

## Retrenching an employee for poor performance unfair

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In the matter of SASBO obo Boughey v Nedbank Ltd the employee sought an order directing the employer to reinstate him in the position he occupied prior to his dismissal for operational requirements.

At the time of his dismissal the employee was employed by the employer as an Area Manager: Sales. The employee argued that the employer had told him in a meeting that he had to accept a demotion, due to alleged leadership problems on his side, failing which his position would be made redundant.

After refusing to accept the demotion, the employee was handed a “Notice of Intended Retrenchment” in terms of s 189 of the LRA. The employer argued that the employee had refused to engage with it in relation to shortcomings in his management style.

The court first confirmed the requirements s 189 of the LRA. In order to prove that the dismissal was substantively fair, the employer, amongst others, had to show that the dismissal was genuinely justified by its operational requirements, and that the dismissal was effected as a measure of last resort.

The court held that on an analysis of the facts, and even on the version of the employer itself, it was clear that the underlying reason for the employee’s dismissal had been something unrelated to operational reasons. The employer’s case was based on “360 degree feedback” received on the employee, exit interviews conducted with employees, and complaints raised against the employee by a colleague. The court held that if the employee excelled in all other areas of his work, as confirmed by the employer, it was unclear why the employee had not been provided with training on leadership skills. The picture created by the employer’s version was rather that the employee had been dismissed for poor performance and not operational reasons. The court in any event held that the employer had failed to prove alleged poor leadership on the part of the employee. The procedure followed in retrenching the employee was also completely unfair for various reasons, including, amongst others, that the employer had failed to consult the employee’s trade union as required by s 189(1) of the LRA and had employer failed to comply with the terms of its own retrenchment policy.

In the result, the employee's dismissal was held to be both substantively and procedurally unfair and the employer was ordered to reinstate the employee, the employer to pay the employee's costs.

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