NORTON ROSE FULBRIGHT

Labour Law by the Book volume 3

A collection of articles related to South African Employment and Labour law and regulations

August 2025

Introduction

Dearest Reader

Welcome to Volume 3 of Norton Rose Fulbright's Labour Law by the Book, a collection of articles related to South African Employment and Labour law and regulations.

There is no shortage to labour and employment rulings, judgments and legislative and regulatory updates. It is admittedly difficult to keep track of all the changes and to stay up to date with recent developments. This volume includes articles on recent developments relating disciplinary hearings, retirement age, business transfers and employers' obligation to pay arrear renumeration and practical guides on how to handle retrenchments, disciplinary hearings and employment equity obligations. There is something for everyone and we trust it will guide you to do things "by the book"!

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Part 1: Developments arising from case law

Constitutional Court clarifies obligation to pay arrear remuneration from date of restoration award

By Heidi Davis (Associate) and Jason Whyte (Director)

In June 2025 the Constitutional Court clarified that the date on which contracts of employment for reinstated employees are restored from, is the date on which the contract was restored by the arbitration award. This in turn impacts on the employer's obligation to pay employees their arrear salaries for any period between the tendering of their services pursuant to the restoration of the contract and the acceptance of the tendered services by the employer.

Following an arbitration award handed down by the Commission for Conciliation, Mediation and Arbitration (the CCMA) which ordered the employee's reinstatement, the employee tendered his services on 1 August 2019. The employer refused to accept the employee's tender of services based on its intention to file a review application against the award. Such an application was never forthcoming. On 25 September 2020, the employee was invited by the employer to resume employment provided that a few additional conditions were met.

Aggrieved with the employer's failure to reinstate him absent the additional conditions, the employee launched contempt proceedings out of the Labour Court. The Labour Court handed down an order that the employee was to be unconditionally reinstated from 1 June 2021 (the Order). The employee returned to work on 1 June 2021 and subsequently requested his arrear salary for the period of August 2019 to 31 May 2021. When the employer failed to comply with the request, the employee referred a dispute to the Labour Court.

The Labour Court found as follows:

- The employee's date of reinstatement was 1 June 2021.
- The employee had abandoned his claim to be reinstated from 1 August 2019 upon acceptance of the Order.
- Until an employee's tender of services has been accepted by an employer, no contractual obligations exist between the parties.

On appeal, key to the Constitutional Court's concern was that in coming to the above findings the Labour Court had misunderstood the Constitutional Court's decision in *NUMSA v Hendor* where, in unequivocal terms, the court had ruled that if a court order reinstates an employee into a position from which they had been unfairly dismissed, the employee should be placed back into the position they occupied prior to their dismissal and they should be paid whatever money or financial benefit they would have been entitled to during the intervening period.

The court clarified that *Hendor* was not authority for the proposition that an order enforcing a reinstatement order automatically replaces the original reinstatement order. All that is replaced by an enforcement order is the factual date upon which restoration of the contract occurred. The legal date of restoration remains the date set by the award. *Hendor* is also not authority for the proposition that a reinstated employee is only to be paid from the date of their factual reinstatement. Upon the factual restoration of the contract, an employee is entitled to all benefits, inclusive of remuneration, that they would have been entitled to had they not been dismissed, unless these have specifically been limited by the reinstatement order.

The court therefore ruled that the employee's contract of employment had been restored from 1 August 2019, the date on which it was restored by the CCMA award, and he was entitled to remuneration from that date to 31 May 2021.

This judgment serves as an important reminder to employers of the effect of reinstatement awards, and reinstatement orders which serve to enforce them, and the legal consequences which may arise should they seek to impose conditions which prevent the immediate reinstatement of employees or should they unsuccessfully attempt to challenge these awards through review proceedings.

Mavundla v Gotcha Security Services (Pty) Ltd (CCT 170/24) [2025] ZACC 11 (18 June 2025)

National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd) [2017] 6 BLLR 539 (CC)

Outsourcing vs. business transfer: Key lessons from the Labour Appeal Court

By Caroline Cotton (Candidate Attorney), Heidi Davis (Associate) and Jason Whyte (Director)

Employers considering restructuring or outsourcing should take note of the February 2025 Labour Appeal Court decision clarifying the scope of section 197 of the Labour Relations Act (LRA). The judgment reinforces that not every outsourcing or internal restructuring exercise will trigger a transfer of a business as a going concern under the LRA.

In response to the economic strain caused by the COVID-19 pandemic, a large corporate group restructured its operations. As part of this process, it shut down a specialised unit within one of its subsidiaries that handled the termination and disposal of leased vehicles. The function was outsourced to another subsidiary within the corporate group (the company) in which the group held a majority share when the outsourcing was implemented.

Following the conclusion of a service level agreement between the two subsidiaries, and a consultation process in terms of section 189A, employees from the closed unit were retrenched in July and August 2020. These employees challenged the fairness of their dismissals, contending that the restructure amounted to a transfer of a business as a going concern under section 197 of the LRA, thereby rendering their dismissals automatically unfair in terms of section 187(1)(g) of the LRA.

The LAC found that the outsourcing of the function provided by the unit did not constitute a transfer of a business as a going concern and that the employees were dismissed due to the business' operational requirements. The court dismissed the employees' claim that their dismissal was automatically unfair and made several important findings that employers should be aware of:

- There was no transfer of a business in circumstances where:
  - What was transferred was merely a "service" or "activity", rather than an independent "business"
  - The subsidiary that took over the service used its own infrastructure, systems, and staff
  - No tangible or intangible assets (e.g., software, premises, or equipment) were transferred
  - The recruitment of six employees by the company was not enough to support a finding that a business had been transferred
- Operational requirements were the dominant cause of the dismissals given that they were part of the group's restructuring in response to economic pressures brought about by COVID-19.
- As no transfer of a business as a going concern took place, the employees' claim that their dismissals were automatically unfair under section 187(1)(g) failed.
- As the employees had relied solely on section 187(1)(g) of the LRA without bringing an alternative claim that the dismissals were unfair retrenchments under section 189, this was fatal to their claim once the court found that no transfer of a business had occurred.

This judgment provides useful guidance for employers navigating outsourcing or internal restructuring:

- It is important to distinguish between the transfer of a service and the transfer of a business providing a service. The transfer must involve the transfer of a business (or part of a business) as a going concern, involving, for example, the handover of assets, infrastructure, the workforce or a cohesive economic entity. Outsourcing a specific function or service does not automatically trigger section 197.
- During section 189 or 189A consultations, employers must clearly communicate the operational reasons for the restructuring and retrenchments. A well-documented process can make or break an employer's defence in the event of litigation.
- In the event of outsourcing during a restructuring process, employers should be prepared to challenge claims brought under section 197. It is important to assess how claims are framed and whether there is sole reliance on section 197 or if section 189 failings are relied on in the alternative.

This judgment is a timely reminder that not all outsourcing arrangements amount to a transfer of a business in terms of section 197. There, however, may be outsourcing arrangements which would trigger the applicability of section 197. Employers are encouraged to ensure they obtain appropriate advice on the legal consequences of any structural changes which they intend to undertake because

the triggering of section 197 is fact specific and could turn on any number of factors.

Zeda Car Leasing (Pty) Ltd t/a Avis Fleet & Others v Belinda Perlee and Nine Others (JA01/24) [2025] ZALAC 8 (10 February 2025)

Reminder from the Labour Court: The importance of procedural fairness when disciplining an employee

By Lesedi Dube (Candidate Attorney), Raees Halim (Associate) and Jason Whyte (Director)

The Labour Court often delivers judgments which warn employers of the pitfalls of not following a fair process before dismissing an employee for misconduct. A 29 May 2025 judgment again emphasises that both substantive and procedural fairness must be complied with when disciplining employees and that a good reason for dismissal will not excuse procedural unfairness.

While substantive fairness looks at the reason for an employee's dismissal, procedural fairness requires an employer to follow a process that does not adversely affect or limit an employee's rights to fair labour practices. One of an employee's fundamental rights is the right to make representations before a decision is taken by an employer to implement disciplinary proceedings. Together with this right is the right to reasonable time to prepare for a disciplinary hearing, to representation, and to be provided with the outcome of a disciplinary process.

In this case, a police officer employed by the South African Police Services (SAPS), was found guilty of being in possession of unlicensed and stolen ammunition which he stored in his work locker and at home. Following a disciplinary hearing he was dismissed. The officer referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council on the basis that the SAPS witnesses' testimony that unlicensed ammunition was found in his locker and home had been fabricated. The arbitrator saw no reason to reject the evidence of the SAPS witnesses and found the dismissal substantively and procedurally fair.

On review, the Labour Court found a material flaw in the process followed in the disciplinary hearing. The officer was not given the opportunity to question the SAPS' witnesses, and he was found guilty of misconduct based solely on written witness statements. While the SAPS Discipline Regulations are silent on the right of employees to cross-examine witnesses, the Labour Court found that to deny an employee the opportunity to question the evidence of witnesses relied upon by the chairperson was a procedural irregularity. Despite the officer being found guilty of the misconduct, the SAPS was ordered to pay the officer compensation of R140 332 (two months' salary) for the procedural unfairness and the officer's costs in the review application.

The judgment highlights that employers often focus on proving an employee's guilt and overlook the importance of procedural fairness. While establishing guilt is crucial, it is only part of the equation; the process that is followed is equally important. Even if an employee is found guilty of serious misconduct this will not always shield the employer from the legal consequences (and, by extension, costs) if they cut corners procedurally.

We encourage employers to revisit their policies and ensure that disciplinary processes are fair and legally compliant. When disciplining an employee, it is important that the employee:

- Is notified of the disciplinary allegations in a form and language the employee can understand
- Is allowed assistance by a trade union representative or fellow employee
- Is given adequate time to prepare a response
- Is given the opportunity to question the evidence of witnesses which is relied upon by the employer in support of the allegations
- Is given the opportunity to state their case
- Is notified of the outcome of a disciplinary hearing

Should any of the above steps not take place, an employer risks an adverse finding on procedural grounds.

Schouten v Safety and Security Sectoral Bargaining Council (SSSBC) and Others (C44/2022) [2025] ZALCCT 36 (29 May 2025)

Retirement age dismissals: Lessons from the Constitutional Court's Split Decision

By Romy Homveld (Senior Associate) and Murray Alexander (Director)

The question of how employers should treat employees working beyond a normal or agreed retirement age in South Africa has become increasingly complex, particularly in light of a December 2024 sharply divided judgment of the Constitutional Court, in a 4:1:4 split.

The dispute at the heart of this Constitutional Court case revolved around section 187(2)(b) of the Labour Relations Act 1995 (LRA). The provision protects employers who dismiss employees because they have "*reached the normal or agreed retirement age*," deeming such dismissals fair rather than automatically unfair. Section 187(2)(b) enables an employer to lawfully terminate employment as soon as an employee who crosses the threshold of the normal or agreed retirement age. However, in practice, the situation has become more complicated if an employer allows the employee to continue working, or does not clearly formalise a new contract, after that age.

The first judgment by Zondo CJ, Chaskalson AJ, Mathopo J and Schippers AJ adopts a strict and narrow interpretation of section 187(2)(b). It holds that a dismissal based on age is only fair if effected on the date the employee reaches the normal or agreed retirement age, unless the employment or collective agreement specifies a different last working day (such as the last day of the month in which the retirement age is reached). If the employer allows the employee to work beyond this date and then later dismisses them on the basis of age, such dismissal would be automatically unfair. The judgment rejects the long-standing *Waco* approach, which permitted dismissals at any time after the retirement age had been reached.

The second judgment by Van Zyl AJ, takes a contractual and election-based approach. It agrees that *Waco* was wrongly decided but differs from the first judgment by holding that, upon reaching the normal or agreed retirement age, the employer is faced with an election to (1) terminate the employment, or (2) allow it to continue. This election must be exercised within a reasonable time, failing which the employer may be taken to have elected not to terminate on the basis of age. The reasonable period is not fixed and depends on the circumstances. If the employer does not act within a reasonable time, it loses the right to rely on section 187(2)(b). This approach is more flexible than the first judgment, allowing for some delay, but does not afford open-ended discretion to employers as permitted by *Waco*.

The third judgment by Rogers J, Dodson AJ, Kollapen J and Tshiqi J essentially upholds the *Waco* approach, interpreting section 187(2)(b) to mean that, once an employee has reached the normal or agreed retirement age, the employer may fairly dismiss the employee on the basis of age at any time thereafter, provided reasonable notice is given. This approach is the most permissive, granting employers broad discretion to dismiss on grounds of age after the retirement age has been reached.

Given the Court's failure to form a binding majority, employers must proceed cautiously. Until further clarity emerges, the safest course is for employers to take positive, transparent steps at the normal or agreed retirement age. Employers who wish to extend an employee's service beyond the normal or agreed retirement age should do so, for example, by way of a fixed-term contract that expressly states the duration of continued employment and any rights the employer may have to terminate that contract for reasons such as operational requirements. Such a contract should clearly indicate that the original employment concludes when the employee reaches retirement age, and that any subsequent employment is a new arrangement of limited duration. This approach may help employers avoid a scenario where an employee, allowed to continue working indefinitely, later claims that their age-based dismissal was automatically unfair.

If an employer neither dismisses an employee at retirement age nor enters into a new agreement, that employer could face an uphill battle to justify a subsequent dismissal based on age alone.

As it stands, the Constitutional Court's split decision leaves South African employers in a precarious space. Although the practical recommendations above can help reduce the risk of liability for automatically unfair dismissals, further litigation may arise, prompting further judicial clarification. In the meantime, best practice calls for employers to err on the side of caution: if an employee remains at work beyond their agreed retirement age, formalise a new, fixed-term agreement that preserves the employer's right to terminate

based on operational requirements or upon expiry of the contract's term.

Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity obo Strydom and Others v State Information Technology Agency SOC Limited (CCT298/22; CCT346/22) 2025 (3) BCLR 312 (CC)

Schweitzer v WACO Distributors (J463/97) [1998] ZALC 48 (28 July 1998)

The Labour Court's power to intervene in ongoing disciplinary hearings

By Ntsako Mabuza (Candidate Attorney), Jessica Blunden (Associate) and Jason Whyte (Director)

In a June 2025 judgment, the Labour Court has reaffirmed its approach to the court intervening in ongoing disciplinary proceedings. Whilst the case dealt with a number of procedural and jurisdictional issues, the court was called upon to address a fundamental question: under what circumstances, if any, will the Labour Court interdict an employer from proceeding with internal disciplinary action?

The employee approached the Labour Court on an urgent basis, seeking an interim interdict to restrain his employer from conducting a disciplinary hearing against him. He sought this relief pending the outcome of a separate urgent application by the employer to interdict a strike. The employee's application was premised on the argument that the disciplinary process was premature and contingent on the finalisation of the strike interdict which would determine whether the strike was in fact unprotected.

The Labour Court reaffirmed the well-established principle that, under the Labour Relations Act (LRA), the management of workplace discipline is primarily the prerogative of the employer. The court's role is not to "micromanage" internal disciplinary processes. Citing the Labour Appeal Court's decision in *Booysen v Minister of Safety and Security*, the court reiterated that its power to intervene in incomplete disciplinary proceedings is reserved for truly exceptional circumstances—specifically, where a failure to intervene would result in a grave injustice. In this case, the employee failed entirely to demonstrate any such exceptional circumstances. The application was accordingly dismissed. In particular, the court noted that the disciplinary proceedings were already at an advanced stage and that the employee had been accused of matters beyond mere participation in an unprotected strike.

The judgment is significant not only for its affirmation of the principles governing judicial intervention in disciplinary hearings, but also for its candid commentary on the current state of the Labour Court's urgent roll. The court expressed concern at the proliferation of meritless urgent applications, which serve only to further strain the court's already limited resources. The court found that the employer's attorneys had failed to properly advise their client and had persisted with a patently unmeritorious application, in disregard of established legal principles and procedural requirements. As a result, the court made a provisional order for costs personally by the attorneys—a rare but pointed measure intended to deter similar conduct in future.

Key takeaways for employers and employees

- The Labour Court will only intervene in ongoing disciplinary proceedings in truly exceptional circumstances, where grave injustice would otherwise result.
- Employees are expected to exhaust internal remedies and utilise the statutory dispute resolution mechanisms provided by the LRA, rather than seeking urgent judicial intervention.
- Legal representatives are under a duty to properly advise their clients and to avoid burdening the courts with frivolous or ill-conceived applications. Failure to do so may result in personal cost orders.
- Employers retain the right to proceed with disciplinary action, even where related legal proceedings are pending, provided that the process is fair and lawful.

This judgment serves as a timely reminder of the limits of judicial intervention in workplace discipline and the importance of procedural rigour—both for litigants and their legal representatives.

Choko-Choko and Others v Tharisa Minerals (Pty) Ltd (2025/072040) [2025] ZALCJHB 233

Booysen v Minister of Safety and Security and Others (CA 09/08) [2010] ZALAC 21

Section 188A(11) referrals: Implications for internal disciplinary hearings

By Tracey Powell (Candidate Attorney), Romy Homveld (Senior Associate) and Murray Alexander (Director)

Section 188A(11) referrals in terms of the *Labour Relations Act*, 1995 (LRA) can present a challenge for employers trying to complete internal disciplinary enquiry processes. The section allows employees to request the set down of a pre-dismissal arbitration with the CCMA or relevant Bargaining Council (BC) instead of an internal disciplinary enquiry conducted by the employer. The Labour Court (LC) in the case of *Ntombela v Community Scheme Ombud Service* confirmed that for a s188A(11) pre-dismissal arbitration to be heard by a commissioner, the employee must satisfy certain jurisdictional requirements and demonstrate good faith. These jurisdictional requirements are that: the employee must make a protected disclosure; the employer must have subjected the employee to an occupational detriment, for example, a disciplinary enquiry or suspension; the employee must have made the allegation honestly and sincerely; and a causal connection must exist between the protected disclosure and the occupational detriment.

Employees may invoke s188A(11) in an attempt to avoid or delay their employer's internal disciplinary enquiry proceedings by alleging that their disclosures are protected. They do so in the belief that the employer is prohibited from continuing with their internal disciplinary enquiry once the referral has been made. If this were the case, the LRA would need to explicitly provide for a stay of the internal disciplinary enquiry proceedings once a s188A(11) referral is made, which it does not. Further, they mistakenly assume that the administrative act of the case management officer at the CCMA or BC setting the pre-dismissal arbitration down for hearing means that the referral has been accepted, the jurisdictional requirements have been determined and satisfied, and the internal disciplinary proceedings are stayed.

The case of *Ntombela* has provided much needed clarity on the question of who the "decision maker" is and confirmed that it is the commissioner, alternatively the LC when an employee seeks to interdict the continuation of their internal disciplinary enquiry, who must make the determination as to whether the jurisdictional requirements and the element of good faith have been satisfied, before a pre-dismissal arbitration may commence under the auspices of the CCMA or BC. Notably, it is not for the chairperson of the internal disciplinary enquiry to determine whether these requirements are met. It is only once the abovementioned jurisdictional requirements and element of good faith have been determined and satisfied by the commissioner or LC, that the internal disciplinary enquiry proceedings are stayed.

Given that there is no automatic stay of the internal disciplinary proceedings upon an employee's s188A(11) referral and such a stay only occurs once the jurisdictional requirements and element of good faith have been determined, and satisfied, employers who are of the belief that the employee has made the referral in bad faith, in an attempt to frustrate the internal disciplinary proceedings, may wish to continue with the internal disciplinary proceedings. Continuing therewith risks the employer being unsuccessful in opposing an application by an employee to the LC to interdict the internal disciplinary enquiry proceedings. Where an employer continues with the disciplinary enquiry, and no interdict is brought by the employee, but a commissioner determines that the jurisdictional requirements and element of good faith are satisfied, the employer risks a punitive costs order by the commissioner (although this is unlikely). It is therefore important that employers proceed with caution, and possibly take legal advice, when deciding whether to proceed with the internal disciplinary enquiry proceedings after a s188A(11) referral has been made by an employee.

Ntombela v Community Scheme Ombud Service and Others (J1631/23) [2024] ZALCJHB 121 (12 March 2024)

Mamodupi v Property Practitioners Regulatory Authority and Another (J68/23) [2023] ZALCJHB 19 (13 February 2023)

Part 2: "How to" guides

Navigating your way through the amended Employment Equity Act: A practical guide for employers

By Raees Halim (Associate) and Karen Ainslie (Director)

The amended *Employment Equity Act, 1998* (EEA) together with the *Employment Equity Regulations, 2025* (Regulations), have ushered in a new era for employment equity compliance in South Africa. This article provides a practical, step-by-step guide on how to prepare the next employment equity plan (EE Plan) following the amendments which came into force on 1 January 2025. .

Understanding your status: are you a designated employer?
The amended EEA narrows the definition of a "designated employer". Only employers with 50 or more employees are required to comply with the affirmative action provisions of Chapter III of the EEA, regardless of annual turnover. However, all employers, designated or not, remain bound by the prohibition of unfair discrimination in Chapter II.

Action points

- Audit your workforce headcount
- Ensure that you only count employees
- If you employ 50 or more people, you are a designated employer and must comply with the full suite of employment equity obligations

Grasping the expanded definition of people with disabilities
The new definition of "people with disabilities" in relation to targets includes long-term or recurring physical, mental, intellectual, or sensory impairments which, in interaction with barriers, substantially limit prospects of employment. A person will be considered a person with a disability for purposes of the EEA if the person meets three criteria namely:

- They have a physical, mental, intellectual or sensory impairment
- Which is long-term or recurring
- Which substantially limits their prospects of entry into or advancement in employment

It does not follow that a person with a disability will be counted for purposes of the EEA targets. By way of example, a person with poor eyesight who manages to conduct their work with the use of spectacles will not, for purposes of reporting, be deemed as a person with disabilities. However, once an employee's eyesight is such that they require accommodation, such as specific software for reading out emails or a larger computer screen, will they qualify as a person with disabilities.

Action points

- Review your policies and ensure that all employees are aware of the expanded definition of "people with disabilities"
- Issue all employees with the EEA1 form (this is the form that requires all employees to indicate their race, gender and whether they have a disability, as defined) to complete. This will assist the employer with identifying the employee distribution of race, gender and disability at various occupational levels

Sectoral numerical targets: know your sector, know your numbers
A cornerstone of the amended EEA and its Regulations is the introduction of sectoral numerical targets. The Minister of Employment and Labour (Minister) has set five-year sectoral targets for equitable representation of designated groups (black people, women, and people with disabilities) across the top four occupational levels. These targets are minimums, not ceilings. Employers are required to use these targets in their new EE Plans with effect from 1 September 2025.

Ultimately, employers must meet the five-year sectoral numerical targets by 31 August 2030.

Once employers have reached the sectoral targets, they need to set new targets to achieve the Economically Active Population (EAP) figures.

Action points

- Identify the sector in which your business operates
- If you operate in multiple sectors, apply the targets for the sector where the majority of your employees are engaged

- Compare your current workforce profile (the top four occupational levels) to the sectoral targets and identify areas of underrepresentation
- Compare the bottom two occupational levels with the EAP and identify areas of underrepresentation

Developing and implementing the EE Plan
Designated employers must prepare and implement an EE Plan for the period 1 September 2025 to 31 August 2030. While it is not mandatory for employers to prepare a single consolidated five-year plan, shorter, successive annual plans must, in totality, meet the applicable sectoral targets by 31 August 2030.

Employers must include annual goals for each year of the EE Plan. After the fifth year, the employer should reach the sectoral targets. For reporting purposes, employers will be measured against the annual goals set for themselves in their EE Plans.

It remains a requirement for employers to identify barriers to employment equity in their EE Plan and to simultaneously identify measures to address the barriers. This is an important part of the EE Plan which should not be overlooked. An employer may have difficulty persuading the Department of Labour (DoL) that it was unable to achieve the five year sectoral targets if it cannot show that it made attempts to overcome the hurdles it faced in reaching the targets.

Action points

- Use the EEA1 form to collect workforce data, ensuring employees self-declare their gender, race and if they have a disability
- Conduct a barrier analysis using the EEA12 template to identify obstacles to equitable representation. The EEA12 template has been amended to include "harassment" as an obstacle to equitable representation
- Draft the EE Plan using the EEA13 template, setting annual targets that will ultimately align with the sectoral targets and the EAP data
- Assess the market conditions and identify factors (external and internal) standing in the way of the company reaching the sectoral and EAP targets. Conduct a thorough analysis of how these difficulties can be overcome and add these measures into the plan as action items that must be completed
- Consult with representative trade unions or employee representatives throughout the process

Certificate of compliance: your passport to state contracts
In order to comply with the EEA, designated employers must strive towards and achieve the five-year sectoral targets – regardless of whether it intends to do business with the state.

Designated employers wishing to do business with the state, must obtain a compliance certificate from the Minister. The certificate of compliance is valid for 12 months from the date of issue. The DoL's online reporting platform now includes a section where employers can apply for a certificate as well as download previously issued certificates in the event of misplacement. To qualify, designated employers must:

- Meet their sectoral targets or provide a justifiable reason for non-compliance (such as insufficient recruitment opportunities, mergers, economic downturn etc). Employers who provide reasons for failing to reach the sectoral targets will be approached by DoL inspectors to verify the reasons offered for non-compliance
- Submit the annual report timeously
- Have no adverse CCMA or court findings for unfair discrimination or non-payment of the national minimum wage in the preceding 12 months. Employers do not have to declare pending litigation or matters that are under review or on appeal

Action points

- Apply for the certificate online using the new EEA15 form
- Keep a proper record of difficulties which the company is experiencing with the sectoral targets so that this can be submitted to the DoL inspectors in support of any argument why the company was unable to reach the sectoral targets. If an employer experiences difficulties in achieving its targets early on, it should consider amending the EE Plan to include these difficulties and measures to address it
- Seek proper legal assistance when faced with an unfair discrimination claim in order to ensure that the claim is dismissed and that there are no adverse findings against the company in matters concerning allegations of discrimination

Concluding remarks
The amended EEA and its Regulations demand a proactive, structured approach to compliance. It is important that designated employers have a good understanding of what EE Plans must look like, how EEA compliance will be assessed and what needs to be in place to receive a certificate of compliance. In addition, designated employers must bear in mind that external factors such as unfair discrimination awards and judgments will impact their ability to obtain a certificate of compliance.

Retrenchments: A 'how to' guide for employers

By Metja Ngoasheng (Candidate Attorney), Heidi Davis (Associate) and Jason Whyte (Director)

Retrenchments are a form of "no fault" dismissals in which employees are dismissed based purely on an employer's operational requirements and not because an employee has committed any wrongdoing or is incapable of performing their job. Considering its impact on employees, and the absence of any fault on their part, the retrenchment process is often thought of as a measure of last resort and thus subject to strict procedural and substantive requirements as set out in sections 189 and 189A of the Labour Relations Act, 1995 (LRA).

Scope of large or small scale retrenchments
The LRA distinguishes between large and small scale retrenchments. Large scale retrenchments are subject to special requirements in terms of procedure. It is thus important for employers to first assess how many employees are likely to be in scope.

A retrenchment is considered a large scale retrenchment if the employer employees more than 50 employees and intends retrenching, on a single occasion or cumulatively over a 12-month period:

- 10 or more employees, if the employer employs 50 – 200 employees
- 20 or more employees, if the employer employees 201 – 200 employees
- 30 or more employees, if the employer employs 301 – 400 employees
- 40 or more employees, if the employer employs 401 – 500 employees
- 50 or more employees, if the employer employs 501 or more employees.

A retrenchment which falls under the above scope is considered a small-scale retrenchment.

Substantive fairness
The employer must have a valid and justifiable operational reason which necessitates the proposed retrenchment. A retrenchment cannot be used as a convenient substitute for misconduct or incapacity proceedings.

Genuine operational reasons include reasons based on the economic, technological, structural or similar needs of an employer. These can be notably wide and range from an unaffordability to maintain the current scale of the workforce to a restructuring of the workforce purely because a new structure would be more profitable or more efficient. A current leading cause for restructuring is the emergence of artificial intelligence (AI) and the need to restructure to accommodate it.

Should a retrenchment be successfully challenged as being substantively unfair, the primary remedy is reinstatement. It is important to ensure that retrenchments are genuinely required and are not used as smoke screens for misconduct or incapacity dismissals as this can result in major challenges for employers who are required by a court order to reinstate a large number of employees, often with backpay.

Alternatively, if an employer is found to have abused the retrenchment process to dismiss delinquent or poor performing employees, the Labour Court may award sufficient compensation to employees of up to twelve months remuneration.

Procedural fairness
Any retrenchment – both small and large scale – occurs in three steps: notice of the proposed retrenchment; consultation; and consensus to termination or a final decision to terminate.

Step one: a section 189(3) notice of proposed retrenchment

As soon as the employer contemplates retrenchment as a possibility, they must issue a written notice inviting the affected employees and/or their representatives to consult on the proposed retrenchment. The notice must contain all the necessary information relevant to the retrenchment including:

- The reasons for the proposed retrenchment
- The alternatives considered by the employer to avoid the retrenchment and the reasons for rejecting those alternatives
- The number of employees likely to be affected and the job categories in which they are employed
- The proposed criteria for selecting which employees to dismiss
- The severance pay proposed
- Any assistance that the employer proposes to offer to the employees to be dismissed
- Any possibility of the future re-employment of the employees who are dismissed
- The number of employees employed by the employer
- The number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months

If the retrenchment is a large scale retrenchment, the employer or a majority trade union may request the appointment of a facilitator from the CCMA. The facilitator will then guide the consultation process through a number of facilitation meetings.

Step two: consultations

The consultation process is designed to allow the employer and employees to jointly determine whether retrenchment is necessary to achieve the employer's operational requirements. Consultations between the parties must be a genuine joint consensus-seeking process and must cover all the topics required for inclusion in the section 189(3) notice.

It is necessary that sufficient information be disclosed to the employees to allow the consultation process to take place fairly. The courts consider the fairness of a retrenchment process to be found in the requirement of consultation prior to a final decision on retrenchment being made.

The consultation must be in good faith. Employees or their representatives must be allowed to make submissions in response to the information set out in the notice, and the employer must consider the submissions in earnest and, if possible, provide responses as to why certain suggestions would or would not be feasible. The purpose of the consultation, namely to ensure that the decision on retrenchment is genuinely justifiable, cannot be achieved without meaningful participation from both sides.

A few key points to note:

- Selection criteria of which employees will be dismissed can be agreed upon or, if no agreement can be reached, unilaterally determined by the employer.
- Selection criteria must be fair and objective. The most common objective criteria is the "last in, first out principle" but can include other objective criteria such as length of service, skills, experience, qualifications and who is operationally required such as AI specialists. A combination of selection criteria may be relied upon by the employer.
- Employers may not rely on subjective selection criteria such as fraught working relationships, disciplinary records and poor performance which is not evidenced by objective performance evaluations. Subjective or discriminatory criteria may render the process unfair.
- Measures by which retrenchment might be avoided could include for temporary layoffs, reduced working hours, voluntary retrenchment packages, or possible salary reductions. A failure to consider alternatives may result in a finding of procedural unfairness.

In respect of large scale retrenchments, the CCMA facilitator will assist the parties in attempting to reach consensus through a number of facilitation meetings which will take place during a period of 60 calendar days after the notification has been issued. The employer may not retrench during that 60-day period unless the consulting parties have reached agreement.

Step three: final decision and retrenchment notice

Following consultation, the best case scenario is that the employer and affected employees reach consensus on the proposed retrenchment which involves the signing of a consensus letter, and the payment of severance pay.

If consensus cannot be reached, an employer may decide to retrench the employees according to the selection criteria. The employer must then issue the employees with formal retrenchment letters and provide them with severance pay. Section 41 of the Basic Conditions of Employment Act,

1997 provides that, at a minimum, this is equivalent to one week's salary for every completed year of service.

At any point in the process the employee may agree to a voluntary retrenchment whereby the employee agrees to be retrenched due to the employer's operational requirements, and a separation agreement is entered into between the parties. This agreement will include a waiver by the employee of their right to institute any claim against the employer arising from the retrenchment in return for the employer providing the employee what they are legally entitled to upon retrenchment (i.e. severance pay and leave pay) and an additional benefit or payment in excess of what the employee is legally entitled to as a means to "sweeten the deal".

Should a retrenchment be successfully challenged solely as being procedurally unfair, the Labour Court may not reinstate the employees and may award up to twelve months remuneration to each affected employee. Therefore, no matter how genuine the employer's reason for the retrenchment may be, if they undertake a process which is not fair, they will be faced with potentially hefty amounts to pay to affected employees.

In respect of large scale retrenchments, the trade union representing the employees may also seek an urgent order in the Labour Court if it believes that the procedure is unfair. This could significantly delay the outcome of the retrenchment process.

Concluding remarks
Employers are reminded that it is imperative to follow a procedurally and substantively fair retrenchment process. Failure to comply with any of the above requirements could result in the dismissals being set aside and the employers being required to reinstate and/or to compensate large numbers of affected employees. Retrenchments are not just a mere 'tick-box exercise' and compliance with the aforementioned prescripts is especially important as the onus to show that a dismissal is fair rests with the employer. By following this guidance, employers can ensure that the retrenchment process is affected in a manner that is procedurally and substantively fair, thereby minimising the risks of such dismissals being challenged.

The ins and outs of disciplinary hearings

By Frances Barker (Associate), Heidi Davis (Associate) and Jason Whyte (Director)

Introduction
Employers in South Africa are legally obliged to ensure that disciplinary hearings are conducted fairly and in accordance with the *Labour Relations Act, 1995* (LRA). Although there is no strict legal requirement for hearings to be overly formal, employers are bound by their internal disciplinary policies and procedures, which may prescribe a specific process. This guide offers practical steps and considerations for employers, with the aim of making the disciplinary process as transparent and efficient as possible.

Relevant legal framework
The LRA sets out the rules for fair disciplinary procedures, and the *Code of Good Practice: Dismissal* (the Code), as updated on 21 January 2025, provides guidelines for both procedural and substantive fairness. The Commission for Conciliation, Mediation and Arbitration (CCMA) is bound to consider the Code when assessing whether a disciplinary process was fair. Employers and employee are required to abide by any internal disciplinary policies.

Preparing for the hearing
One of the most critical aspects of any disciplinary process is thorough preparation. Employers should start by reviewing their disciplinary policy, if such policy exists, and the Code, to confirm the required procedure. This generally involves identifying and collecting all relevant documents, evidence, and witness testimonies which will be presented by the company representative at the hearing.

It is also important to appoint an appropriate chairperson, whether internal or external, to preside over the hearing. To ensure objectivity and avoid the perception of bias, the chairperson should ideally be someone who does not have a direct working relationship with the employee. The chairperson must remain impartial throughout the process, making decisions based solely on the evidence presented during the hearing. If there is any doubt about the chairperson's ability to be objective, another suitable person should be appointed.

Employers must carefully consider the best candidate to present the company's case at the disciplinary hearing, which is often an employee who was not involved in the events which led to the charges. This avoids the need for the company representative themselves to give evidence. If the employee requests an interpreter or if language barriers exist, the employer must make the necessary arrangements for an interpreter.

Once the employer is adequately prepared, they should provide the employee with a written notice of the hearing that clearly states:

- The date, time, and venue of the hearing
- The allegations or charges formulated in plain understandable language
- The employee's rights which include the right:
  - To representation by a colleague of their choice, or trade union representative (where applicable)
  - To call witnesses and to cross-examine any of the company's witnesses
  - To challenge any evidence presented by the company
  - To present evidence themselves by calling their own witnesses and/or documentary evidence
  - To an interpreter

Although the charge sheet need not be overly formal or technical, it must contain enough detail for the employee to understand the charges against them and prepare a defence. The employee should be given sufficient time – generally at least two working days – to prepare for the hearing. To streamline the process, it is recommended that the employer draft the charges in line with their disciplinary policy. Care must also be taken when formulating the charges which should be kept as simple as possible in order to avoid setting standards of proof that are too high. For example, it is generally sufficient to charge an employee with dishonesty, but unnecessary to allege fraud.

Conducting the hearing

When the hearing commences, the chairperson should introduce everyone present and confirm that the employee understands the allegations. The chairperson should carefully explain the procedure at the outset, including how evidence will be led, the right of each party to question witnesses, and the opportunity for opening and closing statements.

It is generally recommended that the disciplinary hearing proceed as follows:

- Opening statements
- The employer presents their case through witness testimony and documentary evidence. This involves examination, cross-examination and re-examination (if necessary) of the employer's witnesses
- The employee then presents their defence by presenting their version of events. Again, this is done through their own testimony and the testimony of witnesses and documentary evidence. In this instance, the employer will be afforded the opportunity to cross-examine the employee's witnesses
- Closing statements
- Depending on the nature and severity of the charge, the chairperson may adjourn the hearing for a short period and reconvene with a finding on guilt. If the employee is found guilty, the parties will then address the chairperson on the sanction with the company representative detailing the sanction they seek and providing aggravating factors (such as the severity of the charge and whether the trust relationship has broken down) and the employee presenting mitigating factors (such as their remorse, if they have lengthy service with the company, and if they are the breadwinner)
- Should the chairperson need more time to consider the evidence presented, they may instead call for representations on sanction before the hearing adjourns with the intent to, within a few days, provide a single finding on guilt and, if necessary, their recommended sanction

The chairperson is required to keep an adequate record of the proceedings, either through an audio recording or detailed notes.

If, at any point, there is a need to postpone the hearing (for example, to gather further details or accommodate an unavailable witness), the employer should ensure that any postponement decisions are communicated promptly. The hearing should be reconvened as soon as reasonably possible so as not to delay the matter unduly.

Outcome and follow-up actions

Once the evidence is presented, closing arguments have been heard and sanction presentations made, the chairperson must make a finding on guilt and sanction based on the facts presented. If the employee is found not guilty, the matter is closed and the employment relationship continues. If the employee is found guilty, the chairperson will recommend a sanction based on facts, the employer's disciplinary policy, the Code and the prevailing case law Sanctions range from a warning to dismissal, depending on the gravity of the misconduct, the employee's disciplinary record, and the surrounding circumstances.

The employer should deliver the outcome to the employee in writing and, where dismissal occurs, inform the employee of their right to refer a dispute to the CCMA within 30 days if they believe the dismissal was procedurally or substantively unfair. If the employer's disciplinary policy provides for an internal appeal, the employer should communicate that right and the applicable time frames and procedure to the employee without delay. Notably, an employee need not follow an internal appeal process before approaching the CCMA. The appeal process is not required by law.

Conclusion

Taking a fair, consistent, and transparent approach to disciplinary hearings is essential to promote trust within the workplace and to ensure legal compliance. Employers should ensure that they prepare in advance, communicate clearly with the employee, and collate all relevant documentation in order to conduct a fair and efficient process. By doing so, employers will not only minimise the risk of procedural and substantive challenges but also foster a sense of integrity and respect within their organisation.

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