THE NEW LAW OF RETRENCHMENT

Introduction

The Labour Relations Act, 1995 ("the LRA"), provides for specific procedures which employers are required to follow when they contemplate retrenchments based on the operational requirements of their business.

Pursuant to pressure from South African trade unions, a significant number of substantive and procedural changes have recently been made to these procedures. These amendments, in the form of the Labour Relations Amendment Act 2002, came into effect as of 1 August 2002.

Background

Previously, the LRA required that consultation only had to take place on appropriate measures to avoid, minimise and change the timing of dismissals, measures to mitigate the adverse effect of the dismissals, the method for selecting the employees to be dismissed, and severance pay for dismissed employees.

The South African Labour Court and the Labour Appeal Court, have been willing to impose fairly strict procedural standards, but typically would not second-guess the substantive, or managerial business decisions which may lead an employer to retrench employees. Provided that the decision was made in good faith, the courts were unwilling to intervene and consider the substantive fairness of this type of decision (although see the decision in BMD Knitting Mills (Pty) Ltd v SACTWU (2001) 7 BLLR 705 (LAC)).

The only area of substantive fairness in which the Labour Court and Labour Appeal Court have been willing to intervene has been in the area of the selection of employees to be retrenched.

The Council of South African Trade Union's ("COSATU") response to this approach was to influence amendments to the South African labour laws in terms of which employees and unions can now elect whether to challenge retrenchments through power play or law. The previous regime only allowed for the adjudication of dismissal disputes relating to retrenchment in our labour courts.

COSATU argued that employees should be able to protect themselves by having the right to strike against dismissals perceived to be unfair, since the court's willingness to insist on fairly strict standards of consultation, offers only limited protection.

The New Retrenchment Law

The effect of the amendments is to create two legal regimes governing retrenchment. The first of these is to be found in the current Section 189 of the LRA, which has been amended in certain important respects. This section applies to what can be termed "small-scale" retrenchments (that is, in respect of employers who employ less than 50
employees), and retrenchments proposed by employers who employ more than 50 people in circumstances where the number of employees who may be retrenched are less than a specified number.

The second legal regime is found in Section 189A and applies to so-called "large-scale" retrenchments. Section 189A will apply to an employer who employs more than 50 employees, and who proposes to retrench more than the number of employees specified in the amendment. Section 189A will also apply to contemplated dismissals if the latest contemplated dismissals would have the result that the total number of dismissals in the last 12 months, for a particular employer, would be equal to, or exceed, the numbers specified by the LRA.

If Section 189A applies to a particular proposed retrenchment, the additional requirements for a fair dismissal, as set out in Section 189A will apply, as well as those set out in Section 189. In addition, employees will, in certain circumstances, acquire the right to strike in opposition to their retrenchment.

**New Procedural Requirements**

The essential requirements and procedures for a fair retrenchment contained in Section 189 referred to above remain unaffected. The section is, however, amended in a number of ways, including an attempt to define what is meant by "consultation".

The employer will now have to issue a written notice inviting the other consulting parties to consult with it, and disclose all relevant information. The new disclosure provision states that if an arbitrator or the Labour Court is required to decide whether or not information is relevant to the proposed retrenchments, the onus is on the employer to prove that any information that it refuses to disclose is not relevant for the purpose for which it is sought.

It is also provided that if a consulting party makes any representation to the employer in writing, the employer must respond in writing.

**Section 189A**

If Section 189A applies to a proposed retrenchment, two important innovations apply.

**Appointment of a Facilitator**

Either the employer or the other consulting party may request the Commission for Conciliation, Mediation and Arbitration ("the CCMA") to appoint a facilitator. The CCMA will then appoint a facilitator from a panel of qualified facilitators. The provision also allows the consulting parties to agree to appoint a specific facilitator.

At a first meeting, the facilitator must facilitate an agreement on the procedures to be followed during the facilitation, the date and time of additional facilitation meetings, and
the information that the employer will be required to disclose, as well as when that information must be disclosed.

A facilitator may conduct a maximum of four facilitation meetings between the parties. This may be increased by the Director of the CCMA. The facilitator may also chair meetings between the parties and decide on procedural issues that arise during the course of such meeting. The powers of the facilitator may also be extended by agreement between the parties.

If there is any dispute about the disclosure of any information, the facilitator may make an order directing an employer to disclose information, as well as documents that are relevant for facilitation.

The facilitator however has no power to make decisions binding the parties as to whether or not a retrenchment may take place, who may be retrenched, and when such retrenchment can take place.

Section 189A envisages a 60 day period during which the facilitation can take place, and during which the employer cannot proceed with the retrenchment. Once the 60 day period expires, the employer may proceed to terminate the employment of the employee that it wishes to retrench. Proper notice of termination must, however, be given in terms of the Basic Conditions of Employment Act, 1997.

**The Right to Strike**

After the expiry of 60 days (apparently even if facilitation has not been requested or taken place), and once the employer has given notice of its intention to terminate employment, any registered union, or the employees who have received notice of termination, may:

- give notice of a strike in terms of Section 64(1)(b) or (d); or
- refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court in terms of Section 191(11).

The intention is therefore to limit the rights to strike in a situation where the union or employees are arguing that there was not "a fair reason for dismissal". In such a case there is an election between strike action and a refusal to adjudication by the Labour Court to be made. Once the election has been made, the other alternative falls away.

It is also worth pointing out that it is not only the employees who are to be retrenched in the workplace who may strike, but also their co-employees in another workplace or branch who are not affected by the retrenchments. Subject to the specific provisions of Section 189A and Section 66, secondary strikes with other employees may also be called. Strikes which comply with the provisions of the LRA will be protected. The employer will, however, have the right to embark on a lockout in response to a protected strike called in terms of the LRA.
Defining a Fair Reason to Retrench

It could be argued that Section 189A(19) of the LRA attempts to provide more detailed guidance as to when there will be a fair reason to retrench in the context of Section 189A. It states that the Labour Court must find that an employee was dismissed for a fair reason if:

- the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- the dismissal was operationally justifiable on rational grounds;
- there was a proper consideration of alternatives; and
- the criteria utilised for selecting people for retrenchment was fair and objective.

This is a much stricter test for substantive fairness than was previously applied.

Procedural Fairness

Disputes concerning allegations that an operational requirements dismissal was procedurally unfair must still be adjudicated by the Labour Court, and a protected strike on this issue cannot be called. If an employer does not comply with a fair procedure, a consulting party can approach the Labour Court on application for an order in terms of which:

- an employer may be compelled to comply with a fair procedure;
- an employer may be interdicted or restrained from dismissing an employee prior to complying with a fair procedure;
- an employer is directed to reinstate an employee until the employer has complied with a fair procedure; and
- an award for compensation may be made if one of the above orders is not appropriate.

Conclusion

There are a number of aspects regarding these amendments which remain uncertain, and the Labour Court and Labour Appeal Court will be called upon in future to provide further guidance.

It is clear however, that this new law of retrenchment will make it more difficult, if not more expensive, for employers in South Africa to restructure their operations.