

**DISMISSAL FOR OPERATIONAL REQUERMENTS:
COMPARISON BETWEEN SOUTH AFRICA AND ENGLISH LABOUR LAW**

by

NKGAPELE MMAKGWANA FREDDY

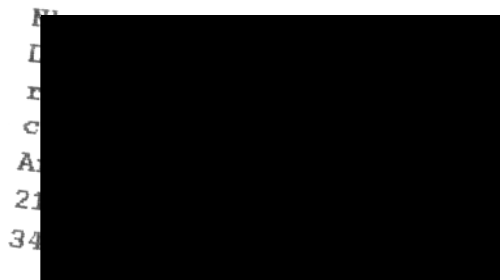
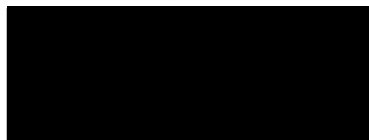
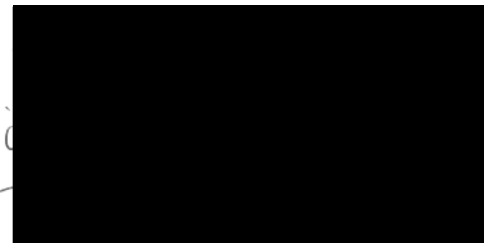


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SUPERVISOR: Mr. M.C LEBEA

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DECLARATION

I Mmakgwana Freddy Nkgapele declare that the mini dissertation hereby submitted to the University of Limpopo, for the degree of Masters in Labour Law has not previously been submitted by me for a degree at this or any other University; that it is my work in design and in execution, and that all material contained therein has been acknowledged.


M.F. NKGAPPELE (Mr.)
Initials & Surname (Title)



10 August 2010
Date

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CHAPTER 1: HISTORY OF DISMISSAL FOR OPERATIONAL REQUIERMENTS.

1.1 Introduction

Employers are frequently compelled for economic reasons to review their staff levels and terminate the employment of some employees to effect savings. Employers have to do so for economic, technological or structural reasons. This form of termination; generally known as dismissal for operational requirements often has effects than any other form of dismissal because it is usually carried out on a greater scale¹.

Dismissal on the grounds of the employers needs also differs from any other forms of termination in the sense the employees affected are economically active and may have rendered impeccable service to their employers and may still able to so. For these reasons, many countries require that dismissal for operational requirements should not be resorted until the employer has complied with certain procedural requirements intended to minimize the prejudice to the employees and their dependants².Of importance on dismissal for operational requirements is the fact that an employee's employment is terminated when there is no fault on his /her part. It is amongst others for this reasons that different rules have been adopted to regulate dismissals for operational requirements³.

“Operational requirements” have always been accepted as a ground for dismissal in South African Labour Law. The Laws that regulate dismissal for operational requirements are today indispensable for attainment of social justice. However the legal pitfalls in this area of Law are myriad⁴.

At common Law; a contract of employment was a personal contract between the employer and the employee. The relationship ceased when the contract came to an end⁵. The common Law did not recognize dismissal for operational requirements as a ground

¹ Stell R, vol.13, March 2003. DE Wet JC, et al (Butterworths 1995).

² Dismissal by Grogan J, Juta & Co Ltd, 2002.

³ Section 189 of the LRA 66 of 1995 and ILO Recommendation 119 pf 1963.

⁴ Nicolas Smit, Transfer of contract of employment 2001.

⁵ Van Wyk A.H, et al,(Butterworths 1995).

for fair termination of a contract of employment; in the same way our Labour Law does currently. At common Law an employer who terminated a contract of employment; for what we could today term operational requirements; was only obliged to give notice of termination to the employees. If the employer terminated such contract without giving notice or terminated a fixed affixed term employment contract for operational requirements; before its expiry the employer would be in breach of contract and be liable for damages. However under certain circumstances termination of a fixed term of employment contract would; like the termination of any other contract; be justified on grounds of impossibility of performance⁶.

Currently dismissal and the treat of dismissal is the main focus of restructuring; be it involving actual dismissal or changes in working conditions. The case Law around the area of this type of dismissal evolved principally form the Tribunals established under the Labour Relations Act⁷ 1956 and its successor, the Labour Relations Act ⁸of 1996. The previous industrial Court, Labour Court, Labour Appeal Court and the Appellate Division developed an equity-based approach to dismissal Law, which represented a radical departure from the previous contract based approach to Labour Law. They developed the concept of “unfair Labour practice”⁹. Previously the Courts were concerned with determining whether the employer was contractually entitled to terminate employment, whereas the post 1965 Act the question before the Court was whether the employer acted fairly in terminating employment. As the result of the above; the principles of administrative Law and international Law was introduced. The concept of substantive and procedural fairness which was unknown under common Law of employment was adopted. Prior to the 1956 Labour Relations Act; damages for unlawful termination of employment contract were usually limited to the amount that would have been earned had a proper notice been given. The 1956 Labour Relations Act, 1996 Labour Relations

⁶ Buthelezi v Municipal Demarcation Board, 2004 ILJ 2317 (LAC)

Fedlife Assurance v Wolfaard 2001(12) BLLR 1301(A)

⁷ LRA 28 of 1956

⁸ LRA 66 of 1996

⁹ De Lange v Smuts & others, 1998(3) SA 785 (CC)

Eskom v Marshall & Others ,2002 (23) ILJ 225(LC)

Fry's Metal v NUMSA, 2003 (2) BLLR 140 (LAC)

Act and the jurisprudence have changed that approach¹⁰. Since 1963 the International Labour Organization has recognized various principles and guide lines in respect of dismissal for operational requirements. The International Labour Organization regarding prior consultations with employees, selection criteria, restrictions on overtime, transfer of workers, training and re-training, have in various instances been approved and accepted internationally¹¹.

The courts have now held, however, that the requirement that all dismissals must be for a fair reason obliges the employer to show that it was in fact necessary to dismiss the employee for operational requirements to effect savings. However the concept of dismissal for operational requirements is also a fundamental rights contained in section 23 of the Republic of South African Constitution. It goes further under section 39 (1) of the Constitution to say that when interpreting the Bill of Rights, the Court may consider an International Law and Common Law as long as they are consistent with the Constitution¹².

A cursory reading of section 189 and 189A of the Labour Relations Act suggest that the requirements placed on employers contemplating dismissal for operational requirements are primarily procedural. However these are the two core of any type of dismissal, which the court will normally have to scrutinize, these are substantive fairness and procedural fairness.

Substantive fairness, being one of the basic requirements for a fair dismissal, deals with the reasons or grounds for dismissal of an employee. The employer must have a fair and justifiable reason for dismissing an employee¹³. When deciding the fairness of the reasons for dismissal, value judgment has to be made. However, the Court or the CCMA has the discretion to determine the fairness of the dismissal if evidences necessitate such

¹⁰ Atlantis Diesel Engines (pty) Ltd v NUMSA, 1994 (15) ILJ 1247

¹¹ Section 158 of the ILO of 1963

¹² Act 108 of 1996

¹³ Section 188(1) (a) of the LRA 66 of 1995

interferences because of clear unfairness¹⁴. Automatically unfair dismissal is one example, which may also constitute substantively unfair while dismissal for operational requirements may be one ground in which the employer may raise justification.

Before it can be stated that an employee has been dismissed in a fair manner, the employer must also comply with specific procedure requirements. The Labour Relations Act has introduced a more informal procedure to ensure that disputes are resolved quickly as possible by the CCMA¹⁵. The Labour Relations Act also contains a Code of Good Practice, which provides guidelines for fair procedures for different cases, which would justify dismissal¹⁶. Provision is also made for disciplinary action short of dismissal¹⁷. Employers may also draft and use their own disciplinary codes on practice. Similarly; a collective agreement may also prescribe a disciplinary procedure, which must be adhered to¹⁸. The holding a disciplinary hearing is the most important procedural act to be complied with in order to effect procedural fairness.

The study is based on the assumption that South Africa does not meet the standard of International Labour Laws, in respect of dismissal for operational requirements especially where it involves a single employee who is not a trade union member nor represented during the process of dismissal for operational requirements. South Africa as member of International Labour Organization is therefore expected to adhere to the policies, rules and regulations that are standard policy by the International Labour Organization. Most employers in South Africa when contemplating for a dismissal based on operational requirements they do not follow the required procedure as stated under the Labour Relations Act 66 of 1996 and International Labour Organization recommendations. Therefore the Labour Relations Act 66 of 1996 is also not efficient in protecting the rights of a single employees who are not a trade union members nor represented when dismissal for operational requirements takes place, because the employee will not get an easy and accessible dispute resolution, since they will not afford Labour Court litigation

¹⁴ Toyota SA Motors (pty) Ltd v Radebe 200 ILJ #40 (LAC)

¹⁵ McKenzie v Multiple Admin cc 2001 ILJ 2753 (CCMA)

¹⁶ Khula enterprise finance Ltd v Madine 2004 ILJ 535 (LC)

¹⁷ Item 3 of schedule 8 of Code of Good practice

¹⁸ Highveld District Council v CCMA 2003 ILJ 577 (LAC)

unlike if the CCMA had a jurisdiction over a matter that involves dismissal for operational requirements.

This dissertation thus endeavors to draw attention to the importance of dismissal for operational requirements provisions for all workers and to the various Labour Law implication that result for statutory interventions of this kind. It will also examine the introduction on the changes of law particular subsequent to the return of a democratic dispensation that the pendulum could have swung too far in addressing the grievances. However the dissertation will mainly focus on comparison between South African and English Labour Laws in respect of dismissal for operational requirements.

What are the factors that lead to the dismissal based on operational requirement?

Is there any criterion that the employer needs to adopt before dismissing an employee based on operational requirement? What are the rights of the employee if the employer wants to effect dismissal based on operational requirement? Is there any legislation that governs the concept of dismissal based on operational requirement? Does the concept of dismissal for operational requirements protect the rights of the single employee who is not a member of trade union or represented during the process of retrenchment under South African Law? Does CCMA have jurisdiction to entertain the concept of dismissal for operational requirements? Is dismissal for operational requirements a fundamental right?

The main aim of the study is to compare the aspect of dismissal for operational requirements between South African and English Labour Law. The significance of the study is to contribute to academic knowledge and influence policy and practice in dealing with dismissal for operational requirements.

1.2. The definition and the meaning of dismissal for operational requirements in terms of Section 213 of the Labour Relations Act:

Section 213 defines a dismissal based on the operational requirements of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology, which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

1.3. Terminology

The distinction between "retrenchment" and "redundancy" has been abandoned in the Labour Relations Act and the concept of "dismissal for operational reasons" is used to cover both situations. The term "operational requirements" is defined as requirement based on the economic, technological, structural and similar needs of an employer. In a case of retrenchment, an employer is compelled to terminate the employment relationship as a result of downturn in the sale of his products or services that is, for financial reasons. Redundancy, on the other hand can be described as the termination of the services of employees because of the restructuring of the undertaking itself, the introduction of the new business ventures or new technology or rationalization consequent upon a merger, that is for operational reasons. Because of the problems with the terminology used in the Labour Relations Act and for the sake of convenience, the concept "retrenchment" is given an extended meaning so as to embrace both the terms "redundancy" and "retrenchment" in its narrow meaning and is henceforth also used to indicate this causa for terminating the employment relationship¹⁹.

¹⁹ 66 of 1995 and EML Strydom in "Essential Labour Law Volume 1: Individual Labour Law", 3rd Edition, 2002,

CHAPTER 2: ORIGIN OF DISMISSAL FOR OPERATIONAL REQUIREMENTS

2.1 Introduction

The recognition of dismissal for operational requirements has its origin from International Labour Organization²⁰. The legal position in South Africa was uncertain in respect of dismissal for operational requirements even after the introduction of the Labour Relations Act of 1956²¹. The concept of dismissal for operational requirements was dealt in terms of the principles of common Law contract. However in 1983, the Industrial Court was requested to adopt International Labour standards, which it has established comprehensive guidelines and identifying two elements, which were substantive and procedural fairness. Substantive fairness relate to the reasons for dismissal, whereas procedural fairness relate to the manner in which dismissal was effected²².

Dismissal for operational requirements is now defined in the Labour Relations Act of 1996 as requirements based on the economic, technological, structural or similar needs of the employer. Technological reasons refer to the introduction of new technology which affects work relationships by either making existing jobs redundant or by requiring employees to adapt to the new technology, even where this may necessitate a change in their terms and conditions of employment. Structural reasons arise where jobs become redundant as a result of a restructuring of the business. Economic reasons relate to the financial well being of the business. It is not necessary that the business should be in financial difficulties in order for a dismissal for operational requirements to be justifiable on the basis of economic needs, merely that there is a sound economic reason for such dismissals.

²⁰ ILO Convention 158 of 1982.

²¹ LRA 28 of 1956.

²² Mawu v Barlow Manufacturing CO Ltd 1983 ILJ, 283(IC).

Gumed v Richens (pty) Ltd 1984 ILJ, 84 (IC).

Le Roux et al, South African Law of Unfair Dismissal (1994) 152.

The Court has generally taken the approach that it will not intervene in the decision for dismissal for operational requirements, provided that there was a commercial rationale for the decision and it was taken in good faith. However, this approach has changed in recent years as the Court has adopted an approach that, if it is not more interventionist, then is at least more investigative in nature. In *B M D Knitting Mills v SACTWU*²³, the Labour Appeal Court indicated that it was entitled to determine whether a reasonable basis existed for the decision of dismissal for operational requirements. Nevertheless, on the enquiry, the Court said that, it should not be directed to whether the reason offered is the one which the Court itself would have chosen. The reason does not necessarily have to be correct, but it must have been fair.

It may also be necessary to dismiss employees on the basis of the operational requirements of the business where such employees are incompatible with other members of management or staff, or at the behest of third parties. For example, a particularly important customer may object to dealing with a particular employee, and there may be no way to accommodate such employee in the business so that he will not be required to deal with the customer. The demand for the dismissal of a particular employee, especially one in a supervisory capacity, may also emanate from a trade union.

Although the Labour Appeal Court has accepted, in *Lebowa Platinum Mined Ltd v Hill*²⁴, that a dismissal may take place at the behest of a third party, it has set out stringent requirements which must be followed before such a dismissal will be fair. These are the following:

- the mere fact that a demand has been made by the third party that a particular employee should be dismissed is not enough to justify the dismissal;
- the demand has to have sufficient foundation;
- the third party's threat of action if the demand is not met must be real and serious;
- the employer must have no other option but to dismiss;

²³ [2001] 7 BLLR 705

²⁴ [1998] 7 BLLR 666 (LAC)

- the employer must investigate and consider alternatives to dismissal and must consult with the employee;
- the extent of injustice to the employee must be considered;
- the blameworthiness of the employee's own conduct must be taken into account.

Various guidelines for dismissal for operational requirements were established by our Courts and these were, to a large extent, codified under section 189 of the Labour Relations Act²⁵. In the case of dismissal for operational requirements, the dismissals must also be both substantively and procedurally fair. The employer must have a valid reason for dismissal for operational requirements, based on its economic, technological, structural or similar needs²⁶.

2.2 The nature of the employment relationship

In an employment relationship, as in all societies, conflict of interests is inevitable. Any judicial intervention in any conflict of interest in the said relationship must be evaluated according to a specific reviewer's perception of justice. Every person has a value system and can thus be characterized by others as representing a particular frame of reference (based on our political, social, economic and legal attitudes)²⁷. The presence of an "objective" and "fair-minded" analysis must be distinguished from the notion of pretence of objectivity. The way in which analysts view the employment relationship will eventually play an important role in the way that they will evaluate the measures safeguarding an employee's position in the event of the transfer of an undertaking or dismissal for operational requirements. It is therefore necessary to identify the most common influences or models that are relevant in this regard.

Firstly, there is the traditional contractual model, which understands employment contracts to be private transactions resulting from free agreement between the parties concerned. This model is based on the assumption that both parties enter the agreement on equal footing and are thus equal partners. Consequently, judicial intervention should be limited to preserving and enforcing the contractual agreement between the parties. This model has been the subject

²⁵ LRA66 of 1995

²⁶ Section 213 of the LRA 66 of 1995

²⁷ Rees B in Weddrburn and Murphy Labour law and the Community (IALS 1982) 129

of much criticism, the most common being that it takes “freedom of contract” as a social fact, rather than a verbal symbol²⁸. There would be no room for provisions such as those contained in section 189 of the Labour Relations Act within this model of the employment relationship.

Secondly, there is the view that parties should be free to conclude employment contracts but that, in the public interest, the interests of the weaker party require attention and are worthy of protection. The state thus has a role in ensuring that a disparity in bargaining power is addressed by establishing a so-called does this “floor of rights”²⁹. This model could also be explained as accepting the existence of moral claims to fair Labour practices, as with human rights generally. In this case the role of the state should accordingly be to enforce those moral rights. Both are found in South Africa: a “floor of rights” as well as a fundamental right to fair Labour practices³⁰.

Thirdly, there is the view that employment contracts are not merely an exchange of goods, as is the case with commercial contracts. Hence, many contractual principles that have been developed for commercial contracts are inappropriate. Here an emphasis is placed on good faith performance. Each party can advance its own interests but only to the extent that those interests are compatible with the others. They should therefore also have a genuine concern for promoting the interests of the other party.

Finally, there is the model that does not view the employment contract as a private transaction, but as one that ultimately concerns the wealth and welfare of society as a whole. Where the needs of society conflict with an individual need, the former must prevail. It is clear that managerial power might not always be a factor outweighing wider societal needs. For example, where managerial prerogative might have an interest in keeping certain records

²⁸ Davies and Freeland *Labour and the Law* 25. Clearly, it is necessary that the law sees the relationship as one based on a freely concluded contract, therefore upholding the tradition that compulsory labour is disallowed. However, as the authors so aptly explain, it is not true freedom but rather the use of words as symbols “*expressing a policy, an aspiration, a tradition, and not as symbols denoting a reality*”.

²⁹ BCEA 55 of 1998.

³⁰ S 23 of the Constitution of the Republic of South Africa. Act 106 of 1996

pertaining to the employment relationship confidential, society requires transparency and the disclosure of information, unless an acceptable justification for non-disclosure is shown to exist³¹. It is submitted that inconvenience and pure economic costs would not add enough weight to the notion that the individual need of an employer should prevail over the welfare of society as a whole. The debate regarding the true nature of the employment relationship must be considered together with the issues of corporate social responsibility and industrial democracy, as well as the ensuing presumptions that flow from such issues. This is because protective Labour law provisions require the impetus of an essentially political choice. Depending on one's point of reference in this regard, all legal principles can be interpreted and emphasized in quite dissimilar ways.

This dissertation is based on the contention that the employment relationship should be acknowledged to be unequal. It is therefore submitted that the second model of the nature of the employment relationship, outlined *supra*, should be endorsed when interpreting and evaluating dismissal for operational for requirement provisions. It is argued that the right to fair labour practices requires employee protection in the wide sense, since the employment relationship is a much wider notion than that of the employment contract³². It is submitted that when considering the position of employees and employers respectively, all rights and obligations originating from the employment relationship must be considered. Relevant statutory, collective rights and obligations must, therefore, also be considered and not only rights and obligations in terms of the contract. The *de facto* position that employees find themselves in should thus be viewed as a whole.

In addition, as will be shown *infra*, this dissertation contends that both the role that employees play in any undertaking and the interests of such employees in the modern companies are greatly underestimated. This dissertation also contends that the welfare of employees ultimately depends on the substantive provisions of Labour Law and that their welfare cannot be left to be catered for by the market or other branches of the Law, including company and the Labour Laws.

³¹ Section 16 of the LRA 66 of 1995

³² NAAWU V Borg Wamer SA (Pty) Ltd 1994 15 ILJ 509 (A)

2.3 The position of common law

The roots of the South African common Law contract of employment can be traced back to the *locatio conductio* (letting and hiring) of Roman Law. In Roman Law there were three types of *locatio conductio*:

- *Locatio conductio rei*: the letting and hiring of a specified thing (*merx*) for a money payment;
- *Locatio conductio operis*: the forerunner of the contract of the independent contractor;
- *Locatio conductio operarum*: the letting and hiring of personal services in return for a money payment.

The contract of employment developed from the *locatio conductio operarum*. The practice of slavery explains why the contract of services was not utilized much in Roman times, as the slave, being a mere object, might form the object of a *locatio conductio rei*, but could neither be locator nor conductor. There is little reference to the *locatio conductio operarum* in the works of the Roman-Dutch writers. This can be explained by the fact that both Voet and Grotius were of the view that the legal principles applicable to the *locatio conductio rei* applied *mutatis mutandis* to the *locatio conductio operarum*. Also, the contract of employment only moved towards the centre of the legal stage with the advent of large-scale employment in factories.

The late development of the contract of employment gives rise to a dilemma for those purists who would argue that the South African contract of employment derives exclusively from Roman and Roman-Dutch Law. As in many other areas of the Law, these two legal systems often provided inadequate authority or relied upon antiquated principles. Faced with an increase in litigation between employees and employers, our Courts tended by inclination and training to turn to English Law and the writings of English authorities. This process of borrowing has made our common Law of employment a rich amalgam of Roman-Dutch and English Law.

It should be remembered that many of the general principles of the common Law of contract apply equally to the contract of employment. It is also important to realize that the common Law contract of employment has to a large extent been displaced or modified by statute. This process of statutory intrusion was provoked by a general realisation that the common Law had lagged behind the reality of modern employment relationships.

The common Law contract of employment remains the basis of the employment relationship, though, in the sense that the legal relationship between the employer and the employee is created by it. It would, however, be meaningless to discuss the common Law without taking into account the extensive statutory enactments, which have impinged upon it. These statutes have limited the parties' freedom of contract in the employment arena and have conferred new rights or imposed new obligations on them. A general knowledge of the principles of the common Law contract of employment nevertheless remains essential to understanding Labour Law.

While freedom of contract might be a hallowed principle of our Law, there can be little quibble with the contention that in the employment realm it may encourage exploitation. Although market forces and competition may in certain circumstances help ensure that employees receive a fair return for their Labour, in most instances it can be safely said that the particular employee needs work more than the employee needs the services of a particular individual. The inequality of the pre-contractual bargaining relationship between aspirant employee and employer can lead unscrupulous employers to take people into service under onerous conditions and at exploitative wages. To redress the balance, the South African parliament has favoured two methods. The first is to impose minimum general conditions of employment on employers and employees generally, or on particular classes of employers and employees; the second is to promote the concept of collective bargaining.

In dealing with a case concerning a specific employee, it is vital to identify which Law applies. One has to decide, on the basis of the facts of each case, whether the employee's terms and conditions of employment are governed by any of the statutes or delegated

legislation or whether they are determined by the common Law; or, perhaps by a combination of both. In addition, it may be that a collective agreement is applicable³³.

The Supreme Court of Appeal has held, in the case of *Fedlife Assurance Ltd v Wolfaardt*³⁴ that the purpose of the Labour Relations Act 1956 and 1995 Labour Relations Acts was to supplement the common Law rights of dismissed employees. The Labour Relations Act does not deprive employees of the right to enforce contractual rights in the civil courts. If an employee, as in the "*Wolfaardt*" case, complained that his dismissal was unlawful rather than unfair, the dispute would be determined in the civil courts. In this particular case, the amount claimed by the employee by way of damages for unlawful dismissal exceeded the maximum amount, which the Labour Court was able to award by way of compensation for unfair dismissal. He was entitled to have his matter dealt with by the civil courts. This principle has been followed in a number of more recent decisions and potential litigants are now more often weighing up their prospects of success in ordinary civil litigation, where the courts are not restricted to paying compensation of 12 or 24 months' remuneration, as the case may be.

The common Law gives the employer wide powers of dismissal, affording little security of employment for the employee, who might be dismissed for any reason or, perhaps, for no reason at all. This position was radically altered by the Labour Relations Act, 28 of 1956, which introduced the concept of the unfair labour practice in terms of which dismissals were required to take place for a fair reason and in accordance with a fair procedure. The current Law of unfair dismissal, as set out in Chapter VIII of the Labour Relations Act, 66 of 1995, and in Schedule 8 to the same Act, is based on this notion of fairness. Consequently, the wide disciplinary powers, which employers enjoyed at common law, have been radically limited. It is critical to understand that an employer must not only act lawfully when dismissing an employee, it must also act fairly.

³³ Contemporary Labour Relations, Finmore at el.

³⁴ 2001] 12 BLLR 1301 (A)

The contract forms the foundation of the relationship between employee and employer³⁵ is a voluntary agreement between employees who tenders their services to the employer for remuneration³⁶. The employment agreement originated from out the Common Law and forms part of the Law of contract and is supported by legislation that includes amongst others, the Constitution of the Republic of South Africa³⁷, the Labour Relations Act³⁸, and Basic Conditions Employment Act³⁹.

The Constitution provides in Section 23 of the Bill of Rights that everyone has the right to fair Labour practices. The aforesaid Section 23 forms the platform on which the LRA is structured. The Labour Relations Act regulate the employment relationship between the employee and the employer including the termination of this relationship.

In terms of the Law of contract where either party breached a serious aspect of the contract, the other party may either enforce the contract or accept the other party's repudiation of the contract and to terminate the contract immediately⁴⁰.

In terms of the Labour Relations Act, the employer may end the employment relationship. If the employer terminates the contract of employment (with or without notice) the termination will fall within the definition of "dismissal"⁴¹.

The legal question that arises is whether the Labour Relations Act and Section 23 of the Constitution deprived the parties of their common Law rights in terms of the Law of contracts, and further what is the right of the employee to claim compensation in terms of the common law and in terms of the Labour Relations Act.

³⁵ Essential Labour Law Basson et al, 4th edition 2005' Labour Law Publications, p 19

³⁶ Essential Labour Law Basson et al, 4th edition 2005, Labour Law Publications, p 21

³⁷ Act 108 of 1996.

³⁸ Act 66 of 1995

³⁹ Act 75 of 1997

⁴⁰ Essential Labour Law Basson et al, 4th edition 2005, Labour Law Publications, p 51

⁴¹ Section 186(1) LRA

This was the aspect in the *Denel (Edms) Bpk v Vorster*⁴² where a disciplinary code was incorporated into an employment contract. The legal aspect that the Court had to decide was that where a disciplinary code is fair, the constitutional right to fair Labour practices does not relieve the employer to comply with disciplinary procedure contained in such code as incorporated into the employment contract.

In this matter the employer dismissed the respondent from his employment and the respondent instituted an action for damages for breach of contract arising out of his dismissal. The employer failed to comply with the disciplinary procedure contained in its disciplinary code and is therefore in breach with the employment contract. The disciplinary procedure required that the employer take two decisions before dismissal. The disciplinary committee must first adjudicate the matter and when decided on dismissal it must refer the recommendations to the assistant general manager who must in consultation with the assistant general manager human resources thereafter decide on the recommendation.

The assistant general manager conducted the disciplinary enquiry himself and did not consult with the assistant general manager human resources in dismissing the employee. The employer breached a material aspect of the fixed term employment agreement.

During the Court case the employer argued that the Constitutional right to fair Labour practices as set out in section 23 of the Constitution implied that there is a duty on both the employer and employee to act fairly towards one another. The employer then argued that it is not necessary to comply strictly with the contract as long as the employer acted fairly towards the employee in the termination of the employment agreement.

The Court held that the employer's argument that the employer may disregard the content of the contract and only focus on the fairness of the termination was incorrect. The employer argued that the procedure that it was adopted was one that respected the employee's constitutional right to fair labour practices and that it would be an

⁴² 2004 (4) SA 481 (SCA)

infringement of the employee's right to fair labour practices if the dismissal were to be regarded as unlawful. The employer argued further that the relationship between employer and employee is governed only by a reciprocal duty upon the parties to act fairly towards one another and that this reciprocal duty supersedes any contractual terms.

The Court held that the argument of the employer in the *Denel-case* is in conflict with the *Fedlife-case supra* and held that:

"If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly, it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect."

The Court held accordingly that the disciplinary code was fair and that the Constitutional right to fair labour practices does not relieve the employer to comply with fair terms incorporated into the contract.

The role and importance of the common Law principles was further well illustrated in the *Buthelezi v Municipal Demarcation Board*⁴³. In this case the legal question was whether or not an employee appointed on a fixed term employment contract could be dismissed for operational requirements, where no such provisions exist in the written contract. The employee was appointed on a five year fixed term contract. The employer notified the employee that he was redundant within the first year of employment and offered the employee an alternative employment in which he was subsequently unsuccessful where after the employee was dismissed. The employee referred the matter to the Labour Court, which held that neither party is entitled to cancel the agreement prematurely if there is no fundamental breach. The Labour Appeal Court in the subsequent appeal concurred with the Labour Court and further affirmed that neither party may terminate a fixed term employment contract prior to the expiry date of the contract unless either party has

⁴³ (2004) 25 ILJ 2317 (LAC)

breached the contract or that such a breach was material. The Court states that the employer takes the risk not to be able to dismiss an employee appointed on a fixed term contract and the employee on the other side takes the risk in that the employee may not resign to take up other employment.

The Court held further that the employer in this case had no right in Law to terminate the fixed term employment contract and therefore the actions of the employer constituted unfair dismissal

The effect of this ruling is that the employee that enters into a fixed term contract with an employer has a claim for an award for compensation in terms of the Labour Relations Act where the employer terminates the fixed term contract unlawfully. The Court however held that the employee is entitled to an amount equal to such an amount the employee would have been entitled to if the employer did not breach the contract, taking into account future employment. Having regard to the right of an employee to claim for breach of contract in terms of common Law contract principles and the right of an employee to institute action for unfair dismissal in terms of the Labour Relations Act, the employee has a choice to institute action and to pursue an award in terms of the Labour Relations Act (*Buthelezi-case*) or to institute action and to claim damages for breach of contract in terms of the common Law (*Denel-case*) or both to claim damages in terms of the common Law and to pursue the matter in terms of the Labour Relations Act⁴⁴.

Section 23 of the Constitution does not amend or supersede the common law principals pertaining to fair contractual remedies as stated in the *Fedlife* and *Denel*-cases supra.

Neither parties to a fixed term employment contract may terminate the fixed term employment contract prior to the expiry date of the contract unless there has been a material breach of the contract.

The unlawful termination of a fixed term employment contract by the employer

⁴⁴ Labour Relations Act 66 of 1995

constituted an unfair dismissal in terms of the *Buthlezi-case*. Where an employer unlawfully terminates an employee's contract the affected employee has the following remedies:

- The employee may accept the repudiation or the cancellation of the employer and pursue action against the employer in terms of the common Law for the breach of the contract and claim damages;

- The employee may refer the dismissal to the CCMA and later on, if applicable to the Labour Court to pursue the matter in terms of an unfair dismissal in terms of the Labour Relations Act and may be awarded compensation equal to one year's remuneration;

2.4 The position of the Constitution of the Republic of South Africa Act 108 of 1996 with regard to Labour law, section 23 and 39.

Every person has a fundamental right to a fair Labour practice⁴⁵ and the Labour Relations Act gives expressions to this right in a number of provisions. Section 189⁴⁶ must be interpreted in a way that it complies with the constitution and gives effect to the primary objects of the Act.⁴⁷ In one of the most important judgments on this issue to date, the Labour Court stated that this area of legal regulation where the tensions between commercial interests and social policy for employees are contrary; the Labour Relations Act shall apply. This underlines the brevity of the provisions of section 189⁴⁸. It must be remembered that the Labour Relations Act is largely the outcome of negotiations at Nedlac and could thus be described as a negotiated compromise. The whole legislative history must be taken into account when considering contentious provisions such as section 189, disclosure of information; consultation, closed shop agreements and many others⁴⁹. However, this still does not make

⁴⁵ Section 23 (1) (a) of Act 106 of 1996

⁴⁶ Act 66 of 1995

⁴⁷ Which are: to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution; to give effect to obligations incurred as a member of state of the ILO; to provide a frame work within which employees, unions, and employers promote effective resolution of labour disputes

⁴⁸ Act 66 of 1995

⁴⁹ Section 16 of Labour Relations Act 66 of 1995

the task of the Labour Court any easier. Employers and employees will have to map out a path for themselves from judgments (Foreign and National), opinions and awards in order to avoid liability or to achieve the desired level of protection. The Labour Appeal Court in *Foodgro v Kell*⁵⁰ had the following to say about the proper interpretation of these provisions:

“The ease or otherwise with which business, trades or undertakings may be transferred; and the consequences flowing from these transfers or retrenchment for economic well-being of a count. There may indeed be very good economic reasons why the free and unrestricted transfers of business or retrenchment, trades and undertaking promote commercial efficiency and thus ultimately promote economic development. The pursuit of economic development by means of a particular interpretation and application of the Act is, however, qualified by the injunction that it must be done in conjunction with other goals; namely those of social justice, Labour peace and democratization”.

It is important to analyze and evaluate the provisions of section 189 in the view of the conclusion that employees do have interest in what they work for and continued employment in the event of change or dismissal for operational requirements; but it can only be done by also referring to other jurisdictions and their attempts at safe guarding the same concept.

South African Labour law has seen some drastic changes since 1994 and the Labour Relations Act, Basic Conditions of Employment Act⁵¹, as well as Employment Equity Act⁵², represent three progressive pieces of legislation. However the Law can only do so much, ultimately the effectiveness of Laws depends to a large degree, on its acceptance by the public, knowledge thereof amongst the public as well as a willingness to use and embrace the Law. The decision to include section 189 and 189A in the final Act was a policy decision; taken with due regard to general socio-economic as well as economic factors. Relatively few cases have been brought under section 189⁵³ to date and one will have to wait and see whether this position will continue, given that it certainly does not seem to reflect the actual state of affairs regarding the occurrence of problems surrounding the dismissal for operational requirements in practice. A very important consequence of a fundamental right to

⁵⁰ 1999 (20) ILJ 252 (LAC) 2524 F-L

⁵¹ Act 75 of 1997

⁵² Act 55 of 1998

⁵³ Act 66 of 1995

fair labour Practice⁵⁴ is that a purposive interpretation of labour legislation must be followed. The fundamental right to fair labour practices also obliges the legislator to have regard to the socio-economic interest of workers. Job security and employee protection in the wide sense would certainly qualify as such interest. The provisions of section 189 will be referred to throughout the remainder of this dissertation.

It is a well-established principle that employees should enjoy a degree of job security. The law of unfair dismissal is thus far reaching and overrides the common Law principles that giving reasonable notice may terminate the contract of employment⁵⁵. There are thus, in almost all national systems, general substantive restrictions on an employer's power of dismissal and the termination of a contract of employment⁵⁶. Other important restrictions on "managerial prerogative" also commonly exist⁵⁷. This is often necessary in order to bring common Law principles within the framework of constitutional requirements and in the field of labour Law, this need is important. Judicial intervention should be seen in the view of the unsatisfactory and inherently unequal protection available in common Law between a bearer of power and one who is subordinated due to that power⁵⁸. The common Law knows nothing of a balance of collective forces. It is inspired by the belief in the equality of individuals, it operates between individuals and not otherwise.⁵⁹

In the constitutional state, when the right to fair labour practices, the right to engage freely in the economic activities or the right to equality is involved in a scenario, these rights have to be analyzed in order to identify their core value. Any limitation of fundamental right must comply with the requirement of limitation clause in terms of section 36 of the constitution⁶⁰. When following a formal approach to equality, it might be accepted that freedom of contracts exists and judicial intervention should therefore only be to ensure that *pacta sunt veranda*.

⁵⁴ Section 23 in the Bill rights of the RSA constitution

⁵⁵ See chapter viii of the LRA

⁵⁶ The English Courts recently began to highlight the latent potential of the contracts of employment as a means of protecting job security in the absence of statutory protection. (Edwing K.D) job security and the contract of employment 1989 ILJ (United Kingdom) 217, namely; a clause, however; expressed which provides a guarantee of no compulsory redundancies and others that relate to procedural aspect and substantive concept.

⁵⁷ Ss 84 and 86 of the LRA 66 of 1995

⁵⁸ See supra discussion regarding the nature of employments relationship

⁵⁹ Davie and Freeland labour and the law 12

⁶⁰ See Davis d "constitutionalization of labour right", Oliver M.P "a charter for fundamental rights for SA.

However, when a substantive approach to equality accepted, a conceptual notion of freedom must be considered. There are thus two possibilities;

Firstly it could be argued that there is no real freedom of contract (equality) in an employment relationship; that therefore it is impossible for this principle to be infringed by protective legislation. Secondly; it could be argued that, the freedom of employment contract (equality) between the parties is severely curtailed. Any limitation of this principle should therefore be contained in the Law of general application and should be reasonable and justifiable in a society that is based on equality, human dignity and freedom. Under the first scenario mentioned above; dismissal for operational requirements of employee will not infringe the substantive core of any of fundamental right such as equality, whereas under the second scenario, it might be necessary to limit symbolic freedom in a given case, in order to give effect to other valid moral rights. The contract of employment is required to be as a *sui generis* contract that encompasses a qualified concept of equality.

The provisions regarding dismissal for operational requirements may be required to be subjected to the limitation test in terms of section 36 of the constitution⁶¹. Section 36 of the constitution provides for the limitation of the Bill Of Rights, in terms of Law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all factors including⁶²:

-the nature of the right

-the importance of the limitation

-the nature and the extent of the limitation

-less restrictive means to achieve the purpose

⁶¹ Act 106 Of 1996

⁶² In German and Canadian system, it is generally accepted that criteria such as the following should be considered when justification for infringement is at issue namely, (a) does the limitation serve a legitimate purpose of sufficient importance, (b) is there sufficient relationship between the limitation and the purpose, (c) is there no other reasonable alternative through which objective can be attained. See *Ferreire v Levin* No, *Vryhoek v Powell* No (1996) 1 SA 984 (CC)

It is important to note that the two stage process still opposite under the final constitution⁶³. The first stage involves asking the question; has there been infringement of a right protected by the Bill of Rights? Only when a relevant fundamental right has been infringed, does the second stage become operative? This stage involves asking, first, whether the policy underlying the Act or omission that caused the infringement is reasonable and justifiable⁶⁴ and secondly; whether, an acceptable method has been used for its implementation⁶⁵. The fundamental rights involved in *casu* are the right to equality, the right to participate freely in economic activities and the right to fair labour practices. The first stage of the enquiry necessitates that, before one considers the goal of dismissal for operational requirements provisions and the means implemented to attain that goal, one must first consider the exact nature and the content of the fundamental rights that are applicable. Section 23 of the constitution provides that everyone has the right to fair labour practices⁶⁶. The unfair labour practice jurisdiction of the old industrial Court, which was essentially discretionary, is thus replaced by this provision. The right to work is not included in section 23, although the rights in section 23 are not absolute, they should be interpreted generously and in a value based manner⁶⁷. Section 39 (1) also requires the courts or arbitrator to 'consider International Law 'when interpreting the Bill of rights, in this circumstances which is Section 23 of the constitution⁶⁸.

2.5 The Labour Relations Act 66 of 1995

The Labour Relations Act⁶⁹ aims to promote economic development, social justice, labour peace and democracy in the workplace. It sets out to achieve this by providing a framework for regulating the relationship between employees and their unions on the one hand, and employers and their organizations on the other hand. At the same time, it also encourages employers and employees to regulate relations between themselves. The Act promotes the right to fair labour practices, to form and join trade unions and employers'

⁶³ Devenish Commentary 543

⁶⁴ Devenish Commentary 544, see *R v Oakes* 26 DLR (4) 200; *R v Bryant* 10 DLR 321

⁶⁵ Devenish Commentary 545, the right to freedom of association.

⁶⁶ Chapter of the Bill of Rights Act 106 of 1996

⁶⁷ See Devenish Commentary 321, where also states that these rights must be interpreted purposively.

⁶⁸ Act 108 of 1996

⁶⁹ Act 66 of 1995

organizations, to organize and bargain collectively, and to strike and lock-out. In doing so it reflects the vision of employees' and employers' rights contained in the Constitution.

The Labour Relations Act 1995 with the subsequent amendments sets out the rights of employers and employees and their organizations more clearly than before. This should provide the parties with more certainty with regard to the exercise of these rights. The Labour Relations Act also favours conciliation and negotiation as a way of settling labour disputes. It expects parties to make a genuine attempt to settle disputes through conciliation before going on to the next step, which could be arbitration, adjudication or industrial action. By providing for a more simplified dispute resolution process, the Act aims to achieve a quick, effective and inexpensive resolution of disputes. It thereby aims to reduce the level of industrial unrest, and to minimize the need for costly legal advice. The Commission for Conciliation, Mediation and Arbitration (CCMA) plays a critical role in actively conciliating and arbitrating disputes, and also provides advice on a range of issues to the parties concerned.

An employer can dismiss employees for reasons of misconduct or incapacity. An employer can also dismiss employees for business-related reasons. A fair procedure must always be followed even in circumstances where there is a good reason for the dismissal.

When an employer is legally permitted to dismiss an employee?

An employer can dismiss an employee for a fair reason (this means the dismissal is 'substantively' fair) and only if the employer has followed a fair procedure (this means the dismissal is 'procedurally' fair).

There are three kinds of fair reason for dismissal, these are:

For misconduct (if an employee intentionally or carelessly breaks a rule at the Workplace, for example, steals company goods);

For incapacity (if an employee cannot perform duties properly owing to illness, ill health or inability); and

For operational reasons (if a company has to dismiss employees for reasons which are related to purely business needs and not because of some failing on the part of the employee).

A code of good practice (Schedule 8 in the Act) sets out the principles of substantive and procedural fairness to be followed in the case of dismissal for misconduct or incapacity. The principles of a fair dismissal for operational reasons are contained in the Labour Relations Act itself and in a code of good practice on dismissals based on operational requirements, issued by NEDLAC. If there is a collective agreement on disciplinary procedures, the employer must comply with the procedures in the agreement.

The recognition of operational requirements as a ground for dismissal has its origins in the International Labour Organization. Operational requirements are defined in the Labour Relations Act as requirements based on the economic, technological, structural or similar needs of the employer. Technological reasons refer to the introduction of new technology which affects work relationships by either making existing jobs redundant or by requiring employees to adapt to the new technology, even where this may necessitate a change in their terms and conditions of employment. Structural reasons arise where jobs become redundant as a result of a restructuring of the business. Economic reasons relate to the financial well being of the business. It is not necessary that the business should be in financial difficulties in order for a dismissal for operational requirements to be justifiable on the basis of economic needs, merely that there is a sound economic reason for such dismissals.

The Court has generally taken the approach that it will not intervene in the decision for dismissal based on operational requirements provided that there was a commercial rationale for the decision and it was taken in good faith. However, this approach has changed in recent years as the Court has adopted an approach that, if it is not more interventionist, then is at least more investigative in nature. In *B M D Knitting Mills v SACTWU*⁷⁰, the Labour Appeal Court indicated that it was entitled to determine whether a reasonable basis existed for the decision to retrench. Nevertheless, the enquiry, said the

⁷⁰ [2001] 7 BLLR 705

Court, should not be directed to whether the reason offered is the one which the Court itself would have chosen. The reason does not necessarily have to be correct, but it must have been fair.

It may also be necessary to dismiss employees on the basis of the operational requirements of the business where such employees are incompatible with other members of management or staff, or at the behest of third parties. For example, a particularly important customer may object to dealing with a particular employee, and there may be no way to accommodate such employee in the business so that he will not be required to deal with the customer. The demand for the dismissal of a particular employee, especially one in a supervisory capacity, may also emanate from a trade union.

Although the Labour Appeal Court has accepted, in *Lebowa Platinum Mined Ltd v Hill*⁷¹, that a dismissal may take place at the behest of a third party, it has set out stringent requirements which must be followed before such a dismissal will be fair. These are the following:

- the mere fact that a demand has been made by the third party that a particular employee should be dismissed is not enough to justify the dismissal;
- the demand has to have sufficient foundation;
- the third party's threat of action if the demand is not met must be real and serious;
- the employer must have no other option but to dismiss;
- the employer must investigate and consider alternatives to dismissal and must consult with the employee;
- the extent of injustice to the employee must be considered;
- the blameworthiness of the employee's own conduct must be taken into account.

Dismissals for operational requirements are known as retrenchments. Various retrenchment guidelines were established by our Courts and these were, to a large

⁷¹ [1998] 7 BLLR 666 (LAC)

extent, codified under section 189 of the Labour Relations Act⁷². In the case of retrenchments, too, the dismissals must be both substantively and procedurally fair.

The employer must have a valid reason for the retrenchments, based on its economic, technological, structural or similar needs. Thereafter a fair procedure must be followed.

This procedure can be summarized as follows:

- Employers must take steps to avoid and minimise the possible termination of employment for operational reasons. For example, depending upon the particular circumstances of the case, the employer might stop hiring new employees, eliminate overtime, offer voluntary retrenchment, offer early retirement, or consider a reduction in working hours.
- The employer must give sufficient prior warning of any pending retrenchment to the employee or his trade union. The Act provides that consultation should take place when the employer contemplates dismissing an employee for operational reasons. Clearly, therefore, the Act envisages that consultation will take place at a stage when it is still possible for the employer to reverse the decision which would otherwise lead to the retrenchments. The duty to consult arises, it seems, when the employer, having foreseen the need to introduce operational changes, contemplates implementing them. A distinction must be drawn between dismissals that are a consequence of external factors, such as a downturn in the economy, and those that are a consequence of internal factors, such as restructuring or the introduction of new technology since, in the latter cases, the employer remains in control and is not required to make hasty decisions.
- The employer must consult in detail with the employee or his representatives on the reasons for the retrenchment, and the practical implementation thereof. This may necessitate the disclosure of certain information.
- Unless the selection criteria are agreed between the consulting parties, the employer must apply fair and objective selection criteria in selecting employees

⁷² Act 66 of 1995

for retrenchment. These selection criteria must be disclosed to the employee or his trade union and consultation must take place regarding the selection criteria.

2.6 The amendment of 2002 of the Labour Relations Act

The introduction of Section 189A of the Labour relations Act makes an interesting legislative contribution to the issue of the substantive fairness of a retrenchment decision. Apparently not entirely satisfied with the differential approach adopted by some courts, the legislature has given the workers and their unions the right to strike in the case of large-scale retrenchments. It is assumed that the right is in relation to the decision to retrench rather than the procedure because the law prescribes an alternative course of action where there are complaints about the procedure. If the workers decide to take the issue into the power arena then they forfeit the right to take the matter to court on the basis of the substantive fairness of the dismissals. This, in some measure, takes pressure off the court in their scrutiny of the fairness of the dismissals as the workers have the right to strike on this issue in the case of large scale retrenchments envisaged in Section 189A. Before Section 189A, workers did not have the right to strike which placed significant onus on the courts to be vigorous in their scrutiny of management decisions in this regard.

In Section 189A (19) the legislation instructs the Labour Court to find that the employee was dismissed fairly if:

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was proper consideration of the alternatives, and
- (d) the selection criteria were fair and objective

The legislatures have effectively defined the concept of fairness without mentioning the issue of fairness other than in sub clause (d), which refers to selection. *Du Toit*,⁷³ sees this section as merely a codification of the existing law, and as such do not think that 189A

⁷³ Du Toit et al *Labour Relations Law* 4th edition (2003) at 425

(19) will make a noticeable difference. The authors believe that it may focus the courts to examine the reasons for dismissal more closely and vigorously. It may offset the effect noted above in regard to the strike provision. Section 189A (19) does raise the obvious question as to why the same amendment was not inserted in Section 189 for the small scale retrenchment. Does the law intend that small scale retrenchment be examined on the basis of fairness as discussed in the case law and that the large scale retrenchment does not have to be evaluated on the basis of “fairness” except as defined? *Todd and Damant* do not believe so and they are of the opinion that *SACTWU vs Discreto*, establishes the correct test and the test is in line with Section 189A (19). Specifically they claim that the legislature has sent a clear message to the courts to stay away from the distributive issues that an enquiry into the relative gains and hardships would involve.

2.7 The position of the International Labour organization on dismissal for operational requirement

In terms of the South African Labour Relations Act 66 of 1995 where employees challenge operational requirements dismissals the Labour Relations Act distinguishes between large-scale and small-scale dismissals⁷⁴. Where there is a small-scale dismissal employees must refer disputes (of substantive and procedural fairness) to conciliation followed by adjudication to the Labour Court. Where there is a large-scale dismissal and a challenge to its substantive fairness employees have a choice either to refer the dispute to the Labour Court or strike. If it is a challenge to procedural fairness this goes to the Labour Court⁷⁵.

⁷⁴ The following have been recognized as large-scale dismissals

A dismissal of 10 employees where the employer employs between 50 and 200 employees.

A dismissal of 20 employees where the employer employs between 200 and 300 employees.

A dismissal of 30 employees where the employer employs between 300 and 400 employees.

A dismissal of 40 employees where the employer employs between 400 and 500 employees.

A dismissal of 50 employees where the employer employs between 500 and 600 employees.

Dismissals that do not fall within the above categories will be regarded as small-scale dismissals

⁷⁵ For an application of section 189A see *NUMSA & Others v SA Five Engineering & others* 2005

(1) BLLR 53 (LC) and *RAWUSA v Schuurman Metal Pressing (Pty) Ltd* 2005 (1) BLLR 78 (LC).

All these provisions are in accordance with International Labour Organization standards. Article 8 of International Labour Organization Convention 158 of 1982, requires that workers who are unfairly dismissed be entitled to refer their disputes to an impartial body, such as a Court, Labour Tribunal, and arbitration committee or arbitrator⁷⁶.

This is also in accordance with the International Labour Organization Examination of Grievances Recommendation (No 130) of 1967, which allow rights disputes to be referred to adjudication. Thus the denial of the right to strike to employees dismissed for small-scale operational requirements comply with International Labour Organization standards. By providing employees subject to large-scale operational requirements dismissals for substantive reasons with a choice either to refer disputes to the Labour Court or to go on strike the Labour Relations Act goes further than what is required by the International Labour Organization. Even though South African Law does comply with International Labour Organization standards both still provide inadequate protection to retrenched employees. The ILO allows the right to strike to be denied to employees who are retrenched, while South African law allows this right to be denied in the case of small-scale dismissals.

Both ILO and South African law do not provide adequate protection for employees who are dismissed for operational reasons. The ILO allows states to prohibit retrenched employees from striking. The LRA prohibits employees subject to small-scale operational requirements from striking. In such circumstances employees can refer disputes to adjudication. This provides employees with inadequate protection since

⁷⁶ The Termination of Employment at the Initiative of the Employer Convention 158 of 1982 Superseded ILO Recommendation 119 of 1963.

According to article 8(2) of the Convention where termination has been authorized by a competent authority the application of paragraph 8 (1) may be varied according to national law And practice. According to section 8(3) a worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination

judges are not suitably qualified to make business decisions and hence often heed to employer prerogative when it comes to retrenchments and often at the expense of employees. Since adjudication does not provide retrenched employees with significant protection it was suggested that all employees facing retrenchments be given the right to strike. A refusal to do so would not only violate ones constitutional right to strike but also other rights integral to the right to strike including the right to equality, life, property, freedom of association and expression. It is suggested that ILO standard sand the LRA be amended to provide all employees who face dismissal for operational requirements with the right to strike.

2.8 Social values in South African Labour law

As stated above, South Africa has seen some progressive legislation in the Labour Law field recently and provisions emphasizing socio-economic rights of workers have contributed to this⁷⁷. Apart from the said legislation, the major role-players in South African Labour Law has also shown a commitment to the same. The Trade and Industry Chamber of Nedlac have been deliberating the issue of a link between labour standards and trade since June 1995. This followed commitment by the social partners (government, labour and business) in what was then the National Economic Forum to explore the social clause in the context of trade liberalization in South Africa and the General Agreement on Tariffs and Trade (GATT) Uruguay Round Trade negotiations. Deliberations on the issue have focused mainly on the proposal by Labour, supported by business that a social clause linking market access to respect for Labour standards are included in all South Africa's bilateral and multilateral trade agreements, including agreements with countries in Southern Africa and with the World Trade Organization (WTO)

The social partners in Nedlac have reaffirmed their unequivocal commitment to human rights and workers' rights, both within South Africa and internationally. This is consistent

⁷⁷ There are numerous examples, including the right to protest action in advancement of socio economic, Section 9 of BCEA, s 17 of BCEA and s 26 BCEA

with the history of the struggle for human rights in South Africa and is the cornerstone of South Africa's new democracy. The social partners further reaffirmed the principle that economic growth and development must be underpinned by a commitment to social justice, including respect for universally recognized labour standards. The social partners affirmed that trade and investment liberalization and the integration of the South African economy into the global economy must promote economic and social progress and not undermine social protection. To this end, they commit themselves to working together within the tripartite framework of Nedlac to ensure the ratification and observance in South Africa of the core ILO conventions embodying universally recognized labour standards⁷⁸. South Africa has, *inter alia*, ratified conventions 87, 98 and 111.

It is recognized that, in the relationship between trade and worker rights, increased liberalization of trade should be accompanied by the harmonization of labour standards and the observance of core ILO conventions. This will allow a process of greater integration, thus improving rights and conditions of workers to a higher level, rather than lowering them to the lowest prevailing standards. Several provisions in the Labour Relations Act is consistent with this approach, including section 189. Protocol 14 of the European Community Treaty on Social Policy, the Agreement on Social Policy and the Amsterdam Treaty¹⁰¹ signify the importance of social rights in labour law. Section II of the Amsterdam Treaty, entitled "The Union and the Citizen", contains an amended chapter on social policy. In essence, the Social Policy Agreement of the Maastricht Treaty will constitute the new Social Chapter of the European Community Treaty. It is clear that the employment chapter does not envisage deregulation as a means of realizing full employment. Article 2 talks of "*a high level of employment and social protection*": it could therefore be concluded that the reference to a "*high degree of competitiveness*" does not suggest competition at all costs but competition based on a skilled, flexible and productive workforce, according to some academics abroad⁷⁹. This is consistent with the view expressed by the European Community Commission that social protection is a

⁷⁸ These conventions are: number 29 of forced Labour (1930); Number 87 on freedom of association and the protection of the right to organize (1951), number 105 of 1957, 111 of 1958 and 138 of 1973

⁷⁹ Barnard C "the United Kingdom, the social chapter' and the Amsterdam Treaty"
The economic case for transnational labour standards.' 1994 ILJ (U.K) 289

productive factor, and that labour standards are seen as an input into the process of enhancing economic competitiveness, rather than simply as a cost of production. It is submitted that it is impossible to expose and understand the policies of government that underlie a system of law. However, it is suggested that South African Labour Law has indeed come a long way (at least since the true function of our labour law was defined in 1980 as “*the preservation of the social and economic structures prevailing in society at any given moment by the confinement and containment of the basic conflict of interests inherent in the relationship between employer and employee*”)⁸⁰. The legislator should at least be applauded for including provisions concerning job security, in addition to the law on unfair dismissal, in our Labour Relations Act.

⁸⁰ Davis D ‘ the function of Labour law ‘1980 CLLSA 212 216

CHAPTER 3: DISMISSAL FOR OPERATIONAL REQUIREMENTS IN TERMS OF
SECTION 189 OF THE LABOUR RELATIONS ACT

3.1. Introduction

“Operational requirements have always been accepted as a ground for dismissal in South African law”⁸¹. The International Labour Organizations Convention 158, which South Africa is obliged to give effect to in terms of the present Constitution, deals with termination for economic, structural or similar reasons. This wording is incorporated in the definition section 189 of the Labour Relations Act of 1995. Section 185 of the Labour Relations Act gives every employee the right not to be unfairly dismissed. Section 188 goes further to say that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on the employer’s operational requirements and that the dismissal was effected in accordance with a fair procedure. Section 189 essentially sets out the procedure to be followed when an employer contemplates dismissal for operational requirements.

Prior 1996 the Labour Courts evolved an extensive body of case Law dealing with dismissal for operational requirements. The Industrial Court had treated lack of fault on the part of the employee as the defining characteristic of this form of dismissal and included it in this category together with dismissal at the behest of third parties dismissal for incompatibility and dismissal based on a breakdown of trust. Section 189 of the Labour relations Act, amplified by the Code of Good Practice, dismissal based on operational requirements thus developed. The code reiterates the categories action such as dismissal as a species of no fault dismissals and states that, for this reasons, the Labour Relations Act places particular obligations, on an employer, most of which are directed towards ensuring that all possible alternatives to dismissal are explored and that those employees to be dismissed are treated fairly⁸².

⁸¹ Act 12 of 2002

⁸² Le Roux and Van Niekerk- Unfair Dismissal (Grogan Dismissal)

3.2 Substantive fairness

Before the introduction of section 189A of the Labour Relations Act in 2002, there was no statutory definition of substantive fairness in the case for operational requirements dismissal. According to the Courts the question whether or not an employee's dismissal for operational requirements is substantively fair is a factual one, the employer will have to prove a number of things. Firstly the employer must prove that the proffered reason is one based on the operational requirements of the business. The employer will thus have to prove that the reason for dismissal falls within the statutory definition of 'operational requirements'. Secondly the employer must prove that the operational reasons actually existed and that it was the real reason for dismissal. In other words, the employer must prove that the proffered operational reason is not a mere cover-up for another reason for the dismissal of the employees⁸³. The Industrial Court found on a number of occasions that the operational reasons advanced by the employer did not constitute the real reason for dismissal. In *SA Chemical Workers Union & Others v Toiletpak Manufacturing (pty) Ltd & Others*,⁸⁴ the Court found that the employer wanted to get rid of a number of employees whom it suspected of misconduct. It had tried to avoid having to hold disciplinary hearing by disguising the dismissal for operational reasons. The Court held that the dismissal for operational reason need not be restricted to the cutting of costs and expenditure. Profit or increase in profit or gaining some advantage such as a more efficient enterprise, can also be acceptable reasons for dismissal for operational requirements.

As for similar needs of an employer, the Labour Relations Act seems to restrict this to grounds akin to economic, technological, and structural reorganization of the enterprise. The Codes of Good Practice states that the obligation placed on an employer are both procedural and substantive. Questions of substance and procedure are indeed closely

⁸³ Essential labour law 4th edition by Ac Basson, C Garbers and others

⁸⁴ (1998) 9 ILJ 295 (IC)

intertwined. As *Mlambo J* held in *Keli v Foodgro (a division of leisured ltd)*⁸⁵, it is through the constructive engagement implicit in this process that the need to retrench is confirmed as well as the selection of those employees who are retrenched. The operational needs of an employer, however, are inextricably bound up with its interest, and the distinction between need and interest is not always clear-cut. Yet the demarcation is crucial in that dismissal to enforce an employer's demand in a matter of mutual interest is automatically unfair in terms of section 187 (1) (C) of the Labour Relations Act. An attempt at defining the notion of fair reason for dismissal based on operational grounds has been made by the legislature with the enactment of section 189A(9) while the definition only applies to disputes falling within the ambit of section 189A of the Labour Relations Act. It is also used to establish a norm, which the courts are bound to apply generally in testing the fairness of the reason for an operational requirement dismissal. The current Labour Relations Act has defined the role of the Court more clearly. It recognizes that the employer's decisions have been modified by changing norms of managerial practice and the principles of public policy favouring greater participation by employees⁸⁶.

As mentioned above Section 188 requires that a dismissal for operational requirements be based on a fair reason. Here the ground is far less solid than in the case of the procedural fairness. The difference being that the court is drawn into what is essentially an economic decision. "There is often not even in principle a clear right or wrong answer to the question whether a business change is necessary to the point. The Court even conceded that management could be foolish as being as it was "strictly bona fide in its deliberations". Furthermore it added "and perhaps based on commercial rationale" of justifying a dismissal. A business line call is at stake".⁸⁷ *Thompson* goes on to say that the courts instinctively avoid being drawn into the economic merits of a decision and give the employers a hefty margin of grace regarding these issues. A good example of the above was the *Atlantis Diesel Engines* case. The Industrial Court conceded that the decision to retrench was exclusively a management prerogative. "The prerequisites for a proper

⁸⁵ 1999 (4) BLLR 345 (LC)

⁸⁶ Labour Relations Act 66 of 1995 as amended

⁸⁷ C Thompson *Bargaining, Business Restructuring and the Operational Requirements Dismissal* (1999) 20 *ILJ* at 769

exercise of such prerogative are that it must be bona fide and that a business rationale must exist". The Labour Appeal Court rejected this view.⁸⁸ "However we respectfully differ from (the) suggestion that the decision to retrench could be fair simply because it is bona fide and made in a businesslike manner. The approach suggests that the Court function is merely to determine whether or not the decision had been correct. What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than the bona fides and the commercial justification of 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".

Moreover it is submitted that taking fairness to the "only reasonable option in the circumstances" is a bridge too far. As *Thompson's*¹³ comments on this decision puts it, if the decision is based on a demonstrably sensible business analysis that has been tested between the parties, is not unreasonable and not disproportionate between the benefits accruing to the business and the losses accruing to the employee, it should be acceptable. Fairness surely requires that there is equity on both sides in terms of the outcome.

In the *Discreto* case,⁸⁹ the Court saw its function in scrutinizing the consultative process, not to second-guess the commercial or business logic of the employer but to ensure that the decision arrived at was genuine and not merely a sham. It would do this by ensuring that the proper consultative process had taken place. If that were the case then it would evaluate the ultimate decision by the employer on the basis whether it was operationally and commercially justifiable on rational grounds. Importantly, in the light of the *ADE* decision, the court did not see its role as deciding whether it was the best decision under the circumstances but only whether it was a rational decision arising from what had emerged in the consultative process. This is definitely not as far as the *ADE* decision, which was to decide whether it was "the only reasonable option in the circumstances".

⁸⁸ *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 3 ILJ 405 (IC), *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 648C

⁸⁹ *SA Clothing and Textile Workers' Union & others v Discreto – a Division of Trump & Springbok Holdings* (1998) ILJ 1451 LAC

The latter requires much further probing into the business process for which the court admitted was not qualified and represents, in my view, an unwarranted intrusion into the prerogative of management.

In the case of *BMD Knitting Mills*,⁹⁰ the Judge reviewed the judicial remarks in the *Discreto* case above in the light of the specific fairness injunction in Section 188(1) of the 1995 Labour Relations Act. (The *Discreto* case was based on the fairness requirements of the 1956 Labour Relations Act) The Judge was of the opinion that the *Discreto* approach was too deferential,⁹¹ based on the principles of an administrative review, rather than the requirements of the Act, viz “the reason for dismissal is a fair reason”. The starting point is “Whether there is a commercial rationale for the decision”⁹². That ties in with the *Discreto* approach. The Judge goes further by saying “rather than take such justification at face value, a Court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party”. The Judge has set up a straw man here in that *Discreto* never suggested that the decision be taken at face value but suggested that it be evaluated for rationality on commercial or operational grounds. The Judge added a further requirement, which is logical in the light of Section 188(1) that the decision is evaluated on the basis of fairness to both parties. That is almost identical to the approach suggested by *Thompson* in his review of the *ADE* LAC decision quoted earlier. It appears that this approach is not necessarily less deferential than the *Discreto* approach but has merely added another dimension, i.e. evaluation for fairness. The Judge goes on further to say that “the court is entitled to examine the content of the reason 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”. This, to my mind, is similar to the *Discreto*'s requirement for rationality but does not go as far as *ADE* as to require the decision to be the only reasonable option. The latter is very similar to saying the reason, which would have been chosen by the court. Finally, the Judge sums up the matter by saying: “Fairness, not correctness is the mandated test”.

⁹⁰ *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers' Union* (2001) 22 ILJ 2264 (LAC)

⁹¹ The Judge was actually referring directly to another case which employed essentially the same test as *Discreto*

⁹² at 2269 I and at 2269 J

In the *Algorax* case,⁹³ the Court addressed the issue of the extent of judicial interference in the decisions of management. As a general rule the judge acknowledged “that a Court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a business person may have to deal with the problems of the workplace”. The Judge said this was not an absolute rule and the court still has an obligation to determine the fairness of the dismissal in an objective manner. The Court cannot defer to management in this context, as this would be tantamount to have abrogated its responsibility. Finally, in relation to this issue the court should not hesitate to deal with an issue, which does not require specialist expertise but simple common sense, as was the case in this matter. The Judge was of the opinion that in the context of this particular case the solution was so self-evident as to allow the court to delve into the area normally reserved for management as conceded in the quotation above.

A good example of the implementation of the issue of substantive fairness, based on the employer’s operational requirements is the case of *General Food Industries v FAWU*.⁹⁴ When the case was heard initially by the Labour Court,⁹⁵ it found that the company did not have a compelling reason to justify the dismissals in the case in terms of Section 189 of the 1995 Labour Relations Act, other than to reduce the wage bill via outsourcing. The Court had therefore found that dismissals were merely a way of pressurizing the workers to accept lower wages and were automatically unfair in terms of Section 187 (1) of the Labour Relations Act. As regards that issue the Court found that on the basis of the *Fry’s Metals* judgment,⁹⁶ the company was entitled to Endeavour to reduce costs by way of dismissals even though it was profitable at the time. In the *Fry’s Metals* case the Judge concluded that “(it) is an employer’s right to dismiss for a reason based on its operational requirements without making any distinction between operational requirements in the

⁹³ *CWIU v Algorax (Pty) Ltd* (2003) 11 *BLLR* 1081(LAC)

⁹⁴ *General Food Industries Ltd v Food and Allied Workers’ Union* (2004) 25 *ILJ* 1280 (LAC)

⁹⁵ *Food and Allied Workers’ Union v General Food Industries Ltd* (2002) 10 *BLLR* 950 (LC)

⁹⁶ *Fry’s Metals (Pty) Ltd v National Union of Metal Workers of SA & others* (2003) 24 *ILJ* 133 (LAC)

context of a business, the survival of which is under threat and a business which is making a profit and wants to make more profit". That in itself was fairly profound in terms of business restructuring in South Africa, but it also had the effect of undermining the judgment of the Labour Court in the *General Food* case. Nevertheless the Labour Appeal Court still had to consider the retrenchments in the light of the Section 189 requirements. In terms of its operational requirements the employer stated that the mill had limited capacity to store its output, flour, and had to have a way of dealing with the many fluctuations in demand that it faced. A solution, which was prevalent in the industry, was to increase the use of outsourcing whereby additional workers could be employed when demand picked up and could be reduced when a slack demand period occurred. Its outsourcing proposal was calculated to effect a saving in wages of R123 000 per month. The union responded during the process of negotiation with a series of measures including a wage freeze, which in total would save R20 000. The union would not accept any reduction in wages and salaries nor would they countenance any negotiation regarding outsourcing, insisting that this had to be conducted at national level.

This is the scenario envisaged by the Labour Relations Act: management and the employee representatives jointly negotiating a solution to the problem. Only when an impasse to that process is created may, the management moves to the next step of retrenchment. As expressed by the Judge, the loss of jobs due to retrenchment has such a devastating effect on the circumstances of the workers "... that – even though reasons to retrench employees may exist – they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum". The consideration of all viable alternative steps is a reasonable test of management's role in the retrenchments. It does not prescribe the outcome but merely mandates the process. The Judge acknowledged that the enterprise required flexibility on the part of employees' terms and conditions of employment in order to be competitive. Although the business was profitable at the time, the substantial differential in costs between the mills in question in comparison to the other mills owned by General Food put at question the long-term viability of the mill.

The union was not prepared to offer the needed flexibility. This was ultimately the deciding factor in the Judge's ruling that there was a compelling reason for the dismissals and that they were thereby substantively fair. The difference between the Labour Court and the Labour Appeal Court decision, other than the intervening *Fry's Metals* judgment, was the acknowledgement that the issue was not merely a question of reducing wages of the workers, but of giving flexibility in the employment of workers to match the variability of final demand.

As mentioned in *Thompson, Todd and Damant*,⁹⁷ in their articles on the issue there does seldom, if ever, an employer in deciding a particular course of action choose a right or wrong answer in the approach. Inevitably there is a whole range of options, which have to be evaluated, and a course of action selected for the range for execution. As required by law, the employer has to engage with the representatives of the work force; if consensus cannot be reached, the employer has to make a decision in the best interest of the business. That is why the shareholders appoint the employer. As has been deduced from the court's deliberation in the above cases, the decision should have a rational and logical basis arising from the consultation with the affected parties. Management should be seen to be exercising its mind and not merely a sham to disguise some other agenda. The decision must critically, be fair in that the outcomes have balance between the parties. The decision does not have to be correct or even one the court would have come to (except in the *Algorax* case where it was glaringly obvious). Where the issue is one of complexity beyond the expertise of the Court it has to concede ground to management as the Judge in *Algorax* put it in the quotation above "should not be critical of the solution". All the above does not mean that the employer has absolute discretion to run the business but within the bounds as described, the employer enjoys the benefit of the doubt. The court on the other hand has a responsibility to evaluate the issues of fairness and rationality and cannot defer to management in its deliberations. *Todd and Damant* summarize the situation as follows: "The Courts must, in our view, show deference to the

⁹⁷ Chris Todd & Graham Damant *Unfair Dismissal – Operational Requirements* (2004) *ILJ* 896

employer's decision in the sense that the enquiry is limited to the question whether or not the employer's decision under scrutiny, falls within the parameter set for it"⁹⁸.

There is an issue with regard to the parameters. *Todd and Damant* suggest the fairness parameter merely requires that rational business decisions are made and does not require adjudication of the trade-off between gains and hardships. Fairness, as mandated by the Judge in the case of *BMD Knitting Mills* as being the test, surely as suggested by Thompson, requires some evaluation of gains and hardship. Thompson quotes the case, where the employer retrenched to save a princely R282 per month. That cannot be fair however rational the business decision"⁹⁹.

(a) The role of the court

Under the previous 1956 Labour Relations Act the Courts showed a marked reluctance to "second guess" an employer's decision to dismiss employees on operational grounds. According to *Le Roux*, allowing enquiry into the merits of management decision would constitute intrusion into managerial prerogative by institution ill qualified to do so. Some judgments asserted a greater role for the court. In *NUMSA v Atlantis Diesel Engines (pty) Ltd (1993) 14 ILJ 642 (LAC)* the previous Labour Appeal Court held that fairness in this context goes further than a bone fide and commercial justification for the decision to retrench. It is concerned, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the Courts to state that termination of employment for disciplinary and performance related reasons should always be a measure of last resort"¹⁰⁰.

The current Labour Relations Act has defined the role of the Court more clearly. The Labour Relations Act recognizes that the employer's prerogative to take operational decisions has been modified by changing norms of managerial Practice and principles of public policy favouring greater participation by employees. In the context of dismissal,

⁹⁸ Todd and Damant at 906

⁹⁹ *Mkhize & others v Kingsleigh Lodge* 1989 ILJ 944 (IC)

¹⁰⁰ 1993 (14) ILJ 642 (LAC)

procedural fairness is not only a value in its own right but means of establishing whether substantive grounds are in fact present, and if so, the most appropriate ways of mitigating consequences¹⁰¹. The function of the Court, it was held in *NEHAWU v The Agricultural Research Council*¹⁰², is not merely to determine whether the decision to retrench was commercially (but) whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances.

In decision of *Surveys International (pty) Ltd v Dlamini & others*¹⁰³, the Court expanded on the meaning of “properly and genuinely” justified by operational requirements. The Court’s function, it was held not to determine whether the requirements for a proper consultation process have been followed and whether the decision to retrench was commercially justifiable. Noting that there may be other options available than dismissal, such as short time, the court went on to explain its role as follows:

If the employer resorts to retrenchment when alternatives to retrenchment are available, it cannot be said that the ultimate decision to retrench is necessary fair. The Court, will, therefore, examine the reasons advanced for retrenchment in order to determine whether the ultimate to retrench genuine and not sham. The purpose of enquiry is to determine whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances. Section 192 (2) of the Labour Relations Act requires the employers to prove that any dismissal is fair. ‘Fair’ in this context means that the reason for dismissal for operational requirements (as Defined in section 213) must be present¹⁰⁴. This places an onus on the employer to present at least prima facie evidence of such reason. If the employer’s evidence is disputed, the Court will need to weigh up the opposing arguments and make finding, as in any other contested matter, as to whether the employer’s grounds are valid within the meaning of section 189 of the Labour Relations Act.

¹⁰¹ LRA 66 of 1995

¹⁰² 2000 (8) BLLR 1081 (LC)

¹⁰³ 1999 (5) BLLR 413 (LAC)

¹⁰⁴ LRA 66 of 1995 as amended

In *Fry, s Metals (pty) Ltd v National Union of Metalworkers of SA & Others*,¹⁰⁵ the Labour Appeal Court held that the Labour Relations Act only recognizes the employer's right to dismiss for operational requirements. The Labour Relations Act does not distinguish between operational requirements in the context where the business is fighting the survival and operational requirements in the case of profitable business wanting to make even more profit.

(b) Commercial rationale and fairness

In *SACTWU v Discreto (a division of Trump & Springbok Holding)*¹⁰⁶, the Court appeared to revert to a position resembling that of Industrial Court, Prior to the case *NUMSA v Atlantis Diesel Engines (pty) ltd (1993) 14 ILJ 642 (LAC)*. In a unanimous judgment delivered by *Foreman DJP* it was held that the purpose of consultation is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or put another way, by a commercial or business rationale. The Court held that when determining the rationality of the employer's ultimate decision on retrenchment, it not the Courts function to decide whether it was the best decision under the circumstances, but only whether it was rational commercial or operational decision, properly taking into account what emerged during consultation process. In *SACWU v Afrox ltd (1999) 10 BLLR 1005 (LAC)*, the Court asserted the role of the court boldly. After weighing up the requirements of section 189 (2) of the Labour Relations Act, the Court concluded, "it can no longer be said that the Courts function in scrutinizing the consultation process, but is merely to determine the good faith of the employer. The matter is now one of proof by the employer, on balance of probabilities, of the cause or reason for the dismissal, the defined "operational requirements that the dismissal was based on" a fair procedure in accordance with section 189 of Labour Relations Act and the facts upon which a finding of a substantively fair reason for the dismissal can be made¹⁰⁷.

¹⁰⁵ (2003) 24 ILJ 133 (LAC)

¹⁰⁶ 1998 (12) BLLR 228 (LAC), see also in *NUMSA v Atlantis Diesel Engines (1993) 14 ILJ 642 (LAC)*

¹⁰⁷ 1999 (10) BLLR 1005 (LAC)

In *Enterprise Foods (pty) Ltd v Allen & others*,¹⁰⁸ the company's shareholders demanded costs are cut to achieve greater profitability. The Labour Appeal Court, although not focusing on the issue because the employees had accepted that there were justifiable economic reasons for dismissal, affirmed that the dismissal was substantively fair. In *Food & Allied Workers union & others v SA Breweries Ltd*,¹⁰⁹ the Court found that the employer's company's decision to restructure its operation was warranted by efficiency considerations and a drive to increase its profitability. The Court held that in a market-driven economy there could be no objection to an employer retrenching to increase its profitability, provided the employer's conduct remains fair on a general assessment of all evidence. The employer had to establish a valid commercial rationale for the retrenchment of the employees.

(c) When dismissal is justified

This requirement builds on the previous requirements. It is not sufficient that the reasons for dismissal are indeed based on the operational requirements of the employer. A dismissal for this reason must be justifiable and such justification must be based on "rational" grounds. "Rational" grounds are grounds founded upon 'reason' or 'logic'. The rationality test is an objective test. In other words, it is a test that measures the acceptability of the reasons for dismissal against that which would generally be considered acceptable reasons¹¹⁰. The standard, which the Court should use in judging the substantive fairness of decision to dismiss, has been interpreted differently. The Court in *SACTWU v Discreto* and *SACWU v Afrox Ltd*, held that an employer who wants to effect dismissal based on operational requirements must seek appropriate measures to avoid dismissal, minimize their number, change their timing and mitigate their adverse effects (section 189 (2)(a))¹¹¹. These are all indications that dismissal should only be used as a last resort when dismissing for operational reasons.

¹⁰⁸ (2004) 25 ILJ 1251 (LAC)

¹⁰⁹ (2004) 25 ILJ 1979 (LC)

¹¹⁰ Essential Labour Law by AC Basson and others

¹¹¹ LRA 660 1995 as amended

The test for substantive fairness thus appears as something more than a reasonable employers test and something less than a “fair employer “test. The criterion, of operational and commercial justifiability implies a balance between the employers’s right to promote the economic interest of the enterprise and the range of employee rights and interest bound up with continued employment. The statutory requirements to seek alternatives to dismissal indicates that dismissal should be avoided if reasonably possible and that alternatives put forward by consulting parties should be considered seriously, even though the employer retains a broad discretion in taking the final decision

(d) Proving substantive fairness

In the case of *Discreto* and *Afrox* decisions, it was accepted that section 189 (2) of the LRA places a duty on the employer to prove, on balance of probabilities, the commercial rationality of its decision. In *Discreto* the test was formulated as follows:

“As a minimum evidence should be presented by someone with personal knowledge of the respondents financial position and, more specifically, its relationship with its bankers, as well as evidence of the boards decision to close [the enterprise] by someone who attended the meeting where the decision was taken. ’

In *Afrox* the rule was stated in more general but even more categorical terms:

“ If an employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it must chose a particular courser and not another. If an employee wishes to challenge evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence.”

Alternatives to dismiss proposed in the course of consultation should similarly be judged on their merits. The limit to the scope of the courts enquiry into the substantive grounds for dismissal would appear to be defined by evidence presented to it. Where the

employer's account of the commercial rationale for its decision is unchallenged, the court will be bound to accept it provided it was taken in a good faith¹¹².

3.3 Procedural fairness

One of the most challenging aspects of a dismissal for operational requirements the fact that there is no clear dividing line between substantive and procedural fairness to the extent as other dismissals. Since the amendments to the LRA in 2002, a distinction is now drawn between large-scale dismissals and small-scale dismissals and large employer and small employer. In terms of the 1956 LRA, the essence of procedural was seen as lying in the employer's duty to consult about impending the dismissal with the employee concerned. Sufficient prior notice was required for the union or employees to engage in meaningful consultation and in the event of the dismissal, for the affected employees to seek alternative employment. Consultation, as defined in section 189 (3) to (6) of the Labour Relations Act, remains the crux of procedural fairness. The Labour Relations Amendment Act 12 of 2002 introduced significant changes. First, section 191 (2) now provides that a single employee faced with dismissal for operational reasons may choose whether to refer a dispute about procedural or substantive fairness to the CCMA or Labour Court¹¹³

As regards to the dismissal involving more than one employee, a "two stream" has been created with a new procedure laid down in respect of what may be termed "major" dismissal by medium to large employers in terms section 189A of the Labour Relations Act. This procedure applies to operational requirements dismissal where

- (a) The employer employs more than 50 employees [s189A]; and
- (b) The number of dismissals contemplated, together with the actual dismissals for operational reasons during the previous 12 months, exceed the threshold numbers laid down in section 189A (1) (a).

¹¹² Comprehensive guide to Labour Law

¹¹³ Act 12 of 2002

The original procedure laid down in section 189 of the Labour Relations Act thus contuse to apply to all dismissal based on operational requirements by employers with 50 or fewer employees and dismissal based on operational reasons by employers with more than 50 employees .the requirements in respect of the content, timing, and topics of the consultation process, as well as the parties whom the employer is obliged to consult and its duty to disclose information, are applicable to the procedure in terms of section 189 of the LRA as well as section 189A of the LRA . An employer barks on dismissal without observing the requirements may be interdicted from proceeding and ordered to comply with the relevant provisions of section 189 [158 (1) (a)]¹¹⁴. In general, clear fault on eh part of the employer will weigh heavily in persuading the court of the need for urgent interim relief. An interdict will not be granted, however, where the union or employees are responsible for the failure of the consultation process.

The procedure set out in Section 189 of the Labour Relations Act essentially follows the procedure set out by the Appellate Division in its landmark decision in the *Atlantis Diesel Engines* case¹¹⁵. This case marked the end of a long running debate as to whether or not consultation was required before or after the decision to retrench. This debate reflected a fundamental difference of opinion as to the scope and extent of the management prerogative. Section 189 resolved the issue of management prerogative regarding the consultative procedure. Nevertheless the issue of management prerogative remains as regards substantive fairness.

Section 189 defines who must be consulted when dismissals are contemplated; it defines the subject matter of consultation and the area where consensus should be reached. It enjoins employers and employee representatives to reach consensus in the measures to avoid dismissals, minimise dismissals, and change the timing of dismissals and to mitigate the adverse effects of dismissals. It also indicates that consensus on the method

¹¹⁴ LRA 66 Of 1995 as amended

¹¹⁵ 1993 (14) ILJ 642 (LAC) at 684 c

of selection of employees and their severance pay be reached. To enable this process to take place the employer is mandated to disclose all material facts related to the proposed dismissal. The procedural requirements for a fair retrenchment, except for the 2002 amendment via 189A, appear to be settled and accepted by most parties concerned. With the enactment of amendments to the Labour Relations Act in 2002,¹¹⁶ the legislature has created a two-track procedure for retrenchments. Small employers below the thresholds set out in Section 189A would adhere to Section 189. Above the thresholds two additional requirements are introduced. Firstly, in order to encourage the parties to utilise outside facilitation, this section sets minimum time periods for the consultation to take place. In the case of a facilitator being appointed, the minimum time period for consultation is 60 days and in the case of a facilitator not being appointed, then the minimum period is 30 days. Secondly, the section gives the trade union access to the Labour Court to resolve matters of procedure as long as the referral is within 30 days of the date of dismissal. Any complaint regarding procedural fairness must be dealt with in this manner and cannot be raised as an issue in any subsequent proceeding of court. This amendment adds further certainty to the issue of procedure regarding an operational requirement dismissal.

(a) Meaning of consultation

“Consultation” means that the consulting party must engage into “meaningful joint consensus –seeking process and attempt to reach consensus” in respect of the consulting matters¹¹⁷. The mere provision of information and documents to a trade union or employee or provision of incomplete information is insufficient¹¹⁸. The employer is not obliged to convince the employee of certain options, e.g. alternatives to retrench, composition of severance pay. The employer must afford the other party the opportunity to make representations on any issue which concerns the matters to be consulted¹¹⁹. The employer must consider the representations and, if he does not agree with them, state his

¹¹⁶ Act 12 (2002)

¹¹⁷ Section 189(2) and item 12 (3) of Schedule 8 of Labour Relations Act 66 of 1995

¹¹⁸ Section 189 (5)-(6) of LRA, *Hadebe v Romatex industrials Ltd* 1986 ILJ 726 (IC) and *Broll property Group (pty) Ltd v Du Pont* 2006 ILJ (LAC)

¹¹⁹ Section 189 (5) of the LRA 66 of 1995, *L&C Steimmuller (Africa) v Shepherd* 2005 ILJ 2359 (LAC)

reasons¹²⁰. After consultations with the employees and after having considered their proposals, the employer must decide whether to proceed with the retrenchment or no¹²¹. If a trade union is authorized to act on behalf of its member, the member will be bound to the retrenchment agreement even if it is to the detriment of their interest¹²².

(b) Content of the duty to consult

The currency of mutual persuasion, formidable as it may seem to the uninitiated, is in alignment with that of other jurisdictions. Such consultation is ideally based upon tripartite participation through dialogue and self-regulation. It is part of a new generation of rights and culture of justification when the loss of livelihood is anticipated that emerged throughout the world in the 1990s. Considerable research and rigorous scrutiny of South African and international standards reveals that the eloquently phrased objectives of consultation in s189 (2) of the LRA are not South Africa's pearls of wisdom but those of the ILO. All national consultation measures – simplistically referred to as the 'employers' burden' in leading text books – just codify ILO Convention 158 and ILO Recommendation 166. The obligation to consult is an international duty implemented in different ways across the globe. Most countries have statutes requiring consultation with employee representatives for collective dismissal¹²³.

Under previous 9156 LRA, consultation was initially considered a more limited form of interaction than negotiation. Following the ruling in *MAWU v Hart (1985) 6 ILJ 478 (IC)*, a prevalent view was that to consult is merely to take counsel, hear representations and to take advice whereas to negotiate means to engage in discussions and bargaining with a view to reaching compromise and agreement¹²⁴. In *Atlantis Diesel Engines (pty) Ltd v NUMSA (1994) 15 ILJ 1247*, however, the Appellate Division accepted the

¹²⁰ Section 189 (6) of the LRA 66 of 1995, *SACCAWU v Sun International SA Ltd* 2003 ILJ (LC)

¹²¹ *NEHAWU v University of Pretoria* 2006 ILJ 117 (LAC), *Mkhwanazi v Moodely* 2008 ILJ 1535 (LC)

¹²² *NUM v Geffens Diamond Cutting Workers* 2008 ILJ 1227 (LC)

¹²³ See Annexure 4, 'Statutory regulation of unfair dismissal': ILO Digest op cit 384-387 at table 1.

¹²⁴ 1985 (6) ILJ 478 (IC), see also *Atlantis Diesel Engines (pty) Ltd v NUMSA* 1994 (15) ILJ 1247 (AD)

characterization of consultation as ‘joint problem solving exercise with the parties striving for consensus where possible.’ According to *Lagrange*, the problem-solving concept ‘ aims to get disputant parties to see their differences in the form of joint problems to which both parties are committed to seek solutions, rather than simply pursuing their own respective positions in a manner which excludes the other party’s interest as well.

Under the current Labour Relations Act employers and their counterparts are similarly required to ‘ engage in meaningful joint consensus-seeking process and attempt to reach consensus’ on the topics over which they are required to ‘consult’ in terms of section [189 (2)] of the labour Relations Act. Section 189 (2) may be said to create a reciprocal duty to engage in a joint problem-solving exercise of the kind envisaged by the Appellate Division in *Atlantis*. In *Johnson & Johnson (pty) Ltd v CWIU (1998) 12 BLLR 1209 (LAC)*, ‘it was held that the primary formal of the employer are geared to a specific purpose, namely to attempt to reach consensus on the objects listed in section 189 (2) of the LRA. The ultimate purpose of section 189 of the LRA is thus to achieve a joint consensus-seeking process’¹²⁵. This purpose may be frustrated not only by the employer but also by another party; for example, by a trade union ‘simply [going] through the entire formal process with no intention of ever genuinely reaching agreement.’ Under such circumstances the employer will be considered to have complied with its obligations

The Labour Relations Act goes on define the content of the employer’s duty to consult as follows:

- (a) It must allow other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections 189 (2), (3) and (4)’ as well as any other matter relating to the proposed dismissals’ in terms of section [189(5)];

¹²⁵ 1998 (12) BLLR 1209 (LAC)

- (c) It 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 of disagreeing; and
- (d) If any representation is made in writing the employer must respond in writing in terms of section [189 (6)] of the LRA.

At the outset of the process in terms of section 189 as well as section 189A of the LRA the employer must issue a written notice inviting the other party to consult with it and disclose in writing all relevant information to its consulting partners [s189 (3) of the LRA]¹²⁶. Taken together, these provisions describe a process to all intents and purposes identical to that of ‘ good faith bargaining’ as defined in the jurisprudence of the Industrial Court

(c)When consultation should take place

Section 189 of the LRA does not prescribe over which consultation should extent. Item 5 of the Code of Good Practice states that the circumstances surrounding the consultation process will be relevant to a determination of a reasonable period. Item 6 of the code state further that the more the urgent the need by the employer to respond to he factors giving rise to any contemplated termination of employment, the more ‘ truncated’ the consultation process might be. However, it goes on to state that urgency may not be induced by failure to commence the consultation process as a reduction of the workplace was likely¹²⁷.

In *Atlantis Diesel Engines (pty) ltd v NUMSA (1994) 15 ILJ 1274 (A)*, the Appellate Division ruled that ‘the duty to consult arises, as a general rule, both in logic and in Law, when an employer, having foreseen the need for it, contemplates retrenchment’. The court thus confirmed that consultation was necessary in respect of the decision to dismiss and not only at the stage of implementation. It was recognized that, in practice,

¹²⁶ LRA 66 of 1995

¹²⁷ Essential Labour Law 4th edition By AC Basson And Others

management would by then have recognized the fact that its business was in difficulty, the need to take remedial steps and the possibility of dismissals. This phase need not involve consultation with employees' representatives but, once the initial contemplation has crystallized, consultation becomes an integral part of the process leading to the final decision to dismiss.

The LRA has construed the duty to consult in a similar manner. It requires the employer to commence consultation when it 'contemplates' dismissing one or more employees for reasons based on operational requirements in terms of section [189 (1)] of the LRA. One of the topics, which the employer must consult on, is measure to avoid the dismissal in terms of section [189 (a) (i)] of the LRA. Section 189 (3) further requires the employer to 'issue a written notice inviting the other consulting party to consult with it' and to disclose all relevant information, including the topics specified in subsection (3). All such topics are subject to consultation in terms of section [189 (5)] of the LRA. For practical purposes, it is submitted; issue of the notice will mark the beginning the consultation process. One specified topics is 'the alternative that the employer considered before proposing dismissals, and the reasons for rejecting each of those alternatives, in terms of section [189 (3) (b) of the LRA. This delineates the scope for the employer to apply its mind to the possibility of dismissal prior consultation. The above provisions make it clear that the employer may not take final decisions on the decision to dismiss prior consultation. Where termination of employment is brought about by the deliberate conduct of the employer, such as restructuring of the business,' the duty to consult arises when the employer, having foreseen the need for it, contemplates changes which might affect the job positions of certain employees¹²⁸.

¹²⁸ Comprehensive Guide to Labour Law

(d) Parties to the consultative process

Section 189 (1) of the LRA,¹²⁹ also sets out with whom the employer must consult. Priority should be given to collective agreements that stipulate with whom the employer must consult. Under the previous dispensation, in the absence of agreement to this effect, there was no duty to consult separately with a minority union where consultation had taken place with majority union. Clause 81 (1) of the draft bill, read with clause 81 (2) (b), sought to give statutory force to this practice. The LRA approaches the matter differently. In the first instance the employer must consult with any person whom it is obliged to consult in terms of collective agreement as required by section [189 (1) (a)] of the LRA. In the absence of collective agreement requiring consultation, the employer must consult with a workplace forum, if there is one, as well as any registered trade union whose members are likely to be affected by the proposed dismissals as stated in section [189 (1) (c)] of the LRA. . If there is no such union, their representatives nominated for that purpose in terms of section [189 (1) (d)] of the LRA. There is no duty on an employer to consult separately with the employees who are represented by a union or other body. To consult directly with the employees belonging to a registered trade union or induce them to enter into an agreement without consulting their union, will amount to breach of section 189 and may render any subsequent dismissals unfair.

Where there are no collective agreements and also no workplace forum or registered trade union, the employer must consult directly with the employees who are likely to be affected or with their representatives nominated to take part in the consultation on their behalf. In *SA Commercial Catering & Allied Workers Union & others V Sun International SA Ltd (A Division of Kersaf Investment Ltd)*,¹³⁰ the Court stated that an employer would also be able to consult directly with employees that are represented by trade union once the consultation process with the union has deadlocked.

¹²⁹ Act 66 of 1995

¹³⁰ (2003) 24 ILJ 594 (LC) at 613

(e) Topics of consultation

Section 189 (2) of the LRA, requires consulting parties to attempt to reach consensus on the specified matters. The parties must therefore already be in the process of consulting regarding the possibility of the retrenchment when they have to comply with these procedural requirements.¹³¹

The topics on which consultation is obligatory are the following:

-Appropriate measure to avoid dismissals in terms of section [189 2 (a) (i)] of the LRA

The consulting parties must try and reach consensus on alternatives retrenchments. Section 189A (19) of the LRA, specifically states that there must be proper considerations of alternatives¹³². In *NUMSA v Atlantis Diesel Engines (pty) ltd (1994) 15 ILJ 12744 (A)*, the Appellate Division held that the purpose of the duty to consult is to give the employer an opportunity to explain the reasons for the proposed dismissals, to hear representations on possible ways of avoiding, minimizing the effects of, dismissal and to discuss and consider alternatives. Echoing these sentiments, the LRA makes it plain that the primary purpose consultation is to attempt to avoid dismissals altogether in terms of section [189 (2) (a) (i)]¹³³. An obvious measure to avoid dismissals is redeployment of the affected employees to appropriate alternative positions. If employees unreasonably refuse such positions, they forfeit their right to severance pay in terms of section [41 (4) of BCEA]¹³⁴. And their dismissal will not be procedurally unfair. Other alternatives to dismissal may include voluntary early retirement, a moratorium on recruitment or overtime, the reduction of night shifts, the elimination of contract work, the retirement of the employees beyond retirement age, short time, lay-offs' bumping' and job-sharing.

¹³¹ Essential Labour Law by AC Basson and Others

¹³² Act 66 of 1995 as amended

¹³³ LRA 66 of 1995

¹³⁴ Basic Conditions Employment Act 66 of 1995

Voluntary severance packages are often resorted to as a means of avoiding dismissals, and may therefore not be implemented unilaterally but subject to consultation in terms of section 189 (2) (a) (i). But there is no obligation on an employer to offer such packages in the absence of any collective or individual agreement to this effect. There has been differing an interpretation of the extent of the employer's duty to consider alternative to dismissals. One position is that the employer must mero muto consider such alternatives before deciding to dismiss, another is that the employer is obliged to consider such alternatives as are placed before it in the course of consultation. Section 189 (3) (b) of the LRA, makes it clear that the employer may consider and reject alternatives to dismissal prior consultation. To the extent that the employer's consultation partners fail to suggest alternatives to dismissal or participate in the consultation exercise, the employer is entitled to make necessary decision, provided it does so fairly and in accordance with the further requirements of the act. The employer will however remain obliged, however, to consult about the measures to minimize the number of dismissal and further issues listed in section 189 (2) of the LRA.

-Appropriate measures to minimize the number of dismissals (section 189 (2) (a) (ii))

Where the dismissal cannot be avoided, the LRA requires the parties to try to reach agreement on measures to minimize the number of dismissals. In practice, measures to avoid dismissals may also serve to reduce the number of dismissal. Measures adopted under the previous Act included in a moratorium on hiring new employees, the elimination of overtime, voluntary termination, extended unpaid leave or temporary lay-off, early retirement and voluntary reductions in working hours. In terms of section 189 (1) an employer is now obliged to consult on proposals of this nature.

-Appropriate measures to change the timing of the dismissals in terms of section [189 (2) (a) (iii)]

The timing of dismissal can be of critical importance to employees selected for dismissal. Changes of timing could afford them more opportunity to make alternative arrangements as well as allowing scope for a more extensive consultation process. An employer may, however, decline to change the timing of dismissal if no good reason is provided for doing so. Where a union withdraws from the consultation process, the employer cannot be held liable for failing to consult about the timing of dismissal.

-Appropriate measures to mitigate the adverse effects of the dismissals in terms of section [189 (2) (a) (iv)]

In the past the Industrial Court found it 'commendable' for employers to assist dismissed employees in finding alternative employment within and outside the firm or, giving dismissed employees priority in re-employment when suitable jobs available. The LRA does not prescribe such measures but imposes a duty to consult in this regard. In practice, an important means to mitigate the effect of dismissal is re-employment agreements between trade unions and employers, granting dismissed employees a right to preferential recruitment if and when available. Such agreement may be the outcome of consultation in terms of section 189 of the LRA. In terms of LRA it is an unfair labour practice for an employer to commit any unfair act involving failure or refusal to reinstate or re-employ a former employee in terms of any agreement as stated in section [189 (2) (c) of the LRA. Agreement on the terms of termination may also be reached between an employer and individual employees.

-The method for selecting the employees to be dismissed in terms of section [189 (2) (b)]

Under the previous dispensation, one of the objectives of consultation was to reach agreement, on criteria for dismissal, failing which the employer had to apply fair and objective criteria. The current LRA restates this position. Where the consultation exercise

produce agreed criteria, the employer must select the employee to be dismissed according to criteria that are fair and objective in terms of section [189 (7) (b)]. In terms of the Code of Good Practice on dismissal based on operational requirements, fair criteria include 'length service, skills and qualifications' in terms of [item 9]. Further criteria laid down by case law may, depending on the circumstances, include 'the employee's competence and merit; technical knowledge or experience, conduct, service record, age and gender.

'Bumping' has been accepted as a legitimate practice in the context of selecting employees for dismissal¹³⁵. In *Porter Motor Group v Karachi* (2002) 4 BLLR 357 (LAC), the following principals were held to be applicable¹³⁶:

- (a) The employer is required to consult over possibility of bumping;
- (b) The point of departure is LIFO ('last in first out');
- (c) Horizontal bumping should take place before vertical bumping;
- (d) Bumping should be implemented to create the minimum possible disruption for the employer;
- (e) Geographical limits may be placed on the unit for selection;
- (f) The size of the unit will depend on the mobility and career paths of affected employees;
- (g) Bumping must be effected with due regard to retention of necessary skills;
- (h) Downward bumping should take place where the employee is prepared to accept downgrading in the work and status.

Selection criteria must be canvassed in the course of consultation and cannot be stated ex post facto. The Court may intervene to struck down unfair criteria but where an employer offered to rectify an unfair criterion and the employee parties failed to respond, it was held that the casual link between the criterion and the dismissals had been broken. Contrary to previous practice, the LRA imposes no duty to consult the individual

¹³⁵ Grogan J Workplace (2003) Juta & Co

¹³⁶ 2002 (4) BLLR 357 (LAC)

employees selected for dismissal if the consultation has taken place with an appropriate bargaining agent.

-Severance pay for dismissed employees in terms of section [189 (2) (c)]

Controversy had existed under the previous Act as to whether employers were under duty to offer severance pay to employees dismissed for operational requirements. On the one hand there was a view that failure to pay severance pay constituted an unfair labour practice, while it was argued that severance pay was a question for collective bargain¹³⁷. Severance pay is now regulated by section 41 of the Basic Conditions of Employment Act. An employer is required to pay severance equal to 'at least' one week's remuneration for each completed year of continuous service, calculated in accordance with section 35 of the BCEA[s 41 (2)]¹³⁸. The Act, however, clearly contemplates the possibility of negotiations to better the statutory minimum and requires the parties to attempt to reach consensus on severance pay in terms of section 189 (2) (c), of the LRA. In *SATU obo Van As v Kohler Flexible Packaging (Cape) (a division of kohler packaging LTD) (2002) 7 BLLR 605 (LCA)* it was held that, where the parties have agreed on severance pay in excess of the statutory minimum, the provisions of the BCEA, including the provisions relating to the calculation of 'remuneration; are inapplicable.

-Further topics for consultation

Section 189 (5) of the LRA provides that the employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsection (2), (3) and (4) as well as any other matter relating to the proposed dismissals'. The effect is that, in addition to the four obligatory topics specified above, any additional matter raised by another consulting party will become part of the process provided in specified I section 189 (3), on which the employer is expressly required to

¹³⁷ LRA 66 of 1995 as amended

¹³⁸ S 41 (2) of BCEA

furnish information, as well as any matter arising in a dispute about the employer's obligation to disclose any particular item or items of information¹³⁹.

(f) The duty to disclose information

In terms of the amended section 189 (3), the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing to that party all relevant information, including, but not limited to¹⁴⁰:

- the reasons for the proposed dismissals;
- the alternatives that the employer considered before proposing dismissals and the reasons for the rejecting these alternatives;
- the number of the employees to be affected and the job categories in which they are employed;
- the proposed method of selecting the employees to be dismissed;
- the timing of the dismissals;
- the severance pay proposed;
- any assistance that the employer proposes to offer employees who may be dismissed;
- the possibility of the future re-employment of the employees who may be dismissed;
- the number of employees employed by the employer and
- the number of the employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months in terms of section [189 (3) (a-j)] of the LRA.

The provisions of section 16, governing the disclosure of information in the context of collective bargaining, are also applicable to the disclosure of information in terms of section 189 (3) and (4) (a) of the LRA. The employer needs to disclose information, which is

¹³⁹ 2002 (7) BLLR 605 (LAC)

¹⁴⁰ S 189 (3) of LRA 66 of 1995

relevant, and need not respond to generalised demands for information. The employer may also refuse to disclose legally privileged information, confidential information likely to cause substantial harm to the employer or employee, private personal information relating to an employee and information which may not lawfully be disclosed. On the other hand, section 16(3), obliges the employer to disclose, in addition to the information specified in section 189 (3), all relevant information that will allow the representative trade union to engage effectively in consultation.’

The test for deciding what information ought to be disclosed is an objective one and should not be based solely on the employer’s view of what is relevant. In *NUMSA v Comak Holdings (pty) Ltd, (1997) 18 ILJ 516 (LC), Mlambo J* elaborated:

Because the employer is always privy to all necessary and relevant information it should not only disclose information, which it deems relevant. It should disclose all information requested by the consulted party subject to the limitation already enunciated. To enable the employee representatives to fulfill their duty to seek alternatives through meaningful and effective consultation, it is necessary to give them an opportunity to consider not only the information which, in the employers view, supports the view that no alternatives to retrenchment exists, but also other information which the employer has not considered to be relevant but which might be.

The requirements that the disclosure must be in writing does not mean that all relevant documents must be physically handed over but will be satisfied if the employer provides reasonable access to the documentation. Disputes over the disclosure of information and the relevance thereof may be referred to the CCMA for conciliation and, if conciliations fails, arbitration in terms of section [189 (4) of the LRA read with section 16 (6) – (13)]. The onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought in terms of section [189 (4) (b) of the LRA]. As noted already, a dispute over a non-disclosure of information does not necessarily mean that the employer can be interdicted from proceeding with the dismissal pending the resolution of the general disputes. In general, an interdict may be granted

where the employer's conduct has created a situation of urgency but not where delay by its consulting partner in seeking arbitration has done so. An interdict interfering with incomplete proceedings will be granted only in the exceptional circumstances¹⁴¹.

¹⁴¹ 1997 (18) ILJ 516 (LC)

Chapter 4: INTRODUCTION OF SECTION 189A VIA THROUGH THE 2002

AMENDMENTS TO THE LABOUR RELATIONS OF 1996

4.1. Section 189A of the Labour Relations Act

The introduction of Section 189A makes an interesting legislative contribution to the issue of the substantive fairness of a retrenchment decision. Apparently not entirely satisfied with the differential approach adopted by some courts, the legislature has given the workers and their unions the right to strike in the case of large-scale retrenchments. It is assumed that the right is in relation to the decision to retrench rather than the procedure because the law prescribes an alternative course of action where there are complaints about the procedure. If the workers decide to take the issue into the power arena then they forfeit the right to take the matter to court on the basis of the substantive fairness of the dismissals. This, in some measure, takes pressure off the court in their scrutiny of the fairness of the dismissals as the workers have the right to strike on this issue in the case of large scale retrenchments envisaged in Section 189A. Before Section 189A, workers did not have the right to strike which placed significant onus on the courts to be vigorous in their scrutiny of management decisions in this regard.

In Section 189A (19) the legislation instructs the Labour Court to find that the employee was dismissed fairly if:

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was proper consideration of the alternatives, and
- (d) the selection criteria were fair and objective

The legislatures have effectively defined the concept of fairness without mentioning the issue of fairness other than in sub clause (d), which refers to selection. *Du Toit*,¹⁴² sees this

¹⁴² Du Toit et al *Labour Relations Law* 4th edition (2003) at 425

section as merely a codification of the existing law, and as such do not think that 189A (19) will make a noticeable difference. The authors believe that it may focus the courts to examine the reasons for dismissal more closely and vigorously. It may offset the effect noted above in regard to the strike provision. Section 189A (19) does raise the obvious question as to why the same amendment was not inserted in Section 189 for the small scale retrenchment. Does the law intend that small scale retrenchment be examined on the basis of fairness as discussed in the case law and that the large scale retrenchment does not have to be evaluated on the basis of “fairness” except as defined? *Todd and Damant* do not believe so and they are of the opinion that *SACTWU vs. Discreto*, establishes the correct test and the test is in line with Section 189A (19). Specifically they claim that the legislature has sent a clear message to the courts to stay away from the distributive issues that an enquiry into the relative gains and hardships would involve.

By contrast, s189A of the LRA, with its process-driven requirements for facilitation under the auspices of the CCMA is far more innovative. The six-year-old section adds a new, homegrown version of the rights- based approach of the ILO Convention. It has, according to a senior CCMA Commissioner, saved thousands of jobs since its introduction in 2002 with its innovative solutions to finding alternative employment. Paradoxically, s 189A of the LRA despite its requirements for third-party intervention is not as unpopular with employers as s 189(3) of the LRA. Facilitation is reportedly requested by at least 30 per cent of employers contemplating dismissal based on operational requirements and is regarded as a model of international best practice by the ILO. It should be emphasized that the facilitation provisions under LRA s189A are in alignment with international labour standards. Article 19 of ILO Recommendation 166 at paragraph 2 states:

Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated. The ILO Recommendation gives a more active role to the competent authority than the ILO Convention in that it calls upon the authority to help the consulting parties find solutions to the problems

raised by the proposed terminations, according to Rubin. Section 189A(3) of the LRA gives effect to Article 19 of the ILO Recommendation by allowing either party the option of a CCMA facilitator to chair the consultation process¹⁴³.

The most significant change brought by section 189A is the introduction of a right to strike in disputes about the fairness of the reason of dismissal based on operational requirements [s 189A (2) (b)] and a corresponding right to lock out. As noted already, the existing section 189 of the LRA continues to apply wherever section 189A of the LRA is silent and the existing resolution procedure (s 191-195) remains applicable except where section 189A provides contrary. Section 189A applies only to employers with more than 50 employees who contemplate a number of dismissal for operational reasons above a given threshold; or if the number of contemplated dismissal together with the actual dismissal for operational reasons in the previous 12 months exceeds the relevant thresholds[s 189A(1) of the LRA]

The thresholds are as follows:

- 10 employees, if the employer employs up to 200 employees;
- 20 employees, if the employer employs 201-300 employees;
- 30 employees, if the employer employs 301-400, employees;
- 40 employees, if the employer employs 491-500,employees; and
- 50 employees, if the employer employs more than 500employees [s 189A (1) (a) of the LRA.]

The most features of the new procedure may be summarized as follows:

- either party may invoke facilitation of the consultation process before notice of dismissal may be given in terms of section [189A (3)] of the LRA¹⁴⁴.
- the employer may not give notice of the dismissal for a minimum of 60 days form the date of the notice in terms of section 189 (3) and [s 189A (7) and (8)] of the LRA.

¹⁴³ Levy, op cit (note 56).

¹⁴⁴ S 189A of LRA 66 of 1995

-if the union or employees want to challenge the fairness of the reasons for dismissal , they can do so only by way of application to the Labour court or whether to strike in terms of section 189A9!!) (a) (ii) of the LRA.

-if the union or employees want to challenge the fairness of the procedure, they can do so only by way of application to the Labour court in terms of section [189A (13), (18)].

-the employer may only lock out employees after strike notice has been given [s 189A (11) (a) (ii)] of the LRA¹⁴⁵.

Different rules will therefore apply depending on whether facilitation has been requested, whether the dispute is about substantive or procedural fairness and, if it is about the substantive fairness, whether the employees persevere by means of strike action or legal action. Facilitation, as opposed to ad hoc consultation, follows a more formal Workshop structure with up to four meetings between the parties unless a settlement can be reached sooner. Facilitation meetings are conducted on a 'with prejudice' basis and the process has been described, as a 'sea change' by CCMA Commissioners. Facilitation in South Africa is essentially a time-driven process with a statutory 60-day moratorium on consultation. Swift provisions for disclosure under the LRA (s 16 and s 189(3)-(4)) and Facilitation Regulations (s 5) ensure that deadlines are met. By contrast, in countries with no statutory obligation to consult employees, such as Cyprus, retrenchment procedures can be more protracted, regulated and complex for employers¹⁴⁶.

4.2. Resolution of disputes

Disputes about the procedural and substantive fairness of a dismissal by a small employer must be referred to the Labour Court¹⁴⁷. Disputes about procedural fairness and substantive fairness of a small-scale dismissal by big employer must also be referred to the Labour Court. In case of large scale dismissals, disputes about procedural fairness should be referred to Labour court within 30 days after the employer has given notice of to

¹⁴⁵ Act 66 of 1995

¹⁴⁶ Facilitation Regulations (2003). And Digest, op cit at 125.

¹⁴⁷ Section 191 of the LRA 66 of 1995

the selected employees in terms of section 189A (13) and 189A 17 (17) (a)¹⁴⁸. In case of a dismissal for operational requirements of a single employee, the employee may refer a dispute about the substantive and procedural fairness of the dismissal either to arbitration or to the Labour Court¹⁴⁹.

¹⁴⁸ At 6 1995

¹⁴⁹ Section 191 (12)

Chapter 5: PROCEDURES AND REMEDIES OF DISMISSAL FOR OPERATIONAL REQUIREMENTS

5.1. General procedure

If an employee disputes the fairness of his dismissal for operational reasons, he may refer the disputes for conciliation to the CCMA or bargaining council having jurisdiction¹⁵⁰. If a dispute remains unresolved the employee may refer it to either the CCMA for arbitration or to the Labour Court for adjudication¹⁵¹. However, the positive law is uncertain, despite the clear purpose of the legislature,¹⁵² when a single employee may refer a retrenchment dispute to the CCMA because of the strange formulation of the relevant LRA provisions. In proceedings before CCMA or the Labour Court, the employer will have to prove that the retrenchment and or severance pay were fair¹⁵³.

5.2 Severance pay

Employees who are retrenched must receive at least one week's remuneration for every year of completed service from the employer. The consulting party may reach agreement on a higher amount. An employee who unreasonably refuses to accept an employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay¹⁵⁴.

5.3 Disputes over dismissals

An employee may refer a dispute about a dismissal to the CCMA or a council for conciliation. If a dispute remains unresolved, the employee may refer the dispute to arbitration by the CCMA or a council or to adjudication by the Labour Court.

¹⁵⁰ Section 191 (1)-(4) of the LRA 66 of 1995, University of Witwatersrand Johannesburg v Commissioner Hutchinson 2001 ILJ 2496 (LC)

¹⁵¹ See Austen v Souci Girls High School 2007 ILJ 2098 (CCMA)

¹⁵² Section 191(5) (b) (ii) read with Section 191(12) of the LRA 66 of 1995, Maake v Prinsloo 2008 ILJ 790 (CCMA)

¹⁵³ Section 192(2), See also s 191(1) and Herbst v Fidelity Guards 2001 ILJ 1828 (LC)

¹⁵⁴ Section 41 of the Basic Conditions of Employment Act, 1997

The following dismissal disputes may be referred to arbitration:

Dismissals for misconduct or incapacity; or constructive dismissals or where an employee resigns after being given less favourable terms and conditions of employment following a transfer of a business as a going concern or the transfer of an insolvent business.

An individual employee who has been dismissed for operational reasons may refer a dispute either to the CCMA (or council) for arbitration, or to the Labour Court for adjudication. Automatically unfair dismissals, dismissals for participating in an unprotected strike, and operational requirement dismissals (other than those that only involve one employee) may be referred to the Labour Court for adjudication.

5.4 Remedies for unfair dismissals

Reinstatement is the first choice of remedy for an unfair dismissal, unless special circumstances exist. These circumstances exist if:

the dismissed employee does not wish to return to work;

the dismissal was only procedurally unfair;

the working relationship between the parties has become intolerable; or

it is not practical to do so. For example, it may be excessively costly for an employer to adapt the workplace to the needs of an employee who was unfairly dismissed for incapacity.

An employee resigns because the employer has made continued employment intolerable.

An employee who is not reinstated is usually given compensation. Compensation must be just and equitable and not more than the equivalent of 12 months remuneration. If the dismissal is automatically unfair, the maximum compensation that may be awarded is the equivalent of 24 months remuneration. Evidence will need to be led on, for example, an employee's loss of earnings, to enable the court or arbitrator to decide what will be just and equitable compensation. The compensation award is additional to monies owing for

other reasons, such as outstanding holiday pay or bonuses. In cases of automatically unfair dismissal or dismissal based on operational requirements the Labour Court can make additional orders apart from reinstatement or compensation.

5.5. Remedies for dismissal based on operational requirements

In a case of unfair retrenchment, the CCMA or Labour Court may order:

- (a) the reinstatement or re-employment of the employee: or
- (b) the payment of compensation to the employee¹⁵⁵.

Much more controversy existed in respect of the compensation to be awarded in the case of retrenchment that was only procedurally unfair until the matter was clarified in the amendments to the Labour Relations Act,¹⁵⁶ where it provided that the compensation to be awarded to an employee for an unfair dismissal must be either because:

- (a) the reasons for dismissal was unfair :or
- (b) a fair procedure was not followed; or Both must be just and equitable and may not be more than 12 month's remuneration¹⁵⁷.

In *Johnson & Johnson (pty) Ltd v CWIU*,¹⁵⁸ the following principles were also restated:

- (a) the court has discretion to award compensation for a procedurally unfair dismissal;
- (b) if compensation is awarded in accordance with the formula set out in the LRA;
- (c) the compensation to be awarded for the unfair procedure is not based on patrimonial or actual loss but is the nature of a *solatium* for the loss of the right to

¹⁵⁵ S 193(1) (a)-(b) of the LRA 66 of 1995, *Republican Press v CEPPWAWU* @007 ILJ 2503 (SCA), S 193 (1) (c) of the LRA 66 of 1995 and Cohen "Exercising a Judicial Discretion- Awarding Compensation for Unfair Dismissals" 20003 ILJ 737.

¹⁵⁶ Section 194 (1) of the LRA 66 of 1995

¹⁵⁷ *Highveld Steel & Vanadium Corp Ltd v NUMSA* 2004 ILJ 71 (LAC). *Ntshanga v SA Breweries Ltd* 2003 ILJ 1404 (LC)

¹⁵⁸ (1998) 12 BLLR 1209 (LAC), [1999] ILJ 89 (LAC)

a fair procedure :”it is punitive to he extent that an employer must pay a fixed penalty for causing that loss”.

The court may also order the employer to consult with the union or employees on an urgent basis. If an employee refuses reinstatement, the employee may not be entitled to compensation for procedurally unfair retrenchment unless he was a senior employee and the fiduciary relationship between the parties was breached¹⁵⁹.

5.6. Disputes regarding severance pay

If a dispute arises about the entitlement of an employee to severance pay the employee may refer the dispute to the CCMA or bargaining council, ¹⁶⁰ which must attempt to settle the dispute through conciliation. If the dispute is not settled it may be referred to arbitration ¹⁶¹ .If the Labour Court adjudicates a dispute on retrenchment, the Court may investigate the amount of the severance pay to which the employee is entitled, determine the amount and issue an order directing the employer to pay that amount¹⁶².

5.7. Waiver of right to severance pay or compensation

An employee is not entitled to claim severance pay if he is reasonably redeployed by the employer or accepts an offer of redeployment. Similarly, an employee has no right in law to claim compensation from his employer because of alleged unfair retrenchment if he:

- (a) accept an offer of redeployment
- (b) unreasonably refuses an offer of alternative employment or reinstatement
- (c) accepts an offer of early retirement or retrenchment and a severance package in full and final settlement of the dispute;

¹⁵⁹ NUMSA v Dorbyl Ltd 2004 ILJ 1300 (LC), Harmsen v Alstom Electrical Machines (pty) Ltd 20004 ILJ 338 (LC)

¹⁶⁰ Section 14(40) of the Basic conditions of Employment Act 75 of 1997

¹⁶¹ Fourie v Iscor Ltd [2000] 11 BLLR 1269 (LC)

¹⁶² Section 41(6),(8), (9)and (10) of Basic Conditions of Employment Act 75 of 1997,k Molapo Technology(pty) Ltd v Schreuder 2002 ILJ 2031 (LAC)

- (d) has his service terminated in terms of a fixed-term contract; or
- (e) resigns after accepting alternative job

Waiver of fundamental labour rights in respect for retrenchment by an employee will not be accepted by the Labour Court rules unless:

- (a) the employee knew he was waiving his rights and
- (b) there is clear evidence of his intention to do so.

An employee will not forfeit his right to severance pay if he accepts alternative employment with another employer, even if his former employer was involved in arranging the alternative employment¹⁶³.

5.8. Disputes regarding and interpretation dismissal for operational requirements

Disputes regarding the conclusion, breach, contents, enforcement, binding effect, of retrenchment agreements, must be solved in accordance with the ordinary principles of law for contract. When interpreting a retrenchment agreement in order to determine the rights of the employees involved in the retrenchment, the following principles apply:

- (a) the intention of the parties to the agreement must be ascertained, or
- (b) if it is not possible to determine their intention, words and terms which are clear and unambiguous should be given their ordinary meaning¹⁶⁴.

5.9. Disputes regarding disclosure for information

Any disputes concerning the disclosure for information during the retrenchment procedure should be conciliated and thereafter-arbitrated .The Labour Court does not have a jurisdiction to adjudicate the dispute¹⁶⁵.

¹⁶³ SATAWU v Old Mutual Life Assurance Co SA Ltd 2005 ILJ 293 (LC), Faku v Municipality Guards Holdings (pty) Ltd (1998) 7 BLLR 746 (SE)

¹⁶⁴ Van As v African Bank Ltd 2005 ILJ 227 (w),

CHAPTER 6: THE LEGAL POSITION OF ENGLISH LAW IN RESPECT OF

DISMISSAL FOR OPERATIONAL REQUIREMENTS (REDUNDANCY)

6.1. Introduction

The Laws governing contracts of employment under English Law derives from three main sources: common Law, Statute and Law of the European Community. The main statutes governing termination of employment is the Employment Rights Act 1996 (ERA), the Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA), the Employment Act 2002, the Employment Relations Act 2004, and the Transfer of Undertakings (Protection of Employment) Regulations 2006. Legislation enacted to prevent discrimination includes the Disability Discrimination Act, 1995, the Sex Discrimination Act, 1975, the Race Relations Act, 1976, the Equal Pay Act, 1970, and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Special provisions under collective agreements may achieve legal effect if they are incorporated into individual contracts of employment. Incorporation is not automatic. This is in sharp contrast to many other countries, where the clauses of collective agreements apply to employment contracts if the provisions are more favourable to the employee.

According to the common Law, any contract may be terminated by either party with due notice. However, the common Law has been restricted by legislation aimed at curbing unfair dismissal. The Employment Rights Act provides that employees have the right not to be dismissed unfairly¹⁶⁵. A dismissal may be fair if the employer shows that the dismissal (Sec. 98(2), ERA, as amended):

- relates to the employee's ability or qualifications to do the work;

¹⁶⁵ S 189A(16) of the LRA, *DISA v Denel Informatics (pty) LTD*.1999 ILJ 137 (LC)

¹⁶⁶ (sec. 94(1), ERA) of 1996

- relates to the employee's conduct;
- is the retirement of the employee?
- was because the employee was redundant; or
- was necessary because continued employment would have necessitated a contravention by either party of a prior or legal duty.

The employee has the initial evidentiary burden of proving a "dismissal" has taken place, then the burden of showing cause shifts to the employer. Where the employer has fulfilled this requirement, it rests with the employment Tribunal to decide whether in all circumstances the employer acted as a reasonable employer in dismissing the employee. Even if the dismissal is considered unfair according to of the Employment Rights Act, the employer may terminate the employee if the termination is because:

the employee was taking part in an illegal industrial action, provided all employees who took part in that action were dismissed without discrimination and not re-engaged within three months, unless the employee ceased his participation in the action before the dismissal¹⁶⁷, or the employer took steps to resolve the dispute before the dismissal or the employer has some other substantial reason to justify the dismissal of an employee (sec. 98(1) (b), ERA). A dismissal is automatically unfair, when the principal reason for dismissal involves:

trade union membership, elected representatives of the employees, representatives of a recognized trade union, or trade union activities (if the employee was or proposed to become a member of an independent trade union or if the employee had taken, or proposed to take, part in activities of an independent trade union) refusal to belong to a trade union (if the employee was not a member of any trade union, or of a particular trade union, or had refused, or proposed to refuse, to become or remain a member).¹⁶⁸.

¹⁶⁷ (sec. 98(4), and sec. 98(2) of ERA 1996

¹⁶⁸ (sec 238, TULRCA, as amended; (sec. 152(1)(a) and (b), TULRCA and sec 103, ERA for employee representatives); (sec 152(1)(c), TULRCA)

Under English Law dismissal for operational requirements is known as redundancy. However I will use the “redundancy” as it is under English Law instead of dismissal for operational Requirements. There is no reference to the term “collective dismissal” in the statutes. However, certain obligations, like consultation and notification in due time for the employer to arrive in circumstances where a certain number of employees are affected by dismissal caused by redundancy. Redundancy is when the employee’s dismissal is attributable wholly or mainly to the fact that; the employer has ceased or intends to cease to carry on that business in the place where the employee was so employed; or the requirements of that business for employees to carry out work of a particular kind in the place where the person affected was so employed have ceased or diminished or are expected to cease or diminish¹⁶⁹.

If more than 10 employees are terminated because of a redundancy, the employer must notify the Secretary of State in writing. Failure to do so may result in a fine. A copy of this notification must be sent to each worker’s representative, who is to be consulted on the redundancy. Furthermore, the employer must contact the employee representatives, who are to be representatives of an independent trade union or, in the case of the absence of a recognized trade union in the workplace, representatives specially elected for consultation on redundancy. These representatives are to receive specific information on the redundancies from the employer prior to the consultation. The consultation must begin “at the earliest opportunity” and, when the employer is proposing to dismiss 100 or more employees within 90 days, the consultation must begin at least 90 days before the first of the dismissals takes effect. If 10 to 99 employees are to be dismissed for redundancy reasons within 30 days, the consultation must start 30 days before the date expected for dismissals. The consultation is a place to discuss ways to avoid or reduce the dismissals, and ways to mitigate their consequences. If the obligation to consult is not observed, a complaint may be presented to the employment tribunal, which may make a protective award that keeps employees on the payroll for a period of time. The Tribunal

¹⁶⁹ (sec. 139(1), ERA

determines a length that will be just and equitable in all circumstances, with regards to the seriousness of the employer's default¹⁷⁰.

No severance payment is offered if an employee was terminated because of misconduct or personal attributes. However, an employee whose contract has been terminated on the grounds of redundancy is entitled to receive a redundancy payment in accordance with sec. 135 of the Employment Rights Act. The amount of the payment is calculated according to the length of uninterrupted employment. The employee is to receive (sec. 162 (2), ERA)¹⁷¹:

One-and-a-half week's pay for each year of employment in which the employee was not below the age of 41;

One week's pay for each year of employment in which the employee was not below the age of 22; and

One half-week's pay for each year of employment for each year not falling within the above.

The maximum week's pay cannot exceed £310. Moreover, wherever an employee has been dismissed for redundancy reasons but the dismissal has been unfair, the redundancy compensation received will be subtracted from the compensation payable to the employee for the unfair dismissal (secs. 122(4) and 123, ERA). Employers and employees have to contribute to the National Insurance Fund, out of which redundancy payments are financed in case the employer is financially unable to do so (secs. 167, ERA)¹⁷².

Until the 1965 redundancy payments act the only hope a dismissed employee had to legal entitlement to "compensation" was if the dismissal was a breach of contract (wrongful dismissal). There was no Law of "unfair dismissal" under English Law until the 1971 Industrial Relations Act. The first statutory redundancy rules were introduced in 1965 and the unfair dismissal rules in 1971. They overlap in some ways and are now consolidated into one Act, the Employment Act Rights of 1996. They remain, however,

¹⁷⁰ (sec. 193, TULRCA); (sec. 194, TULRCA); (sec. 188, TULRCA); (sec. 188(1), TULRCA); (sec. 188(4), TULRCA); (sec. 188(2)(a), TULRCA); (sec. 188(7), TULRCA); (sec. 189, TULRCA) and (sec. 189(4), TULRCA

¹⁷¹ ERA of 1996

¹⁷² ERA of 1996

separate sets of rules, those for unfair dismissal being part x of ERA 1996 and those for redundancy being part xi of the ERA of 1996. Being redundant is sometimes used as a euphemism for being dismissed. This is wrong because neither in Law nor in English language does “redundancy” mean to losing a job or being sacked. “Redundant” means “superfluous, excessive”. Redundancy is not a reason to dismissal and is not itself dismissal. In particular it is not unfair dismissal although a dismissal by reason of redundancy may be unfair dismissal if the facts warrant it¹⁷³. Where an employee is dismissed by reason of redundancy, he or she is entitled to a lump sum payment based on his or her age and length of service (up to a maximum of 20 years,) and his or her weeks pay. In calculating the week’s pay, only contractual overtime, which is obligatory on both sides, is taken into account¹⁷⁴.

6.2. Definition of redundancy

The definition of redundancy is contained in Employment Rights Act, 1996, section 139. It defines redundancy as occurring where an employer has ceased or intends to cease to carry on the business for the purpose of which employee was employed by the employer, or to carry on the business in the place where the employee was so employed, or where the requirement of the business for employees to carry out of a particular kind, have ceased or diminished. The main problems area has concerned the definitions of “work of a particular kind” and “in the place where the employee was employed by the employer”¹⁷⁵. There can only be a redundancy situations at all if one or both of these or diminished, or is expected to do so, the test for this being objective.

The Courts adopt a broad definition of ‘work of a particular kind’ in the sense that the job can change considerably without a redundancy situation arising, although the particular employee becomes incompetent at the new job. The test of place of work until recently thought to be defined by the terms of the employment contract, although a different view

¹⁷³ Net lawman (the first inn and outs of redundancy rule)

¹⁷⁴ Paul Todd (Redundancy law)

¹⁷⁵ S 139 of ERA of 1996

was taken more importantly in, *High Table v Horst*¹⁷⁶, the Court indicated that ‘if the work of the employee for his employer has involved a change of location, as would be the case where the nature of the work required the employee to for place to place, then the contract of employment may be helpful to determine the extent of the place where the employee was employed .

Redundancy “has two different meaning for the purposes of English employment Law”. One derives from the 1965 redundancy payments Act and the other from European Law, specifically the collective redundancies directive 98/59/EC (which repealed and consolidated the collective redundancies directives, 75/129/EEC as amended by directive 92/56/EEC). In terms of section 139(1)¹⁷⁷; an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributing wholly or mainly to –

- (a) The fact that his employer has ceased or intends to cease
 - (i) to carry on the business for the purpose of which the employee or employed by him
 - (ii) to carry on that business in the place where the employee was so employed

- (b) The fact that the requirement of that businesses-
 - (i) for employee to carry out work of a particular kind or
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished are expected to cease or diminished.

The definition of redundancy covers three basic situations:

- Where the employer ceases to carry on business on a permanent or temporary basis
- Where the employer ceases business in the place where the employee is employed and

¹⁷⁶ 1997 (IRLR) 513

¹⁷⁷ Employment Relation’s Act 1996

-Where the employers business no longer requires any employees or as many employees to do a particular kind of work

Should the employee be offered suitable alternative employment at a different location, such offer needs to be considered seriously as unreasonable refusal of such an offer could lose them their redundancy pay? Further should the employee have a mobility clause in their contract (e.g. requiring them to relocate to premises within a reasonable traveling distance of their home) and they reject such offer, they could potentially be dismissed for gross misconduct instead of redundancy(Workforce reduction ;genuine redundancy). However, where a job has been altered or modernized, (e.g. technology) the redundancy may not necessarily be genuine. The test is whether the job once upgraded now requires different skills, aptitude, or knowledge .It most certainly is not a genuine redundancy if the employer simply employs a direct replacement for replacement for the employee with immediate effect.

6.3 Consultation

Employers proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less must consult, in advance, appropriate representatives of employees affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals. Consultation should be 90 days before the termination date when more than 100 employees are involved. Consultation should be at least 30days before the termination date when less than 100 employees are involved. Notice must be given to the department of employment stating scope, reasons for redundancy; and method of selection and consultation process adopted. Notice to employees to effect lawful termination (1-1 2) weeks according to length of service¹⁷⁸.

6.3.1 Legal requirements for consultation in cases of redundancy process

¹⁷⁸ Gibson Dunn -UK Employment and Labour Law (quarterly executive summary)

Under the provisions of collective redundancy and transfer of undertaking (Protection of Employment) (Amendment regulations 1999), the legal requirements to consult in good time; should be at least 90days before proposed redundancies, with the union recognized for collective bargaining process. Where there is no union recognized for a particular staff group, then elected employee representatives staff group must be consulted. In all cases, consultation must also take place with the individual members of staff who may be affected.

- (a) Consultation with union representatives and elected employee representative on redundancy.

In practice personnel services will normally consult formally with the appropriate trade union officials or directly elected employee representatives; as well as complying with the statutory notification procedure for redundancies to the Department of Trade and Industry. At the outset this involves furnishing the trade union or elected employee representatives as appropriate, with the following details in writing:

- (i) reasons for the proposals
- (ii) numbers and descriptions of the employees who it proposed to dismiss as redundant
- (iii) total numbers of employees of that description employed by the employer
- (iv) proposed method of selecting the employees who may be dismissed
- (v) proposed method of carrying out the dismissals (I.e. procedure to be followed) and period over which dismissal are to take effect;
- (vi) Proposed method of calculating any redundancy payments

The regulations stipulate that the aim of consultation for redundancy purposes is to, avoid dismissals, reduce the number of employees to be dismissed on grounds of redundancy and mitigate the consequences of dismissal. In cases of redundancy, consultation must be undertaken with a view to reach agreement with the representatives and must include consultation when proposals are at their formative stage, adequate information to enable a

response to be made, adequate time in which to respond, and conscientious consideration by management of any response for employees.

(b) Consulting with individuals employees who may be affected by redundancy

Appropriate consultation at departmental level with individual employees whose posts may be made redundant or who may be affected by potential redundancies, will normally involve inviting them with either union representative, if they are members or an accredited elected staff representatives (normally the administrator) to discuss the future of their jobs. At the meeting, the reduction in the need for work and the considerations that have been given to restructuring, reorganizing, and redeployment in order to avoid dismissal would have explained. The employees should be given the opportunity to put forward their own suggestions as to how jobs may be retained or altered to avoid redundancy. Any such suggestion should be given serious consideration by management and, if rejected, clear reasons should be given. It is also recommended that all discussions are documented in the form of a letter summarizing details of any meeting and it would be appropriate for personnel services to see any letter before they were sent to staff.

Meetings and consultation with staff must be given a minimum 90 days prior to the proposed redundancies. If staffs are to be offered suitable alternative employment in the department, it should be made clear to them that this will be a similar, although not necessarily identical, terms and conditions to those as their current employment.

(c) Looking for alternative work in cases of potential redundancy

If no alternative to redundancy is found through consultation with the staff affected, then before they are given notice of dismissal on grounds of redundancy (which may according to the exact terms of their contracts be a period of up to three months) alternative employment should be sought following a similar procedure to that for

consideration of alternative employment within the staff approaching the end fixed term appointment. In brief, the details of staff affected should be circulated to other departments and alternative suitable employment should be actively sought by going through each issue of opportunities with the individuals affected and sending priority application to relevant department if a suitable vacancy is identified.

Funding individual to obtain relevant training to improve their chances of finding alternative employment may also form an aspect of the redeployment support offered by the department if appropriate. It should be noted that if suitable alternative employment was not found and a staff member did not accept it then he or she would not be eligible to receive redundancy payment. This would not be the case if the job offer and refused was not considered suitable alternative employment. Ultimately, if following consultation and attempted redeployment no suitable alternative work within the department, then the staff could be dismissed lawfully on grounds of redundancy. If they were to be made redundant they would, subject to at least two years continuous service and assuming that their contracts did not include a valid waiver clause be entitled to statutory redundancy pay or in certain circumstances, for an *ex-gratia* payment equivalent to statutory payment¹⁷⁹.

6.3.2 New pitfalls for the employers in the redundancy process

The Employment Act of 2002 (Dispute Resolution) regulations 2004 (“regulations”) is now in force, and introduced statutory dismissal and disciplinary procedures (DDPS), with which employer and employees must comply. Many employers are still unaware that dispute resolutions and disciplinary procedures regulations apply to redundancies. The DDPS apply to all type of dismissals that includes dismissal on grounds of redundancy, failure to renew a fixed term contract and on ill health grounds.

¹⁷⁹ Personnel Services- Managers (Redundancies)

(a) Initial warning and consultation

There is some academic argument as to whether the initial stages of redundancy do, in fact, fall under the dispute resolution and disciplinary procedures (DDPS). One could argue that the announcement of possible redundancies and potential selection for redundancy should be regarded as the same as contemplating dismissal and so the DDPS would apply. On the other hand, the employer may, after discussion, decide that there is no longer a need to undertake or continue with the redundancy process and consequently, the procedure would not apply. The regulations are not clear. A prudent approach would be to carry out one to one consultation even at this stage.

Although the DDPS apply when an employer is proposing to dismiss an employee on the grounds of redundancy, the regulations provide that, when an employer will be making more than 20 employees redundant, it will not be required to comply with DDPS. This is because the need to carry out collective consultations which will apply even if the number of employees to be made redundant falls below 20 employees.

6.4. Unfair redundancy

In terms of section 139 of Employment Relations Act , an employee shall be taken as being dismissed by reason of redundancy in case of a cessation of business, where the employer moves his place of his business or in a situation of surplus labour. The question of whether an employer has ceased to carry on business in the place where the employee was employed is a factual, not a contractual one. Thus, it is decisive where the employee actually worked and not where he was contractually required to work. Mobility clauses shall not be taken into account. The distance between the old and the new premises have to be considered as well as the inconveniences to the employee affected in a redundancy situation..

A situation of surplus Labour is given where the employer requires fewer employees for existing work or where there is less work for the existing employees and consequently

some are redundant. This often occurs because of reorganizing of the work, the introduction of labour-saving devices or a change in the work pattern, which requires the same number of employees but different kind of skill.

6.4.1 Grounds on which dismissal may be held unfair

A redundancy situation may be a reason for dismissal, in respect of which the employee may be able to obtain a redundancy payment, yet it does not follow that a dismissal by reason of redundancy will automatically be fair. There are three main grounds on which redundancy may be held to be unfair.

(a) No adequate consultation

The employer should seek to give as much warning as possible of impending redundancies and consult with the employees and unions. The consultation must be fair and genuine and an opportunity must be given to the affected employees to express their views.

Three propositions with regard to consultation that should be taken into account:

- (1) where no consultation about redundancy has taken place with the employees or trade union, the dismissal will normally be unfair, unless the reasonable employer has concluded that the consultation would be an utterly futile exercise.
- (2) the consultation with trade union does not itself release the employer from obligation to consult with the employees concerned.
- (3) it will be a question of fact and degree for the employment tribunal to consider whether such consultation with the employees or trade union was so inadequate as to render a dismissal unfair.

The test of fairness is to be judged by what the employer did, and not by what he might have done. Where it can be said that the employer acted reasonably on the basis of

circumstances known to him at the time of dismissal, the dismissal may be even fair despite the absence of a warning or consultation.

In a welcome decision of *Middles rough Borough Council v TGWU and UNISON* the Employment Relation's Act 1996 has highlighted an employer's obligations to consult over the proposed redundancies. It is not sufficient for the employer to consult over the ways of reducing the numbers to be made redundant, it is also consult about ways of avoiding the dismissals altogether¹⁸⁰. Following local government reorganization in 1996, *Middlebrough Borough Council* faced serious financial problems. The management team proposed reducing the number of employees in on e department. On the 24 June 1998, the council sent the union a copy of its notification of redundancies that said that up to 150 staff in the department would be made redundant as at 30 September 1998. At the council meeting on 2 July, the redundancy of 'up to 150 employees' was approved and redundancy notices were issued the next day.

Section 188 (2) says that "consultation" must include about ways of, avoiding the dismissal; reducing the number of employees to be dismissed; and mitigating the consequences of dismissals¹⁸¹.

The union argued that the Employment Tribunal that, although they made representations at the council meeting on 2 July, they were never consulted about the ways of avoiding the dismissals and therefore the council had breached the provision of section 188. In effect, the decision to make staff redundant was already 'set in stone' by the time of the council meeting on 2 July. The tribunal agreed. The first point for the Employment Appeal Tribunal was when the timetable for consultation begins. They held that the relevant date is the effective date of termination and therefore the consultation should start 90 or 30 days before the end of the notice period and not by reference to the date the notice given. This means that the consultation can take place during the notice period itself.

¹⁸⁰ 2001 (670) IRLB

¹⁸¹ The Trade Union and Labour Relations (Consolidation) Act 1992

Upholding the substance of the Tribunal decision, the Employment Appeal Tribunal confirmed that the three topics of consultation spelled out in section 188 must each be consulted over. This requirement was mandatory. It was not open to an employer to escape its obligations on the grounds that consultation under any heading would be futile. The EAT agreed that it was plainly open to the Tribunal to conclude that even if there had been any consultation over the ways of avoiding dismissals, that consultation was a sham. In reality there was no prospect of avoiding redundancies in the minds of council members.

The council argued that the ‘special circumstances’ defence applied. Section 188(7) states that if there are special circumstances that make it not reasonably practicable to comply with the consultation obligation, then an employer need only do their best in the circumstances¹⁸². In this case because there were no special circumstances, the defence raised by the council failed.

(j) No fair selection procedures

The employer’s procedures for selecting redundancies have to be fair and reasonable. If there is an established procedure in existence, it should be followed. The general rule in industry for redundancy selection is “last in, first out”. Furthermore, superior abilities and experience, the respective hardship caused or bad time-keeping or absenteeism records can be taken into account. Although the selection criteria are management to determine, it is reasonable to agree this in advance with the trade unions, since adherence to a redundancy agreement with a trade union is generally sufficient evidence to rebut unfairness. If jobs are interchangeable between departments, then the basis for selection is between employees of the same description within the whole of the same concern, not on a departmental basis.

¹⁸² TULRA 1992

(k) No consideration of alternatives

In a redundancy situation the employer has to reasonably consider whether there would be some way of avoiding the redundancy, especially the retraining and the redeployment of the employee elsewhere in the concern or with associated companies.

If an employer can offer alternative employment and is accepted by the employee, the employer can avoid redundancy payments. However an employee can refuse that offer if he or she establishes that it is not reasonably suitable on number of grounds. If the employer refuses to accept the reasons of the employee on the basis that the grounds of employee's refusal are unreasonable, the employee may submit an application to the employment tribunal. The employment Tribunal will look at both the suitability of the job offered and the reasons for the employee's refusal of the alternative separately and come to separate decisions respectively.

When an offer of alternative employment is made it must be clearly stated what changes to exist and conditions to enable the employee to make a reasonable decision. The offer must be made before the contract and position is terminated within four weeks of the date. An employee is entitled to ask for a trial period if the job offered is a difference nature. The statutory period is four weeks, but this can be extended by agreement. All conditions of the trial period must be made in writing prior to the commencing¹⁸³. It is a defence to a redundancy claim that the employer has made an offer of suitable employment, which has unreasonably refused by the employee. The cases suggest that the test of what is suitable alternative is subjective; whereas that of reasonableness of refusal is objective in so far that it takes account of the personal position of the employee¹⁸⁴.

¹⁸³ David Royden Employment Solicitors, UK)

¹⁸⁴ See further in general ERA, Ss 141(2)-(3), and the *Hindes v Supersine Ltd* (1979) I.C.R. 517 (E.A.T), *Standard Telephones and Cables Ltd v Yates* (1981) I.R.L.R. 21 (E.A.T)

6.5 Collective redundancies

(a) The duty to consult on impending redundancies when a workplace closes now includes a legal duty to consult on the reason for the closure

Section 188 of Trade Union & Labour Relations (Consolidation) states that, Where an employer is proposing to dismiss as redundant more than 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult all the persons who are appropriate representatives of any of the employees who a may be affected. The consultation must begin in a “good time” and in any event, where the employer is proposing to dismiss 100 or more employees, at least 90 days, and otherwise, at least 30 days before the first of the dismissals takes effect. Appropriate representatives are representatives of trade unions or representatives elected or appointed by the employees¹⁸⁵.

According to the European Court of Justice the word “establishment” means the unit to which the workers made redundant more are assigned to carry out their duties. It is not essential for that unit to be endowed with a management that can independently effect collective dismissals. The consultation shall take place before notices are issued, but notices can be issued during the consultation period.

The consultation requires consultation about ways of avoiding the dismissals, reducing the numbers to be dismissed and mitigating the consequences of the dismissals, and must be undertaken with the view to reaching agreement with the appropriate representative. The representatives have to informed at the beginning of the consultation period in writing about the reason for the proposals, the number and the description of employees whom it is proposed to dismiss, the total number of employees of any such description employed by the employer at that establishment, the proposed method of selecting the employees who may be dismissed, the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are

¹⁸⁵ Act 1992 (TULCRA)

to take effect and the proposed method of calculating the redundancy payment if this differs from the statutory sum.

Where the employer has failed with the requirements of section 188 TULR (C) A 1992, employee representatives, trade unions and the individual employee who is dismissed as redundant can complain and may be awarded a protective award. Furthermore the employer must notify the secretary of state in writing where he proposes to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or more than 20 employees within a period of 30 days at least 90 respectively 39 days before the first of those dismissals take effect.

The Employment Appeal Tribunal (EAT) has recently held that section 188 of the Trade Unions and Labour Relations (consolidation) Act (section 188) requires employers to inform and consult about proposed business decisions, which will inevitably, or almost inevitably, lead to collective redundancies (*UK coal mining Ltd v NUM*, *EAT/0397/06/RN and EAT/ 0141/07/RN*)¹⁸⁶. The decision will have a significant impact on the process for collective redundancy consultation, although its impact may not be as great as some commentators have suggested.

The employer, *UK Coal Mining Ltd*, decided to close a coal mine, which inevitably meant that 158 employees would be redundant. It undertook limited information and consultation process, on any analysis, did not comply with section 188, and did not consult about its business decision to close. To complicate matters, the employer stated that the decisions was made on safety grounds .The EAT did not believe this, and concluded that it was for economic reasons. The employer argued that there was no requirement to consult over the business reasons behind the redundancies and that the obligation was limited to informing and consulting about the proposed redundancies themselves. It relied on two EAT decisions which had explicitly held that there was no

¹⁸⁶ UK Coal Mining v NUM 2007 (EAT)

obligation to consult over the business reasons (*Middlebrough Borough Council v TGWU and Securicor Omega Express Limited v GMB*¹⁸⁷).

The Employment Appeal Tribunal departed from those two decisions. It noted that it had been accepted that Article 2 (2) of the collective redundancies Directive (98/59/EC) (the Directive) required the employers to consult about the reasons behind proposed redundancies. In addition, although the High Court in *Vardy* had commented (*obiter*) that the English legislation did not require such consultation, section 188 was then amended to provide that consultation must include consultation about ways of avoiding the dismissals (*R v British Coal Corporation and the Secretary of State for Trade and Industry, ex parte Vardy, Middlebrough BC and Securicor* had relied on *Vardy* without considering those changes¹⁸⁸).

The Employment Appeal Tribunal also held that the revised wording in section 188 could and should be construed consistently with Directive, so as to require consultation over the business decision where the business decisions will inevitably, lead to the collective redundancies. The decision in this case may be appealed and technically is not binding as there are now conflicting Employment Appeal Tribunal decisions. However, it is likely to be followed since it was given by the president (*Elias J*) and, in our view, is the correct legal analysis.

The decision has significant implications for running a collective redundancy process. The decision does not change the question of when consultation must begin, but simply confirms the earlier authorities. The previous position was that where a business decision is very likely to lead to redundancies, consultation should take place before that business decision is finalized. That was the position taken by the Employment Appeal Tribunal in *Cranwick Country Food v GMB*¹⁸⁹. Cranwick exchanged contracts on the sale of a plant before starting collective redundancy consultation. Closure of that site would inevitably

¹⁸⁷ (2002) IRLR 322 and (2004) IRLR 9; and (1993) IRLR 104

¹⁸⁸ *Middlebrough Council v TGWU* (2002) IRLR 332

¹⁸⁹ *Cranwick Country Food v GMB UK* (EAT/0225/05/ZT)

lead to redundancies. The EAT found that consultation started too late, because by the time it started, the closure, and the consequential redundancies, were irreversible.

6.5.1. UK Coal Mining Ltd (1) National Union of Mineworkers (2) British Association of Colliery Management

UK coal mining owned the Ellington Colliery, where it employed 329 employees. The National Union of Mineworkers (Num) and British Association of Colliery Management (BACM) were recognized in respect of the employees. In January 2005, the colliery managers informed NUM and BACM representatives that the mine would be closed on safety and economic grounds due to flooding .UK Coal began formal consultation with unions stating that the reasons for proposed redundancies were special circumstances as a result of being forced to cease production for safety reasons. The closure was, in fact for economic reasons. Consultation with the unions took place between 26 January and 22 February, and the first compulsory redundancies took effect on 26 February. The unions then made claims for protective awards for failure to consult.

The Tribunal awarded the maximum protective award of 90 day's pay per employee. It held that although that there was no obligation to consult about the reasons for the decision to close the colliery, as UK Coal chose to give information about the reason for closure, that information should have been true and given in good faith. There were no special circumstances justifying a reduction in the period of consultation.

Uk Coal appealed to the Employment Appeal Tribunal (EAT) and unions cross-appealed, arguing that there is no obligation to consult over the reason for the redundancy, and where that reasons the closure of the workplace, that involves consulting over the reasons for the closure decision.

The EAT held that UK Coal had failed to comply with the e duty to consult by giving a deliberately misleading reason for the closure, which affected the nature of the subsequent consultation. UK Coal had not established the special circumstances defence.

The Eat said the tribunal was entitled to consider that this was a very serious failure to comply with redundancy consultation requirements. It went on to consider whether UK Coal was, in fact, obliged to consult over a decision to close a work place. in a closure context, dismissals are proposed at the same time as albeit provisional, intention. The obligation to consult therefore arises when closure is fixed as clear, inevitably involves engaging with the reasons for the dismissals and that, in turn, requires consultation over the reasons for the closure.

Implications of the above case

This importance case overturns the accepted principle that employers do not consult with employee representatives over the reasons for the closure of a work place. This will have a significant impact on the information that employers have to provide employee representatives at the start of a consultation. Where closure of a workplace is for economic reasons, meaningful consultation is likely to require the disclosure for information regarding the economic basis for the decision. This could give rise to the risk that sensitive business information may be leaked to competitors. The repercussions for employer that fail to consult over the reasons for closure for a workplace will be significant, as the tribunal may regard the rest of the consultation process as fundamentally flawed. This could mean that, even if the employer undertakes lengthy consultation, if the consultation over the underlying reasons for the closure was inadequate, the employer could still be exposed to maximum protective award¹⁹⁰.

(d) Failure to consult

Section 188 of the Trade Union and Labour Relations (Consolidation) Act provides that, I employers proposing to make 20 or more employees redundant within 90 days, they have to consult the appropriate representatives of anyone who might be dismissed “in good time”

¹⁹⁰ 2007 (EAT)

In *Hardy v Tourism South East*, the Employment Appeal Tribunal (EAT) said that this obligation to consult applies even when the employer intends to offer alternative employment to most of the employees. In December 2003, Tourism South East (TSE) decided to restructure its business and told its 26 staff in the turn bridge wells office that it was to be closed on 30 January. The employer hoped that the affected staff would be redeployed, resulting in just 12 redundancies. Those wanting redeployment, however, had to apply for the jobs, all of which had different job descriptions and would either be at the East Leigh office 100 miles away, or at new sub-office that had not been set up.

Mrs. Hardy complained that TSE had failed to comply with section 188 of the Act because more than 20 staff was losing their jobs. For its part, TSE said the legislation was not applicable because it was only proposing to make 12 employees redundant at the same establishment. Mrs., Hardy responded that the legislation would be fundamentally undermined if her employer were able to argue that there was no obligation to consult because it hoped to bring the number of redundancies below 20 through redeployment. The tribunal agreed with TSE. It said that, as the employer was proposing to dismiss less than 20 staff in its turn bridge wells office, the legislation did not apply.

The Eat disagreed with the employer's argument and decided in Mrs., Hardy's favour. It said that the definition of "dismissal" in the case of *Hogg v Dover College (1990) ICR 39* was central to its decision. The Court said that there was a dismissal for the purposes of section 188(1) and the employer should have consulted. The EAT decided that any other conclusion would undermine the legislation. One of the reasons for having collective consultations is so that both parties have a chance to discuss ways of avoiding dismissals and reducing the number of employees dismissed. The question of an appropriate remedy was remitted back to the tribunal¹⁹¹.

¹⁹¹ 1990 (39) ICR

6.6 Redundancy Payment

Where an employee has been dismissed by reasons of redundancy, he is granted the right to claim redundancy, payment, as far as no exclusions apply¹⁹². A claim for redundancy must be made to the employment tribunal within six months of the relevant date they want a payment, referred a question as to their right to payment or its amount to a tribunal, or presented a complainant of unfair dismissal to a tribunal¹⁹³. It lies within the discretion of the Employment Tribunal to admit a claim which is outside this period, but no claim can be entertained after 12 months have elapsed¹⁹⁴. The amount of redundancy depends on the employee's length of continuous service, his age and the amount of a week's gross pay¹⁹⁵. Increased wage rates agreed subsequently to the dismissal shall not be taken into account¹⁹⁶. With a maximum of 20 years of service taken into account, redundancy payments are calculated according to the following formula, starting at the end of the employee's period of service and calculating backwards¹⁹⁷:

- (1) One and half's week pay for each year of employment in which the individual was between the ages of 41 and 64
- (2) A week's pay for each year of service in which the individual was between the ages of 22 and 40;
- (3) Half a week's pay for each year of employment between ages of 18 and 21

Statutory redundancy pay entitlement is in addition to contractual entitlements. A redundant employee is fully entitled pursuant to contract, as well as statutory redundancy payment¹⁹⁸. An employee is entitled to a written statement form employment confirming how redundancy payment is calculated and failures by an employer to comply with this obligation without reasonable excuse may constitute a criminal offence¹⁹⁹.

¹⁹² Section 135 of the Employment Rights Act

¹⁹³ Section 164 of Employment Rights Act, Lewis and Sargeant at P.264

¹⁹⁴ Selwyn, at p 451

¹⁹⁵ Lewis and Sargent at p 274

¹⁹⁶ Leyland Vehicles Ltd v Resten (1981) I.R.L.R 19

¹⁹⁷ The U.K parliament, Trade and Industry Appendices

¹⁹⁸ Net lawman (Redundancy the first in and outs)

¹⁹⁹ www.hodgehalsll.co.uk/node/65

6.7 Redundancy trial periods

An employee under the notice of redundancy who accepts an offer of alternative employment with the same employer is entitled to a statutory four-week trial period in order to decide whether the job is suitable. If the employee gives notice to terminate employment during this trial period, they will be treated as having been dismissed by reason of redundancy on the date their original contract terminated. The employee will be entitled to a redundancy payment provided they did not act unreasonably in refusing suitable alternative employment²⁰⁰.

(a) Right to a trial period

An employee who accepts an offer for alternative work is allowed a trial period to see if the work is really suitable. For the purpose of calculating continuity of employment this trial period is regarded as starting from when the employee's old job ends even where there is in fact a gap between jobs. The trial period will normally continue for four weeks after the employee starts work but may be extended by agreement between employer and employee in order to retain the employee for the new work. Employees who leave their work with good reason or who are dismissed during the trial period retain their rights to payment under protective award. If, however, they give up the work or training without adequate reason or the employer dismisses them fairly for the reasons unconnected with the changed terms of employment, they will lose their right to payment for the rest of the protected period.

(b) Extension of trial period for retraining

The trial period may be extended to retrain the employee for new work, by agreement between the employer and the employee. Such agreement must be made before the

²⁰⁰ Redundancy: The Law and Practice 2nd edition by John McMullen

employee starts the new work; must be in writing; and must specify the date that the trial period ends and terms and conditions of employment that will apply after that date. Employees have the right to trial period if they starts a different job with their employer at any time during the protected period and it makes no difference whether the employer offers them work before or after the end of the old job.

(c) Redress available if an employer fails to pay money due under a protective award

If an employer fails to pay money due to an employee under a protective award, the employee has a right to complain to an employment tribunal. A complainant must normally be made within three months of the last day for which there has been an alleged failure to pay. If the Tribunal is satisfied that the complainant is justified it will order the employer to pay the employee or employee concerned the money due to them under the award²⁰¹.

6.8 Time off

An employee who has been continuously employed for two years is entitled by law to be given paid time off to look for work or to make arrangements for training, during the final notice period. The Case Law suggests that it is not unreasonable for this to be up to two days per week²⁰².

(a) Right to reasonable time off with pay

Employee representatives whether trade union or not, have a statutory right to reasonable time off with pay during their normal working hours to perform their functions, and also to undergo appropriate training to enable them to do so. The legislation does not specify the amount time off that it is reasonable it allow since this will vary according to the circumstance. Payment should be at the appropriate hourly rate for the period of absence

²⁰¹ Business Enterprise and Regulatory Reform(Redundancy Consultation and Notification: guidance No:06/1965y

²⁰² www.scie-peoplemanagement.org.uk/resource

form work. This is normally arrived at by dividing the amount of a week's pay by the number of normal working hours in the week.

(b) Redress where rights of employee representative are infringed

Representatives or Candidates who are dismissed or subjected to a detriment as a result of their activities may make a complaint to an employment tribunal .A complaint will not normally be considered unless it is made within three months of the date when the alleged infringement occurred. If the tribunal finds that a dismissal was unfair, it may order the employer to reinstate or re-engage the employee or make an appropriate award of compensation. If the tribunal finds that the employer has failed to allow employee representatives reasonable access or appropriate facilities, it shall make a declaration to that effect and may make a protective award of compensation.

If the Tribunal finds that a representative was unreasonably refused time off, shall make a declaration to that effect award to the representative an amount equal to the pay which he or she would have been entitled if time off had not been refused . If the tribunal finds that a representative did not receive appropriate pay for time off, it shall order the employer to pay amount due.

(c) Protective award

The employer is required to pay employees covered by a protective award their normal week's pay for each week of a specified period , regardless of whether or not they are still working. To be covered by an award, they must be employees whom the employer plans to dismiss or has already dismissed as redundant and they must be employees in whose case the employer has failed to comply with the consultation under TULR. The protected period will begin with the date on which the first dismissal takes effect or the date of tribunal award, which is earlier. The length of the period will be determined by the tribunal, taking into account the extent of the employer's failure to consult and any

extenuating circumstances. It is however subject to an upper limit to ninety (90) days in all cases²⁰³.

²⁰³ Business Enterprise and Regulatory Reform(Redundancy Consultation and Notification: guidance No:06/1965y

CHAPTER 7: SIMILARITIES AND DIFFERENCES BETWEEN SOUTH AFRICAN AND ENGLISH LABOUR LAWS IN RESPECT OF DISMISSAL FOR OPERATIONAL REQUIREMENTS (REDUNDANCY)

7.1. Introduction

Both South African and English legal systems, acknowledge that redundancy or dismissal for operational requirements may be a reason for dismissal. Under both legal systems an employee has to be distinguished from an independent contractor and both systems come to the conclusion that the answer depends on the relevant circumstances of the individual case.

7.2. The definition of redundancy or dismissal for operational requirements

Under English Labour Law the definition of redundancy is contained under section 139 (1),²⁰⁴ whereas under South African Labour Law system the definition of dismissal for operational requirements is contained under section 213.²⁰⁵ The English Labour law provides that an employee shall be taken to be dismissed by reason of redundancy in case of a cessation of business; where the employer moves his place of business or in a situation of surplus Labour²⁰⁶ or have diminished or expected to diminish, while the South African Labour Law take a different approach for the definition of redundancy or dismissal for operational requirements. Under South African Labour law, section 213,²⁰⁷ defines the term operational requirements, to mean requirement based on the economic, technology and structural or similar need of an employee, and Code of Good Practice elaborates further to define operational requirements as follows:

-Economic reasons are those reasons that relate to financial management of the enterprise

²⁰⁴ Employments Rights Act

²⁰⁵ Labour Relations Act 66 of 1995

²⁰⁶ Selwyn, N, at 438 et seq; Bowers, n, 34 act pp 369 et seq

²⁰⁷ Act 66 of 1995

-Technology reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employee to adapt to the new technology or a consequential restructuring of the workplace.

-Structural reasons relate to the redundancy posts consequent a restructuring of the employer's enterprise.

Under English Labour Law redundancy is governed by various statutes and legislations, while in South Africa the position is different in that it is regulated in terms of Labour Relations Act. The main legislation governing redundancy under English Labour Law is, The Trade Union and Labour Relations (Consolidation) Act 1992, The Collective Redundancies and transfer of undertaking (protection of employment) regulations 1996 (SI 1996/2587), regulations 1999 and regulations 2007 and Employment Rights Act 1996, while Labour Relations Act 66 of 1995 is the only South African Legislation that deals with dismissal for operational requirements. The meaning of redundancy under English Perspective derives from redundancy payment act and the other from European Law,²⁰⁸ while under South Africans perspective it derives from the International Labour Organization, which was later, implemented in Section 213 of the LRA²⁰⁹.

7.3. The legal requirement for dismissal based on operational requirements

Under English Law Perspective, Section 188,²¹⁰ provides that an employer who is proposing to dismiss as a redundant 20 or more employee at one establishment within the period of 90 days or less must consult "in good time" and in any event at least 30 days before the first of dismissals takes effect (which means before giving notice to the first dismissal, while in South African Labour Law provides that, when the employer contemplates dismissal for operational requirements, the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information relating to dismissal in terms of section 189 (3)²¹¹. The English

²⁰⁸ 1956 Redundancy act and Directive 98/59/Ec and 75/129/EEC

²⁰⁹ Act 66 of 1995

²¹⁰ Trade Union and Labour Relations Act 1992 (TULRA)

²¹¹ Act 66 of 1995

Labour Laws provide that, statutory consultation and notification procedures apply only in dismissals concerning 20 or more employees and extend over 90 days. In South Africa for section 189A dismissals, the consultation period may last up to 60 days comparatively less onerous for employers. The most common waiting period, according to *Van Niekerk* is 30 days. The length of consultation periods in other countries compare favourably (i.e. are in alignment) with the requirements of the LRA, even where s 189A of the Act and its 60-day moratorium applies. The length of consultation under the LRA is not unduly onerous for South Africa's employers compared with that in many other countries²¹². Under English Labour Law the right to justify dismissal for redundancy is created by Statute, e.g. there is no statutory remedy for unfair dismissal until an employee has served a qualifying period of one year, while the position of South African Labour Law is different in that the right for dismissal based on operational requirement is a fundamental right which give an employee right to a constitutional claim.

Both legal systems acknowledge redundancy as a reason why a dismissal may be held fair on procedurally aspect in that the employer must invite or consult employees when contemplating to dismiss for operational requirements. Although the definition of when a redundancy is given may differ, the basic idea is that where a business closes or moves or where a smaller workforce is required, it must be possible for an employer to dismiss employee without being considered unfair. Further more both legal systems take into account that an offer of alternative employment may render a dismissal unfair, since in this case a dismissal would not be inevitable. Other common aspects between South African and English Labour Law are fair selection process and the principle of "the last in and first out". Under English Labour Law it is up to the management to determine the selection criteria which have to be fair and reasonable, while employers in South Africa are generally given a free hand when it comes to selecting employees for retrenchment, and the Courts intervene only to ensure that such dismissal has not been used as an opportunity to discard employees for reasons unrelated to operational requirements.

²¹² Article by Emma Levy

7.4. Collective redundancy or large-scale dismissal based on operational requirements

Section 188 of Trade Union and Labour Relations,²¹³ regulate dismissal for collective redundancy under English Labour Law whereas section 189A of the LRA;²¹⁴ regulate the dismissal for operational requirements where it involves more than 10 employees. However the above statement means same, but only the interpretation words differ. Under English Labour Law, an employer who is proposing to dismiss as redundant 20 or more employees at one establishment within the period of 90 days must consult in a good time and in any event at least 30 days before the dismissals takes effect, while the position of South African Labour Law is different, in that the employer can dismiss as redundant from 10 employees or more at once, unlike from 20 employees as stated under English law perspective. Both legal systems distinguish between the small scale by employer and large-scale dismissal by the employer. Both legal systems acknowledges that the consultation requires consultations about was of avoiding the dismissals, reducing the numbers to be dismissed and mitigating the consequences for the dismissal and must be undertaken with the view to reaching agreement with appropriate representatives.

Both English and South African Labour Law, further acknowledges that the representatives have to be informed at the beginning of the consultation period in writing about the reasons for the proposals, the number, and description of employees whom it is proposed to dismiss, the total number of employees of any such description employed by the employer establishment, the proposed method of carrying out the dismissals with due regard to any agreed procedure, including the period over which the dismissals are to take effect and the proposed method of calculating the redundancy payment if this differs from statutory sum.

Under English Law individual notices of dismissal for redundancy may not normally be issued in a collective redundancy situation until the process of consultation has been

²¹³ Consolidation Act 1992 (TULCRA)

²¹⁴ Act 66 of 1995

completed in accordance with these statutory requirements. The required notice period will depend on what an individual's contract of employment provides for, subject to minimum periods set out in section 86,²¹⁵ While the position in South African Labour law is different in that there is a little protection of individual dismissed for operational requirements.

Both legal systems recognize the concept of severance payment in settlement agreement. However the English Labour Law has legislation that regulates redundancy payment,²¹⁶ specifically unlike South Africa. The main legislation governing redundancy under English Labour Law are five, namely, The Trade Union and Labour Relations 1992, The Collective redundancy and Transfer of Undertakings 1996, The Employment Rights Act 1996, regulations 1999 and the collective redundancy regulations 2006, while under South African Labour Law only Labour Relations Act 66 of 1996 regulate dismissal for operational requirements under section 189.

South African regulations pertaining to the dismissal for an operational requirement differs fundamentally from those of European Union and English Labour Law as far as collective rights and obligations are concerned. Under English law a retrenched worker could expect to receive inter alia income for support, housing benefit, child benefit and family tax credit, whereas the position of South African Labour Law is different. Both legal systems acknowledge that the employee who is dismissed for dismissal for operational requirements or redundancy is entitled to severance payment

²¹⁵ Employment rights Act 1996

²¹⁶ Section 135 Employment Rights Act

CHAPTER 8: RESEARCH FINDINGS, RECCOMENDATIONS and CONCLUSION

Section 1 of the LRA 66 of 1995, states that the purpose of the Act is to advance economic development, social justice, Labour peace and democratization of the workplace by fulfilling the primary object of the Act. These include the aim of promoting orderly collective bargaining and employee participation in decision-making in the work place.

The Bill of rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom .the key consideration among these rights and democratic values are the rights for Labour practices that is crucial for any democratic society. On the other hand, sustainable development and social peace are not possible without Labour practice in the workplace. Employees and employers rights are generally dealt with and studied with Labour Relations Rights.

The present definition of “operational requirements” as found in section 213 of the LRA, which refers to needs of the employer, is clearly problematic. An employer could, for example, argue that it is operational requirements to dismiss employees. It is submitted that even, though a purposive interpretation of the Act should prevent such a rationalization from being accepted, it would for the sake of legal certainly, be better to expressly limit the definition of “operational requirements.

In South Africa, an “employee” is defined narrowly by our legislation and the Courts, has utilised the dominant impression test to determine the status of individual in cases of doubt. It is suggested that the notion of an “employee” must be interpreted widely so as to achieve the object and purpose of the LRA, as defined in Section (1) thereof.

Despite consideration to be given into international law and to some extent to foreign Law in the interpretation of the Bill of rights, South African Labour Law students and experts have very often overlooked the cooperative perspective. The value of well-known comparative experiences in foreign jurisdictions should never be underestimated. It

should, however, not be over-estimated either. Regulating the concept of dismissal for operational requirements in a way, which is fitting for South Africa at present, should be explored. It is submitted that we have not arrived at a point where we can say the current regulations of dismissal for operational requirements in South Africa is the most appropriate, that its results in the minimum amount of legal uncertainty and that it fulfils the primary object of our Labour Relations Act; which, among others strives to give effect to the right to fair Labour practice as contained in Section 23 of the South African Constitution.

The dissertation has accepted the primary goal of dismissal for operational requirements provisions (essentially being that of employee protection) and has regarded this as indispensable for achieving the fulfillment of the fundamental right to fair Labour practices. In order to ensure justice towards all parties, it is however, necessary that these statutory measures should persistently be scrutinized and debated. The dissertation further attempted to take up this challenge and to try to fill the gap by investigating workers and employer's right on the aspect of dismissal for operational requirements, especially when a single employee who is not a member of trade union or represented during the process of dismissal for operational requirements in the light of foreign, but mostly international law and jurisprudence. Much more research is still need on dismissal for operational requirements and greater attention should be given to dismissal for operational requirements when a single employee who is not a member of trade neither union or represented during the process of dismissal for operational requirements, considered against the background of international law that inspired our Bill of Rights and Labour legislation. Consideration should also be given to international jurisprudence as well as to the law and jurisprudence of the other democratic countries in order to promote the concept of dismissal for operational requirements in our own law and jurisprudence.

Section 189 of the LRA, as amended, deals with the termination of the employment contract for operational requirements. The section prescribes a consultation process to be followed. In 2002 the LRA was amended and introduced section 191(12). This section

gives a single employee who was retrenched, a choice whether to refer a dispute to the CCMA for arbitration, or the Labour Court for adjudication.

The section states: “If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.”

From the wording it is clear that section 191(12) applies where a single employee was consulted and subsequently retrenched. It is not applicable where there was more than one employee retrenched. If more than one employee was retrenched, the CCMA has no jurisdiction – those employees must refer the dispute to the Labour Court.

If a single employee was retrenched he/she has a choice to either refer the dispute to the Labour Court for adjudication or to the CCMA for arbitration. The Labour Court had an opportunity to interpret section 191(12) in an unreported matter of *Rand water vs. Bracks & others JR1965/05*.

The court considered the section in the light of the explanatory memorandum of 2002, which stated that the CCMA was to deal with relatively simple cases of individuals who may not be able to afford the cost of labour court litigation. The court makes an observation that a matter does not become complex merely because of the number of employees retrenched, but the facts of a matter determine its complexity.

The court regards the substantive issues as possibly less complex and therefore the CCMA should deal with that. The court interprets the section to mean that the employee may only refer such a dispute to the CCMA if the substantive issues are in dispute only. Because the section says; “following a consultation procedure in terms of section 189...” the court said that it was the intention of the legislator that section 191(12) only allows a single employee to refer a dispute on substantive issues to the CCMA. Any dispute on the procedure must be referred to the Labour Court for

adjudication. In the light of this judgement it seems to be safer to refer all retrenchment disputes to the Labour Court after conciliation failed.

A recent judgement whereby if a single employee has been retrenched and he or she intends to challenge the procedure relating to the dismissal, the CCMA no longer has jurisdiction to adjudicate on the dispute.

The unreported Labour Court matter of *Rand Water v Bracks and Others* JR 1965/05 holds that the Commission for Conciliation Mediation and Arbitration (CCMA) only has jurisdiction when the substantive fairness of a single employee's dismissal for operational requirements is in issue. Any dispute on the procedure must be referred to the Labour Court for determination.

The case concerned an employee (Miss Swart) who was employed by Rand Water as a GIS Specialist in its Scientific Services Division. Rand Water had two GIS sections, one in the Scientific Services Division and the other in the Engineering Services Division. Swart's letter of appointment included that statement that her appointment would be "subject to the changing requirements of Rand Water".

During June 2002 Rand Water considered a merger of its Engineering Services Division with the Water Treatment and Technology Divisions. If this happened Swart would have been required to move from the former division to the latter. Correspondence was exchanged between Swart and Rand Water on this issue and various meetings took place, culminating in Rand Water making an offer to Swart that she be transferred to the Engineering Services Division. Her salary and conditions of employment were to remain the same. Despite this, Swart refused to accept the offer and in May 2003 Rand Water wrote to Swart terminating her services. Swart referred the matter to the CCMA for conciliation, and when it remained unresolved she referred it to arbitration. The commissioner found in Swart's favour and it was on the basis of this award that Rand Water appealed to the Labour Court.

The relevant and important aspect of the Labour Court's judgment relates to the question of whether or not the CCMA had jurisdiction to hear the dispute in the first place. Rand Water argued that it did not, stating that in terms of section 191(12) of the Labour Relations Act 66 of 1995 (the LRA) the jurisdiction of the CCMA to hear single retrenchment dismissals is restricted.

In terms of Section 191(12), if an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

Rand Water's representative argued that on a proper interpretation of this section:

- It is clear that the CCMA has jurisdiction only when the substantive fairness of a single employee's retrenchment is in issue; and
- By inserting the phrase "following a consultation procedure in terms of section 189" the legislature intended to grant specific jurisdiction to the CCMA for single retrenchments only when the substantive issues surrounding the dismissal were in dispute.

He premised his argument on a literal reading of the section, stating that if the legislature intended the CCMA to have general jurisdiction to arbitrate disputes involving a single employee where both substance and procedure were in issue, section 191(12) would not have contained the words highlighted above. In coming to its decision the Labour Court relied on the established canon of statutory interpretation; that in interpreting a particular section of an act, effect must be given to all the words encapsulated by that section. In interpreting the phrase "following a consultation procedure in terms of section 189", the Labour Court found that the language of the section was peremptory in that the word "following" (in the context of the section) indicated causation – that is, a consequence or a result.

I further submit that the legislature has not succeeded by 2002 amendment to resolve the problems created by different interpretation of section 189 of the LRA.

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