

Code of good practice on Operational Requirements

This Act 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.

(2) *Dismissals for operational requirements* have been categorised as "no fault" *dismissals*. In other words, it is not the *employee* who is responsible for the termination of employment. Because retrenchment is a "no fault" dismissal and because of its human cost, *this Act* places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to *dismissal* are explored and that the employees to be dismissed are treated fairly.

(3) The obligations placed on an employer are both procedural and substantive. The purpose of consultation is to permit the parties, in the form of a joint problem-solving exercise, to strive for consensus if that is possible. The matters on which consultation is necessary are listed in s189(2). This section requires the parties attempt to reach consensus on, amongst other things, appropriate measures to avoid *dismissals*. In order for this to be effective, the consultation process must commence as soon as a reduction of the workforce, through retrenchments or redundancies, is contemplated by the employer so that possible alternatives can be explored. The employer should in all good faith keep an open mind throughout and seriously considers proposals put forward.

(4) *This Act* also provides for the disclosure of information by the employer on matters relevant to the consultation. Although the matters over which information for the purposes of consultation is required are specified in s189(3), the list in that section is not a closed one. If considerations other than those that are listed are relevant to the proposed *dismissal* or the development of alternative proposals, they should be disclosed to the consulting party. In the event of a disagreement about what information is to be disclosed any party may refer the dispute to the CCMA in terms of section 16(6) of *this Act*.

(5) The period over which consultation should extend is not defined in *this Act*. The circumstances surrounding the consultation process are relevant to a determination of a reasonable period. Proper consultation will include:

- (a) the opportunity to meet and report back to *employees*;
- (b) the opportunity to meet with the employer; and

(c) the request, receipt and consideration of information.

(6) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. On the other hand the parties who are entitled to be

consulted must meet, as soon, and as frequently as, may be reasonably practicable during the consultation process.

(7) If one or more employees are to be selected for *dismissal* from a number of employees, this Act requires that the criteria for their selection must be either agreed with the consulting party or if no criteria have been agreed be fair and objective criteria.

(8) Criteria that infringe a fundamental right protected by *this Act* when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are on the face of it neutral should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

(9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the "last in first out" (LIFO) principle. There may be instances where the LIFO principle or other criteria needs to be adapted. The LIFO principle for example should not operate so as to undermine an agreed affirmative action programme. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should however be treated with caution.

(10) *Employees* dismissed for reasons based on the employer's *operational requirements* are entitled to severance pay of at least one week's remuneration for each completed year of continuous service with the employer unless the employer is exempted from the provisions of section 196. This minimum requirement does not relieve an employer from attempting to reach consensus on severance pay during the period of consultation. The right of the trade union, through collective bargaining, to seek an improvement on the statutory minimum severance pay is not limited or reduced in any way.

(11) If an *employee* either accepted or unreasonably refused to accept an offer of alternative employment, the employee's statutory right to severance pay is forfeited. Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the *employee's* refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the *employee's* personal circumstances play a greater role.

(12)(1) *Employees* dismissed for reasons based on the employers' operational requirements should be given preference if the employer again hires employees with comparable qualifications, subject to -

(a) the employee, after having been asked by the employer, and having expressed within a reasonable time from the date of dismissal a desire to be re-hired; and

(b) a time limit on preferential rehiring. The time limit must be reasonable and must be subject of consultation.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of re-employment.

