SUBSTANTIVE FAIRNESS IN DISMISSALS FOR OPERATIONAL REQUIREMENTS CASES

by

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SUMMARY

Part II of the International Labour Organisation Convention 158 recognises operational requirements of an organisation as a ground for dismissal.

Section 213 of the Labour Relations Act describes operational requirements reasons as requirements based on the economic, technological, structural or related needs of an employer. The employer’s needs in case of operational requirement dismissal must be separated from the other reasons for dismissal, such as misconduct and incapacity.

Operational requirements dismissals are governed by section 189 of the LRA. The LRA draws a distinction between small and large scale dismissals and regulates them separately. Section 189 control small scale dismissals, while section 189A pertains to large scale dismissals.

For substantive fairness of a dismissal for operational requirements, the employer must prove that the said reason is one based on operational requirements of the business. The employer must be able to prove that the reason for the dismissal falls within the statutory definition of operational requirements.

Employers are not allowed to use retrenchment to dismiss employees who they believe to have performed unsatisfactorily. This means that employers are not entitled to retrench for ulterior reasons, than those of operational requirements.

The Labour Court has held that an employer may not under any situation retrench an employee on a fixed-term contract if the termination takes place before the contract of the employee ends, unless the contract of employment makes provision for termination at an earlier date. Retrenchment in this situation will amount to a breach of contract.

Another point of interest in dismissals for operational requirements is that the Labour Relations Act states that it is not unlawful to dismiss a striking employee for reasons based on the employer’s operational requirements. In relation to the selection criteria to be used during these dismissals, the Labour Relations Act again states that if an agreement cannot be reached between the consulting parties, then the employer must use criteria that are fair and objective.
CHAPTER 1: INTRODUCTION

Under the common law, the only requirement was that a dismissal had to be lawful and this requirement was met if the employer gave an employee notice of the termination of employment. There was no requirement for the dismissal to be fair. The Labour Relations Act (hereinafter referred to as the “LRA”), on the other hand, requires that a dismissal must be effected for a fair reason and a fair procedure must be followed.

The Labour Relations Act acknowledges three reasons on which a termination of employment will be considered to be legitimate. These include misconduct, incapacity, and the operational requirements of the employer’s business.¹

Dismissals based on operational requirements are usually founded on the economic, technological, structural or similar needs of the employer.² It is not easy to identify all the conditions that might legitimately form basis of a dismissal for this reason. In addition to reasons of structural, economic and technological needs there are those similar needs which are not clearly defined.

The idea of operational requirements was significantly ill-defined than what it is now. The LRA of 1995 clearly defines what constitutes an operational requirement. The definition of operational requirements in the LRA, “even though it provides more clarity and coherence to the idea of the employer’s operational requirements as a reason for dismissal, has also had the effect of narrowing down how we interpret this important concept.”³

Dismissals for operational requirements are regulated in terms of section 189 and 189A of the LRA. Section 189A deals with large scale dismissals, whilst section 189 deals with small scale dismissals.

Section 188(2) of the LRA—requires that any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice issued in terms

¹ Labour Relations Act 66 of 1995 Schedule 8 2(2).
² 66 of 1995.
³ Mischke “Misconduct or operational requirements…. the plot thickens” 2011.
of the LRA. Accordingly, when dealing with dismissals for operational requirements regard must be made to the Code of Good Practice on Dismissals based on Operational Requirements.

Dismissal for operational requirements are related to the business needs of the employer, regardless whether these needs are based on downsizing, restructuring, new technology, or by decreasing the costs of wages to ensure the continued existence of the organisation. A note must be taken that not all reasons submitted by the employer will amount to a real reason to retrench. The reasons given by the employer to dismiss will be doubtful if an employer retrenches and takes on new employees or makes use of casual or contract workers simultaneously.

Section 189 of the LRA, states that when an employer considers dismissing one or more employees for reasons based on the employer’s operational requirements, the employer must consult the appropriate trade union, relevant employees and or forums. During this consultation, the employer and the consulting parties must embark in a meaningful joint consensus-seeking process and endeavour to reach an agreement. The employer must also give notice before the consultation, requesting the consulting party to consult with it and the employer must also divulge in writing all the applicable information for consultation.

Another controversy during retrenchments has been strike action, being submitted as reason for the dismissal. When during strike action, the continued existence of an employer’s enterprise is threatened; it may justify the dismissal of employees on the grounds of operational requirements. Employees have voiced their grievance in this regard, that in specifically hard times, employees feel prejudiced to strike over issues as it might lead to their dismissals. Also, when considering the definition of dismissal for operational requirements, the issue of strike as a reason for the dismissal is not mentioned. However, in reality, the effect of strike on the profitability and productivity of the business can lead to the business having to cut down costs through this type of dismissal.

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5 Mischke “The need to retrench” 2007.


7 Loock “Employees on strike can be sacked” 1999.
It must also be taken into consideration that it is not unfair for an employer to restructure even a profitable business to increase its turnover and to stay competitive even though this may lead to retrenchment. This substantiates the theory that an employer may restructure not only make a profit but also to enhance a profit.\textsuperscript{8}

The LRA states that a dismissal will be fair if it is implemented for a fair reason and a fair procedure is also followed. This paper will focus on substantive fairness in relation to dismissals for operational requirements reasons.

\textsuperscript{8}Mischke “Operational requirements – making business sense” 2007.
CHAPTER 2: LITERATURE REVIEW

Operational requirements will be accepted as a legitimate reason for dismissal of employees, in terms of the Labour Relations Act. However, dismissal falling under this category will be subject to certain strict conditions.

2.1 The ILO Conventions

South Africa is a member of the International Labour Organisation (ILO) and has therefore ratified a number of ILO conventions. The ILO Convention on Termination of Employment (No. 158) was adopted in 1982 and has so far been ratified by some 33 countries. The Convention requires Countries to specify the grounds upon which a worker can be terminated from employment. Employment cannot be terminated by the employer unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the business.

As consequence of the ILO convention and its ratification in South Africa, employers are permitted to dismiss only where a legitimate reason to do so exists. The reasons for dismissal can be on three grounds which include cases of misconduct, incapacity of an employee or the need to retrench or restructure due to operational needs. The employer must be able to substantiate how the reason of the dismissal is categorised into one of these three categories. These stringent rules make it very difficult to use the retrenchment process where there are no valid grounds.

Article 8 of the ILO Convention 158 of 1982 requires that workers who are unfairly dismissed be entitled to refer their disputes to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator. By providing employees subject to large-scale operational requirement dismissal for substantive reasons with a choice either to refer

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10 Bendix Industrial Relations (2001) 388.
12 Good Practice Note “Managing Retrenchment” 2005 Volume No.4 11.
13 “A critical analysis of operational requirements dismissal as governed by the South African Labour Relations Act (LRA) in the context of Neo-liberal Global Pressure” 2007 2.
disputes to the Labour Court or to go on strike the LRA goes further than what is required by the ILO. Even though South African law does comply with ILO standards both still provide inadequate protection to retrenched employees. The ILO allows the right to strike to be denied to employees who are retrenched, while South African law allows the right to strike to be denied in the case of small-scale dismissal.¹⁴

An employee dismissed for operational reasons, who is under the impression that the dismissal was unfair on any grounds, that employee can refer the dispute to the Labour Court. A group of employees can even go further and go on strike action. A single employee is however restricted from strike action and his or her dispute will be dealt with only at the labour court.

The Convention (158) is supported by the ILO Termination of Employment Recommendations, 1982, which contains specific guidance with regard to retrenchment situations. The Recommendations also provides guidance on appropriate criteria for selection of those workers to be dismissed, suggesting that the selection criteria of those employees whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to a criteria, established wherever possible in advance, which give due weight to both the interests of the business, establishment or service and to the interests of the workers.¹⁵

2.2 Dismissal Grounds for Operational Requirements

The LRA makes use of the term ‘dismissal for operational requirements of the employer’ instead of the word ‘retrenchment’, which is generally known. The phrase ‘operational requirements’ has an unambiguous lawful meaning, in that the requirements for this type of dismissal are based on the economic, technological, structural or similar needs of an employer.¹⁶

Operational requirements, is described in section 213 of the Labour Relations Act as a requirements based on the economic, technological, structural or related needs of a

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¹⁵ Good Practice 2005 No.4 11.

employer. The Code of Good Practice describes economic reasons as those related to the financial running of the business. Technological grounds relate to the creation of new technology that influence work relationships either by making existing jobs redundant or by requiring employees to adjust to the new technology or a major restructuring of the workplace. Structural reasons relate to the dismissal as an aftermath to a restructuring of the employer’s organisation.17

Similar needs of the employer would seem to be restricted in the LRA as grounds related to financial, technological and structural changes of the organisation. The spotlight should be on the real reason for dismissal because it could be related to, or based on, more than one legal ground. Similar needs cannot be stretched to include a reason related to conduct.18

Operational requirements dismissals are governed by section 189 of the LRA. The LRA draws a distinction between small and large scale dismissals and regulates them separately. Section 189 control small scale dismissals, while Section 189A pertains to large scale dismissals. Section 189A of the LRA applies to an employer employing more than 50 employees if that employer considers dismissing as a result of employer’s operational requirements. The employer must be contemplating to dismiss as follows:

- 10 employees, if the employer employs up to 200 employees,
- 20 employees if the employer employs more than 200 employees,
- 30 employees, if the employer employs more than 300 employees,
- 40 employees if the employer employs more than 400 employees,
- 50 employees if the employer employs more than 500 employees.19

The test of substantive fairness during dismissal for operational requirements has been interpreted in different ways by the labour court and the labour appeal court, varying from retrenchment being recognised as a legitimate way to increase profits to it being allowed as

a measure of last resort. When employees are retrenched, certain guidelines and procedures have to be followed.\textsuperscript{20}

The courts have ruled that employers do not have to be in a dire state before the initiation of the retrenchment process. However, it should be last resort. Retrenchment will be determined to be valid when the employer has investigated all possible avenues, other than retrenchment and determines that the only way that the organisation will survive or remain profitable would be to retrench.

“Legislature with the enactment of section 189A, has attempted to define the concept of fair reason for dismissal based on operational grounds. The definition applies only to disputes falling within the ambit of section 189A, although it is submitted that it establishes a norm which the courts are bound to apply generally in testing fairness as a reason for an operational requirements dismissal. Nevertheless, the definition attaches little or nothing to the philosophy developed by the courts. The large jurisprudence on the question therefore remains the main foundation of clarification.”\textsuperscript{21}

The employer’s needs in case of operational requirement dismissal must be separated from the others reasons for dismissal, such as misconduct and incapacity. In misconduct or incapacity cases, the cause for dismissal is generally instigated by the employee in some way or another. The employee could have failed to conform to workplace rules or the employee was incompetent to do the work for which he or she was employed for. In the case of operational requirements, the reason is based in the employer’s needs and requirements.\textsuperscript{22}

The employer, in its retrenchment activities, must avoid committing an unfair labour practice.\textsuperscript{23} According to section 187 of the LRA, a dismissal to force an employee to accept changes in his or her terms and conditions of employment is considered as automatically unfair.\textsuperscript{24}


\textsuperscript{22} Basson, Christianson, Garbers, le Roux, Mischke & Strydom (2005) Essential Labour Law 4\textsuperscript{th} ed 146.


\textsuperscript{24} 66 of 1995.
The employer must prove that the proffered reason is one based on the operational requirements of the business. The employer will thus have to “prove that the reason for dismissal falls within the statutory definition of operational requirements. The employer must prove that the proffered reason actually existed and that it was the real reason for the dismissal.” The employer must prove that the reason is not a mere cover-up for another reason for dismissal of the employees.  

In general, employers are not allowed to use the retrenchment process to rid themselves of employees whose services have previously proved unsatisfactory; they are certainly never entitled to do so for ulterior reasons or motives.  

2.3 The Role of the Court

In the preceding Act, the courts demonstrated an obvious unwillingness to question an employer’s decision to dismiss employees on operational grounds. Earlier decisions “considered a bona fide and non-discriminatory decision by the employer to be sufficient. Once that was established, it would enquire into the merits of the decision.”

Therefore, the court appeared to re-establish a ‘reasonable employer test’, comparing reasonable conduct by an employer with fairness. As consequence, the decision to dismiss an employee may become more complex to defend as rational if a plausible alternative is put forward by the employees.

Although the courts do not want to decide on behalf of employers during the retrenchment process, should it come to the fore that there was an alternative to the retrenchment process, the courts will likely to side with the affected employees. However, the courts are reluctant to tell employers step by step as to how they should run the retrenchments process. What the courts expect though, is for employers to adhere to the guidelines stipulated by the Labour Relations Act.

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“The current Act has defined the role of the courts more clearly. The Act has established the employer’s right to take operational decisions in the perspective of changing norms of managerial practice and public policy favouring greater participation by employees. In the context of dismissal, procedural fairness is not only a value in its own right but a means of establishing whether substantive grounds are in fact present and, if so, the most appropriate ways of mitigating the consequences.”

The Labour appeal court has confirmed that an employer may dismiss employees for operational requirements in order to get rid of certain employees and employ a new group of employees that will be prepared to work according to the needs of the business. In this case, the employer will be dismissing the old employees because the contracts of employment between the employer and employees can no longer provide for the employer’s operational requirement.

29 Du Toit et al Labour Relations Law 427.

CHAPTER 3: THE MEANING OF OPERATIONAL REQUIREMENTS

The Code of Good Practice on Dismissal for Operational Requirements in the Labour Relations Act defines dismissals due to operational requirements as those dismissals rooted in the economic, technological, structural or similar needs of the employer.  

“The recognition of operational requirements as a ground for dismissal originates from Part II of the International Labour Organisation Convention 158.”

A need to retrench arises when an employer experiences losses that jeopardise the sustained existence of the business. In the latter, retrenchment would be for a valid economic reason in that it relates to the employer’s necessity to cut costs and to guarantee its short or medium term survival.

3.1 Technological Needs

According to the Code of Good Practice on Dismissals based on Operational Requirements, technological needs refer to the introduction of new technology that have an effect on working relationships by rendering jobs redundant or which require employees to adjust working techniques to new technologies.

This means that it would be fair for the employer to dismiss employees who become redundant after the introduction of new technology, provided that a fair procedure in effecting the dismissals is followed. This was the case in Naicker v Q Data where the dismissal of an employee who lacked the skills required by the new technology introduced by the employer was found to substantively fair by the labour court.

31 66 of 1995 (1).
33 Mischke “The need to retrench” 2006.
34 66 of 1995.
35 Naicker v Q Data Consulting [2002] 23 ILJ 739 42.
3.2 Structural Needs

The Act further describes structural needs as the redundancy of posts following the restructuring of the employer’s enterprise.\(^{36}\) This occurs in circumstances where an organisation converts itself into new working clusters, or joins other existing clusters.\(^{37}\)

In *Mzolo v Toyota SA*, the employer required to remodel its production methods to become more efficient in order to remain competitive.\(^{38}\) Toyota reduced man-hours through voluntary early retirement, severance packages, short time and extended cost cutting measures. The employer had to further decrease production volumes due to loss of business.\(^{39}\) On these reasons forwarded by the employer, the labour court found the retrenchment to have been substantively fair.\(^{40}\)

In *Enterprise Foods v Allen*, Enterprise Foods merged with another company, Renown Foods and after this restructuring some employees became redundant.\(^{41}\) The court held their dismissal for operational requirements to be fair.\(^{42}\)

In the current economic climate, many organisations have had to formulate new strategies and plans to ensure efficiency and cut out costs. This is also attributed to globalisation where companies are not only competing locally, but globally, with organisations that are far more technologically advanced. If these companies decide to restructure themselves and in the process some employees become redundant, then their dismissal could be held to be substantively fair.

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38 *Mzolo & others v Toyota SA Manufacturing (D510 /99) [2000] (LC) 143 2.*

39 *Mzolo V Toyota 4.*

40 *Mzolo v Toyota 151.*

41 *Enterprise Foods (Pty) Ltd v Allen & others [2004] 25 ILJ 1251 (LAC) 7.*

42 *Enterprise Foods v Allen 18.*
3.3 Economic Needs

Economic reasons resulting in retrenchment are generally related to the financial management of the organisation. Economic reasons refer to external factors such as the state of the market and economy, which impact on business profitability. A decrease in demand for a company’s products may call for budget cuts and the decrease of working hours, leading to job losses.

In Smith v Courier Freight, the employer had not been profitable. The shareholders were informed of the loss, leading to Courier Freight (employer) proposing retrenchments. The retrenched employees had been unhappy that their dismissals were brought about by the financial state of the company. They challenged the substantive and procedural fairness of their dismissal. However, the labour court ruled that is was satisfied that Courier Freight had proved on the balance of probabilities that there was a legitimate reason to restructure the finance department and to retain only the employees with the required skills and competencies. The labour court then ruled the retrenchment of the employees to be substantively fair.

Even if the economic reason for the retrenchments had been caused by negligence of management, the court will still regard it as a justifiable reason for dismissal for operational requirements. In any case, it is generally unbelievable that a company will mishandle itself with an outlook of dismissing its employees. The intentions of employers are not suspect unless there is clear substantiation of such unfair motives.

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45 Smith and others v Courier Freight [2008] 29 ILJ 420 (LC) 3.
46 Smith v Courier Freight 1.
47 Smith v Courier Freights 58.
3.4 Similar Needs

Less clear is the meaning of “similar needs.” The Code of Good Practice does not define what “similar needs” are. According to Du Toit\(^\text{49}\) similar needs would seem to be restricted to grounds that are similar to economic, technological and structural reorganisation of the enterprise. Du Toit further argues that the meaning of ‘similar’ needs cannot be extended to include a reason related to conduct. However, there could be instances where there is overlapping between operational requirements and incapacity or misconduct. For instance, incompatibility which means the ‘inability of an employee to work in harmony with fellow employees’, is regarded as a form of incapacity. However, it is possible that inability to work in harmony with fellow employees can adversely affect production. This may in turn result in financial losses for the company. This could now give rise to the need to dismissals for operational requirements dismissal. It is for this reason that Du Toit argues that when using ‘similar needs’ the focus should be on the actual reason for dismissal because it could be related to, or based on, more than one legal ground.

3.4.1 Varying employee’s terms and conditions of employment:

A business may have to be restructured, or it may have to merge or amalgamate with another enterprise, or its mode of operation may have to be altered in order to ensure its survival. These changes may lead to an employee becoming redundant, but changes of this sort may also lead to the employee being offered a new position with changes to the terms and conditions of employment. If the employee unreasonably refuses to accept the changes to the terms and conditions of employment, the employee may be dismissed for operational reasons.\(^\text{50}\)

3.5 Changes to Terms and Conditions of Employment and Operational Requirements

Section 187(1)(c) states that a dismissal is automatically unfair, if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee.


\(^{50}\) Basson et al *Essential Labour Law* (2005) 147.
The classification of these reasons as automatically unfair, indicate that they cannot be classified as misconduct, incapacity or a dismissal for operational requirements. As previously indicated, the dividing line between automatically unfair dismissals and those initiated for lawful reasons may sometimes give a vague idea.

There has been a link between changes to terms and condition of employment and operational requirements. In some circumstances this may have resulted in overlapping between an automatically unfair dismissal in terms of s187(1)(c) of the LRA and operational requirements dismissals.

For substantive fairness, the employer must prove that the said reason is one based on operational requirements of the business. “The employer will have to prove that the reason for the dismissal falls within the statutory definition of operational requirements.”

The LRA permits employers to dismiss employees on grounds of operational requirements. This means that an employer can restructure an enterprise in order to ensure its competitiveness. In some cases this may result in some employees becoming redundant. For instance an employer may be forced to introduce a new shift system for employees in order to meet the operational requirements of the business. On the other hand, the employees may be unwilling to accept the new shift system which is necessitated by the business needs. This was the case in Fry’s Metals v NUMSA & Others.

The challenge faced by the employer would be that if he or she dismisses the employees in order to force them to accept the new shift system, such a dismissal would be automatically unfair in terms of the LRA. On the other hand, if the new shift system is not introduced then the operational needs of the business would be adversely affected.

This tension between the operational needs of the business was dealt with in the Fry’s Metals case, where the court held that the employer may dismiss employees who are unable to meet the operational requirements of the business as long as those dismissals are final

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51 Basson et al Essential labour law 151.

52 Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA and others [2003] 24 ILJ 133 (LAC) 6.

53 66 of 1995 section 187(1)(c).
and irrevocable. Basson states that “the LRA does not distinguish between operational requirements in the context where business is fighting for survival and operational requirements in the case of a profitable business wanting to make even more profit.”

3.6 Conclusion

The LRA allows an employer to dismiss employees for operational requirements. If a dismissal is effected for operational requirements reasons, it must fall within the ambit of the Dismissal for Operational Requirements definition. If the reasons are outside of the definition, that dismissal can be said to be automatically unfair.

This requirement essentially entails that the reason for dismissal must be for operational requirements as defined in the Code of Good Practice on Dismissal based on Operational requirements and section 213 of the LRA. The dismissal must also be the real reason for the dismissal and not a camouflage for any other reason.

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CHAPTER 4: FAIRNESS DURING DISMISSAL FOR OPERATIONAL REQUIREMENTS

Section 188(1)(a) of the LRA states that a dismissal would be unfair if the employer fails to show that the reason for the dismissal was for a fair reason related to the employee’s conduct or capacity or that it is based on the employer’s operational requirements. Accordingly, a dismissal for operational requirements must be substantively fair.

4.1. The approach of the courts in determining fairness

For quite some time the courts assumed that the substantive fairness requirement for operational requirements was met if the employer could demonstrate that the reason for the dismissal fell within the ambit of the definition of operational requirements and that the employer had also followed a fair procedure. The reason behind this deference to the employer’s decision was the fact that the court felt that the employer was best placed to know the needs of the business. SACTWU v Discreto emphasised the fact that the court must defer to the employer’s decision to dismiss for operational requirements this way:

“The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer’s ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham…The manner in which the court adjudges the latter is to enquire whether the legal requirements for a proper consultation process [have] been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds.”

However, in BMD Knitting Mills v SACTWU the court questioned the fairness of this approach of deferring to the employer’s decision. It held that it is the role of the court to actually scrutinise the decision of the employer. The court aptly put it this way:

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56 SACTWU & others v Discreto (a division of Trump and Springbok Holdings [1998] 19 ILJ 1451 (LAC) 8.
“The word ‘fair’ introduces a comparator that is a reason which must be fair to both parties affected by the decision. The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face-value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.”

It is also worth noting that in an earlier decision in National Union of Metalworkers of SA v Atlantis Diesel Engines, the deferential approach was severely criticised in this way:

“However, we respectfully differ from their suggestion that the decision to retrench could be fair simply because it is bona fide and made in a business-like manner. That approach suggests that the court’s function is merely to determine whether or not the decision had been correct. What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question of whether termination of employment is the only reasonable option in the circumstances.”

The approach of deferring to the employer when determining whether a dismissal based on operational requirements was further unequivocally rejected in CWIU v Algorax where the court held:

“The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or


58 National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd [1993] 14 ILJ 642 (LAC) 648C–D.
should be fair...Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic.\textsuperscript{59}

Taking into account that the Constitution accords both the employer and the employee a right to fair labour practices, it would appear that the approach of deferring to the decision of an employer when determining the fairness of dismissals based on operational requirements brings in an element of unfairness towards employees who are retrenched.

Given the fact that the constitutional court in \textit{Sidumo v Rustenburg Platinum Mines} emphatically rejected the deferential approach,\textsuperscript{60} it is submitted that the approach suggested in \textit{BMD Knitting Mills v SACWTL}\textsuperscript{61} as well as \textit{CWIU v Algorax} is the correct one. The courts must scrutinise the decision of the employer.

\textbf{4.2. Section 189(19)}

Concerning small-scale retrenchments which are regulated in terms of the ordinary section 189 of the LRA, the Act makes no express reference to the substantive fairness requirements for operational requirements dismissals. This aspect has largely been determined by the courts. However, in the case of large-scale retrenchments section 189A (19) of the LRA lists the factors that must be considered by the labour court when determining the substantive fairness. These are whether:

- The dismissal was to give effect to a requirement based on the employer’s economic, technological, structural or similar needs;
- The dismissal was operationally justifiable on rational grounds;
- There was a proper consideration of alternatives; and
- The selection criteria applied were fair and objective.\textsuperscript{62}

\textsuperscript{59} \textit{CWIU & others v Algorax (Pty) Ltd} [2003] 24 ILJ 1917 (LAC) 69.

\textsuperscript{60} \textit{Sidumo v Rustenburg Platinum Mines} [2007] 28 ILJ 2405 (CC) 61.

\textsuperscript{61} \textit{BMD Knitting Mills v SACTWU} 19.

\textsuperscript{62} 66 of 1995.
These factors indicate that the mere fact that a dismissal is triggered by operational requirements does not entirely guarantee that it is substantively fair. The employer is expected to go a step further. Not only must the dismissals be based on operational requirements, they must be, objectively speaking, justifiable, rational and logical. The employer is further expected to properly consider the alternatives to the dismissals, failing which the dismissals may be held to be unfair. These requirements further consolidate the approach which rejects deferring to the employer’s decision when dealing with substantive fairness in relation to operational requirements dismissals.

Notwithstanding that these factors that must be considered by the labour court are listed under section 189A of the LRA which regulates large-scale retrenchments, it is submitted that they can also be usefully applied to small-scale retrenchments. In any event both sets of dismissals are triggered by operational requirements and it is inconceivable that the legislator intended to create different substantive fairness requirements for small and large-scale retrenchments, as this would create confusion. In Johnson & Johnson v CWUI, the labour appeal court held that a mechanical check-list approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to determine whether the purpose of the joint consensus-seeking process has been achieved.63

In BMD Knitting v SA Clothing and Textile Workers Union, it states that “the function of the court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer’s ultimate decision, but to pass judgement on whether the ultimate decision arrived at was genuine and not merely a sham. It is important to note that when determining the rationality of the employer’s ultimate decision on retrenchment, it is not the court’s function to decide whether it was the best decision under the circumstances, but whether it was rational, commercial or operational decision, properly taking into account what emerged during the consultation process.”64

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63 Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union & others [1999] 20 ILJ 89 (LAC) 29.
64 BMD Knitting Mills v SACTWU 17.
4.3 Justifiable Test

In applying the justifiable test, the question is whether a dismissal was justifiable on rational grounds and whether the employer satisfied the court that the dismissal was the only alternative under the circumstances. The prerequisite that a dismissal for operational reasons must be substantively fair does not mean that retrenchment can be used only as a means of last resort. The test remains whether the decision to retrench was part of a bona fide attempt to improve the business, whether through restructuring, outsourcing, reducing production costs, or simply cutting the payroll. The courts will not decide that a retrenchment is unfair simply because the court sees the decision as unwise.\textsuperscript{65}

The requirement that dismissal be the only reasonable option during dismissals for operational requirements brings in an objective element in the test. It will not be adequate for the employer to declare that it considered dismissal in general, or the termination employees’ contracts, to be the best for the business. If the court discovers that dismissal could have been evaded by implementing some rational option, dismissal would be considered unfair.\textsuperscript{66} This was emphasised in \textit{Enterprise Foods v Allen} where the court held:

“The court must examine whether there is a fair reason to dismiss. If...there are two rational solutions, one of which preserve jobs, fairness as mandated by the Labour Relations Act 66 of 1995... dictates that this is the solution that must be adopted by the employer.”\textsuperscript{67}

This clearly indicates that the LRA enjoins an employer to apply its mind during the retrenchment process and make a rational and logical decision which is aimed at preserving jobs where possible. The courts will not make a ruling that a retrenchment had been unfair if the court is content that the employer has considered all the alternatives that may have reduced the number of dismissals, or even avoided them altogether. If retrenchment occurs where the latter has not been considered, it will be held unfair on substantive grounds.\textsuperscript{68}

\textsuperscript{65} Grogan \textit{Dismissal, discrimination & unfair labour practices} (2005) 373.

\textsuperscript{66} Grogan \textit{Dismissal} (2010) 354.

\textsuperscript{67} \textit{Enterprise Foods v Allen} 17.

\textsuperscript{68} Grogan \textit{Dismissal} (2010) 357.
The test for substantive fairness appears as something more than a reasonable employer test and something less than a fair employer test. Although rationality is an important principle, the mere existence of a commercially plausible reason may not be enough to establish that a decision to dismiss is justifiable. Equally, the mere fact that the court would have preferred an alternative to dismissal does not render it unjustifiable. The criteria of operational and commercial justifiability implies a balance between the employer’s right to promote the economic interests of the enterprise, including the right to increase profits, and the range of employee rights and interests bound up with continued employment. The statutory requirement to seek alternatives to dismissal indicates that dismissal should be avoided if reasonably possible and that alternatives put forward by consulting parties should be considered seriously, even though the employer retains discretion in taking the final decision.69

In *South African Transport and Allied Workers Union v Old Mutual Life Assurance Company South Africa Limited*, the employees disputed the fairness of their dismissal.70 The retrenchments that were brought about by a failed management buy-out strategy which was later abandoned.71

When the proposal was abandoned, retrenchment was raised subsequent the shutdown of operations and the outsourcing of some work to private contractors. The reasons for the change were as a result of developments within the industry, together with the fact that the company was already outsourcing most of its services. Outsourcing would also allow greater flexibility in terms of inbound costs avoiding disadvantage of an in-house operation where costs are in the main fixed costs.72 The court found the dismissal of the employees to have been substantively fair.73

Also, in *Numsa v Genlux Lighting*, Numsa challenged the substantive fairness of the dismissal of its members for operational requirements. The court held that:

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70 *SATAWU v Old Mutual Life Assurance Co SA Ltd* [2005] 26 ILJ 293 (LC) 1.

71 *SATAWU v Old Mutual* 7.

72 *SATAWU v Old Mutual* 33.

73 *SATAWU v Old Mutual* 115.
• A retrenchment is unfair if the employer seeks to achieve impermissible ends such as ridding itself of trade union members or some other automatically unfair objective, even if such a dismissal will have a favourable economic effect.

• It is also unlawful to use retrenchment as a disguise to get rid of employees who are underperforming.\textsuperscript{74}

This clearly shows that the mere presence of an operational requirement does not automatically mean that a dismissal is fair. The courts will intervene on the basis of improper motive even if there is otherwise a valid operational reason for dismissal.\textsuperscript{17}

What HR professionals have also experienced is that when the issue of possible retrenchments is brought up, immediately managers want to retrench people that they could have managed through incapacity. Their selection also at times becomes biased as they do not look at what the business needs to survive, but what they rather see as trouble-makers as first to be put up for possible retrenchments.

Section 189A (19) clearly directs the Labour Court to establish, not only whether the dismissal was undeniably for operational requirements, but also whether the dismissal was operationally justifiable on rational grounds. Even though this condition applies only to big employers retrenching certain number of employees, it brings to the fore, the test the fairness of a retrenchment. The requirement is that the decision must be shown to be, not only linked to the employer’s perceived operational requirements, but also linked in a manner that is justifiable and rational.\textsuperscript{75}

In \textit{NUMSA v Genlux}, the employer came across various operational problems. There was a high prevalence of theft which led the company losing money. The decision was then taken to dismiss all the hourly paid employees and that Jobmates-Phakisa would take over the staff recruitment for the respondent.\textsuperscript{76} The new employment system brought about considerable development in the industry. There were still incidents of theft that remained,

\textsuperscript{74} \textit{NUMSA & others V Genlux Lighting} (Pty) Ltd [2009] 30 ILJ 654 (LC) 28.

\textsuperscript{75} Grogan \textit{Dismissal} (2010) 342.

\textsuperscript{76} \textit{NUMSA v Genlux Lighting} 13.
but there was no longer any labour unrest.\textsuperscript{77} The labour court ruled that the dismissal of the applicants by the employer was substantively unfair.\textsuperscript{78}

The economic crisis faced by the Genlux, did not stop it from taking back the employees previously employed, into the same positions they held prior to their dismissal. The reasons stated for retrenchment, when seen against the behaviour of the employer after retrenchment, portrayed that the decision to retrench was a sham. The overwhelming evidence shows that the retrenchment was not properly justified by operational requirements. The decision to retrench was undoubtedly not a reasonable option in the circumstances.\textsuperscript{79}

\textbf{4.4 Fairness in fixed-term contract employees}

An employer, who terminates an employee’s fixed-term contract before it expires, runs the risk of the dismissal being challenged as a repudiation which constitutes an unfair dismissal.

Generally, a temporary employment contract between an Employment Service and an employee include a clause that the employment contract shall lapse if the customer, for whichever reason informs the employer or the employee that it no longer wants to utilise the employee’s services.\textsuperscript{80}

Section 186(1)(b) of the Act defines dismissal as an employer terminating a contract of employment with or without notice or where an employee had expected his or her contract to be renewed on same or similar terms and the employer does not.\textsuperscript{81}

In \textit{Buthelezi v Municipal Demarcation Board}, the employment contract of an employee who was employed on a five-year fixed-term contract was prematurely terminated on the grounds of operational requirements. The employee, Buthelezi in this case, argued that the termination of his employment contract was substantively unfair by virtue of the fact that the

\textsuperscript{77} NUMSA v Genlux Lighting 15.

\textsuperscript{78} NUMSA v Genlux Lighting 37.

\textsuperscript{79} NUMSA v Genlux Lighting 33.

\textsuperscript{80} Gandidze “Dismissal for operational requirements” 2010 88.

\textsuperscript{81} 66 of 1995.
parties had concluded a fixed term contract of employment and that the respondent could not terminate such contract for operational requirements during its term.\textsuperscript{82}

It is noteworthy that the LRA considers dismissal for operational requirements as a fair reason for dismissal. Equally important to highlight is the fact the LRA does not differentiate between employees who are employed on fixed-term contract and those employed indefinitely. All that the LRA says is that dismissal for operational requirements constitutes a fair reason for dismissal.

The labour court determined that the parties had concluded a fixed-term contract of employment and was of critical importance to the adjudication of the appeal. This is significant because the enquiry into substantive fairness of the dismissal should proceed from the premise that the parties had entered into a valid fixed term contract which was intended to endure until a specified time, but was prematurely terminated by the respondent, allegedly on grounds of operational requirements.\textsuperscript{83}

The labour court later established that each party to a fixed-term contract is entitled to expect that the other party has looked into the future, and has satisfied itself that it can meet its obligation for the entire term without material breach. The applicant’s dismissal was found to have been substantively unfair.\textsuperscript{84}

Although the organisation, on contracting services of an employee on fixed-term contract, will evaluate the likelihood of sustaining the contract for the entire duration of the contract, this is not cast and stone in our volatile economic environment. Changes take place everyday which might lead the employer having to review the term of the contract.

The court’s view is that an employer has the option of concluding an indefinite duration contract instead of a fixed-term contract, if the threat that the employee’s services might have to be terminated exists and is based on the ability of an employer to foresee the future of economic and financial condition of a business. While the likelihood of concluding a fixed-term contract should be well thought-out in light of contractual obligation that arise, this advantage of foresight is not always simple to obtain in a developing country influenced by

\textsuperscript{82} Buthelezi v Municipal Demarcation Board [2004] 25 ILJ 2317 (LAC) 5.

\textsuperscript{83} Buthelezi v Municipal Demarcation Board 8.

\textsuperscript{84} Buthelezi v Municipal Demarcation Board 23.
volatile international financial fluctuations. Although such reflections will be important to the evaluation of the fairness of the employee’s early termination and may well shed light on the legitimacy of the reasons put forward by the employer for retrenching, it will not as such make the dismissal substantively unfair.\(^{85}\)

The Labour Court has held that an employer may not under any situation retrench an employee on a fixed-term contract if the termination takes place before the contract end date, unless the contract makes provision for termination at an earlier date. Retrenchment in this situation will amount to a breach of contract, for which the employee will be at liberty to claim payment for the salary lost during the period that the contract would have lasted. During retrenchment, the employer will have to select employees on an indefinite contract period before those on fixed-term contracts, even if this means violating the LIFO principle, unless the employer is prepared to pay a high price in damages.\(^{86}\)

### 4.5 Dismissal of Striking Workers

Section 65(1)(c) read together with section 191(5)(b)(ii) of the LRA do not allow industrial action over disagreements relating to dismissal for operational requirements. Section 191 further declares that an employee may lodge the dispute with the labour court for adjudication if the employee is of the opinion that the reason for dismissal is based on the employer’s operational requirements.\(^{87}\) Section 189A, which relates to large-scale retrenchments allows employees to strike to bring to a standstill proposed retrenchments.\(^{88}\)

Dismissing an employee because of participation in an protected industrial action will be automatically unfair.\(^{89}\) Then again, industrial action which threatened the sustained functioning of an employer’s business may substantiate the dismissal of employees, on the basis of operational requirements.\(^{90}\)

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\(^{87}\) Gandidze “Dismissal for operational requirements” 2010 89.

\(^{88}\) 66 of 1995.

\(^{89}\) Gandidze “Dismissal for Operational requirements” 2010 84.

\(^{90}\) Loock “Employees on strike can be sacked” The Citizen (1999-07-19).
There has been much debate over the point at which strike-bound employer ought, in fairness, to be permitted to rely on operational requirements to dismiss strikers so that it can replace them with willing workers. In some cases, it was held that the employer must be facing extinction, in others that the employer must have suffered irreparable harm. Alternatively, the employer must have real prospects of irreparable harm, and the dismissals must arise out of genuine economic necessity. 91

Section 67(5) of the Labour Relations Act states that it is not unlawful to dismiss a striking employee for reasons based on the employer's operational requirements. 92

In MAWU v BTR, the parties were not in deadlock and were still in the process of negotiating when MAWU (the union) and its members took to strike. The dispute was that BTR snatched at the opportunity to dismiss the employees unfairly, recklessly; and that it thereafter pursued a policy of selective re-employment so as to ensure that MAWU and its members would not return to the factory. 93

The supreme court evaluated whether the dismissal was substantively fair. The court determined that negotiations were drawn out by MAWU. When the parties were very close to agreement, and the stage of final deadlock had not yet been reached, the workers embarked upon an unlawful and illegitimate strike which was not justified in these circumstances. The prevailing circumstances were not conducive to a resolution of that deadlock. The parties became locked in an economic power struggle. BTR's response was to dismiss the striking workers. In the light of inter alia, previous industrial action (some of it unlawful) on the part of the workers, warnings of dismissal, the circumstances surrounding the strike and the manner in which the workers conducted themselves, the likely duration of the strike, economic considerations adversely affecting BTR and the lack of any response to the ultimatum. 94

92 66 of 1995.
93 Betha & others v BTR Sarmcol (A Division of BTR Dunlop Ltd) [1998] 19 ILJ 459 (SCA) 70.
94 Betha v BTR 70.
The supreme court decided that the dismissal of the workers was both justified and fair, notwithstanding the workers’ long period of service. With regard to fairness, all the workers were invited to re-apply for their jobs. The fact that they failed to do so was no fault of BTR.\footnote{Betha v BTR (631/95) 70.}

The court in these circumstances should not take the word of the employer at face value. The court’s duty is to determine from all the facts, including the employer’s professed motive, the weight played by the strike in shaping the decision to dismiss. If, from the facts, it emerges that the dismissal would have taken place even if the employees had not been engaged in strike action, the strike cannot be ruled out as the cause of the dismissal.\footnote{Grogan Collective Labour Law (2010) 236.}

From the afore-mentioned case, because of the economic pressure that was put on the employer, it had no choice but to dismiss the employees in these circumstances.

\textbf{4.6 Conclusion}

Although the courts do not want to prescribe the approach that the employers must follow during dismissal for operational requirements, employers are still expected to abide by the provisions of legislations. There is no mechanical checklist that the employer has to follow, but the employer has to ensure substantive and procedural fairness during these dismissals.

The employer must be able to prove specific substantive reasons for the retrenchment and not only generalise and say that the retrenchment is for the good of the business.
CHAPTER 5: SELECTION CRITERIA

According to the Labour Relations Act\(^1\) the employer and the other consulting parties must during consultation for dismissal for operational requirements; engage in a meaningful joint consensus-seeking manner. They must attempt to reach consensus on amongst other things, the method for selecting the employees to be dismissed.

In relation to the consultation process the LRA envisages two possible situations. The consulting parties must either reach an agreement on the selection criteria to be used, or if there is no agreement reached then the employer must use criteria that are fair and objective.\(^97\)

In addition, the Code of Good Practice states that “if one or more employees are to be selected for dismissal from a number of employees, the Act requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective.”\(^98\)

During the consultation process, the employer and the trade union may agree on selection criteria that may be subjective. Because these criteria are agreed, the employer will not act unfairly in using these subjective criteria when selecting employees to be retrenched. It is only when the employer departs from the agreed selection criteria that he or she will be deemed to be acting unfairly. In the event that there is no agreement on selection criteria then the employer must use criteria that are fair and objective”.\(^99\)

Efficiency, ability, skills, capacity, experience, attitude to work and productivity are generally favoured by employers since they assist in the retention of hardworking workers who have shown aptitude or potential in spite of of the time they have been employed. They are viewed as objective provided they do not depend exclusively on the opinion of the person making the selection, but can be objectively tested. Furthermore, these criteria may only be used if the employee knew that the employer considered them as essential.\(^100\) This indicates

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\(^{97}\) 66 of 1995 section 189(7).

\(^{98}\) 66 of 1995 Code of Good Practice on Dismissal based on Operational Requirements (7).

\(^{99}\) Mishke “The need to retrench” 2006.

that if an employer uses these criteria for selecting the employees to be dismissed for operational requirements in a situation where an employee was unaware that they were essential, then the process will be flawed.

In *Benjamin & Others v Plessey Tellumat SA* the employer embarked on a restructuring process in terms of which employees in affected departments would be redeployed to other sections. The LIFO principle would be used in selecting the employees to be redeployed. Also, the retention of essential skills would inform the redeployment process. Those employees who could not be redeployed would be retrenched. After consultation, the union representatives failed to explain to the affected employees that the LIFO principle would be used.\(^\text{101}\) The court held that the retrenchment process was flawless and the dismissals were substantively and procedurally fair.\(^\text{102}\)

Once again, looking at the afore-mentioned case, depending on the employer’s position, the employer can decide to retrench in a certain department, plant, section and the like. The employer can also decide on which skills he needs to retain to ensure the continuity of the business. All that is required is that the employer must consult the other party in order to reach consensus and where this is not possible the employer must use selection criteria that are fair and objective.

### 5.1 The analysis for Substantive Fairness

“If the employer uses subjective criteria that have not been agreed upon, the selection process may be abused to get rid of employees the employer views as unwanted but against whom the employer cannot produce evidence of misconduct or poor work performance. If the employer strikes a deal, it can proceed to use these subjective selection criteria.”\(^\text{103}\)

In fairness, the deciding factor should not be subjective but appropriate, preferably relating to aspects or conduct of the employee such as duration of employment, skill, capacity and output and the requirements of the business. “Objectivity means that the criteria should not depend on the subjective prejudices of the person making the selection. The person making

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\(^{101}\) *Benjamin v Plessey Tellumat* 6 & 9.

\(^{102}\) *Benjamin v Plessey Tellumat* 49.

\(^{103}\) Mischke “The need to retrench” 2006.
the selection should not use the pretext of redundancy to dismiss an employee who is regarded as a ‘troublemaker’.”

Where an employer proposes selection criteria, it must be able to display why certain skills and abilities are seen as most vital in selecting employees for retrenchment. One cannot use arbitrary or discriminatory reasons to justify the dismissal. This would include certain levels of education where clearly these are not required to perform the job. Moreover, some jobs would be deemed as suitable for men and only female employees may be selected for retrenchment. However, that would be regarded as unfair discrimination by the courts, unless the employer can prove that it is indeed not only an operational requirement but also an inherent requirement that the job can only be performed by men.

A criterion that violates any fundamental right sheltered in the Act when it is implemented can never be fair. This incorporates selection based on being a union member or involvement in union activities, pregnancy, or some other unfair discriminatory ground. A criterion that seems unbiased on face-value should be cautiously examined to make certain that when they are applied, they do not have unfair effect. “For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.”

In reality though, discrimination tends to occur, as sometimes managers state that they do not want certain employees. The reasons for these employees’ dismissals are then disguised as dismissal for operational requirements. The criteria used in selection should be fair and reasonable. One must take into account the legislation of the country whenever making such decisions.

“But the question as to who goes and who stays is always a difficult one: given the fact that operational requirements dismissals are no fault dismissals and that they are always high emotional issues.”

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105 66 of 1995 schedule 1 (8).
5.2 LIFO (last in, first out)

Section 189(2)(b) requires that the consulting parties attempt to reach consensus for the method for selecting the employees to be dismissed.107

In general the test for fair and objective criteria will be fulfilled by the making use of of ‘last in, first out’ (LIFO) theory. There may be cases where LIFO principle or criteria will need to be modified. The LIFO principle, for example, should not operate so as undermine an agreed affirmative action program. Exception may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution."108

By means of the LIFO principle, long-serving employees are retained at the expense of those with shorter service in similar or less-skilled type of work. LIFO is recommended by unions, seeing that it looks after workers with a longer service record and minimises the probability of employers’ using subjective judgement to make a decision of who shall be dismissed for operational requirements reasons.109

LIFO has been seen as the most credible selection criterion by unions. This is so, because when using LIFO, longer serving and usually most experienced employees are not the first to be selected for retrenchment. Rather, the employees who came into the organisation last are usually the first to be retrenched.

However, there is nothing preventing companies from using FIFO (first in, first out). Whereas willingness to co-operate and personal relationships have been held to be subjective, attitude and personality are accepted as relevant in determining and employee’s suitability for alternative position.110

Once the employer has decided on the selection criteria to use, employees and their representatives must be informed of this criteria and the motivation behind it. Each party

107 66 of 1995 189(2)(b)
108 66 of 1995 schedule 1 (9).
110 Gandidze “Dismissal for Operational Requirements” 2010 87.
must be able to understand how those chosen to be retrenched were selected and whether it was a fair criterion.

5.3 Case Law

In *Numsa v Dorbyl*, during the consultation process, Numsa proposed LIFO as the criteria to select employees to be transferred to the Gauteng operation. Management wanted to choose employees on the basis of core skills. Later, management then announced that the criteria to be used would be a mixture of LIFO and preservation of skills.\(^{111}\)

The court found that the employer had consulted the union (Numsa) both on the selection criteria and the employees to be selected, and that through the process of consultation substantial consensus was reached. In addition, the persons identified for relocation were people who had relocated already. The Labour Court found that the selection criteria and the actual selection of employees to be relocated or retrenched were fair.\(^{112}\)

In *Num v Anglo American Research Laboratories*, the only issue for adjudication was whether the selection criteria were correctly applied in selecting the third applicant for retrenchment. The dispute was specific to the application of the selection criteria.\(^{113}\)

The existing facts on this matter pointed out that the union never agreed with management’s suggestion of the selection criteria. The union specified their support for management’s proposal of LIFO as a method for selecting the employees to be retrenched, but did not agree to their suggestion regarding skills preservation.\(^{114}\)

The union argued that the skills which the employees lacked could be transferred to them through a short process of training. With the evidence presented, the labour court indicated that it was content that the selection criteria had been substantively fair and that the

\(^{111}\) NUMSA & others v Dorbyl Ltd & another [2004] 25 ILJ 1300 (LC) 14.

\(^{112}\) NUMSA v Dorbyl 42.

\(^{113}\) NUM & others v Anglo American Research Laboratories (Pty) Ltd [2005] 2 BLLR 148 (LC) 2.

\(^{114}\) NUM v Anglo American Research Laboratories 14.
employees did not possess the required skills. The candidates necessary to be retained by the respondent possessed the skills to ensure uninterrupted continuation of shifts.\textsuperscript{115}

This again shows that subjective criteria are considered by the court when they are viewed to be applicable.

In \textit{Food and Allied Workers Union v SA Breweries}, the labour court considered the primary selection criteria, LIFO, as part of the substantive fairness enquiry. There was sufficient proof to show that a huge number of retrenched employees had substantively been re-employed by the company in terms of a service agreement with labour brokers. The dismissed employees were still needed by the company during stages of higher production demand; in spite of their obvious lack of training and/ or unsatisfactory ABET levels. These temporary employees who were previously dismissed for operational requirements from the company were used by the company, doing exactly the same work previous to their retrenchment.\textsuperscript{116}

The Labour Court ruled that the company had not proved on a balance of probabilities that the primary agreed selection criteria were practicable and valid.\textsuperscript{117}

In general, the courts leave employers with a free hand when it comes to deciding on employees for retrenchment. One of the roles of the court is to ensure that the criteria applied do not allow employers to use retrenchment as a chance to get rid of employees for grounds not related to operational requirements. Despite the fact that LIFO may be qualified by the requirement to preserve special skills, the qualification requirement may not be arbitrary or subjective.\textsuperscript{118}

In \textit{Janse van Rensburg v Supergroup trading}\textsuperscript{119} the employee, disputed his dismissal based on operational reasons as being both substantively and procedurally unfair. The employer,
on the other hand contended that the employee was found to be rude, aggressive and had poor relations with his customers."

It has been held that the selection criteria could, depending on the circumstances of the case, impact on both substantive or procedural fairness or otherwise of the dismissal for operational reasons.\textsuperscript{120}

Under these circumstances, the court accepted the employee’s version that the consultation process of the employer was a facade and was not planned to accomplish the purpose as put out in legislation. The employer had failed to prove its duty of showing that the dismissal of the employees were for a fair reason and implemented after following a fair process. The court held the dismissal to be substantively and procedurally unfair.\textsuperscript{121}

LIFO appears to be the selection method that presents least problems when it comes to selecting employees to be retrenched. Other selection methods may give rise to contentious issues. According to Grogan, there are problems that come up from using selection criteria other than LIFO. These are:

“The first is that the failure by employees to measure up to the other criteria may be linked to incapacity or misconduct. It is generally considered unfair if an employer relies on past deficiencies or misdemeanours when selecting employees for retrenchment. The second difficulty is that the procedures required for retrenchment are not adequately designed to give individual employees an opportunity to answer charges relating to past poor work performance or misconduct. So the courts have endorsed the proposition that the vaguer and more subjective the criterion adopted for selection, the more pressing the need for individual employees to be given an opportunity to be personally consulted before they are judged by the standard adopted.”\textsuperscript{122}

In \textit{CWIU v Latex Surgical Products}, when the employer, Latex Surgical Products considered retrenchments, it consulted with the union on the selection criteria amongst other things. The employer proposed the selection criteria to include:

\begin{footnotesize}
\begin{enumerate}
\item Janse van Rensburg v Supergroup Trading 32.
\item Janse van Rensburg v Supergroup Trading 49 – 50.
\end{enumerate}
\end{footnotesize}
➢ Essential critical expertise;
➢ Duration of service;
➢ Performance record;
➢ Disciplinary record;
➢ Level of schooling required; and
➢ Experience.  

The union however reiterated that it favoured LIFO as a criterion, but there could be instances where length of service would not be important. The union also placed emphasis on retention of skills.  

The employer contracted a third party to assess each individual’s skills, ability, technical expertise and general attitude to work. The purpose of the assessment was to determine which employees would be most suitable for the respondent’s operations in order to make any future selection criteria for retrenchment fair and objective.  

The contracted party to administer the assessment admitted that the questions asked during the individual interviews during the evaluation exercise had an element of subjectivity. They further conceded that the scoring system had a subjective system.  

The Labour Court found the dismissal to have been for unfair reasons.  

“The Employment Equity Act 55 of 1998 specifically provides, for example, that employers may take appropriate measures to ensure the retention of members of designated groups. This provision may possibly serve as a defence were an employer to adopt LIFO to ensure that efforts to maintain a demographically ‘balanced’ staff are not wiped out by a rationalisation exercise.”  

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124 CWIU v Latex Surgical Products 6.
125 CWIU v Latex Surgical Products 20.
126 CWIU v Latex Surgical Products 29 – 30.
127 CWIU v Latex Surgical Products 125.
LIFO need not be applied if it would cause severe disruptions or result in the loss of necessary skills. The courts will therefore tolerate such departures from LIFO as necessitated by the operational needs of the concern, taking into account the special skills and other aspects of employees.¹²⁹

“If one or more employees are to be selected for dismissal from a number of employees, the LRA requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria. An example of fair selection criteria is “LIFO”, which means that the last employee in, therefore the one with the least amount of service, is the first employee to be chosen for retrenchment. This criterion is based on years of service and not on any subjective means such as the performance or disciplinary record of the employee, which will be unfair.”¹³⁰

5.4 Conclusion

LIFO is preferred means of selection by unions, as it minimises disputes of bias and unfairness. However, once other criteria are introduced, such as level of skill, the employer usually faces a challenge from employees who then want to be reassured of how the decision of required skill is made. One suggestion from employee representatives is that employees can always be trained, instead of taking away their livelihood.

Employers must also bear in mind that they will be judged on stricter grounds by the courts when considering alternatives of employment as opposed to dismissals.


¹³⁰ Rhedeer “Retrenchment and measures how to avoid retrenchment” 2010 1.
CHAPTER 6: RECOMMENDATIONS

The objective of this study was to investigate substantive fairness during dismissal for operational requirements. This was achieved through literature review and analysis of relevant case law.

The recommendations are intended to assist parties dealing with dismissal for operational requirements to ensure that the dismissals are substantively fair. These include the following:

6.1 Adherence to the definition

First, employers must ensure that the dismissals fall within the ambit of the definition of “operational requirements” as per the LRA. To be substantively fair the dismissal must be based on the economic, technological, structural or similar needs.

Furthermore, the employers must always keep in mind that the onus to prove that the reason for dismissal is one based on the operational requirements of the business lies on the employer. The employer will have to extensively consider and possibly consult with Labour Relations experts before going ahead and announcing the intention to retrench. The employer must prove that the reason actually exists and that it is the real reason for the dismissal. After the employer has considered extensively the reasoning, it can find that it does not really need to retrench, but through restructuring and redeployment the same desired outcomes can be achieved.

In addition, the consulting parties must familiarise themselves with section 189 (small-scale retrenchments), section 189A (large-scale retrenchments) and the Code of Good Practice on Dismissal for Operational Requirements of the LRA. This is because these sections provide certain guidelines and procedures to be followed when retrenching employees.

Lastly, employers need to be conscious of section 187 (1) (c) of the LRA which provides that a dismissal is automatically unfair if the employer dismisses an employee to compel the employee to accept a demand in respect of any matter of mutual interest between the

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131 66 of 1995 section 213.
employer and the employee. Dismissal in this case would only be fair if the business cannot continue functioning or will be significantly prejudiced if the required changes do not come into effect. However, the employer must ensure that the dismissal is final and irrevocable.\textsuperscript{132}

6.2 Alternatives as Opposed to Dismissal

The LRA\textsuperscript{133} enjoins an employer who is intending to retrench not only to consider alternatives to dismissal but to provide reasons for rejecting each of the alternatives. This clearly shows that employers must before embarking on retrenchment process, first consider alternatives. Failure to do so will render the retrenchment process substantively unfair.

It is against this background that the consulting parties should during the consultation process take time in listening to each other’s views, opinions and proposals. This may help the parties find alternatives which may result in the retrenchments being avoided. It is also imperative that the parties involved should avoid going to the consultation process with their minds already made up or being biased as information relating to proposals that may assist with alternatives that may prevent the dismissals might not be heard or even considered.

6.3 Dismissal of employees on fixed-term contractors

Employers operate under circumstances where it is a bit difficult to get a clear forecast of the future of a business. This in turn forces employers to make use of fixed-term contracts as indefinite contracts of employment may not be ideal. However, there are challenges that arise when it comes to retrenching employees who are employed on fixed-term contracts. Whilst the LRA unequivocally acknowledges that it is fair to dismiss employees for operational requirements and also draws no distinction between employees employed on indefinite contracts and those on fixed-term contracts, the courts, relying on the common law principles have held that to retrench an employee on a fixed-term contract is unlawful\textsuperscript{134}. To be on the safer side employers who make use of fixed-term contracts should ensure that such contracts includes clauses that provide for premature termination of the contracts should circumstances so require.

\textsuperscript{132} Fry’s Metal v Numsa 18 – 19.

\textsuperscript{133} 66 of 1995 section 189 (6)(a).

\textsuperscript{134} Buthelezi v Municipal Demarcation Board 16.
6.4 Selection of employees to be dismissed

Employers should not use dismissal for operational requirements to rid of themselves employees who are either poor performers, not compatible within the business or for misconduct. The LRA provides clear guidelines on how such cases must be handled. If the reason is purely based on operational requirements, then the employer should ensure that the employees selected for retrenchment are selected using agreed or fair and objective criteria. If these are not adhered to, there could be dire consequences for the business. There could be, for instance, adverse financial consequences as the employer may have to pay compensation to the employees who were dismissed unfairly. Also, the organisation’s reputation could be placed in a bad light.

6.5 Conclusion

The recommendations set above are not conclusive for every retrenchment process. They are however important concepts that at times parties fail to look at when embarking on Dismissals for Operational Requirements.

Given that dismissals for operational requirements involves the competing interests of the employer who must run a sustainable enterprise and the employee’s need for job security, there are stringent requirements that have to be met in order for the dismissals to be fair. Unlike dismissals for incapacity and misconduct where the employee may be at fault, dismissals for operational requirements are triggered by the operational needs of the employer’s enterprise without any fault on the part of the employee. It is therefore, unsurprising that employers must ensure that the dismissals fall within the narrow ambit of the definition of operational requirements as per the LRA. It is to a certain degree a fact that due to the volatile market and economic conditions employers will at times be forced to dismiss employees for operational requirements. A situation may arise where, for instance, the dismissals may be genuinely triggered by the operational requirements but because the employer failed to properly consider alternatives, the dismissals may be found to be substantively unfair. In a worst case scenario, the manner in which the notice for dismissing employees may, as it was the case in CWIU v Algorax\textsuperscript{135} be phrased in a way that makes a dismissal which is genuinely triggered by operational requirements, to be automatically

\textsuperscript{135} CWIU v Algorax 32.
unfair. It is against this background that the recommendations can be of great assistance to the employers.
CHAPTER 7: CONCLUSION

The LRA makes provision for the employer to dismiss employees for reasons based on operational requirements. These reasons must be based on the economical, technological, structural and similar needs. Dismissal for operational requirements of an employer has its own challenges in the form of the social and economic impact it has on the person retrenched and to the larger society. For this reason, the courts, although they will not prescribe to the employer, become very strict on substantive and procedural requirements of this type of dismissal. This is unsurprising, given the fact that when it comes to dismissal for operational requirements, the employee is not at fault. Instead, the dismissal is triggered by the business needs of the employer.

The Code of Good Practice mentions alternatives to be considered before deciding to dismiss. Should the court find that the dismissal could have been avoided through employing a reasonable alternative, then that dismissal would be deemed as unfair. The courts will also be strict against an employer when determining whether alternatives that the employer should have considered were available.

The reason for the dismissal must be genuine and must not be a cover up to dismiss an employee for misconduct relating to capacity and performance of the employee. The test for substantive fairness remains whether the decision to retrench was part of a bona fide attempt to improve the business, or to ensure its sustainability.

Even though the LRA provides that it is fair to dismiss employees for operational requirements, this appears not to be the case when it comes to employees employed on a fixed-term contract. Whilst it may appear to be fair from the LRA to retrench an employee on a fixed-term contract, under the common such a dismissal will be unlawful. The only consolation is that there is nothing that prevents an employer from including in the contract of employment of an employee on a fixed-term contract a clause making provision for premature termination of the contract, should circumstances so require.

It also clear that section 187 (1)(c) which renders a dismissal that is aimed at compelling an employee to accept a demand in respect of a matter of mutual interest automatically unfair, does not prevent employers from dismissing employees who refuse to accept a change in their terms and conditions of employment as long as that change is necessary for the operational needs of the business. However, such dismissals must be final and irrevocable.
Section 189A (13) of the LRA makes provision that should the employee be of the opinion that the employer does not comply with a fair procedure, that they may approach the Labour Court in order to compel the employer to comply with a fair procedure. The employee may interdict or restrain the employer from proceeding with the dismissal prior to complying with a fair procedure or direct the employer to reinstate the employee until it has complied with a fair procedure.

The effect of the strike during a pending retrenchment in my view is limited. Its effect will be a compromise between the objective of the employer and the interests of the employees. The introduction of strike action is not an effective mechanism during a retrenchment process, as it is limited to after the termination notices have been issued, leading the strike action to be limited.

LIFO (Last In, First Out) has also been commonly used as a selection method during retrenchments. One other reason for this preference of LIFO is that the unions will likely agree to this criterion as compared to other criteria. This is because LIFO to a certain degree protects employees with longer service. Although this is the case, there have been instances where the organisation has to go beyond LIFO to ensure sustainability of skills which are essential for the continuation of the business.

With the revised legislation coming to the fore, dealing with issues of retrenchment has become harder to implement for employees. This is because retrenchments also carry impactful consequences as the employees are in danger of losing their jobs. At the same time should the employer fail to ensure fairness during this process, they run the serious risk of having to reinstate employees or paying large amounts as compensation to the unfairly dismissed employees.
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