissals/* (accessed 15 April 2021).
[309] *Brake v Grace Team Accounting Ltd* (2013) *NZEMPC* 81.
[310] *Brake v Grace Team Accounting Ltd* (2013) NZEMPC 81 65.

http://etd.uwc.ac.za/

> rather proceeded to evaluate its options based on incorrect information. We can see no error in the findings by the EC that a fair and reasonable employer would not do this.'[311]

The discussion above illustrates that there are inconsistencies in New Zealand when it comes to the extent to which courts scrutinise the substantive fairness of with dismissals based on redundancy. There are judges who are in favour of the managerial prerogative when it comes to dismissals based on redundancy, while on the other hand there are judges who review the decision of the employer objectively to ensure that it is what a fair and reasonable employer would do in all circumstances.

Dismissals based on redundancy have a devastating impact on the effected employees.[312] Employees have to cope with uncertainty and hardship when employers exercise their right to make positions redundant.[313] While the ERA emphasises a conceptual point of view of acknowledging and lecturing on the imbalance in power within the employment relationship for redundancy, this safety is mainly intended to be accomplished through mutual engagement.[314]

In South Africa, courts are required to determine whether a dismissal based on operational requirements is fair or unfair.[315] This is similarly the case in New Zealand. In South Africa, the courts have acknowledged that even if the reasons are examined it is not up to the courts to determine whether the decision given by the employer is correct, but merely whether it is fair. [316] In New Zealand courts advocate for the power of the managerial prerogative and seldom interfere with the decision of the employer to make positions redundant. The question to ask is whether the decision to dismiss is one which a fair and reasonable employer would have made. If one compares the position in New Zealand to that in South Africa, it may be concluded that in circumstances where the South African courts examine the content of the reasons

[311] *Grace Team Accounting Ltd v Brake* **(**2014**)** NZCA 541 94.
[312] *G N Hale & Son Limited v Wellington, etc, Caretakes, etc, IUW* (1991) 1 NZLR 151 157.
[313] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 38.
[314] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 38.
[315] See para 2.2.1 above.
[316] *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union* (2001) 22 ILJ 2264 (LAC) 19.

http://etd.uwc.ac.za/

given by the employer for dismissing employees based on operational requirements, more protection is provided to employees in South Africa than what is provided to employees in New Zealand. Procedural fairness is discussed below.

3.2.2 Procedural fairness

The ERA provides that parties to an employment relationship are required to deal with each other in good faith; and must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. [317]

The duty of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, 'responsive and communicative.'[318] The duty of good faith also 'requires an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment of one or more of his or her employees to provide the affected employees with access to information, relevant to the continuation of the employees' employment, about the decision and an opportunity to comment on the information to their employer before the decision is made.'[319] The duty of good faith therefore places an obligation on the employer to consult with the employees and to disclose relevant information.

UNIVERSITY of the
WESTERN CAPE

The duty of good faith also applies to instances of redundancy.[320] With procedural fairness, an obligation is placed on employers to comply with the values of natural justice.[321] The ERA compels employers to provide notice[322] and to engage in real and meaningful consultation.[323] The consultation should be genuine and thus more than an unadorned notification.[324] The employers are compelled by the ERA[325] to follow

[317] Section 4(1)(a)(b)(i)(ii) of the Employment Relations Act 2000.
[318] Section 4(1A)(b) of the Employment Relations Act 2000.
[319] Section 4 (1A)(c)(i)(ii) of Employment Relations Act 2000.
[320] Section 4(4)(e) of the Employment Relations Act 2000.
[321] Hughes J et al *Personal Grievances* 4.4.
[322] Section 4 (1A) of the Employment Relations Act 2000.
[323] Section 4 (1A) (c) of the Employment Relations Act 2000.
[324] *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited* (1993) 2 ERNZ 429 457.
[325] Employment Relations Act 2000.

http://etd.uwc.ac.za/

these procedures in order to ensure that all possible alternatives were considered before the decision to dismiss was made.[326]

The judiciary continually stated that, in determining the fairness of the procedural components of any redundancy process, the process should be viewed "in the round",[327] in other words "not every imperfection renders a dismissal unjustifiable".[328] To determine whether the procedure of a dismissal has been managed in an unjustifiable or justifiable manner, a fair perspective must be taken by the judiciary, by viewing the positive and negative aspects of the termination process.[329] The employer's efforts must not be observed with precise review.[330]

In the matter between *Lewis v Howick College Board of Trustees,*[331], the approach to procedural issues was reaffirmed.[332] There were circumstances where it was held by the judiciary, that the dismissal is still valid, when considered in total, even if there have been elements of a termination process that are not procedurally fair.[333] However, although the ruling of the CA was primarily directed at the issue of substantive justification, it was stated that a fair procedure in redundancy dismissals, must be followed. Fairness relies mainly on the contexts of the case.[334] The CA stated this ideal as follows[335]

> 'A reasonable employer cannot be expected to surrender the right to organise his own business. Fairness, however, may well require the employer to consult with the union and any workers whose dismissal is contemplated, before taking a final decision on how a planned cost-saving is to be implemented……This is a field where probably hard and fast rules cannot be evolved.'[336]

UNIVERSITY of the WESTERN CAPE

[326] Section 4 (1A) of the Employment Relations Act 2000.
[327] *Mastertrade Limited v Te Kooro* (1998) CC43/98 EC 15.
[328] *Mastertrade Limited v Te Kooro* (1998) CC43/98 EC 15.
[329] *Mastertrade Limited v Te Kooro* (1998) CC43/98 EC 18.
[330] *NZ Food Processing Union v Unilever New Zealand* (1990) 1 NZILR 35 46. However, in the recently legislative amendments to the test of justification it specifically state in s 103 A (5) that: "the Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defeats in process followed by the employer".
[331] *Lewis v Howick College Board of Trustees* (2010) NZEMPC 4.
[332] Also see *Chief Executive of Unitec Institute ofTechnology v Henderson* (2007) 8 NZELC 98,749.
[333] *Mastertrade Limited v Te Kooro* (1998) CC43/98 EC 15.
[334] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW* (1991) 1 NZLR 151 156.
[335] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW*, (1991) 1 NZLR 151.
[336] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc IUW*, (1991) 1 NZLR 151 156.

http://etd.uwc.ac.za/

In South Africa, a fair procedure must be followed prior the decision being made to dismiss based on operational requirements. The LRA places particular obligations on the employer, to ensure that the dismissal is procedurally fair. In New Zealand as far as procedural fairness is concerned, an obligation is placed on the employers to comply with the values of natural justice.[337] The employers are compelled by the ERA to provide the employee parties with access to information and to consult with the employee parties.[338] These obligations are discussed below.

3.2.2.1 Retrenchment Notice

An important requirement of the procedural fairness is the retrenchment notice. The ERA requires employers to provide employees with access to information.[339] The retrenchment notice is a critical ingredient of the consultation process in terms of which the employer informs the employees of potential redundancies.[340] Although the statutes in New Zealand do not make specific reference to the specific information which the retrenchment notice should contain, the EC in *Simpson Farms Limited v Aberhart*[341] merely held that 'sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so' without prescribing the specific information that should be provided by the employer.

UNIVERSITY of the
WESTERN CAPE

The retrenchment notice can be divided into two types. First, the prior notice to possible redundancies which is forwarded to employees prior to the decision to make positions redundant,[342] and secondly actual notice of termination of employment which is forwarded to the employees concerned after a procedurally fair decision that the employees' position is redundant was made.[343] For employees and unions, it is essential to be informed of a possible redundancy situation. Apart from notice periods in the employment agreement, there is no statutory notice period that provides the time

[337] Hughes J et al *Personal Grievances* 4.4.
[338] Employment Relations Act 2000.
[339] Section 4(1A)(c)(i) of the Employment Relations Act 2000.
[340] Section 4 (1A) of the Employment Relations Act 2000.
[341] (2006) ERNZ 825 62.
[342] Section 4 (1A) of the ERA states that prior notice must be given when a "proposal" is formulated.
[343] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 111.

http://etd.uwc.ac.za/

period within which an employee must be advised that their positions will be made redundant.[344]

Both South African and New Zealand protect their employees since it is a statutory requirement for employers to forward the retrenchment notice to the employee parties in advance. In South Africa the written notice should contain specific information which employers should disclose to employees. This is beneficial to employees since it provides the employee parties with access to the required information to enable them to prepare for the consultation and provides legal certainty with regard to the information that employees are entitled to. Employees in South Africa are more protected than those in New Zealand since the written notice to be provided to employees in South Africa should contain prescribe information which is not the case in New Zealand.

3.2.2.2 Consultation

With the enactment of the ERA, the uncertainty with regards to the consultation appeared to be clarified by the express words used in section 4 (4)(c).[345] It provides that the duty of "good faith" applies in the case of a:

> 'consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:'[346]

The ERA places an obligation on employers to consult with the employee parties before the decision of redundancy is made. [347] When the employer is proposing to make a redundancy decision, this duty arises.[348] Research shows that the word "consulting" has been described as a word that 'serves many purposes in quite different meanings

[344] Report on the Public Advisory Group Restructuring and Redundancy (2008) 13.
[345] Section 4 of the Employment Relations Act 2000.
[346] Section 4(4)(c) of the Employment Relations Act 2000.
[347] Section 4 (1A) of the Employment Relations Act 2000.
[348] Section 4 (4)(c) of the Employment Relations Act 2000.

http://etd.uwc.ac.za/

or shades of meanings'.[349] During the consultation, the interest and feelings of the employees must be considered, therefore, consultation goes beyond communication.[350] In *T & L Harvey Limited v Ducan*[351] the judge noted that

> 'effective consultation required three elements to be satisfied. These elements were: firstly, the provision of sufficient information to fully appreciate the proposal being made and the consequences of it and, secondly, an opportunity to consider that information, and thirdly, a real opportunity to have input into the process before a final decision is made'.[352] 'These elements needed to be satisfied before any decisions were taken which would affect the employee's employment.'[353]

The notion of consultation reveals the principal grounds on what may be identified as being good faith behaviour under the ERA.[354] Chief Judge Goddard averred that

> 'although the process of consultation resembles that of negotiation in some respects, the key difference relates to the fact that at the conclusion of the consultation process the employer may make a decision which may take into account some of the objections raised through the consultation process. Such a decision to accommodate objections may be made not because the employer is under any form of obligation or pressure to reach an agreement, as that would amount to negotiation, rather it is simply the employer acting in good faith and fulfilling its obligation to consult.'[355]

UNIVERSITY of the
WESTERN CAPE

In *Cammish v Parliamentary Service,*[356] Chief Judge Goddard summarised the obligation associated with consultation as follows:

> 'Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be

[349] *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited* (1993) 2 ERNZ 429 457.
[350] Shorter Oxford English Dictionary 5 ed (2002) 1 497.
[351] *T & L Harvey Limited v Ducan* (2009) 7 NZELR 161.
[352] *T & L Harvey Limited v Ducan* (2009) 7 NZELR 161 36.
[353] *T & L Harvey Limited v Ducan* (2009) 7 NZELR 161 35.
[354] Section 4 of the Employment Relations Act 2000.
[355] *Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited* (1993) 2 ERNZ 429 457.
[356] *Cammish v Parliamentary Service* (1996) 1 ERNZ 404.

http://etd.uwc.ac.za/

done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation.'[357]

In *Simpson Farms Limited v Aberhart,*[358] the EC held that section 4 (1A) of the ERA strengthened the fundamental factors of consultation and therefore confirm that they are compulsory in all circumstances.[359] Furthermore, the EC held that prior notification, accurate and adequate information accompanied by acceptable time to obtain and reveal an opinion must be provided to the employees.[360] The consultation process can be conducted orally or in writing, but the employer must make a true effort to take the views of the employees into consideration.[361] The employer is permitted to prepare a working plan regarding the proposed changes, but it is required by good faith that the employer must have an open mind and be ready to start with the consultation process.[362] The EC also confirmed that 'any proposal cannot be acted upon until consultation is completed.'[363]

With the enactment of the 2004 amendments on procedural fairness, the approach to the timing and content of the consultation as supported in the Employment Contract Act (ECA)[364] decision in the matter, has been codified, as stated by the judge in *HP Industries (New Zealand) Limited v Davison,*[365]

UNIVERSITY of the
WESTERN CAPE

'Generally when a restructure takes place there will have been at least two points at which decisions are made: first, where a review of the business leads to a decision that a restructure is necessary and second, the resulting decisions about how a restructure is to be implemented. At each of these stages the decision is likely to have an adverse effect on the continuation of the employment of employees and this gives rise to the employer's obligation to give information about the decision and an opportunity for the employee to comment on that information.'[366]

[357] *Cammish v Parliamentary Service* (1996) 1 ERNZ 404 417.
[358] (2006) ERNZ 825 62.
[359] *Simpsons Farms Limited v Aberhart* (2006) ERNZ 825 60.
[360] *Simpsons Farms Limited v Aberhart* (2006) ERNZ 825 62.
[361] *Simpsons Farms Limited v Aberhart* (2006) ERNZ 825 62.
[362] *Simpsons Farms Limited v Aberhart* (2006) ERNZ 825 62.
[363] *Simpsons Farms Limited v Aberhart* [2006] ERNZ 825 62.
[364] Employment Contracts Act 1991.
[365] *HP Industries (New Zealand) Limited v Davison* (2008) ERNZ 514.
[366] *HP Industries (New Zealand) Limited v Davison* (2008) ERNZ 514 11.

http://etd.uwc.ac.za/

In *Hildred v Newmans Coach Lines,*[367] it was suggested

> 'that employees will have the best understanding of their own worth. Thus, a decision made by management without the input of the affected employees will be ill-informed and as a consequence, irrational.' The dismissed employee should have been extended an opportunity to discuss with his employer the business concerns which led to another employee being retained instead of himself.'[368]

The EC in *Simpsons Farms Ltd v Aberhart*,[369] confirmed that 'dismissals will be rendered unjustified, should an employer fail to comply with the statutory requirements.'[370]

South African law imposes an obligation on the employer to consult with the employee parties and to provide the employee parties with an opportunity to make representations.[371] The law in New Zealand also imposes similar obligations on the employers. Accurate and adequate information should be provided to the other party accompanied by acceptable time to obtain and reveal an opinion. The employer must make a true effort to take the views of the employees into account. In South Africa, the employer is not only obliged to allow the other party to make representations but also to consider and respond to the other party. This process should lay the foundation for the parties to engage meaningfully to avoid dismissals where possible and to address the employers' operational needs. Both the South African law and the law in New Zealand governing consultation protects employees as far as this area of the law is concerned.

3.2.2.2.1 Consulting Parties

In terms of the ERA the duty of good faith applies to the parties to the employment relationship.[372] While the ERA states that employment relationships that exist are those between 'an employer and an employee employed by the employer',[373] 'a union

[367] *Hildred v Newmans Coach Lines* (1992) 3 ERNZ 165.
[368] *Hildred v Newmans Coach Lines* (1992) 3 ERNZ 165 187.
[369] *Simpsons Farms Ltd v Aberhart* (2006) 1 ERNZ 825 (EC) 41.
[370] Section 4 (A)(1)(c) of Employment Relations Act 2000.
[371] See para 2.2.2.2.5 above.
[372] Section 4(1) of the Employment Relations Act 2000.
[373] Section 4(2)(a) of the Employment Relations Act 2000.

http://etd.uwc.ac.za/

and an employer',[374] 'a union and a member of the union',[375] 'a union and another union that are parties bargaining for the same collective agreement',[376] 'a union and another union that are parties to the same collective agreement',[377] 'a union and a member of another union where both unions are bargaining for the same collective agreement',[378] 'a union and a member of another union where both unions are parties to the same collective agreement',[379] 'an employer and another employer where both employers are bargaining for the same collective agreement' to whom the duty of good faith applies, an employer in New Zealand is only required to provide the employees who are likely to be affected by the decision with information. The ERA does not make express mention of other parties who the employer is required to consult such as parties outlined in a collective agreement or trade unions.[380]

In South Africa the employer is required to consult with all the appropriate parties as prescribed by the LRA.[381] The fact that the LRA makes provision for all the relevant parties with whom the employer should consult shows that employees in South Africa are more protected in this regard.

3.2.2.2.2 Subject Matter of Consultation

UNIVERSITY of the WESTERN CAPE

Although, the ERA does not specifically provide the subject matters on which the parties must consult, section 41(A) provides that 'employers must consult, provide information and give employees the opportunity to commend on this information before any decision effecting their employment is made.' Section 41(A)(b) requires the parties to an employment relationship 'to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.'

[374] Section 4(2)(b) of the employment Relations Act 2000.
[375] Section 4(2)(c) of the employment Relations Act 2000.
[376] Section 4(2)(d) of the Employment Relations Act 2000.
[377] Section 4(2)(e) of the Employment Relations Act 2000.
[378] Section 4(2)(f) of the Employment Relations Act 2000.
[379] Section 4(2)(g) of the Employment Relations Act 2000.
[380] Section 4(2)(h) of the Employment Relations Act 2000.
[381] Section 189(1)(a)(b)(c)(d) of the Labour Relations Act 66 of 1995.

http://etd.uwc.ac.za/

According to the LRA in South Africa the parties are required to engage in a meaningful joint consensus seeking process in order to attempt to reach consensus on appropriate measures to avoid the dismissals, to minimise the number of dismissals, to change the timing of the dismissals and to mitigate the adverse effects of the dismissals.[382] Employees in South Africa are more protected than the employees in New Zealand since employers in South Africa are obliged to consult on specific matters when they contemplate dismissal based on operational requirements.

3.2.2.2.3 Selection criteria

Another important aspect of redundancy is the selection process.[383] As Cooke P stated[384]

> 'I have no doubt that a dismissal for redundancy must be carried out by a fair procedure and that, on the facts of particular cases, this will extend to the manner of selecting the worker or workers declared to be redundant….'[385]

The ERA does not provide specific requirements for the selection criteria. However, the courts have expressly acknowledged that in selecting an employee to be made redundant, there are a wide range of factors which can be taken into account.[386] To begin the selection process the employer makes a decision to reduce a number of similar positions within its business.[387] During the selection process the employees that will be retained and the positions that will become redundant within the organisation will be determined.[388] The employees who carry out the work associated

[382] See para 2.2.2.2.2 above.
[383] Anderson G et al *LexisNexis Employment Law Guide* 7 ed (2005) ER103.51A.
[384] *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* (1991) 1 NZLR 151 151.
[385] *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc, IUW* [1991] 1 NZLR 151 156.
[386] See *Law v G E Tregenza* (1992) 2 ERNZ 149 cited in the Employment Tribunal decision of *Orringe v Forestry Corporation of NZ Limited* (Employment Tribunal, Auckland, AT202/92, 16 September 1992, B W Stephenson). Also see *Baguley v Coutts Cars* (2000) 2 ERNZ 409 58; *New Zealand Building Trades Union v Hawkes Bay Area Health Board* (1992) 2 ERNZ 897 913 where the requirement for the selection process to be both fair and reasonable has been expressed.
[387] Daniels K 'Factsheet: Redundancy' available at *https://www.cipd.co.uk/knowledge/fundamentals/emp-law/redundancy/factsheet?WBCMODE=PresentationUnpublishedaboutaboutaboutaboutfaculty.htm* (accessed 24 April 2021).
[388] Honsby-Geluk S *Managing Organisational Change – Legally* (2009) The Human Resources Institute of NewZealand Conference Engaging Change 12.

http://etd.uwc.ac.za/

with those redundant positions, must be involved in the selections process. [389] In the matter between *Dunn v Methanex New Zealand Limited* (1996),[390] Chief Judge Goddard stated the following in respect of selection processes:

> 'Effectively, what takes place is not a selection for redundancy but a process under which employees are required to apply all over again for the positions they already hold, with the employer regarding itself as at liberty to grant or withhold their application.'[391]

The selection process, when selecting an employee to be made redundant, must be carried out in a manner that is fair, reasonable and good faith. [392] If a fair selection process is not followed, the legitimacy of the process may be questioned.[393] The Chief Judge in the matter between *Unkovich v Air New Zealand Ltd,*[394] doubted whether 'the manager in question, who was new to the company, could fairly select employees for redundancy without first hearing those employees' submissions.'

In the matter between *Nee Nee and Ors v TLNZ Auckland Limited,*[395] there was a specific clause within the applicable collective agreement which specified the criteria to be considered where selection was required. The clause read as follows:

> 'The company will select employees on a last on first off basis.[396] However, it is recognised by the parties to this contract that the company has a need to maintain an efficient workforce. Skill and aptitude factors will therefore be taken into account in the selection of workers to be made redundant, and at all times in the selection process the company retains the right of final selection.'[397]

If the employment agreement contains a specific process in relation to the selection of

[389] Daniels K:'Factsheet: Redundancy' available at *https://www.cipd.co.uk/knowledge/fundamentals/emp-law/redundancy/factsheet?WBCMODE=PresentationUnpublishedaboutaboutaboutaboutfaculty.htm* (accessed 24 April 2021).
[390] *Dunn v Methanex New Zealand Limited* (1996) 2 ERNZ 222.
[391] *Dunn v Methanex New Zealand Limited* (1996) 2 ERNZ 222 10.
[392] *New Zealand Building Trades Union v Hawkes Bay Area Health Board* (1992) 2 ERNZ 897 91.
[393] See *Pahono v Vice Chancellor of the University of Auckland* (2008) A153/08 where the redundancy was held to be unjustified as the dismissal was not a result of a fair selection process rather that of poor performance. The Pahono case was discussed in Barlett P et al *Brookers Employment Law* p ER103.22.
[394] *Unkovich v Air New Zealand Ltd* (1993) 1 ERNZ 526.
[395] *Nee Nee and Ors v TLNZ Auckland Limited* (2006) ERNZ 689.
[396] *Nee Nee and Ors v TLNZ Auckland Limited* (2006) ERNZ 689 40.
[397] *Nee Nee and Ors v TLNZ Auckland Limited* (2006) ERNZ 689 40.

http://etd.uwc.ac.za/

an employee in a redundancy situation that was agreed upon by the parties, that specific process should be followed.[398] It will be very difficult for a party who fails to comply with the terms and conditions contained within the employment agreement to assert that their action was justifiable.[399] The following are factors of common selection criteria used by organisations: skills,[400] experience,[401] qualifications,[402] performance,[403] ability,[404] attitude and behaviour,[405] length of service[406] as well as general criteria such as to ensure an effective and efficient workforce[407] or operation.[408]

It is persistently emphasised by the courts that selection cannot be made on inappropriate or invalid criteria but that the criterion must be relevant.[409] It will depend largely on a case-to-case basis what is deemed to be appropriate.[410] In the past, a common mode of selection for redundancy was length of service. This was described as 'last on, first off' principle and in some instances was included in the employment agreement.[411] Recently, employers choose to place greater weight on factors such as skills and performance, and less weight has been given to this criterion.[412]

In both South Africa and New Zealand, the consulting parties should first attempt to agree on a criterion for selecting employees for retrenchment. In South Africa, if there

UNIVERSITY of the
WESTERN CAPE

[398] *Lane Walker Rudkin v Daymond* (1999) CEC46/98 17.
[399] *Priest and Ors v Fletcher Challenge Steel Limited* (1999) 2 ERNZ 395 19.
[400] Skills as one of the selection criteria has been used in *Dunn v Methanex New Zealand Limited* (1996) WEC44/96 (EC).
[401] Experience as one of the selection criteria has been used in *Mastertrade Limited v Te Kooro* (1998) CC43/98 (EC).
[402]Qualifications have been used as one of the selection criteria in see *Tua v ERG Connect Limited* (1999) WC60/99 (EC).
[403] Performance has been considered as one of the selection criteria in *Unilever New Zealand Limited v MacDonald* (2001) AC24A/01 (EC).
[404] Ability as one of the selection criteria has been used in *Dunn v Methanex New Zealand Limited* (1996) WEC44/96 (EC).
[405] Attitude and Behaviour as one of the selection criteria has been used in *Dunn v Methanex New Zealand Limited* (1996) WEC44/96 (EC).
[406] Length of service has been considered as one of the selection criteria in *Tua v ERG Connect Limited* (1999) WC60/99 (EC).
[407] An effective or efficient workforce has been considered as a selection criterion in *Klusken and Ors v James Hardie Building Services and Technologies New Zealand Limited* (1997) AEC36/97 (EC).
[408]An effective or efficient operation has been considered as a selection criterion see *Tua v ERG Connect Limited* (1999) WC60/99 (EC).
[409] See *New Zealand Building Trade Union v Hawkes Bay Area Health Board* (1992] 2 ERNZ 897 913.
[410] See *Baguley v Coutts Cars Limited* (2000) 2 ERNZ 409 55.
[411] Hughes J et al *Personal Grievances* 4.35.
[412] Hughes J et al *Personal Grievances* 4.35.

http://etd.uwc.ac.za/

is no agreement on the selection criteria, a fair and objective criterion should be used.[413] Even though the ERA does not provide specific requirements with regard to the selection criteria to be used, the courts have expressly acknowledged that, in selecting an employee to be made redundant, there are a wide range of factors which can be considered. Thus, in South Africa as well as in New Zealand factors such as skills, experience, qualifications, performance, ability, attitude and behavior and length of services can be taken into consideration. More protection is provided to employees by the law in South Africa than what is provided by the law in New Zealand since the LRA provides expressly that where no agreement on the selection criteria can be reached, a fair and objective criterion should be used, while this not expressly stated in the ERA.

Courts in New Zealand have held that if a fair selection process is not followed, the legitimacy of the process may be questioned.[414] In circumstances where the employment agreement contains a specific process in relation to the selection of an employee in a redundancy situation, that was agreed upon by the parties, that specific process should be followed.[415]

3.2.2.2.4 Redundancy compensation

UNIVERSITY of the
WESTERN CAPE

Redundancy compensation payments can be defined broadly as 'an additional payment given on top of any payment in lieu of notice made by an employer to an employee affected by redundancy.'[416]

According to the LRA of NZ -

'(1) Any worker, union, employer, employer's organisation, or association may, notwithstanding anything in any other section of this Act or in any award or agreement, at any time negotiate an agreement dealing with compensation for redundancy (in this Act referred to as a redundancy agreement).

[413] See para 2.2.2.2.3 above.
[414] *Staykov v Cap Gemini Ernst and Young New Zealand Limited* (2005) AC18/05 (EC); *Pahono v Vice Chancellor of the University of Auckland* (2008) A153/08 (EC).
[415] In *Lane Walker Rudkin v Daymond* (1999) CEC46/98 (EC) Judge Palmer held that failure to follow a specified process contained in the affected employee's employment agreement amount to an unfair dismissal.
[416] Honsby-Geluk S *Managing Organisational Change – Legally* (2009) The Human Resources Institute of New Zealand Conference Engaging Change 13.

http://etd.uwc.ac.za/

(2) If -

(a) There is no current registered redundancy agreement; or

(b) The award or agreement applicable to the workers concerned does not deal with compensation for redundancy –

The Commission may register a redundancy agreement negotiated pursuant to subsection (1) of this section.'[417]

It was never a requirement in New Zealand's legislation that employers pay any form of compensation to employees who was affected by redundancy.[418] New Zealand's Wage Adjustment Regulations 1974 limits both privilege of the claimant as well as the amount of redundancy compensation.[419] Since New Zealand has not ratified Convention 158 of the ILO, employees do not have a statutory right to redundancy compensation.[420] To date, the issue of employers paying redundancy compensation to employees affected by redundancy has a confrontational and judicially bold area of redundancy law in New Zealand.[421]

According to the New Zealand Public Advisory Group numerous purposes, for both employer and employee, are served by the employer paying redundancy compensation. For the employee it can be a form of appreciation for the services provided, also recognition for the loss of the benefits related to the loss of employment and the fact that termination was made on a no fault basis.[422] Furthermore, redundancy compensation can be a safety net,[423] a form of financial security to assist the employee while the employee is searching for employment .[424] When the employer pays redundancy compensation to the employees, it may be regarded as good employment practises or it will be viewed as a desire to look after the employees in the redundancy situation.[425]

UNIVERSITY of the WESTERN CAPE

[417] Section 184 of the Labour Relations Act 1987.
[418] Szakats A & Mulgan M *Dismissal and Redundancy Procedures* 2 ed (1990) 193-268.
[419] Report on the Public Advisory Group Restructuring and Redundancy (2008) 12.
[420] Report on the Public Advisory Group Restructuring and Redundancy (2008) 13.
[421] Hughes J et al *Personal Grievances* 4.36-5.29.
[422] Report on the Public Advisory Group Restructuring and Redundancy (2008) 34.
[423] A means of protection against difficulty or loss.
[424] Report on the Public Advisory Group Restructuring and Redundancy (2008) 34.
[425] Report on the Public Advisory Group Restructuring and Redundancy (2008) 34.

http://etd.uwc.ac.za/

In *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW*,[426] the CA held that compensation might be an element of procedural fairness. Even though it was stated by Cooke P that

> 'The mere offer of redundancy compensation does not make a dismissal for alleged redundancy justifiable. The President went on to note that 'an offer of compensation was one factor in determining whether, as a whole, the employer's conduct has been fair and reasonable.'[427]

The extent to which employees are entitled to fair treatment when redundancy arises, has raised different opinions in the courts. It was held that 'payment of compensation, even in the absence of a contractual entitlement, was a factor to be taken into account when considering the reasonableness of the employer's conduct.'[428] The most acceptable amount payable in recognition of an employee's first year of service is the equivalent of six weeks salary or wages.[429] The most acceptable maximum level of compensation payable is between 14 to 39 weeks.[430]

In *Brighouse Limited v Bilderbeck*,[431] the question was raised: "what procedural obligation, if any, did an employer have in respect of paying compensation to employees dismissed on grounds of true redundancy where the applicable employment contract made no mention of compensation was addressed?"[432] The court's decision affirming that 'there was no general obligation on an employer to pay compensation in all situations involving redundancy.'[433] Yet, there may be circumstances where the employer's commitment to fair treatment will involve the payment of compensation to validate a dismissal for redundancy, irrespective of no agreement regarding redundancy compensation.[434]

---

[426] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* (1991) 1 NZLR 151.
[427] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* (1991) 1 NZLR 151 156.
[428] *G N Hale & Son Limited v Wellington, etc, Caretakers, etc, IUW* (1991) 1 NZLR 151 151.
[429] Blumenfeld et al *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (2008) 65.
[430] Blumenfeld et al *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (2008) 67.
[431] *Brighouse Limited v Bilderbeck* (1994) 2 ERNZ 243.
[432] *Brighouse Limited v Bilderbeck* (1994) 2 ERNZ 243.
[433] *Brighouse Limited v Bilderbeck* (1994) 2 ERNZ 243 244.
[434] *Brighouse Limited v Bilderbeck* (1994) 2 ERNZ 243 244.

http://etd.uwc.ac.za/

Nevertheless, according to the current legislation in New Zealand, if the employment agreement does not contain a definite stipulation regarding the payment of redundancy compensation then employees in redundancy situations have no right to any form of payment.[435] In *Canterbury Spinners v Vaughan*, [436] the court held that according to the employment contract, redundancy compensation had to be paid in accordance with the clause that stated:

> 'the employer shall negotiate a level of redundancy compensation to be paid to employees to be made redundant (with the employee's representative), which shall involve the employer making an offer of redundancy compensation to the employees to be made redundant.'

The employer must comply with the obligation to pay redundancy compensation, where there is a contractual obligation to do so.[437]

In South Africa the employer is obliged to pay severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, to an employee who has been dismissed for reasons based on the employer's operational requirements.[438] South Africa's rate of statutory severance pay is comparatively low, although the amount is in line with article 12 of Convention 158.[439] If the agreed amount for severance pay is in excess of the statutory minimum, the South African employer is required to pay that amount.[440] New Zealand on the other hand has not ratified Convention 158, and therefore there is no statutory right to

UNIVERSITY of the
WESTERN CAPE

[435]Anderson et al *Mazengarb's Employment Law* ERA103.52C.
[436] *Canterbury Spinners v Vaughan* (2003) 1 NZLR 176 31.
[437] Anderson et al *Mazengarb's Employment Law* ERA103.52C.
[438] See para 2.2.2.2.4 above.
[439] Article 12 division E ILO Convention 158 states: '1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to *(a)* severance allowance or other separation benefits, the amount of which shall be based inter alia on *length of service* and the *level of wages, paid directly by the employer or by a fund* (emphasis added) constituted by employers' contributions, or *(b)* benefits from unemployment insurance or assistance or other forms of social security such as old age or invalidity benefits, under the normal conditions to which such benefits are subject. 2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph *(a)*, of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph *(b)*. 3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph *(a)* of this Article in the event of termination for serious misconduct.'
[440] See para 2.2.2.2.4 above.

http://etd.uwc.ac.za/

redundancy compensation, nor is there a common law right unless employers and employees or their union have agreed that redundancy compensation be paid in the applicable employment agreement.[441] Although there is no obligation that redundancy compensation be paid in New Zealand, the employer can still choose to make a payment. However, the employer is required to comply with the obligation where there is a contractual obligation.[442] Employees in South Africa are more protected than those in New Zealand, since in South Africa the LRA places an obligation on employers to suggest severance pay in their written notice to consulting parties and to pay severance calculated in terms of section 41 of the BCEA if a higher amount has not been agreed to between the parties. [443] In circumstances where the employer in New Zealand is contractually obliged to pay severance pay the amount is 6 weeks wages for the first year of service and 2 weeks wages for each year of service thereafter. It is recommended that the severance pay to be paid to employees in South Africa, which is one week's remuneration for each year of continued service with the employer be increased in accordance with what it is in New Zealand.

3.2.2.2.5 Representations

As far as representations are concerned, section 4(1A)(c) of the ERA requires:

UNIVERSITY of the
WESTERN CAPE

> 'an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment of one or more of his or her employees, to provide to the employees affected access to information and the opportunity to comment on that information before any decision is made.'

In *Simpson Farms Limited v Aberhart,*[444] Chief Judge Colgan reiterated the words of the legislation where he stated that

> 'sufficient and precise information to be given to employees along with adequate time in order to develop and express an opinion on the information provided. Furthermore, it was articulated that this opportunity to engage in consultation could be expressed orally or in writing and there must be a genuine effort on the part of the employer to accommodate the views of their employees.'

[441] Report on the Public Advisory Group Restructuring and Redundancy (2008) 12.
[442] Anderson et al *Mazengarb's Employment Law* ERA103.52C.
[443] Section 189(3)(f) of the Labour Relations Act 66 of 1995.
[444] *Simpson Farms Limited v Aberhart* (2006) ERNZ 825 62.

http://etd.uwc.ac.za/

In *T & L Harvey Limited v Duncan*[445] the EC concurred that adequate information should be presented to the other party and an opportunity should be provided to the other party to consider the information and to comment on that information.

In South Africa, the LRA requires the employer to provide the employee parties with an opportunity to make representations, consider the representations and for the employer to respond thereto. These obligations aim to ensure that the employer takes the representations made by the employee parties seriously. In New Zealand, the ERA compels the employer to provide adequate information and allow the employment parties an opportunity to respond to it. Employees in both South Africa and New Zealand are protected by their respective laws governing representations.

3.2.2.3 Re-deployment

Redeployment is defined as 'to transfer to another job, task or function.'[446] If put in the framework of redundancy law, it is another option than to make a role, currently filled by an employee redundant.[447] The CA held that 'while the actual decision to make a position redundant is focused directly on the position itself, as opposed to the employee who fills that role, the duty of fairness relates to the employee rather than the position'.[448] Furthermore, the CA suggested that it may create uncertainty upon the legitimacy of a redundancy should the parties fail to consider redeployments during the discussion in the consultation process.[449]

In these circumstances the potentially redundant employee is offered an alternative or new job which will result in the employee carrying on employment.[450] Since there is no termination of employment, the redeployment of the employee within the organisation does not amount to redundancy.[451] The CA stated in the matter between *New Zealand Fasteners Stainless Ltd v Thwaites*, that

[445] Employment Court, Christchurch, CC19/09, 20 November 2009, Judge Couch 36.
[446] Shorter Oxford English Dictionary 5 ed (2002) 2 2500.
[447] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 196.
[448] *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601 629.
[449] *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601 618.
[450] *Group Rentals NZ Limited v Canterbury Clerical Workers IUOW* (1987) NZILR 255 259.
[451] *Group Rentals NZ Limited v Canterbury Clerical Workers IUOW* (1987) NZILR 255 259.

http://etd.uwc.ac.za/

> 'Redundancy is determined in relation to the position not the incumbent. Whether a position is truly redundant is a matter of business judgment for the employer. The genuineness of any determination of redundancy can be reviewed. If it is not one the employer acting reasonably and in good faith could have reached it may be impeached. In any such review it may be relevant that the employer did not consult with affected employees or consider whether the redundancy might have been avoided by redeployment or otherwise. Absence of such steps might in particular circumstances indicate absence of genuineness in the determination.'[452]

In the matter between *HP Industries (NZ) Limited v Davison*,[453] the Employment Court (EC) made it clear that Section 4 (1A) recognises that

> 'the provision of information relevant to the continuation of an employee's employment is the responsibility of the employer. The obligation is on the employer to provide the employee with information about possible alternatives to redundancy or options for redeployment.' Furthermore that 'the employer should have made efforts to find an alternative for him at the beginning rather than the end of the process.'[454]

The aforementioned judgment advocates for the fact that the employer is obliged to take the initiative within the redundancy process to give real information with regard to alternatives to redundancy for the employee to consider.[455] This is a confirmation that redeployment is an element of procedural fairness.[456]

In South Africa, the LRA provides that the employer should include the possibility of future re-employment of the dismissed employees in the written notice.[457] Should the same employer open a new branch and employ new employees instead of transferring the retrenched employees, the retrenchment may be regarded as unfair.[458] In New Zealand, the ERA provides that the employer is obliged to take the initiative within the redundancy process to provide real information with regard to the continuation of the

[452] *New Zealand Fasteners Stainless Ltd v Thwaites* (2000) 1 ERNZ 739 22.
[453] *HP Industries (NZ) Limited v Davison* (2008) AC44/08 (EC) 44.
[454] *HP Industries (NZ) Limited v Davison* (2008) AC44/08 (EC) 57.
[455] Section 4 (1A) (c) of the Employment Relations Act 2000.
[456] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 208.
[457] See para 2.2.2.1 above.
[458] See para 2.2.2.1 above.

http://etd.uwc.ac.za/

employees' employment.[459] The EC held that 'the employer should have made efforts to find an alternative for him at the beginning rather than the end of the process.'[460] Employees in both South Africa and New Zealand are protected by their respective laws governing re-deployment.

3.2.2.4 Outplacement support

In New Zealand the provision of outplacement services is an element of procedural fairness.[461] The outplacement services comprise of a range of different assistance measures such as 'provision of financial or career advice, training as well as assistance with obtaining new employment such as job searches, curriculum vitae writing and interview training'.[462] It also comprises of the offering of counselling to provide relief in instances where employees experience issues relating to tension and anxiety due to the redundancy situation.[463] Employers are not required in terms of legislation to provide any particular outplacement support services. Nevertheless, it was generally accepted by the courts that the supplying of any outplacement services to affected employees has formed a part of the judgment, on the actions of the employers to determine whether the employer acted in a procedurally fair way.[464] There is no specific reference to outplacement support as part of the procedural requirements in a redundancy circumstance in the ERA, however, the EC stated in *Harris v Charter Trucks Limited,*[465] that

> 'Charter Trucks Limited offered no support or assistance to the employee, in coping with the effects of dismissal in circumstances where the employee had done no wrong and had no alternative employment prospects. This was a case in which a fair and

[459] Section 4 (1A)(c)(i) of the Employment Relations Act 2000.
[460] *HP Industries (NZ) Limited v Davison* (2008) AC44/08 (EC) par 57.
[461] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 212.
[462] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 212.
[463] Russell A 'The 'Emperor's New Clothes': The Judicial Fabric of Redundancy Under the Employment Relations Act 2000' (2003) 9 *New Zealand Business Law Quarterly* 125 134.
[464] Hughes J et al *Personal Grievances* 4.33.
[465] *Harris v Charter Trucks Limited* (2007) CC16/07.

http://etd.uwc.ac.za/

reasonable employer would have provided the type of assistance referred to by the Court of Appeal in the passage from *Aoraki*.'[466]

However, to date, no conclusive legal clarification on what support or assistance should actually be provided exists. It was recommended by the Advisory Group Report on Restructuring and Redundancy, that a statutory requirement that provides redundancy support as well as active labour market processes to both affected employees and organisations be contemplated by government.[467] Also that if employers consider redundancies the employers should make certain that they have support mechanisms in place to mitigate the adverse effects of any terminations on the affected employees.[468] The South African law places an obligation on employers to provide outplace services to the affected employees.[469] Even though the obligation to provide outplace services is not set out in the legislation in New Zealand, the provision of such services is considered in determining whether the dismissals are procedurally fair. Employees in South Africa and New Zealand are protected as far as the employer's obligation to provide outplace services is concerned.

3.3 LARGE-SCALE RETRENCHMENTS

The law of New Zealand does not distinguish between small-scale and large-scale retrenchments. Employees in South Africa involved in large-scale retrenchments are more protected than employees in New Zealand since the LRA requires employers in South Africa to manage large-scale retrenchments in a certain manner and additional rights are provided to parties who are involved in large-scale retrenchments whilst this is not the case in New Zealand where there is no distinction between small-scale and large-scale retrenchments.

---

[466] *Harris v Charter Trucks Limited* (2007) CC16/07 95. See *Aoraki Corporation Limited v McGavin* (1998) 3 NZLR 276 23 were Judge Travis considered that: ... even where dismissals were genuinely based on redundancy the Employment Court and the Employment Tribunal were entitled to take account of such aspects as whether the employer had taken steps to make a just choice if there were some redundancies; whether counselling or payment for it had been made available to the redundant employees; and whether possibilities of redeployment had been adequately explored.

[467] Report of the Public Advisory Group on Restructuring and Redundancy (2008) Part Four Recommendation 1(d).

[468] C158 Termination of Employment Convention 1982, article 13 (1) (b).

[469] See para 2.2.2.3 above..

http://etd.uwc.ac.za/

3.4 RELIEF AND REMEDIES

The ERA provides that a personal grievance is 'any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee has been unjustifiably dismissed'.[470] The ERA provides that where the court has established that a personal grievance has arisen, the court may order the employer to pay compensation to the employee for the loss of any benefit.[471]

The ERA[472] also provides that the remedy of reinstatement applies, 'if it is determined that the employee has a personal grievance and the remedies sought by or on behalf of an employee in respect of a personal grievance includes reinstatement.'[473] The ERA also provides that 'the Authority may, whether or not it provides for any of the other remedies, provide for reinstatement if it is practicable and reasonable to do so.'[474] The ERA provides 'protection to specified categories of employees if, as a result of proposed restructuring, their work is to be performed by another person'.[475] In addition, the ERA states that 'if an employee is elected to be transferred to another employer, the employee may bargain for redundancy entitlements with the new employer'.[476] 'The Authority may investigate bargaining and determine redundancy entitlements if the employee and his new employer fail to agree on redundancy entitlements.'[477]

UNIVERSITY of the
WESTERN CAPE

Employees in both South Africa and New Zealand are adequately protected by the law governing the remedies available to the employees since the legislation in South Africa and New Zealand provides similar remedies to employees.

[470] Section 103(1)(a) of the Employment Relations Act 2000.
[471] Section 123(1)(c)(ii) of the Employment Relations Act 2000.
[472] Employment Relations Act 2000.
[473] Section 125(1)(a)(b) of the Employment Relations Act 2000.
[474] Section 125(2) of the Employment Relations Act 2000
[475] Section 69A(10) of the Employment Relations Act 2000.
[476] Section 69N of the Employment Relations Act 2000.
[477] Section 69O of the Employment Relations Act 2000.

http://etd.uwc.ac.za/

3.5 THE EMPLOYER'S ELECTION TO DISMISS AN EMPLOYEE ON THE GROUND OF OPERATIONAL REQUIREMENTS AS OPPOSED TO ON THE GROUND OF MISCONDUCT OR INCAPACITY

While the laws in New Zealand governing redundancy will not be compared to its laws governing dismissals based on misconduct and incapacity as it was done in chapter 2, the discussion that follows will show that as in South Africa, situations also exist in New Zealand where employees are dismissed based on redundancy as opposed to misconduct or incapacity. The reason for the laws in New Zealand governing redundancy not being compared to its laws governing misconduct and incapacity is due to chapter 2 revealing the reasons for employers in South Africa electing to dismiss employees based on operational requirements as opposed to dismissing the employees based on misconduct or incapacity.

Research has shown that in New Zealand there are employers who use redundancy as a camouflage, in situations where the true reason for the dismissal is misconduct or incapacity.[478] A genuine redundancy situation may exist in the workplace, however the selection of the employee to be dismissed based on redundancy is not made for genuine reasons.[479] The definition of redundancy focuses on the position and not the person.[480] The judiciary held that 'where there are issues unrelated to a redundancy situation, they must remain separate issues and be dealt with accordingly'.[481] There were cases where employers dismissed employees by means of redundancy where the real reason was actually poor performance. [482] At times this happens where the efficacy or standard of the work of the employee does not meet the standards of the employer.[483] When such a situation arises, the employer should immediately inaugurate a performance management process where the employee should be

[478] *Godfrey v Sensation Yachts Limited* (1999) AC44A/99 where the court held that the redundancy was not genuine as there were pre-existing allegations of serious misconduct which had not been determined prior to the dismissal.
[479] Hughes J et al *Personal Grievances* 5.28.
[480] *New Zealand Fasteners Stainless Limited v Thwaites* (2000) 1 ERNZ 739 22.
[481] *Godfrey v Sensation Yachts Limited* (1999) AC44A/99.
[482] *EDS (New Zealand) Limited v Inglis* (2001) ERNZ 59; *Staykov v Cap Gemini Ernst & Young New Zealand Limited* (2005) AC18/05 (EC); *Rolls v Wellington Gas Company* (1998) WC46/98 (EC).
[483] Department of Labour 'Employment relationships: Guide for Employers' available at <www.workplace.govt.nz/publications/pdfs/employers_guide_to_er.pdf> (accessed 20 May 2021).

http://etd.uwc.ac.za/

notified that he/she does not meet the employers' standards and where the employer support and encourage the employee to improve.[484]

In *Samujh v Gould, the Vice Chancellor of the University of Waikato,*[485] it was held that the real reason for dismissal was poor performance.[486] The University made the senior lecturer, who was working in the accounting department redundant, due to supposed financial strains with the accounting and finance department.[487] The EC held that the real reason for the dismissal was disguised since if all the facts were taken into consideration it was evident that an alleged absence of skills with regard to the teaching and research outputs of the lecturer was visible.[488] The teaching and research outputs did not correspond with those of a senior lecturer and the underperformance was not dealt with.[489] Alternative and appropriate positions were available at the same time the lecturer's position was declared redundant.[490] The EC held that the dismissal was unjustifiable since it was evident that she should not have been dismissed based on redundancy. [491]

Cases exist in New Zealand where employees are dismissed based on redundancy where misconduct is the real reason for the dismissal is misconduct. In the matter between *Godfrey v Sensation Yachts Limited* AC44A/99,[492] the EC held that

> 'I am satisfied that the claim made by the plaintiff that there has been discrimination against him because of his union activities and his claim that the redundancy is not genuine because of the defendant's allegations of serious misconduct which have never been addressed in a disciplinary setting, both justify the grant of interim relief. Limited interim relief can be provided in a way which protects the interests of both parties and creates the least damage to them until the Tribunal can dispose of the matter.'[493]

[484] Department of Labour 'Employment relationships: Guide for Employers' available at <www.workplace.govt.nz/publications/pdfs/employers_guide_to_er.pdf> (accessed 20 May 2021).
[485] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC).
[486] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC) 11.
[487] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC) 11.
[488] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC) 18.
[489] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC) 2.
[490] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC) 18.
[491] *Samujh v Gould, the Vice Chancellor of the University of Waikato* (1995) AEC12A/95 (EC) 21.
[492] *Godfrey v Sensation Yachts Limited* AC44A/99, (1999) NZEmpC 124.
[493] *Godfrey v Sensation Yachts Limited* AC44A/99, (1999) NZEmpC 124 10.

http://etd.uwc.ac.za/

The court is entitled to scrutinise with care claims that dismissals were for redundancy reasons and may expect an adequate commercial explanation from the employer. In *Smith v Sovereign Limited,*[494] it was held that

> 'Mr Staykov's unchallenged evidence satisfied me that his redundancy was not genuine. His dismissal came about, more probably than not, to mask the adverse view that Mr Stewart had formed about him. There was no evidence from the defendant as to the criteria used or any explanation as to why it was not provided to Mr Staykov on his request. The defendant provided no justification for the circumstances surrounding the redundancy. Mr Staykov has established that the redundancy was not genuine in his case and in any event it was carried out in an unfair manner. Had the proper criteria been applied and Mr Staykov not been subjected to an unfair and unjustified process of isolation, his previous work record would have ensured his continued employment even if there had been the need to make one person redundant in the area in which he had worked.'[495]

According to Judge Richardson, the best way to determine whether redundancy was in fact the true reason for the dismissal is to investigate the claims that dismissals were based on redundancy.[496]

This research illustrates that in New Zealand, similar to South Africa there are situations where employers dismiss employees based on operational reasons while it is not always the true reason for the dismissal.

3.6 CONCLUSION

The purpose of this chapter is to compare the legislation governing dismissals based on operational requirements in New Zealand to that in South Africa to ascertain whether South Africa can learn from the laws in New Zealand governing such dismissals. The LRA of NZ defines redundancy as 'a situation where a worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer'.[497] The ERA provides that before an

[494] *Smith v Sovereign Limited* (2005) AC68/05 (EC).
[495] *Smith v Sovereign Limited* (2005) AC68/05 (EC) par 36.
[496] *G N Hale & Son Ltd v Wellington, etc, Caretakers, etc IUW* (1991) 1 NZLR 151 157.
[497] Section 184 (5) (a) (1) of the Labour Relations Act 1987.

http://etd.uwc.ac.za/

employer considers dismissing employees based on redundancy, the employer must first consider the substantive and procedural validations.[498]

In New Zealand the courts do not often interfere with the decision of the employer to make positions redundant but rather support the influence of managerial entitlement. In New Zealand, the question that is asked is whether the decision to dismiss in one which a fair and reasonable employer would make. Employees in South Africa are more protected than those in New Zealand in circumstances where the courts examine the content of the reasons provided by the employer for dismissing the employees based on operational requirements.

The law governing consultations in New Zealand places an obligation on employers to consult with the employee parties before the decision of redundancy is made and provides that it is mandatory in all cases.[499] Legislation in South Africa imposes an obligation on the employer to consult with the employee parties and to provide them the opportunity to make representations during the consulting process. Adequate protection is provided to employees in both South Africa and New Zealand since the law governing consultations in both South Africa and New Zealand requires employers to provide accurate and adequate information and to take the views of the employees into account.

UNIVERSITY of the
WESTERN CAPE

In New Zealand, when it comes to procedural fairness, an obligation is placed on the employers to provide the employee parties with a written notice.[500] Employers in South Africa are also obliged to provide a written notice to the employee parties which should contain specific information. While employers in both South Africa and New Zealand are required to provide written notice to the employees, it is only in South Africa where the LRA sets out the specific information which the retrenchment notice should contain.[501] Employees in South Africa are thus more protected than what employees in New Zealand are in this regard.

[498] See para 3.2 above.
[499] Section 4 (1A) of the Employment Relations Act 2000.
[500] See para 3.2.2.1 above.
[501] See para 2.2.2.1 above.

http://etd.uwc.ac.za/

The ERA does not specifically provide the subject matter which the parties should consult on however does state that sufficient information should be given to employees and also that an opportunity should be provided to the employees to respond to the information prior to the decision effecting their employment is made. In South Africa the LRA provides that the parties should engage in a meaningful joint consensus seeking process in order to attempt to reach consensus on appropriate measures to avoid the dismissals, to minimise the number of dismissals, to change the timing of the dismissals and to mitigate the adverse effects of the dismissals. Although the employers in both South Africa and New Zealand are required to consult, employees in South Africa are more protected since the LRA makes specific provision for the topics which should form the subject matter of the consultation between the parties.

According to the LRA, consulting parties in South Africa should use a fair and objective criterion if they are unable to reach an agreement on a selection criterion.[502] Although the ERA does not provide specific requirements with regards to the selection criterion the courts in New Zealand have expressly acknowledged a wide range of acceptable factors that can be considered, such as skills, experience, qualifications, performance, ability, attitude and behaviour and length of services, when selecting employees to be made redundant. The courts in New Zealand may question the legitimacy of the process if it is not carried out in a fair manner, reasonable and in good faith.[503] Employees in South Africa are more protected than those in New Zealand as employers in South Africa are required to use a fair and objective criterion if the parties cannot agree on a selection criterion.

Employers in South Africa are compelled by law to pay an effected employee severance pay equal to at least one week's remuneration for each complete year of continuous service with that employee. Employers in New Zealand on the other hand are not required to pay redundancy compensation unless an agreement is concluded by the parties to this effect. Employees in South Africa are more protected than those of New Zealand since an obligation is always placed on employers of South Africa to

[502] See para 2.2.2.2.3 above.

[503] See *Pahono v Vice Chancellor of the University of Auckland* (2008) A153/08 where the redundancy was held to be unjustified as the dismissal was not a result of a fair selection process rather that of poor performance. The Pahono case was discussed in Barlett P et al *Brookers Employment Law* p ER103.22.

http://etd.uwc.ac.za/

pay severance pay. Although the employers in New Zealand are not always obliged to pay redundancy compensation to retrenched employees, in circumstances where redundancy compensation is paid by the employer the value of the redundancy compensation in New Zealand is considerably higher than the rate that South Africa employees are entitled to. It is recommended that the legislation in South Africa be amended in such a way that the value of the redundancy compensation in South Africa be increased to that which employers who are required to pay redundancy compensation in New Zealand pay to employees.

In the above research it is evident that the law governing re-deployment does protect the employees in South Africa as well as in New Zealand. The LRA provides that employers in South Africa are required to include the possibility of re-employment in the retrenchment notice. The ERA places an obligation on employers in New Zealand to provide real information to employees in the redundancy process, with regard to the continuation of the employees' employment.[504]

This chapter illustrates that similar to South Africa, in New Zealand there are still cases where employers dismiss employees based on operational reasons while redundancy is not the true reason for the dismissal. It is thus evident that the courts should scrutinise the employer's decision to retrench to ensure that a fair decision has been made by the employer.

The next chapter being the final chapter of this thesis contains the conclusion and the recommendations.

[504] Section 4 (1A)(c)(i) of the Employment Relations Act 2000.

http://etd.uwc.ac.za/

CHAPTER 4

CONCLUSION

4.1 INTRODUCTION

The Constitution of South Africa states that everyone has the right to fair labour practices.[505] The LRA was enacted to give effect to section 23 of the Constitution. Operational requirements are based on the economic, technological, structural or similar needs of an employer.[506] When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer is required to consult with the employees.[507] This thesis has shown that some employers only consult after the decision to retrenchment has been taken and thereby fail to comply with the law governing dismissals based on operational requirements. There are also employers who despite the provisions contained in the LRA,[508] use dismissals based on operational requirements to dismiss employees while it is not the true reason for the dismissal.

4.2 THE EXTENT TO WHICH EMPLOYEES ARE PROTECTED

The objective of this thesis is to determine the extent to the South African law governing dismissals based on operational requires protects employees and whether the law should be amended or supplemented.[509] For this reason the law governing dismissals based on operational requirements has been compared to that in New Zealand.

New Zealand does not have a single constitutional document.[510] The constitution of New Zealand is referred to as an uncodified constitution or unwritten constitution. Dismissals based on operational requirements in South Africa are governed by the provisions contained in the LRA, while the LRA-NZ and the ERA contains the provisions governing such dismissals in New Zealand.

---

[505] Section 23(1) of the Constitution of the Republic of South Africa, 1996.
[506] See para 1.1 above.
[507] Section 189(1)(a) of the Labour Relations Act 66 of 1995.
[508] Section 189 and 189A of the Labour Relations Act 66 of 1995.
[509] See para 1.3 above.
[510] See para 3.1 above.

http://etd.uwc.ac.za/

Both South Africa and New Zealand recognise dismissals based on operational requirements as no-fault dismissals since those affected have not committed any wrong. The legislative framework governing dismissals based on operational requirements in South Africa and New Zealand provides that in order for such dismissals to be fair and justifiable, the dismissal should be assessed on the fairness of substance and procedure.

As far as substantive fairness is concerned, in South Africa courts are entitled to examine the reason given by the employer, since it is the court's role to determine whether the dismissal is fair. Some judges are of the opinion that they are not the best qualified people to assess the merits of business decisions to determine whether those decisions were based on sound business or economic principles.[511] In New Zealand the managerial prerogative of the employer to ascertain the structure of the business and therefore to make positions redundant, is accepted however it must be legitimate and carried out in just and admissible manner.[512] In New Zealand, the question that is asked is whether the decision to dismiss is one which a fair and reasonable employer would make. In both South Africa and New Zealand the employees are not always protected adequately by the law governing substantive fairness, since the extent by which fairness is assessed is not always consistent with the exception in South Africa where judges examine the content of the reasons provided by the employer for retrenching the employees.

UNIVERSITY of the
WESTERN CAPE

It is thus recommended that the law governing substantive fairness be supplemented in order to compel the courts to examine the content of the reasons given by the employer for dismissing employees based on operational requirements in order to ensure that the extent by which fairness is assessed is consistent.

South Africa and New Zealand have a similar approach when it comes to procedural fairness. The employers in both countries are obliged by legislation to follow a fair procedure. In both countries, employers are required to provide employees with a

[511] See para 2.2.1 above.
[512] *G N Hale and Son Ltd v Wellington Caretakers etc IUW* (1991) 1 *NZLR* 151 p 156.

http://etd.uwc.ac.za/

written notice in circumstances where the employers consider dismissing employees for reasons of an economic, technological, structural or similar nature. In South Africa the LRA provides that the retrenchment notice should include 'the alternatives which the employer has considered before deciding on retrenching employees and the reasons why the considered alternatives were not accepted by the employer', 'the proposed method for selecting employees to be dismissed', 'the severance packages proposed', 'any assistance which the employer would be willing to offer affected employees', 'whether there is any possibility of employees who are dismissed being reemployed by the employer in the future', 'the total number of employees employed by the employer and the number of employees which the employer has retrenched in the preceding 12 months'.[513] While employers in South Africa and New Zealand are required to provide written notice to the employees, it is only in South Africa where the LRA makes specific provision for the information that should be provided in the written notice. Since this is not provided in the laws in New Zealand, employees in South Africa are more protected in this regard.

The legislation in South Africa and New Zealand imposes an obligation on the employer to consult with the employee parties and to provide the employee parties with an opportunity to make representations during the consultation process.[514] Employees are thus protected in the same way in New Zealand and South Africa in this regard.[515] In South Africa, the LRA prescribes the appropriate parties with whom the employer is required to consult.[516] The ERA on the other hand does not make express mention of other parties with whom the employer is required to consult such as trade unions.[517] The fact that the LRA makes provision for all the relevant parties with whom the employer should consult shows that employees in South Africa are more protected in this regard.

In South Africa the LRA provides that the parties should engage in a meaningful joint consensus seeking process in order to attempt to reach consensus on appropriate measures to avoid the dismissals, to minimise the number of dismissals, to change

[513] See para 2.2.2.1 above.
[514] See para 2.2.2.2.1 above
[515] See para 3.2.2.2.1 above.
[516] See para 2.2.2.2.1 above.
[517] See para 3.2.2.2.1 above.

http://etd.uwc.ac.za/

the timing of the dismissals and to mitigate the adverse effects of the dismissals.[518] The ERA does not specifically provide the matters that should be discussed in the consultation process. Since the LRA requires employers in South Africa to consult on specific matters when they contemplate dismissing employees based on operational requirements, employees in South Africa are more protected than the employees in New Zealand.

The legislation in South Africa and New Zealand places an obligation on the employer to involve the employees in the selection process. In South Africa, where the parties are unable to reach an agreement on the selection criteria, a fair and objective criterion should be used.[519] In New Zealand, no specific requirements are provided by the ERA, however the courts have expressly acknowledged that, in selecting an employee to be made redundant, there are a wide range of factors such as skills, experience, qualifications, performance, ability, attitude and behaviour and length of services which can be considered. This research shows that more protection is provided by the LRA in South Africa since it makes express provision for the fact that a fair and objective criterion should be used where the parties are unable to reach an agreement in this regard.

UNIVERSITY of the
WESTERN CAPE

South Africa's LRA places an obligation on employers to suggest severance pay in their written notice to consulting parties.[520] South African legislation provides that selected employees are entitled to severance pay of at least one week's remuneration for each completed year of continued service with the employer.[521] Although the South Africa's rate of statutory severance pay is low,[522] there are countries such as New Zealand who are not obligated to pay any severance pay in case of dismissals based on operational requirements unless the employer is contractually obligated to do so.[523] The current rate of redundancy compensation in New Zealand is 6 weeks wages for the first year of service and 2 weeks wages for each year of service thereafter.[524] Since

[518] See para 2.2.2.2.2 above.
[519] See para 2.2.2.2.3 above.
[520] See para 2.2.2.2.4 above.
[521] See para 2.2.2.2.4 above.
[522] See para 2.2.2.2.4 above.
[523] See para 3.2.2.2.4 above.
[524] See para 3.2.2.2.4 above.

http://etd.uwc.ac.za/

employees in South Africa have a statutory right to severance pay, as opposed to the situation in New Zealand where employees may only receive redundancy compensation where their employer is contractually obligated to pay it, employees in South Africa are more protected in this regard. While there is no statutory right placed on employers in New Zealand to pay redundancy compensation, in circumstances where the employer is contractually obligated to do so, the amount which should be paid to employees is more than what it is in South Africa. As far as the amount payable is concerned, South Africa can learn from New Zealand. Since the rate of severance pay is low in South Africa, it is recommended that the severance pay to be paid to employees who are retrenched be increased to 6 weeks wages for the first year of service and 2 weeks wages for each year of service thereafter.

New Zealand's legislation provides that the employer is obliged to take the initiative within the redundancy process to provide real information to the employees with regard to the continuation of the employees' employment.[525] According to South Africa's legislation the employer is required to include the possibility of future re-employment of the dismissed employees in the written notice.[526] The employees in both South Africa and New Zealand are protected by the law governing re-deployment.

UNIVERSITY of the
WESTERN CAPE

As a result of the enactment of section 189A in the LRA, the law of South Africa distinguishes between small-scale and large-scale retrenchments. As far as large-scale retrenchments are concerned, the employees have the right to strike to dissuade the employer from retrenching and the parties are entitled to make use of the process of facilitation. This is not the case with small-scale retrenchments. Employees in South Africa involved in large-scale retrenchments are more protected than employees in New Zealand since the law of New Zealand does not distinguish between small-scale and large-scale retrenchments.

New Zealand's legislation does not place an obligation on its employers to provide outplace services to the affected employees however it is considered in determining the procedural fairness of a dismissal. South Africa on the other hand, places a

[525] Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011) 208.
[526] See para 2.2.1 above.

http://etd.uwc.ac.za/

statutory obligation on its employers to provide outplace services to the affected employees. Employees in South Africa and in New Zealand are protected by the law governing outplacement support.

4.3 THE EMPLOYER'S ELECTION TO RETRENCH

An additional objective of this mini-thesis is to determine how it is possible that employers are dismissing employees based on operational requirements when this is not the real reason for the dismissal. In South Africa as well as in New Zealand there are still employers who dismiss employees based on operational reasons when this was not the true reason for the dismissal. This thesis contains a discussion on the South African law governing dismissals based on misconduct and incapacity to show that the procedures which should be followed in the aforementioned forms of dismissals are more onerous than what it is with dismissals based on operational requirements.[527] Research shows that some employers do not want to follow the long and time-consuming procedure that should be followed with dismissals based on misconduct and incapacity and therefore dismiss the employees based on operational requirements instead.[528] It is thus very important that the courts should scrutinise the employer's decision to retrench to ensure that a fair decision has been made by the employer.[529]

UNIVERSITY of the
WESTERN CAPE

Prior to dismissals based on incapacity, in circumstances where an employee fails to meet a performance standard the employer is required *inter alia* to provide the employee with a reasonable opportunity to meet the standard and is also required to provide appropriate guidance, training and counselling.[530] In the case of dismissals based on ill-health or injury the employer is required to determine the extent to which the circumstances at work can be adapted to accommodate the employee, alternatively whether the duties of the employee can be adapted.[531] In addition, the employee should be provided with an opportunity to state his/her case prior to the dismissal.[532] There are also onerous obligations which an employer should comply

[527] See paras 2.5.1. & 2.5.2 above.
[528] See paras 2.5.1. & 2.5.2 above.
[529] See paras 2.5.1. & 2.5.2 above.
[530] See para 2.5.2.1 above.
[531] See para 2.5.2.2 above.
[532] See para 2.5.2.2 above.

http://etd.uwc.ac.za/

with in order to dismiss an employee based on misconduct in comparison to retrenching an employee. With dismissals based on misconduct, the employer is required to conduct an investigation and a hearing should be held by a presiding officer who inevitably determines whether the employee may be dismissed.[533] With dismissals based on operational requirements the requirements which employers should comply with are less cumbersome and the ultimate decision to retrench lies with the employer.[534]

To ensure that the information depended on for making decisions is accurate, and that redundancy is what a fair and reasonable employer would do in all circumstances, employers will need to apply extra vigilance in composing business explanation for restructuring proposals.[535] In order to reduce the situation where employers dismiss employees based on operational requirements when this is not the real reason for the dismissal, a recommendation is made that the LRA be supplemented in terms of which courts be required to examine the content of the reasons provided by employers for retrenching employees. It is also recommended that the legislation of South Africa be amended in order to provide employees effected by small-scale retrenchments with the right to strike and also be provided with the right to require that a facilitator be appointed by the commission to ensure that employers do not retrench employees when it is not the real reason for dismissal.

UNIVERSITY of the
WESTERN CAPE

4.4 CONCLUSION

The above research illustrates that employees are protected by South Africa legislation in a number of respects when it comes to dismissals based on operational requirements. When analysing the legislative framework governing dismissals based on operational requirements this research also shows that the said framework can be amended and/or supplemented in the ways in which it is discussed above. This conclusion has been made not only as a result of the comparisons that have been made between the laws in South Africa and New Zealand, but also as a result of comparing the South African law governing dismissals based on misconduct and

[533] See para 2.5.1 above.
[534] See para 2.5.1 above.
[535] Three60 Consult 'New Law for Redundancy Dismissals' available at *https://www.three60consult.co.nz/ourblog/law-redundancy-dismissals/* (accessed 15 April 2021).

http://etd.uwc.ac.za/

incapacity on the one hand with the South African laws governing dismissals based on operational requirements on the other.

Word count: 30780

http://etd.uwc.ac.za/

BIBLIOGRAPHY

Constitution:

The Constitution of the Republic of South Africa of 1996

Legislation:

Basic Conditions of Employment Act 75 of 1997

Code of Good Practice: Dismissal

Code of Good Practice on Dismissal Based on Operational Requirements

Employment Relations Bill 2000

Employment Contracts Act 1991

Labour Relations Act 1987

Labour Relations Act 66 of 1995

Termination of Employment Convention 158 1982

Termination of Employment Recommendation 166 1982

The Employment Relations Act 2000

Wage Adjustment Regulations 1974

Case Law:

Airey and Others v GE Security (Africa) (C218/06) (2008) ZALC 132

Air New Zealand v V (2009) ERNZ 185

Aoraki Corporation Limited v McGavin (1998) 1 ERNZ 601

Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others (CCT181/18) (2020) ZACC 1

Baguley v Coutts Cars Limited (2000) 2 ERNZ 409

Benjamin & others v Plessey Tellumat SA Limited (1998) 3 BLLR 272

Bemawu on behalf of Mohapi & Another v Clear Channel Independent (Pty) Ltd (2010) 31 ILJ 2863 (LC)

BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union(2001) 22 ILJ 2264 (LAC)

Brake v Grace Team Accounting Ltd [2013] NZEmpC 81

Brighouse Limited v Bilderbeck (1994) 2 ERNZ 243

Broll Property Group (Pty) Ltd v Du Pont & Others (2006) 27 ILJ 269 (LAC)

Cammish v Parliamentary Service (1996) 1 ERNZ 404

http://etd.uwc.ac.za/

Canterbury Spinners v Vaughan (2003) 1 NZLR 176
CEPPWAWU obo Gumede v Republican Press (2005) ZALC 21
Chemical Workers Industrial Union v Algorax (2003) 24 ILJ 1917 (LAC)
Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd (2006) 27 ILJ 292 (LAC)
Chief Executive of Unitec Institute of Technology v Henderson (2007) 8 NZELC 98
Communication and Energy Workers Union Incorporated v Telecom New Zealand Limited [1993] 2 ERNZ 429
CWIU and Others v Algorax (Pty) Ltd [2003] 11 BLLR 1081 (LAC)
Decision Surveys International (Pty) Ltd v Dlamini and Others (1999) 5 BLLR *413* (LAC)
Dunn v Methanex New Zealand Limited (1996) 2 ERNZ 222
EDS (New Zealand) Limited v Inglis (2001) ERNZ 59
FAWU and others v Ruto mills (Pty) Ltd (CLL) unreported case no 17/06 (January 2008)
FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River (2010) 31 ILJ 1654 (LC)
G N Hale & Son Ltd v Wellington etc Caretakers etc IUW (1991) 1 NZLR 15 (2002) 9 *BLLR* 797 (LAC)
Godfrey v Sensation Yachts Limited (1999) AC44A/99
Goldfields Trust (Pty) Ltd. & Another v Stander and Others (2002) 9 BLLR 797 at 806A-C (2002) 9 BLLR_797 (LAC)
Grace Team Accounting Ltd v Brake **(**2014**)** NZCA 541
Group Rentals NZ Limited v Canterbury Clerical Workers IUOW (1987) NZILR 255
Gumede v Richdens (Pty Ltd t/a Richdens Foodliner (1984) 5 ILJ 84 (IC)
Harris v Charter Trucks Limited (2007) CC16/07
Hildred v Newmans Coach Lines (1992) 3 ERNZ 165
HP Industries (New Zealand) Limited v Davison (2008) ERNZ 514
IEA obo Birc v RGC Engineering Sales Divisions (Pty) (2008) 7 BALR 677 (CCMA)
Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & Others (1999) 20 ILJ 89 (LAC)
Karbusicky v Anglo American Corporation of SA Ltd (1993) 14 ILJ 166 (IC)
Klusken and Ors v James Hardie Building Services and Technologies New Zealand Limited (1997) AEC36/97 (EC)

http://etd.uwc.ac.za/

Law v G E Tregenza (1992) 2 ERNZ 149
Lane Walker Rudkin v Daymond (1999) CEC46/98 (EC)
Lewis v Howick College Board of Trustees (2010) NZEMPC 4
Mastertrade Limited v Te Kooro (1998) CC43/98 EC
McDonald & another v Shoprite Checkers (2005) 26 ILJ 168 (CCMA) 174
Mohamed v Nampak Management Services (2004) 1 BALR 919 (CCMA)
Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare (2005) 26 ILJ 889 (LC)
Mthombeni v Air Traffic & Navigation Services Ltd (2008) 29 ILJ 188 (LC)
Mweli and Another v MTN Group Management Services (Pty) Ltd (JS610/16) (2019) ZALCJHB 119
National Union of Mineworkes and Another v Black Mountain Mining (Pty) Ltd (CA22/2012) (2014) ZALAC 78
Nee Nee and Ors v TLNZ Auckland Limited (2006) ERNZ 95
New Zealand Building Trades Union v Hawkes Bay Area Health Board (1992) 2 ERNZ 897
New Zealand Fasteners Stainless Ltd v Thwaite (2000) 1 ERNZ 739
New Zealand Nurses Union v Air New Zealand Limited (1992) 3 ERNZ 548
Northern Distribution Union v BP Oil New Zealand Ltd (1992) 3 ERNZ 483 (CA)
Num v DB Contracting North CC (2013) 34 ILJ 971 (LC)
NUMSA v Atlantis Diesel Engines (Pty) Ltd (1992) 13 ILJ 405 (IC)
NUM and Others v Anglo American Research Laboratories (Pty) Ltd (2005) 2 BLLR 148 (LC)
NUMSA obo Appel v Golden Arrow Bus Services (Pty) Ltd (2007) JOL 20171 (DRC)
NUMSA v Comark Holdings (Pty) Ltd (1997) 18 ILJ 516 (LC)
NZ Food Processing Union v Unilever New Zealand (1990) 1 NZILR 35
NZPSA v Land Corporation (1991) 1 ERNZ 741
Orringe v Forestry Corporation of NZ Limited (Employment Tribunal, Auckland, AT202/92, 16 September 1992)
Pahono v Vice Chancellor of the University of Auckland (2008) A153/0
Porter Motor Group v Karachi (2002) 23 ILJ 348 (LAC) 349
Priest and Ors v Fletcher Challenge Steel Limited [1999] 2 *ERNZ* 395
Rolls v Wellington Gas Company (1998) WC46/98 (EC)
SAA v Bogopa (2007) 11 BLLR 1068 LAC)

http://etd.uwc.ac.za/

SA Mutual Life Assurance v IBSA (2001) 9 BLLR 1045 (LAC)
Samujh v Gould, the Vice Chancellor of the University of Waikato (1995) AEC12A/95 (EC)
Simpsons Farms Ltd v Aberhart (2006) 1 ERNZ 825 (EC)
Smith v Sovereign Limited (2005) AC68/05 (EC)
Staykov v Cap Gemini Ernst and Young New Zealand Limited (2005) AC18/05 (EC)
T & L Harvey Limited v Ducan (2009) 7 NZELR 161
Telkom SA Soc Limited v Van Staden and Others (JA68/2018) (2020) ZALAC 52; (2021) 42 ILJ 869 (LAC)
The New Zealand Nurses Union v Air New Zealand (199) 3 ERNZ 548
Transport & General Workers Union v City Council of the City of Durban (1991) 12 ILJ 156 (IC)
Tua v ERG Connect Limited (1999) WC60/99 (EC)
Unilever New Zealand Limited v MacDonald (2001) AC24A/01 (EC)
Unkovich v Air New Zealand Ltd (1993) 1 ERNZ 526
Wolfaardt v IDC Case number J869/00 handed down on 01 August 2002 (LC)
Wood v Christchurch Golf Club Incorporated (2000) 1 ERNZ 756

Papers:
General Notice 1517 'Government Gazette 20245' (1999)
Good Practice Note 'Managing Retrenchment' (2005) 4
Honsby-Geluk S *Managing Organisational Change – Legally* (2009) The Human Resources Institute of NewZealand Conference Engaging Change

Journal Articles:
Du Toit D 'Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond' (2005) 26 *ILJ* 595 - 617
Hayward K 'Ho do New Zealand Labour Standards Comply with The International Labour Organisation's Conventions and Recommendations: Implemented after 1980 and the Introduction of Neo-Liberalism' (2013) 21 *WLR* 158 - 179
Levy E 'Is South African Labour Law on operational requirement dismissals unduly onerous for employers?' (2016) 37 *ILJ* 1552 - 1573
Mackey K 'Organisational Downsizing and Redundancies: The New Zealand Workers' Experience' (2004) 29 1 *NZJERS* 63 - 87

http://etd.uwc.ac.za/

Manamela ME ‘Selection criteria: The dismissal of employees based on operational requirements’ (2007) 19 *SA Merc LJ* 103 - 108
Manamela T ‘When the lines are blurred- a case of misconduct, incapacity or operational requirements: are all going operational?’ (2019) 40 1 *Orbiter* 97 - 117
Mitchell DH ‘The burgeoning of Fairness in the Law Relating to Redundancy’ (1995) *Auckland University Law Review* 897 – 930
Nawaj K & van Eck S ‘Automatically Unfair Operational Requirement Dismissals: Making Sense of the 2014 Amendments’ (2016) *PER/PELJ* 19 1 -30
Rycroft A ‘Employer and Employee Obligations with regard to Alternatives to Retrenchment’ (2015) 36 *ILJ* 1775 426 – 432
Russell A ‘The ‘Emperor’s New Clothes’: The Judicial Fabric of Redundancy Under the Employment Relations Act 2000’ (2003) 9 *New Zealand Business Law Quarterly* 125 -149

Books:

Anderson G et el *LexisNexis Employment Law Guide* 7 ed (2005) Wellington: LexisNexis
Anderson et al *Mazengarb’s Employment Law* Online: LexisNexis
Basson et al *Essential Labour Law* 4 ed (2005) South Africa: Labour Law Publications
Blumenfeld et al *Employment Agreements: Bargaining Trends & Employment Law Update 2008/2009* (2008) Industrial Relations Centre, Victoria University of Wellington
CCMA *Candidate Commissioner Training 2019: Module 5 – Managing Dismissals and Unfair Labour Practice Disputes* Cape Town: CCMA
Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) Durban: LexisNexis
Eichbaum C & Shaw R *Public Policy in New Zealand - Institutions, processes and outcomes* (2005) New Zealand : Pearson Education
Grogan J *Dismissal* 2 ed (2014) Cape Town: Juta
Grogan J *Dismissal Discrimination and Unfair Labour Practices* 2 ed (2007) Cape Town: Juta
Grogan J *Workplace Law* 13 ed (2020) Cape Town: Juta
Hughes J et al *Personal Grievances* Online: LexisNexis

http://etd.uwc.ac.za/

Hughes J *Labour Law In New Zealand* (1990) North Ryde, New South Wales : Law Book Company
McDowell M et al *The New Zealand Legal System* 3 ed (2002) Wellington : LexisNexis Butterworths
Rubin N *Code of International Labour Law*: *Law, Practice and Jurisprudence* (2005) 1 vol (2) United Kingdom: Cambridge University Press
Shorter Oxford English Dictionary 5 ed (2002) 497. Oxford University Press: Oxford
Szakats A & Mulgan M *Dismissal and Redundancy Procedures* 2 ed (1990) Butterworths: Wellington
Van Niekerk A *Unfair Dismissal* 4 ed (2008) Cape Town: Siber Ink

Internet Sources:
Agodi E 'Why leaders should provide support during retrenchments' available at *Why leaders should provide support during retrenchments - CHRO South Africa* (accessed 24 August 2021)
Daniels K 'Factsheet: Redundancy' available at *https://www.cipd.co.uk/knowledge/fundamentals/emp-law/redundancy/factsheet?WBCMODE=PresentationUnpublishedaboutaboutaboutaboutfaculty.htm* (accessed 24 April 2021)
Department of Labour 'Employment relationships: Guide for Employers' available at *<www.workplace.govt.nz/publications/pdfs/employers_guide_to_er.pdf>* (accessed 20 May 2021)
De Villiers J 'Retrenchment tracker: South Africa's big corporate job losses in 2019 - so far' available at *https://www.businessinsider.co.za/total-number-of-job-losses-south-africa-retrenchment-corporate-job-losses-2019-6* (accessed 15 June 2020)
Gordhan H 'Is South Africa lagging behind in supportive retrenchment polices?' available at *Is South Africa lagging behind in supportive retrenchment policies? - HR Pulse* (accessed 24 August 2021)
International Finance Corporation of the World Bank Group 'Good Practice Note – Managing Retrenchment' available at *https://www.ifc.org/wps/wcm/connect/e417f063-41a3-45d8-8c2d-bc08d058e857/Retrenchment.pdf?MOD=AJPERES&CVID=jkD10-G* (accessed 23 February 2021)

http://etd.uwc.ac.za/

Peer Y ‘Small scale retrenchments – What obligations do employers have? A South African perspective’ available at *https://www.globalworkplaceinsider.com/2015/02/small-scale-retrenchments-what-obligations-do-employers-have-a-south-african-perspective/* (accessed 23 February 2021)
Raman A ‘Redundancy in New Zealand: Procedural Fairness and Remedies’ available at *https://www.nzinitiative.org.nz/reports-and-media/reports/power-in-employment-relationships/document/58* (access 12 April 2021)
Slier, K ‘Everything you need to know about bumping’ available at *https://blog.seesa.co.za/index.php/2018/10/15/everything-you-need-to-know-about-bumping/* (accessed 09 May 2022)
‘Stats SA’ available at *http://www.statssa.gov.za/?p=13049* (accessed 15 June 2020) (accessed on 26 April 2020)
Three60 Consult ‘New Law for Redundancy Dismissals’ available at *https://www.three60consult.co.nz/ourblog/law-redundancy-dismissals/* (accessed 15 April 2021)
Van der Sandt A ‘Dismissal based on an employer’s operational requirements as per the Labour Relations Act’ available at *https://www.serr.co.za/dismissal-based-on-an-employers-operational-requirements-as-per-the-labour-relations-act/* (accessed 24 February 2021)

Thesis:
Hughes SJ *A portrait of Redundancy Law in New Zealand* (unpublished LLM thesis, University of Canterbury, 2011)
Makan K *When is dismissal an appropriate sanction for misconduct? And who has the last say?* (unpublished LLM thesis, University of the Western Cape, 2009).

Other:
Report of the Public Advisory Group on Restructuring and Redundancy (2008)

http://etd.uwc.ac.za/