

Is South African labour law for dismissal based on operational requirements unduly onerous for employers?

An international perspective on retrenchment based on the application of international labour standards (ILO 'Termination of Employment' Convention 158 and ILO 'Termination of Employment' Recommendation 166)

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**International Society for Labour and Social Security Law,
21st World Congress, Cape Town
15-18 September 2015**

Introduction

This paper dispels the myth that South African law for dismissal based on operational requirements is unique, unduly onerous on employers and over-regulated from an international perspective based on the application of ILO ‘Termination of Employment’ Convention 158 (1985), ‘Termination of Employment’ Recommendation 166 (1982) and ILO source material.¹

Following the Labour Relations Act’s² (LRA) step-by-step process for dismissal based on operational requirements, the first section examines South Africa’s provisions for an employer to consult under s 189(2) of the Act and finds that there is a legal obligation to justify proposed dismissals in most parts of the world.³

Moving to the detailed written notice of consultation requirements of s 189(3)(a)-(j) of the LRA, part two assesses the procedure’s suitability for small employers in South Africa with reference to selective application and special Codes of Practice suggested by leading labour lawyers Halton Cheadle⁴ and André van Niekerk.⁵

Part three looks at measures taken around the world to avoid or minimise dismissals based on operational requirements (an obligation stipulated in s 189(2)(a)(i)-(ii) of the LRA). It considers innovative ways of finding alternatives and reviews the global debate on whether it should only be used as a last resort.

Part four compares national measures to mitigate the adverse effects of such termination, a requirement under LRA s 189(2)(a)(iii)-(iv),⁶ with those of other countries. For example, in some jurisdictions the obligation to rehire a retrenched employee is far more onerous than the obligation to consider ‘the possibility’ of rehiring a worker, in South Africa.⁷

¹ ILO *Termination of Employment Digest: A Legislative Review* (2000) Geneva, International Labour Office.

² Act 66 of 1995.

³ Angelika Muller, *Employment Protection Legislation Tested by the Economic Crisis* (2011) ‘A global review of the regulation of collective dismissals for economic reasons’ (September 2011), ILO.

⁴ Cheadle Halton, *Regulated Flexibility: Revisiting the LRA and the BCEA* (December 2006) unpublished concept paper.

⁵ Van Niekerk André, *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA. A Response to Halton Cheadle’s Concept Paper* (March 2007) Development Policy Research Unit 07/119.

⁶ LRA s 189(2)(a)(iii): to change the timing of the dismissals; s 189(2)(a)(iv): to mitigate the adverse effects of the dismissals.

⁷ LRA s 189(3)(h): the possibility of the future re-employment of the employees who are dismissed.

Part five evaluates the flexibility of selection criteria under s 189(2)(b) of the LRA⁸ for employers to make the retrenchment decisions of their choice, and examines the scope of ILO instruments and national laws to protect the most vulnerable workers.

Part six compares severance pay under s 189(2)(c) of the LRA⁹ and s 41 of the Basic Conditions of Employment Act¹⁰ with other jurisdictions and finds that the financial burden for employers in South Africa is far lower than in many other countries.

Part seven, looks at notification of administrative authorities – an international obligation in many countries but not a statutory requirement in South Africa except for miners (under s 52 of the Mineral and Petroleum Resources Development Act of 2002). This part seeks to dispel the myth of over-regulation in South Africa with examples of more onerous requirements in many other countries.

1. The obligation to consult

Most countries have laws requiring consultation for collective dismissal. ILO source material lists at least 45, including: Argentina, Australia, Austria, Belgium, Brazil, Cambodia, Cameroon, Canada, Caribbean Community, China, Côte d'Ivoire, Czech Republic, Ethiopia, France, Gambia, Germany, Guinea, India, Indonesia, Italy, Kenya, Korea, Mauritius, Namibia, Netherlands, Nigeria, Peru, Philippines, Poland, Russian Federation, Senegal, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Thailand (with employees not employees' representatives), Tunisia, United Kingdom, United States of America (if covered by WARN Act), Venezuela, Vietnam and Zimbabwe (with tripartite committee).

Under such statutes, the employer is 'generally expected to consult workers' representatives on the measures it intends to adopt'. Article 13 of ILO Convention 158 and Article 19 of ILO Recommendation 166 form the basis for similar legislation (see words highlighted in bold).

Division A. Consultation of Workers' Representatives

Article 13:

- (1) When the employer contemplates terminations for reasons of an **economic, technological, structural or similar nature**, the employer shall:
 - (a) provide the workers' representatives concerned in **good time with relevant information**, including the **reasons** for termination contemplated, the **number** and **categories** of workers likely to be affected and **the period over which** the terminations are intended to be carried out;
 - (b) give in accordance with national law and practice, the workers' representative

⁸ LRA s 189(2)(b): the method for selecting the *employees* to be dismissed; LRA s189 (3)(d): the proposed method for selecting which *employees* to dismiss.

⁹ LRA s189(2)(c): the severance pay for dismissed *employees*; s 189(3)(f) the severance pay proposed.

¹⁰ Act 75 of 1997.

concerned, as early as possible, an opportunity for consultation on **measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects** of any termination on the workers concerned such as **finding alternative employment**.

The statutory obligation for South African employers ‘contemplating’ dismissals to consult in s 189(1) of the Act, and the process in s 189(2) to discuss, consider and justify the proposals are both based on Article 13(b) of ILO Convention 158.¹¹

Section 189A of the LRA, an amendment introduced in 2002, imposes additional obligations on employers with more than 50 employees proposing dismissals of more than 10 workers to consult under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) in the form of facilitation. Section 189A of the LRA must now be read together with Facilitation Regulations (2003).

The timing of consultation envisaged under Article 13(1) of the ILO Convention – when the employer ‘contemplates’¹² retrenchment – is identical to s 189(1)(a) of the LRA (see below, words highlighted in bold), which states:

When an employer contemplates dismissing **one or more** employees for reasons based on the employer’s operational requirements, the employer **must consult**.

According to Rubin, consultation should have some influence on the decisions taken.¹³ To have a chance of making a positive contribution, Rubin points out, that Article 13(1)(b) of the Convention states that consultation must take place as ‘early as possible’, without haste and with circumspection. ILO Recommendation 166, Rubin observes, adds a further component. It proposes consultations *before* the stage where retrenchment becomes inevitable.

While there is no definition of ‘consultation’ in s 213 of the LRA, it is stated in s189(2) of the LRA that consulting parties must engage in ‘a meaningful joint consensus-seeking process and attempt to reach consensus’.¹⁴

Here it should be emphasised that the ‘consensus-seeking process’ envisaged requires the employer to do no more than *consider* suggestions from employees or their representatives, and, if they are not seen as practical, give reasons for rejecting them. All the process does is to impose a culture of justification on employers.

¹¹ Grogan John, *Dismissal Discrimination and Unfair Labour Practices*, 2ed (2007) 443.

¹² Definition of ‘contemplates’: ‘to spend time considering a possible future action, or to consider one particular thing for a long time in a serious and quiet way’: *Cambridge Dictionary Online*.

¹³ Rubin, *op cit* 536 at para 6.

¹⁴ *National Education & Allied Workers Union & others v University of Pretoria* [2006] 27 ILJ 117 (LAC).

‘Consultation’ it has been held must be ‘exhaustive’ and ‘not sporadic, superficial or a sham’ to be meaningful.¹⁵ The courts act as monitors. Social dialogue is a two-way process. An employer cannot reasonably be expected to consult a trade union that evades dialogue or seeks to drag it out for no good reason. And a trade union cannot be blamed for failing to consult an employer if, from the outset, it was confronted with a *fait accompli*.¹⁶

The Code of Good Practice on Dismissal Based on Operational Requirements¹⁷ codifies this when it states: ‘The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.’

South Africa, it transpires, just follows international standards. A unique part of the LRA is s 189(3)(a)-(j) with its explicit, step-by-step approach to written notice of consultation and built-in rights to disclosure of information. But, even this most important part of the Act, widely perceived as unduly onerous by employers, is a codification of ILO Convention 158 and Recommendation 166. The substantive detail of s 189(3) adds nothing new to the ILO blueprint, although it serves as a good summary and workable model of a new generation of rights that emerged in the 1990s for the acceptance or rejection of the employer’s rationale.

LRA s 189 (3):

The employer must issue a written notice inviting the other consulting parties to consult with it and disclose in writing all relevant information, including but not limited to –

- (a) **the reason** for the proposed dismissals;
- (b) **the alternatives** that the employer considered before proposing the dismissals, and the **reasons for rejecting each of those alternatives**;
- (c) the **number** of employees likely to be affected and the **job categories** in which they are employed;
- (d) the proposed **method for selecting** which employees to dismiss;
- (e) **the time** when, or the period during which, the dismissals are likely to take effect;
- (f) the **severance pay** proposed;
- (g) any **assistance** that the employer proposes to offer to the employees likely to be dismissed;
- (h) the **possibility of future re-employment** of the employees who are dismissed;
- (i) the **number of employees employed** by the employer, and
- (j) the **number of employees that the employer has dismissed** for reasons based on its operational requirements **in the preceding 12 months**.

By contrast, s189A of the LRA, with its process-driven requirements for facilitation under the auspices of the CCMA, is far more innovative. The amended section adds a new, home-

¹⁵ *Hadebe & Others v Romatex Industrials Ltd* [1986] 7 ILJ 1718 (LAC).

¹⁶ *NUM & Others v Alexcor Ltd* [2005] 1 BLLR 1186 (LC).

¹⁷ GG 2054 GN 1517 (16 July 1999).

grown version of the rights-based approach of the ILO Convention. It has, according to a senior CCMA Commissioner,¹⁸ 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 retrenchment and is regarded as a model of international best practice by the ILO.

It should be emphasised that the facilitation provisions under s189A of the LRA are in alignment with international labour standards. Article 19 of ILO Recommendation 166 states:

Where appropriate, the competent authority **should assist the parties in seeking solutions** to the problems raised by the terminations contemplated.

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 process.¹⁹ 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 meetings²⁰ are conducted on a ‘with prejudice’ basis and the process has been described as a ‘sea change’²¹ by CCMA Commissioners. The procedure is relatively popular with unions and employers, according to one CCMA facilitator in the Western Cape, who estimates 70 per cent of facilitation requests are brought at the instigation of unions and 30 per cent by employers.²²

Facilitation in South Africa is essentially a time-driven process with a statutory 60-day moratorium on consultation unless a longer period is rationally justified. Swift provisions for disclosure under the LRA (s 16 and s 189(3)-(4)) and Facilitation Regulations (s 5)²³ ensure deadlines are met.

¹⁸ Senior CCMA Commission Leon Levy.

¹⁹ The consent of only one party is required for facilitation to take place under LRA s 189A, unlike at the Advisory Conciliation and Arbitration Service (ACAS) in the United Kingdom where the agreement of both parties is necessary.

²⁰ Facilitation Regulations (2003).

²¹ CCMA, *s189 Facilitation Under the LRA; 2003 update for CCMA Commissioners* (2003) at 2.

²² Levy, op cit (note 19).

²³ Facilitation Regulations s 5: Power to order disclosure of information (1) If there is a dispute about the disclosure of information the facilitator may, after hearing representations from the parties, make an order directing an employer to produce documents that are relevant to the facilitation.

By contrast, in countries with no statutory obligation to consult employees, such as Cyprus, retrenchment procedures can be more protracted and complex for employers.²⁴ In Israel, consultation provisions are in an array of collective agreements – as is the case in Japan.

Research indicates that countries with *no* statutory or other provisions for consultation are less in alignment with international labour standards than those with provisions. ILO source material identifies countries without provisions as: Bangladesh, Bulgaria, Chile, Hong Kong, Colombia, Dominican Republic, Egypt, Ghana, Iran, Iraq, Jamaica, Malaysia, Mexico, Nepal, Pakistan, Panama, Singapore, Syria and Zambia.

However, many of these countries, such as Mexico and Nepal, require notification and approval of the administrative authorities for retrenchment to be valid. Such statutory provisions are far more onerous for employers than South Africa's obligation to consider alternatives. In addition, some of these countries, such as Mexico, pay more severance pay than South Africa.

2. The obligation to consult and small business

While most countries have statutes requiring employers to consult employees when they are contemplating retrenchment, the *general* application of such procedures in South Africa is controversial in so far as it affects small businesses. The same procedures apply to the retrenchment of a single domestic worker as the dismissal of 49 employees.

Section 189(1)(a) of the LRA gives full application to the ILO instrument where it stipulates:

When an employer contemplates dismissing **one or more** employees for reasons based on the employer's operational requirements, the employer must consult.

It should be stressed, that the inclusion of all 'employees' is in alignment with Article 13 of ILO Convention 158 which sets no quantitative criteria for consultation to apply.²⁵

The obligation to consult can apply to a single worker, if national methods state, according to Rubin. However, the Committee of Experts, Rubin notes, observes that national legislation

²⁴ Cyprus: The Termination of Employment Law, 1967, as amended in 1994 requires the employer to notify the Minister of Labour and Social Insurance of the proposed redundancies at least one month prior to the date they are implemented (s 21 TEL). The notification must include the number of employees likely to become redundant (and, where possible, their occupation, names and responsibilities), the branch which is affected and the reasons for the retrenchment. The TEL, however, does not require employers who are contemplating retrenchment to consult with and provide information to employee representatives. Provision for such information and consultation is made in Part II of the Industrial Relations Code (IRC) of 1977. The Code is not binding, so no legal sanctions can be imposed for not complying with its provisions. ILO Digest, op cit at 125.

²⁵ Rubin, idem at 535 para 1 citing General Survey, 1995 at para 277.

and collective agreements frequently exclude small and medium-sized enterprises by introducing a minimum threshold, and that these excluded firms account for many, if not most, enterprises in some countries.

The ILO mechanism of limitation – to a specified number or percentage of the workforce – is used in many advanced economies. Leading South African labour lawyer Halton Cheadle is not out of alignment to have initiated a debate in South Africa over whether small business ‘must consult’ to the same degree. For example, in Germany, the Protection Against Unfair Dismissal Act²⁶ does not normally apply to enterprises employing less than 20 workers.

In the UK, statutory consultation procedures apply only in dismissals concerning 20 or more employees and extend over 90 days. In South Africa, s189A consultation may last up to 60 days – comparatively less onerous for employers.²⁷ The most common waiting period, according to labour lawyer Andre van Niekerk²⁸ is 30 days (Norway, Netherlands, Ireland, Denmark and Austria) but some countries extend consultation to 45 days (Italy and Poland), 75 days (Portugal) and two to six months (Sweden). The length of consultation in other countries compares favourably with those of the LRA, even where s 189A of the Act and its 60-day moratorium applies.

Van Niekerk,²⁹ writing from a business perspective, argues it is a valid area for review.³⁰ He cites Austria, Belgium, Denmark, Finland, Greece, Hungary, Switzerland and Turkey as examples where employers with less than 20 employees are exempt from statutory consultation.³¹

He states that selective application of legislative standards, has ‘never been seriously contemplated’ in respect of South African rights to employment security, and a review is ‘appropriate’ and ‘necessary’. One of the reasons for such a ‘failure’, as van Niekerk puts it, ‘is probably historical’.³² In other words, the exclusion of African workers from the legal framework governing employment rights for more than half a century means that the

²⁶ s 17-18 Protection Against Dismissal Act (PADA), 1996; citing ILO Digest, op cit at 158.

²⁷ UK: The definition of ‘redundancy’ is that 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 diminish, citing s 139(1) Employment Rights Act, 1996: ILO Digest, op cit at 347.

²⁸ Citing OECD Report 1996 at 11: van Niekerk, idem.

²⁹ van Niekerk, op cit (note 4) at 9.

³⁰ Idem, at 3.

³¹ General Survey: ‘Protection against unjustified dismissal’, International Labour Conference 82nd Session 1995 at para 277: van Niekerk, op cit at 26.

³² van Niekerk, ibid.

tripartite alliance (employers, unions and government) will not contemplate a dualist or non-coherent dismissal system.

While a full discussion of the country's once racially exclusive labour laws is beyond the scope of this paper, it is worth mentioning a few important historical facts that van Niekerk omits. First, the Industrial Conciliation Act 11 of 1924 excluded African workers from the definition of 'employee'. Labour relations in South Africa was subject to this 'vision' for more than 50 years.

Second, the Industrial Conciliation Act 28 of 1956 further revised South African labour legislation to bring it into line with apartheid. African workers were unofficially defined by the Prime Minister as 'drawers of water and hewers of wood'.³³ The Act prohibited the registration of new 'mixed' unions and formally introduced 'job reservation' for white workers. This dual system continued throughout the 1970s until industrial unrest by African trade unions made the status quo unworkable.

Finally, it was only in 1979 after the Wiehahn Commission of Inquiry into Labour Legislation, that African trade unions could be registered, that the dual system of labour relations ended. In this way, the 1980s saw the emergence of a coherent system of labour law in South Africa. Because Africans were disenfranchised, this gave rise to political struggles until the Labour Relations Amendment Act 83 of 1988 and tripartism began in earnest.³⁴

The Constitution now entrenches rights to equality, labour rights, access to the courts and administrative justice for everyone. Any loss of employment security or 'dual system' of consultation using the ILO mechanism of 'selective application' would have to be justified in terms of these fundamental requirements.

A review of selective application of employment security is not therefore as 'appropriate' or 'necessary', as van Niekerk would have us believe. His argument is a response to Cheadle's unpublished paper 'Regulated Flexibility and Small Business: Revisiting the LRA & BCEA' (2006) but goes further in its recommendations for exemption than Cheadle's proposals for simplification.

Cheadle, merely contends that the consultation procedures for dismissal based on operational requirements are 'not suitable' for small businesses:

³³ Prime Minister Hendrik Verwoerd, architect of apartheid.

³⁴ du Toit, op cit at 13.

They do not typically have the internal resources nor can they afford the external resources to advise them to follow the complex set of obligations and consultations before dismissal for operational requirements. It may be less onerous but without any loss of protection to exclude small business from the detailed retrenchment provisions in the LRA and to supplement the general duty in section to follow a fair procedure under section 188 with provisions in a code setting out a simplified procedure based on the principles that informed the more rigorous statutory procedure.³⁵

While there may be something to be said for a simplified consultation procedure for enterprises with fewer than five or six people in economic crisis, it is worth reiterating Rubin's point that small firms account for many, if not most, enterprises in the labour market.³⁶

Cheadle's concept paper, however, lacks detail on which statutory elements should be changed. One can only surmise from his choice of words 'complex set of obligations and consultations' that he is referring to s 189 (3) (a)-(j) – the employer's obligation to issue a written notice of consultation setting out the rationale for the proposed dismissals (thereby starting the process) because he does not cite any particular subsection as too onerous.

In addition, it is worth bearing in mind that Codes do not afford the same level of protection as statutes. To quote Cheadle:

Codes do not impose duties but set standards of behaviour. Deviation from those standards do not give rise to any penalty but may lead to an adverse finding in the CCMA or the Labour Court unless the deviation can be justified. The primary mechanism is voluntary compliance...³⁷

Codes also run the risk of being overtaken by jurisprudence if they are not regularly updated. For example, the present Code of Practice on Dismissal on Operational Requirements was written in 1999, before s 189A of the LRA was introduced, and has not been updated subsequently.

It should also be emphasised that those countries with greater legislative flexibility for small business generally tend to have greater social security than South Africa and are often required to notify the authorities.

³⁵ Cheadle, op cit 29 at para 88.

³⁶ For example in the UK only 10 per cent of the total number of legal proceedings initiated for termination of employment in 1994 were considered unjustified and 53 per cent of these cases took place in enterprises employing fewer than 50 workers; 'Great Britain Labour Force Survey' (1994) cited in ILO Digest, op cit at 12.

³⁷ Cheadle, idem 7 at para 20c.

For example in Ireland, the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act of 2007 established a Redundancy Panel to examine different cases of dismissals for economic reasons.

Austria, France, China and the Netherlands also have social plans.³⁸ South Africa, by contrast, has comparatively low income protection, particularly in terms of statutory severance pay. Consultation, rigorously applied under the LRA, is the employee's prime source of protection against unfair dismissal. Indeed, the CCMA now has jurisdiction to arbitrate individual retrenchment disputes in terms of the amended s 191(12) of the LRA.³⁹

3. Measures to avoid or minimise dismissal

International labour standards, according to Neville Rubin, reflect the principle that the employer should only use termination of employment as a last resort⁴⁰ and should first consider all possible measures to avoid dismissals.

However, South African labour law is less onerous for employers than Articles 21 and 22 of ILO Recommendation 166 because the LRA does not state that dismissal based on operational requirements may only be used as a last resort, notes Darcy du Toit.⁴¹ It should be emphasised that s 189(2)(a) of the LRA stipulates measures to avoid or minimise dismissals only as a topic that must be considered in consultation.

The employer is obliged to give the reason for the proposed dismissals under s189(3)(a) of the LRA and have considered 'alternatives *before* proposing the dismissals and be able to give the reasons for rejecting each of those alternatives' under s 189(3)(b) of the Act in the written notice to the consulting party. The employees' representatives are then free to suggest other alternatives in consultation. These alternative possibilities must also be explored by the employer.

Although, Rubin observes, ILO Convention 158 does not indicate the substantive content of such possibilities – except for an explicit reference to 'finding alternative employment'⁴² either within the establishment or elsewhere – this is one of the key measures that employers can take to avoid dismissals.

³⁸ ILO Digest, op cit 400-402 at table 4.

³⁹ As a result of the LAC decision in *Bracks NO & another v Rand Water & another* (2010) 31 ILJ 897 8BLLR 795 (LAC).

⁴⁰ Rubin, op cit 545 at para 2.

⁴¹ du Toit, *Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond* (2005) 26 ILJ 595.

⁴² Rubin, *ibid* at para 3.

In addition, it should be stressed that ILO Recommendation 166 goes further than South African legislation when it says that an employer's decision to dismiss will only be considered 'fair' or 'valid' *if* the employer has sought to 'avert or minimise' dismissals and that the measures in Article 21 of the ILO Recommendation are among those that should be considered.

Such measures outlined in Article 21 include inter alia restriction of hiring, spreading the workforce, reduction of staff levels over a certain period to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

According to Rubin, when Article 21 of the ILO Recommendation was drafted in the early 1980s, measures to avoid dismissal were proposed in a climate of economic slowdown and aimed to find alternatives to dismissal that were voluntary.⁴³

CCMA facilitators in South Africa have observed 30 years later that there is a major difference between retrenchments that originate from an employer's need to expand (aspirational changes) and those from loss of markets and an inability to beat competitors (distress changes). For example, in an aspirational situation, information from an employer of large number of employees⁴⁴ may suggest to a facilitator or union that there are opportunities for voluntary retirement or retrenchment. In distress situations, by contrast, employees may be willing to take unpaid leave or accept short-time.

Paying partial compensation for temporarily reduced hours is popular with employers, according to Rubin, because it saves them the cost of severance pay as well as recruiting and training a new workforce.

In the same way, internal transfers are relatively cost-free. In South Africa, s 189(3)(j) of the Act and question 5 of LRA Form 7.20 (in s 189A cases) ask employers how many employees have been retrenched in the past 12 months. This assists the facilitator (or union) to assess the scope for transfers to alternative jobs.⁴⁵ However, if no suitable vacancies exist, the possibility of 'bumping' – ie placing longer serving employees in positions held by shorter serving employees and retrenching the latter – must be considered in South Africa⁴⁶.

⁴³ ILO Digest op cit at 29-31.

⁴⁴ Under LRA s 189A, first question on form LRA 7.20: How many employees does the employer employ?; s 189(3)(i): the number of *employees* employed by the employer.

⁴⁵ CCMA, op cit at 5.

⁴⁶ *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC)

With the exception of bumping,⁴⁷ South African courts have differed in their approaches to the appropriate level of scrutiny to ‘finding alternatives’ in s 189 dismissals. While ILO Recommendation 166 does not have the force of international law, du Toit notes, it has been persuasive when seeking to interpret the LRA and its guidelines have entered case law.

For example, in *SA Chemical Workers Union and other v Afrox*,⁴⁸ the LAC held that ‘an employer must seek appropriate measures to avoid dismissals, minimise their number, change their timing and mitigate their adverse effects’ – a reference to Article 13(1)(b) of the ILO Convention.

Five years later, in *CWIU v Algorax*⁴⁹, the court drew a different conclusion:

[s 189 implies] that the employer has an obligation, if at all possible to avoid dismissals of employees for operational requirements altogether or to minimise the number of dismissals if possible and to consider other alternatives of addressing its problems without dismissing the employees and to disclose in writing what those alternatives are that it considered and to give reasons for rejecting each of those alternatives.

In short, ‘business efficiency rather than necessity is the [international] yardstick,’ according to du Toit.⁵⁰ Article 19⁵¹ of ILO Recommendation 166 stipulates that no measure to avoid or minimise dismissal can be prejudicial to the ‘efficient operation’ of the business.

Consequently, the length of the consultation process can be relatively more onerous for employers if there are urgent factors giving rise to the terminations contemplated.⁵² A dispute about the fairness of such a dismissal cannot be referred to a bargaining council or the CCMA until 30 days after the date of the dismissal, or within 30 days of the employer making a final decision to dismiss. As noted above, facilitation under s189A of the LRA requires 60 days between notice of intention and issuing an award or ruling – although if the parties reach agreement sooner the matter can be resolved.

Comparative research shows that consultation periods are no longer in South Africa than many other jurisdictions, even where s 189A of the LRA and its 60-day moratorium applies.

⁴⁷ ‘Bumping’ comes from United States but is not an internationally accepted practice.

⁴⁸ [1999] 20 ILJ 1718 (LAC).

⁴⁹ [2004] 24 ILJ 1917 (LAC).

⁵⁰ du Toit, op cit (note 95).

⁵¹ ILO Recommendation 166, at Article 19: All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned...

⁵² The period of consultation under s 189 of the LRA is not defined but according to the Code of Good Practice should include the opportunity to meet and report back to employees, the opportunity to meet with the employer, and the request, receipt and consideration of information.

Although South African employees can use consultation to change the timing of dismissals under s 189(2)(a)(iii) of the LRA,⁵³ the courts are not sympathetic to ‘wilful foot-dragging’ by unions.⁵⁴ Conversely, if more time is needed for consultation, the employer is wise to grant it.⁵⁵ Consultation is seldom deemed sufficient when it is rushed.⁵⁶ To be ‘meaningful’, in terms of s 189(2) of the LRA, the process must allow sufficient time for disclosure, consideration and dialogue.

In closing, both parties should aim to get the best deal they can through mutual persuasion. Unions need to be proactive and suggest innovative alternatives that assist the employer and facilitator to avoid and/or minimise the number of retrenchments. Thousands of jobs have reportedly⁵⁷ been saved in this way under s 189A of the LRA since 2002.

4. Measures to mitigate the adverse effects of dismissal

The LRA places a statutory duty on consulting parties to consider ways they can ‘mitigate the adverse effects of the dismissals’ under s 189(2)(a)(iv) of the Act. This measure is given substantive content where the employer must in written notice consider at s 189(3) of the Act:

- (e) the time, when or the period during which, the *dismissals* are likely to take effect ...
- (g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed and;
- (h) the possibility of the future re-employment of the *employees* who are dismissed.

The LRA uses the words and concepts of ILO Recommendation 166, Articles 25-26 as a blueprint:

Mitigating the Effects of Termination

25. (1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible with training or retraining, where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers’ representatives concerned.

According to Rubin, the aim is to introduce a degree of tripartite participation into the search for ways of mitigating the effects of dismissal. The intention of the ILO text is not to

⁵³ LRA s189(3)(e): the time when, or the period during which the dismissals are likely to take effect.

⁵⁴ Grogan, op cit, at 462.

⁵⁵ s189(6)(a) LRA: The employer 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 for disagreeing.

⁵⁶ *Broll Property Group (Pty) Ltd v Du Pont & Others* (2006) 27 ILJ 269 (LAC): The court held that if consultation is ‘woefully deficient’ it may render dismissal substantively unfair.

⁵⁷ Levy, op cit (note 58).

impinge on the employer. ‘Where possible’ is the language used by Article 25(1) of the Recommendation.

In South Africa such tripartite participation is given best effect under s 189A of the LRA with the appointment of a facilitator under the auspices of the CMMA. In alignment with ILO Recommendation 166, the LRA introduces tripartism without impinging on the employer’s ultimate decision. All the employer must do is to consider the possibility of mitigating the adverse effects. While consultation may initially seem onerous to employers, experience shows that ‘meaningful joint consensus’ can often be reached through the innovative suggestion of alternatives to dismissal that may benefit both the enterprise’s long-term labour relations and its future prosperity.

According to Rubin the effective application of the ILO Article also depends on training.⁵⁸ More generous financial provisions for training are also contained in Article 26 (1) of the ILO Recommendation,⁵⁹ although in South Africa an employer is not obliged to offer retrenched employers special training to enable them to fulfil the tasks of new vacancies.⁶⁰ By contrast, in New Zealand, under common law the employer is required to consider alternative options, including training.⁶¹

Furthermore, in South Africa, employers are not obliged to seek alternative work for retrenched employees with other employers. However, it is possible that a court may hold that fairness requires a company in a group to seek posts among corporate affiliates.⁶² Article 25(2) of the ILO Recommendation says:

Where possible, the employer should assist the workers affected in the search for suitable employment, for example, through direct contacts with other employers.

Nor does the LRA expressly impose an obligation on employers to rehire retrenched workers, although the employee parties are entitled to be consulted on the possibility of it

⁵⁸ Rubin, *ibid* at para 5.

⁵⁹ ILO Recommendation 166, Article 26(1): With a view to mitigating the adverse effects of termination of employment for reasons of an economic technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with a training or retraining and with finding and taking up employment which requires a change of residence.

⁶⁰ *Bosal (Afrika) Pty Ltd v NUMSA obo Both and Other* cited in Grogan, *op cit* at 461.

⁶¹ *GH Hale and Sons v Wellington, etc, Caretakers IUOW* (1991) 1 NZLR 151; cited in ILO Digest, *op cit* at 247.

⁶² *Sikhosana & others v Sasol Sunthetic Fuels* (2000) 21 ILJ 649 (LC) cited in Grogan, *idem* at 462.

under s 189(3)(h) of the LRA.⁶³ The obligation to consider a possibility is far less onerous than an obligation to make an offer of alternative employment.

This contrasts with China, Netherlands, Serbia and Turkey where re-employment priority *must* be given to retrenched employees for up to six months.⁶⁴ The requirement is even more onerous in Cyprus, where priority must be given to retrenched employees for eight months.⁶⁵

In Tunisia,⁶⁶ wage earners whose employment is terminated for economic reasons are given priority re-engagement⁶⁷ for one year. This is also the case in Bangladesh, the Democratic Republic of Congo, France, Gabon, Italy, Jordan, Luxembourg, Morocco, Pakistan, Peru, Slovenia and Ukraine⁶⁸. The period is extended to two years in Burkina Faso, Cambodia, Cameroon, Camaras, Niger and Senegal. The order of re-engagement is often determined according to the employee's length of service.

The LRA, by contrast, does not state how long a South African employer should keep open such an offer or the criteria for workers to be selected for re-employment. However, a refusal to re-employ an employee is an 'unfair dismissal' under s 186(1)(d) of the Act if an 'employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another'. However, employers retain the right to choose whether retrenched employees are suitable for vacancies that may arise.⁶⁹

If an employer has agreed to re-employ retrenched employees, he or she is obliged to do so. The court has held that the fact contract workers were appointed is a clear indication that there was no substantive need to retrench.⁷⁰ In practice, re-employment is an important means of mitigating adverse effects of dismissal and, according to a senior CCMA Commissioner, has saved many jobs.

Guidelines for rehiring can be found in ILO Recommendation 166 at Article 24. However, they are very flexible.

Priority of Rehiring

24 (1) Workers whose employment has been terminated for reasons of an economic,

⁶³ Grogan, *idem* at 481-482.

⁶⁴ ILO Dialogue In Brief No 3 [2011] *op cit* at p11.

⁶⁵ Cyprus: s 22 Termination of Employment Law, 1967 cited in ILO Digest, *op cit* at 123.

⁶⁶ Tunisia: s 21-31 Labour Code of 1996: cited *idem* at 344.

⁶⁷ Under the conditions of their remuneration at the moment of dismissal: cited *supra*.

⁶⁸ *Employment Protection Legislation Tested by the Economic Crisis*, Angelika Muller, ILO 2011

⁶⁹ *SACCAWU & Others v Wimpy Aquarium*, [1998] 9 BLLR 965 (LC).

⁷⁰ *CWU & Others Latex Surgical Products (Pty) Ltd* [2006] 2BLLR 142 (LAC)

technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(1) Such priority of rehiring may be limited to a specified period of time.

(2) The criteria for the priority of rehiring, the question of retention of rights – particularly seniority rights – in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

The ILO guidelines are based on the idea that where an employer has to later hire staff again, out of fairness, a certain priority should be granted to workers whose employment was terminated.⁷¹ Rubin notes that legislation in many countries establishes priority of rehiring as a duty, while in other countries it is in collective agreements.⁷² However, it is generally specified that priority goes to workers with comparable qualifications.

For example, in Slovakia under the Labour Code, employers may not, for three months, establish a position and recruit another employee in place of the dismissed employee. In 2011, the government reduced this from three to two months for companies with fewer than 20 employees.⁷³ Likewise in Antigua and Barbuda, an amendment was proposed in 2010 to introduce a preferential right to be rehired for dismissed employees if similar positions reopened.

It should be emphasised that South Africa has not adopted such measures and is far less onerous than many other jurisdictions. There is a big difference between ‘should be given a certain priority’ for re-employment and ‘the possibility of’ being considered for re-employment under the LRA.

5. Selection criteria

Employers in South Africa are generally given a free hand to select employees for retrenchment, and the courts intervene only to ensure it has not been used to discard employees for reasons unrelated to operational requirements.⁷⁴ However, choosing employees for retrenchment is the most onerous stage of consultation for employee parties. Inevitably, employees and union representatives are forced to name colleagues and draw up a hit-list. The consulting parties are obliged to try and agree a method for selecting employees

⁷¹ Rubin, op cit 547 at para 1.

⁷² Ibid at para 3.

⁷³ *Employment Protection Legislation Tested by the Economic Crisis*, Angelika Muller, ILO 2011.

⁷⁴ Code of Good Practice on Dismissal Based on Operational Requirements states that selection criteria that infringe a fundamental right protected by the Act can never be fair. It includes length of service, skills and qualifications. Generally, it states the test for fair and objective criteria will be satisfied by the LIFO principle.

for retrenchment under s 189(2)(b) of the LRA. If no selection criteria is agreed, the criteria must be ‘fair’ and ‘objective’ under s 189(7)(b) of the LRA.

The principle of ‘last in first out’ (LIFO) commends itself to this purpose of objectivity, according to the Code of Good Practice on Dismissal Based on Operational Requirements,⁷⁵ but other criteria – such as qualifications, attendance records and productivity – which can also be objectively verified and applied equally, have been accepted as ‘fair’. Essentially, the method should be agreed between the parties where possible.

If criteria is established in advance, as advocated by the ILO, the risk of subjective decision is reduced. ILO Recommendation 166, Article 23(1) seeks to make the choice as objectively as possible and avoid the risk of arbitrary decision.

Criteria for Selection for Termination

23 (1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.⁷⁶

Research shows that the criteria most often applied to selection for termination are occupational skills, length of service and family circumstances. Other criteria may sometimes be included, such as the difficulty of finding alternative employment.

In some countries the focus of selection criteria is on protecting the most vulnerable workers. This is accepted practice in Belarus, Benin, Bulgaria, Ethiopia, France, Mali, Mexico, Morocco, Portugal, Senegal and Tunisia.⁷⁷

In other countries, legislation protects certain categories of employee, such as the disabled. Employers can also be encouraged to retain employees with greater numbers of dependants. This is the case in Ethiopia, Mexico, and Bulgaria. While in other jurisdictions, employee representatives or trade union officials enjoy priority for retention, or are absolutely protected.

In Bulgaria, family and material situation or health conditions of the employee are taken into consideration. In cases where there are two employees with equal qualifications, the one

⁷⁵ (1999) GN 1517 GG 20254.

⁷⁶ Note balance of selection criteria ie ‘due weight’ both to interests of employers and employees.

⁷⁷ Rubin, op cit 546 at para 6.

with the more disadvantaged situation will not be dismissed. Similarly, where there are workers with equal qualifications, those who are sole breadwinners will get preference.⁷⁸

In Ethiopia,⁷⁹ preference against retrenchment is given to employees who have been disabled by a work-related injury, shop stewards and expectant mothers.⁸⁰

Similarly, in France, criteria must take into account family responsibilities, particularly in the case of single parents, those whose re-entry into the labour market is difficult (disabled or elderly employees), as well as skills and length of service.⁸¹ In Estonia, the new labour law of 2009 provides shop stewards and employees with children under the age of three priority in retaining their jobs.⁸²

In South Africa, employers are given far greater flexibility than in the countries mentioned above and perhaps consideration should be given to more vulnerable workers.

8. Severance pay

In South Africa, an employee who is dismissed for reasons based on operational requirements is entitled to one week's remuneration for each completed year of continuous service – the statutory minimum under s 41(2) of the Basic Conditions of Employment Act⁸³ (BCEA). Although the amount is in alignment with Article 12 of ILO Convention 158,⁸⁴ which states that it must be calculated *inter alia*, on length of service and level of wages, South Africa's rate of statutory severance pay is comparatively low.

⁷⁸ s 329 Labour Code (1996) cited in ILO Digest, op cit at 78.

⁷⁹ s 29(3) of the Labour Proclamation No 42 of 1993: cited idem at 141

⁸⁰ Idem at 143.

⁸¹ L321-6 Labour Code (1973): cited idem at 147.

⁸² ILO Dialogue in Brief No 3 op cit at p9

⁸³ Act 75 of 1997 (updated 2002).

⁸⁴ ILO Convention 158, Division E: Severance Allowance and other Income Protection. Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to (a) severance allowance or other separation benefits, the amount of which shall be based *inter alia* on *length of service* and the *level of wages, paid directly by the employer or by a fund* [emphasis added] constituted by employers' contributions, or (b) benefits from unemployment insurance or assistance or other forms of social security such as old age or invalidity benefits, under the normal conditions to which such benefits are subject. 2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b). 3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a). of this Article in the event of termination for serious misconduct.

Twenty nine jurisdictions listed in the ILO Termination of Employment Digest award higher statutory severance payments than South Africa. In approximate order, from most generous to least, with South Africa at the bottom:

Country	Statutory severance pay
Mexico	six months' wages for first year of service, 20 days for each extra year
Brazil	two months' for each year of service
Italy	one year's wages divided by 15.5 plus 1.5% for each year's service plus compensation for inflation
Chile	one month's wages for each year of service
China	one month's wages for each year of service
Colombia	one month's wages for each year of service
Iran	one month's wages for each year of service
Philippines	one month's wages for each year of service
Bangladesh	30 days' wages for each year of service
Korea	30 days' wages for each year of service
Nepal	30 days' wages for each year of service
Ethiopia	30 days' wages for first year of service, 40 days' wages for subsequent years, with a maximum of 12 months' wages
Dominican Republic	maximum of 23 days' wages for each year of service
Pakistan	20 days wages for each year of service
Cyprus	minimum two weeks to maximum four weeks' wages for each year of service
Egypt	half a month's pay for first five years of service, one month for each subsequent year
Syria	half a month's pay for each of the first five years of service, one month's pay for each subsequent year
Caribbean Community	two weeks' wages for first 10 years of service, three weeks wages for each subsequent year
India	15 days' wages for each year of service
Kenya	15 days' pay for each year of service
Mauritius	15 days' wages for each year of service
Jamaica	two weeks' for each year for first 10 years, three weeks for each year of service thereafter
Vietnam	half a month's salary for each year of service
Argentina	two weeks' for each year of service
Lesotho	two weeks' for each year of service
Zambia	two weeks' for each year of service
Cameroon	40% of monthly wage
Côte d'Ivoire	40% of monthly wage
Malaysia	10 days' wages for first year of service, 15 days' for each of the next four years of service
South Africa	one week's pay for each year of service

Nine countries pay one month's wages for each year of service – Bangladesh, Chile, China, Colombia, Iran, Italy, Korea, Nepal and the Philippines. The highest severance pay is in

Mexico – six months’ for the first year of service and 20 days’ for each year of service, followed by Brazil at two months’ for each year of subsequent service.

Three of the countries pay 15 days’ per year of service – India, Mauritius, Kenya and Lesotho. Other countries, besides South Africa, paying one week for each year of service are the United Kingdom and Namibia. However, the UK has greater social security provision, in alignment with Article 12(1)(b) of ILO Convention 158.⁸⁵

In South Africa, severance pay is only paid for dismissal based on operational requirements, a limitation often regarded as deeply unfair by those dismissed for reasons related to capacity or conduct with years of seniority.⁸⁶ In some countries, legislation makes severance pay an absolute right based on length of service. The right is acquired irrespective of the reason for termination of employment. Some countries regard severance pay as a right that must always be paid, even in the case of voluntary resignation or serious misconduct, such as in Venezuela. This is far more burdensome for employers than provisions under the LRA.

South Africa is in alignment with many African countries with a French labour relations background, where inter-occupational agreements set a minimum level of compensation but make provision for collective agreements to modify fixed statutory amounts.⁸⁷ This contrasts with some jurisdictions where the amount is fixed, such as in the Czech Republic.

Nonetheless, the maximum amount payable is sometimes restricted. For example, in Spain the limit is 12 months’ wages and there may also be a specified minimum. In South Africa there is no ceiling. All employees, irrespective of status, are entitled to severance pay if they are dismissed for reasons based on operational requirements.

The BCEA does not empower the Minister of Labour to exempt employers from the obligation. A dispute about entitlement to severance pay may be referred to a bargaining council or the CCMA but a Commissioner is not empowered to arbitrate disputes concerning claims by employees in excess of the statutory amount.⁸⁸

⁸⁵ The provisions of ILO Convention 158 on severance pay duplicate those previously stated in Article 18 of ILO Recommendation 166 ‘Severance Allowance and Other Income Protection’.

⁸⁶ LRA s 188(a)(i).

⁸⁷ Digest, op cit at 19.

⁸⁸ The Labour Court has held that severance packages calculated on a different basis may be discriminatory and therefore render a dismissal unfair; *Matthews v GlaxoKline SA (Pty) Ltd* (2006) 7 ILJ 1876 (LC) cited in Grogan, op cit at 475.

Severance pay is the last issue parties are obliged to consult under s 189(2)(c) of the LRA, although employers must propose severance pay in its written notice to consulting parties under s 189(3)(f) of the Act.

Where severance pay is agreed in excess of the statutory minimum, the employer is obliged to pay that amount.⁸⁹ However, an employee who unreasonably⁹⁰ refuses an offer of alternative employment is not entitled to severance pay under the BCEA.⁹¹

However, in the final analysis, South Africa's severance payments are comparatively low and cannot be considered unduly onerous for employers. The BCEA does not reflect loyal years of service with sliding scales of pay, as Jamaican law does or protect against inflation, as Italian law does. An amendment to s 41 of the BCEA may encourage voluntary retirement or retrenchment of employees with longer years of service.⁹²

Nonetheless, the scope of who is an 'employee' in South Africa makes the application of severance pay more widespread than some countries. ILO source material on severance pay shows qualifying periods vary widely. Some countries restrict it to workers who have been employed for one year (South Africa, Benin, Mali, Peru and Venezuela), two years (Gabon), three years (Mexico), five years (Bolivia, in cases of voluntary retirement, and Malawi), 10 years (Panama, if the worker is over 40 years of age) or even 20 years (Switzerland, where the worker must be over 50 years of age.)⁹³

Generous application of severance pay in South Africa – low qualifying period and no ceilings – makes this otherwise limited statutory provision relatively more onerous for employers, although it still cannot be considered a significant financial burden for most.

8. Notification of the administrative authorities

Nineteen out of 68 countries in the ILO Digest table have a statutory duty to notify administrative authorities of collective dismissals.⁹⁴ However, such notification, also a

⁸⁹ *Barry and Africa Defence Systems (Pty) Ltd* [2004] 25 ILJ 1120 (CCMA) cited in *idem* at 475.

⁹⁰ Whether or not an employee's refusal of alternative employment is reasonable depends on the nature of the position, for example its location, status and other factors such as reduced income and inconvenience (eg relocation): Grogan, *op cit* at 480.

⁹¹ BCEA, s 41(4): An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).

⁹² CCMA, *op cit* at 4

⁹³ ILO Digest, *op cit* at 24.

⁹⁴ See Annexure 5: ILO Digest, *op cit* 399-402 at table 4.

provision of ILO Convention 158, is not a statutory requirement⁹⁵ in South Africa except for miners.

Jurisdictions with a statutory requirement to notify the administrative authority include: Brazil, Bulgaria, Colombia, Dominican Republic, Egypt (for all dismissals), Guinea, India (when the establishment has more than 100 workers), Kenya, Mauritius, Mexico (by arbitration committee), Namibia, the Netherlands, Pakistan (authorisation from the Labour Court needed except in an extreme emergency to close down; also has the power to suspend collective dismissals) and Zimbabwe (with tripartite committee).

Some of these countries require not just that the relevant authority is informed but also its approval for it to be considered justified. For example, in Sri Lanka, any dismissal without the approval of the Labour Commissioner is null and void.⁹⁶ In addition, there is no machinery for appeal, as the decision is final.⁹⁷

Similarly, in Colombia, collective dismissal requires prior authorisation from the Ministry of Labour and Social Security. The Ministry of Labour should decide on the matter within two months.⁹⁸ If the dismissal is found to be unfair the employer must pay compensation.⁹⁹

Such notification is in alignment with international labour standards. Article 14 of ILO Convention 158¹⁰⁰ makes provision for the ‘competent authority’ to be notified in ‘accordance with national law and practice... as early as possible’. The ILO instrument requires employers to give the authority ‘relevant information, including a written statement of the reasons for termination, number and categories of workers likely to be affected and period over which it is to be carried out’.

⁹⁵ Except if the matter later becomes a ‘dispute’.

⁹⁶ Sri Lanka: s 5 Termination of Employment of Workmen (Special Provisions) Act (1990): cited in ILO Digest, op cit at 312.

⁹⁷ s 2f Termination of Employment of Workmen (Special Provisions) Act: cited in supra.

⁹⁸ Colombia: s 66 of the Labour Code, Act 50 of 1990: cited in ILO Digest, op cit at 115.

⁹⁹ If the undertaking has taxable liquid assets of less than 1,000 minimum monthly wages, the amount of compensation is 50 per cent of that sum: cited in supra.

¹⁰⁰ ILO Convention 158: Division B. Notification to the Competent Authority, Article 14 (1): When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. (2) National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number or workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce. (3) The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

In the event of non-compliance with consultation and notification procedures, legislation and collective agreements generally make provisions for various sanctions that can be applied cumulatively, such as fines, compensation or even invalidation of the dismissals.

Notification of the administrative authority for collective or any other dismissals is not required in South Africa except for the retrenchment of miners. In this instance, miners are afforded further protection under the Mineral and Petroleum Resources Development Act 28 of 2002 (s 52) although this does not replace the requirements of section 189A.¹⁰¹¹⁰²

Generally, in South Africa, s 189 of the LRA leaves consultation up to the affected parties. However, s 189A(3) of the LRA allows both sides involved in large-scale dismissals to request facilitation under the auspices of the CCMA.¹⁰³ In closing, it should be stressed that the role of the CCMA is only to facilitate a ‘consensus-seeking process’ *not* to arbitrate – although the proceedings are conducted on a ‘with prejudice basis’.

The powers and duties of a facilitator are laid out in s 4 of Facilitation Regulations. However, if there is a dispute about disclosure of information, the facilitator may make an order directing an employer to produce relevant documents under s 5 of the Regulations. A facilitator cannot impose any ruling in terms of a settlement. The matter can only become a dispute if after 60 days agreement cannot be reached and the employee party chooses to go on strike. Alternatively, if the matter goes to court, a facilitator cannot be called to give evidence.¹⁰⁴

Conclusion

ILO instruments on termination of employment and source material dispel the myth that South African legislation for dismissal based on operational requirements is unique, unduly onerous and over-regulated for employers.

¹⁰¹ s 52 Mineral and Petroleum Resources Development Act (2002), Notice of profitability and curtailment of mining operations affecting employment. (1) The holder of a mining right must, after consultation with any registered trade union or affected employees or their nominal representatives where there is no such trade union, notify the Board.

¹⁰² *National Union of Mineworkers v Anglo American Platinum Ltd & Others* [2012] 12 BLLR 1252 (LC).

¹⁰³ In the UK, the Advisory Conciliation and Arbitration Service (ACAS) offers facilitation, but both parties must accept the service for it to take place. In South Africa only one party need request the statutory offer from the CCMA.

¹⁰⁴ s 7 Facilitation Regulations (2003): Status of facilitation proceedings, (1) A facilitation is conducted on a with prejudice basis (2) Despite sub-regulation (1) the parties may agree in writing that a part of the facilitation is to be conducted on a without prejudice basis (3) the part of the facilitation conducted on a without prejudice basis may not be disclosed in any court proceedings.

Evidence shows that the perceived constraints of mandatory consultation under the LRA may be onerous for employers (ie ‘difficult to do, or needing a lot of effort’¹⁰⁵) but not unduly so.¹⁰⁶ The South African statute does not, as often stated, put a bar on downsizing, efficiency or competitiveness.

Most of South Africa’s law for dismissal based on operational requirements (and that of its global competitors), originates from ILO Convention 158 and ILO Recommendation 166. These instruments have served as a template for South African and international lawmakers.

A more unique part of the LRA is s 189(3)(a)-(j) with its built-in, step-by-step approach to written notice. While well-crafted, even ingenious with its provisions for swift disclosure, this subsection is still a codification of ILO Convention 158 and Recommendation 166.

The subsection contains no new elements and just gives effect to South Africa’s obligations as a member of the ILO under s 1(b) of the LRA and to fundamental rights conferred by the Constitution.

By contrast, s 189A of the LRA is truly innovative with its process-driven requirements for facilitation under the CCMA in large-scale disputes. Each question on form LRA 7.20 contains a request for further and better disclosures, which assist facilitators and the parties in finding their way to an appropriate solution.¹⁰⁷

Paradoxically, this notionally more regulatory part of the Act is not perceived as onerous by business and is requested by at least 30 per cent of South African employers contemplating retrenchment. The amendment appears to have been a huge success and has apparently saved thousands of jobs with its creative solutions for finding alternative employment and led to a minimal number of strikes.

Although this part of the LRA gives a more generous interpretation to ILO Recommendation 166 than legislation in many other countries, it is still in alignment with international standards. Section 189A should be regarded as our home-grown model of best international practice.

More of a burden (ie ‘difficult or unpleasant’¹⁰⁸) for South African employers is the non-original s 189 of the LRA and its *general* application of consultation procedures for small and

¹⁰⁵ Definition of ‘onerous’: *Cambridge Dictionary Online*.

¹⁰⁶ Definition of ‘unduly’: *idem*.

¹⁰⁷ CCMA, *op cit* at 4.

¹⁰⁸ Definition of ‘burden’: *Cambridge Dictionary*.

medium-sized businesses. While there may be valid arguments that consultation can sometimes be too onerous for small employers, comparative analysis with other countries illustrates that where limitations on employment rights are selectively applied, they are usually underpinned by greater income protection and state regulation. The prime financial protection South African employees have against retrenchment is severance pay and this is relatively low compared to many other jurisdictions.

The provisions of s189 of the LRA are in full alignment with international labour standards and are not more onerous than those of its competitors. In many respects— most notably in relation to its law on selection criteria, rehiring, severance pay and notification of administrative authorities – South African employers are given comparatively *more* flexibility than in many jurisdictions.

For example, South African employers are pretty much given a free hand to select who is to be retrenched, or rehired if business improves. In addition, there is no statutory notification of administrative authorities except for the retrenchment of miners.

In the final analysis, it is hard to see how the LRA and BCEA can be thought of as unduly onerous for employers in South Africa, when the legislation stops short of hitting them where it hurts most – their bank balances. Consultation may be formidable, time-consuming and complex, but ultimately it is only an obligation to consider.

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