

How to end the employment relationship in a fair manner where the employer needs to reduce the number of employees it employs based on its operational requirements, commonly known as “retrenchment”.

Operational requirements include requirements based on the employer’s economic (financial), technological, structural, or similar requirements.

The law places certain duties on all employers that are considering retrenching one or more of its employees. Before taking any decision to retrench, the employer is required to consult with the relevant parties. The consulting parties could include a workplace forum, registered trade union (where employees likely to be affected are members of the union) and the employees likely to be affected. Consultation requires joint meaningful engagement in an attempt to reach consensus.

[See How to Guide: How to manage retrenchment](#)

Consultation sessions may result in an agreement between the consulting parties but this is not always the outcome. Employers must ensure that the process followed is fair and the underlying reasons for the retrenchment can be justified under the circumstances.

What happens when a retrenchment agreement is concluded?

If the consulting parties agree on the selection criteria for retrenchment and the terms of the retrenchment, an agreement should be drawn up and signed. This approach is advised as it reduces the likelihood of an employee successfully challenging the fairness of the dismissal at the CCMA, a bargaining council or the Labour Court.

[See Template: Retrenchment Agreement](#)

What happens where no consensus is reached after consulting?

In the case of small-scale retrenchments, when the consultation process has concluded without reaching an agreement, the employer may proceed with the retrenchment by providing written notice to the affected employees.

The notice period is determined with reference to the employee's employment contract, provided that the notice period is not less than the notice period as per the Basic Conditions of Employment Act 75 of 1997 as amended (“BCEA”) or any relevant bargaining council collective agreement. Where the employment contract does not specify the notice period then the BCEA or relevant bargaining council collective agreement applies.

The employer can choose between requiring employees to work during the notice period or requiring them to leave immediately and paying them for the notice period.

Each employee should be paid a severance package of no less than one week’s remuneration per completed year of continuous service, in addition to payment owing in respect of accrued leave, the final wage/salary payment, and any other amount owing by law or in terms of the employment contract. It is important to note that certain bargaining council’s collective agreement might prescribe severance pay which is greater than one week’s remuneration per completed year of service and employers must comply with this if applicable.

An employee who unreasonably refuses to accept the employer’s offer of alternate employment with that employer or any other employer, is not entitled severance pay.

The employer should provide the employee with a Certificate of Service.

[See Information Sheet: What is severance pay](#)

When will a retrenchment be fair?

By law for a retrenchment to be fair, two requirements must be satisfied:

- the employer must have a **fair reason** for retrenching an employee; and
- the employer must also follow a **fair procedure** before retrenching any employees.

What is a fair reason for retrenchment?

As a guideline, the following questions should be asked in order to determine whether there is a valid reason to retrench employees:

- Was the retrenchment a result of the employer's economic, technological, structural, or similar needs?
- Was the retrenchment operationally justifiable?
- Was there a proper consideration of alternatives to retrenchment and a good reason not to implement any alternatives?
- Were the selection criteria fair and objective?

For the reason for the retrenchment to be fair, the answer to all the questions above should be "yes".

What is a fair procedure to follow during the retrenchment process?

The requirements for a retrenchment procedure to be fair are as follows:

- The employer must invite the consulting party/parties, in writing, to consult with it and disclose the required information including the reasons for proposing retrenchment, alternatives considered, number of affected employees, proposed severance pay, selection criteria, proposed assistance for any retrenched employees and the possibility of re-employment for employees who may be retrenched. The employer must disclose the number of employees in its employ as well as the number of employees retrenched in the past 12 months.
- The employer must provide an opportunity for a meaningful joint consultation process before employees are retrenched. This includes attempting to reach consensus over a number of issues including appropriate measures to avoid or reduce the number of retrenchments, the timing of the retrenchments, selection criteria and the severance pay.
- The employer must disclose information that is relevant to the proposed retrenchments.
- The employer must allow consulting parties to make representations and proposals.
- The employer must consider and respond to the representations and proposals. If such representations or proposals are made in writing the employer must respond in writing.
- The employer must select employees to be retrenched according to fair and objective criteria, or criteria that the consulting parties have agreed upon. The selection criteria commonly used and which the courts have found to be fair is "LIFO"- last in, first out, in other words the employees with the shortest service will be the ones selected for retrenchment. However, this is just a guide and consideration should be given to the operational needs of the organisation and the need to avoid acts of unfair discrimination.

See CCMA Information Sheet: Small-scale Retrenchments

See CCMA Information Sheet: Retrenchment in terms of S189A of the LRA