



## THE CONCEPT OF BUMPING EXPLAINED

by Maserumule Corporate Employment Law

### Introduction

The topic of retrenchment is not unfamiliar in South Africa given the widespread economic challenges.

In the matter of *Porter Group v Karachi*<sup>1</sup> (Karachi), the Labour Appeal Court (LAC) set out the principles of bumping in retrenchments. It held that the Last-in-first-out (LIFO) principle is considered to be a fair selection method as it prioritises those employees who have served the employer for a longer period of time.

It further accepted the principle of “bumping”. This envisages that an employee who faces possible retrenchment, because of the application of LIFO, may request that they be placed in a position that was not necessarily targeted for retrenchment but another which is filled by persons with less length of service – the more senior employee “bumps” the less senior employee.

It pointed out that bumping can either be vertical or horizontal. Horizontal bumping involves moving an employee who is affected by retrenchment to a position that has similar status, pay and conditions of service whereas vertical bumping involves moving the employee to a position that has a lower status, pay and conditions of service. The LAC went on to hold that employers should prioritise horizontal bumping before resorting to vertical bumping, using the latter only when no suitable horizontal positions are available.

This begs the question – what if horizontal bumping is not a feasible alternative to retrenchment, and the employer considers vertical bumping, but the employees reject it due to the lower pay associated therewith?

### Background

This was the issue of the LAC addressed in the matter of *Fischer Tube Technik SA v Bayene and Another*<sup>2</sup>.

In this matter, Fischer Tube Technik SA (the Company), dismissed employees whose positions had become redundant after a consultation process under section 189 of the Labour Relations Act (LRA).

The Company consulted with NUMSA, the union representing the employees, during the retrenchment process. During the consultation process NUMSA proposed LIFO and bumping as the selection criteria. I pause to mention that section 189(7) of the LRA prescribes that:-

“The employer must choose the employee to be dismissed according to a selection criteria-

- i. That have been agreed to by the consulting parties;
- ii. If no criteria have been agreed upon, criteria that are fair and objective are required.”

The Company agreed to the Union’s proposal and two positions were identified where bumping could take place. The agreed-upon positions were lower-level positions in line with the principle of vertical bumping. Later in the consultation process, a dispute arose as to whether the employees who would be placed in the two posts should retain their existing salaries. NUMSA argued that the two employees who would be placed in the positions should retain their salaries linked to the higher positions that they occupied.

Alternatively, it was proposed that the affected employees continue to receive the same salary but forgo their increment for the following year. The Company declined their proposal and set a deadline within which the employees should

<sup>1</sup> (C635/99) [2000] ZALC 64 (19 July 2000)

<sup>2</sup> (JA100/23) [2024] ZALAC 25

accept the offer of alternative employment in the form of bumping on its terms. When the deadline expired without a response, the Company terminated their employment. NUMSA referred a dispute and claimed that the dismissal was procedurally and substantially unfair.

### **Labour Court (LC)**

The LC accepted that generally, employers must attempt to find alternative positions for employees whose roles become redundant. Further, it held that the employer had failed to provide persuasive evidence as to why horizontal bumping was not a viable option and that the mere selection of the criteria and identification of the positions were not enough; the parties ought to have permanently fixed the criteria by agreeing on which bumping, vertical or horizontal, to adopt.

The result was that the dismissal of the employees was procedurally fair but substantively unfair. Accordingly, the employees were each awarded compensation equal to ten months' salary.

The Company appealed the decision, contending that the court erred in determining that it should have applied the principle of horizontal bumping.

### **Labour Appeal Court (LAC)**

The LAC held that the LC's finding that the employee's dismissal was unfair due to lack of persuasive evidence presented by the employer to the effect that horizontal bumping was not feasible, overlooked key issues.

Firstly, the LC had misrepresented the *Karachi* judgment and found that, while employees are entitled to refuse an offer of vertical bumping (especially due to the inevitably lower salary associated with the lower position), this does not mean that any dismissal consequent on that finding is necessarily unfair.

Secondly, the LC mistakenly equated horizontal bumping with a situation where there is a reduction in those terms and conditions. As noted in the *Karachi* judgment, bumping is fundamentally about the employer's organisational structure, not the salary impact on the employees placed in new positions. The terms and conditions of bumping should be separately negotiated.

Consequently the LAC found that the dismissals had been fair in the following terms:-

*"[19] I thus fail to appreciate how it can be said that the appellant's conduct can be described as unfair. Ultimately, the employees were not retrenched on account of any failure by the appellant to apply horizontal bumping. There was an agreement with NUMSA on the application of the principle of vertical bumping. NUMSA must have realised at the time that it made the bumping proposal that the employees would be placed in positions of a lower status, with a commensurate lower rate of pay. Despite this agreement, NUMSA belatedly demanded that the employees be retained at their existing salaries. It was not unfair for the appellant to refuse to agree to that demand, and the ultimate retrenchment of the employees was not unfair. The appeal stands to be upheld."*

### **Key takeaways**

Employees generally have the right to decline any offer of vertical bumping, especially if such an offer involves a demoted position and inevitable reduction in compensation. However, a dismissal that follows a refusal to agree to vertical bumping will not necessarily be unfair. Fairness remains a two-way street, and both parties must attempt to reach a consensus on alternative measures to retrenchment, but agreement is not a precondition for fairness.

### **Conclusion**

While bumping is not an absolute requirement in retrenchment selection criteria, it is a crucial consideration that must be discussed during the consultation process. The principles derived from case law indicates that bumping should be applied in a manner that is fair and practical, with horizontal bumping being the preferred initial approach.

Employers must be prepared to justify their decisions regarding bumping, ensuring that the selection process for retrenchment remains objective and fair.

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