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RETRENCHMENTS

Must an employer consider "bumping" as an alternative to retrenchment? Must it offer a redundant employee an available alternative position even if this would require additional training?

These are some of the issues that occupied the Labour court in the matter of *NUMSA v Timken SA (Pty) Ltd.* The union, on behalf of six of its members, claimed that their dismissals were both substantively and procedurally unfair. Despite numerous consultation meetings between the employer and the union, they could not agree on selection criteria. The employer subsequently retrenched the six employees based on its own preferred criteria, which included LIFO but also considerations such as poor attendance and "tardiness".

The issues the court had to determine was the fairness or otherwise of such criteria; whether an employee must be offered a vacant position even if this would require additional training; and whether the employer is obliged to consider "bumping".

Turning to the first issue, the court confirmed that if the consulting parties were unable to reach consensus on the selection criteria, it was the prerogative of the employer to apply its preferred selection criteria.

However, four qualifications seem to apply: first, the criteria that the employer applies must be fair (e.g. have a good business rationale) and objective (i.e. measurable); second, it must be *applied* fairly (i.e. in a non-discriminatory way); third, where the criteria tend to be more subjective, e.g. "poor attendance", "tardiness" and "performance", the affected employees must be given an opportunity to challenge the information on which negative conclusions against them are drawn on the basis of such criteria. Finally, the employer should be able to provide a good business reason for deviating from LIFO. While LIFO is the most objective and fair criterion to use when selecting employees for retrenchment, it need not be applied if it would result in loss of key skills or disruption to the business.

In the present matter the employer never afforded the employees an opportunity to influence the scores used to assess whether or not they should be retrenched. The employer could also not explain why it had used such subjective criteria without considering criteria that are inherently more objective, such as the employees' skills, qualifications, experience and long service.

The second issue the court considered relates to the difference between a position becoming redundant and the actual retrenchment of the incumbent. The court reiterated that retrenchment of employees must be an act of last resort. If an employee's position becomes redundant but work is available which an affected employee could perform, s/he must be offered that position. If the employee lacked skills to perform in that position, the employer is obliged to consider any additional training that might assist the employee. If it declines to provide training, it should be able to provide a justification for it. The same applies where new positions are created: existing employees should have the first bite at the cherry, so to speak.

Finally, the court turned to the question of "bumping". During the consultation process, the union had proposed bumping as an alternative to retrenchment. However, neither during the consultation process nor in proceedings before the court did the employer provide any reasons for not considering bumping. The court was therefore of the view that the employer had not considered other alternatives to retrenchment as required by s 189 of the LRA and therefore the retrenchment of the employees had not been an act of last resort.

The court found that the dismissals were substantively and procedurally unfair and the employer was ordered to reinstate the employees retrospectively, with costs.

The case really reaffirms the fact that the courts will not sanction a dismissal for operational reasons (retrenchment) if the employer cannot demonstrate that it had a sound business case; that it consulted fully and exhaustively on all aspects of the retrenchment; and that there were no other reasonable alternatives available that could have saved an affected individual's position. It also highlights again the fact that retrenchments should not be used as easy processes for getting rid of under-performing employees. If the main reason for dismissal is the employee's under-performance, incapacity procedures should be followed and the employee should be dismissed specifically for poor performance. On the other hand, if under-performance is one of the criteria used in a genuine retrenchment exercise, employers must be certain that they can prove (preferably on paper) that employee A, whom the employer wants to keep, is a better performer than employee B, who has been selected for retrenchment. However, employers should never use subjective criteria, such as poor performance, on their own, but do so only in combination with criteria that are objectively determinable, e.g. length of service, qualifications and skills.

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