

How to manage the employment relationship where the employer needs to reduce the number of employees it employs for operational, financial, or technological reasons (retrenchment)

Restructuring of a business, for whatever reason, can be a traumatic experience for employers and employees alike. When employees lose their jobs through no fault of their own through retrenchments, it is not only they that are affected, but the other employees who are not retrenched (“survivors”) as well. The direct financial cost and indirect morale and adjustment costs to employers in retrenching staff can also be significant.

This trauma can be minimised if employers:

- transparently, sensitively and proactively communicate with employees - the sooner that employees are made aware of the possibility of retrenchment, the better;
- make affected employees aware of their rights and obligations - employers are well-advised to be honest and open and disclose information as far as possible;
- follow best practice procedures when faced with any of these issues. Follow the guidelines contained in the Code of Good Practice On Dismissal Based On Operational Requirements ;
- ensure that retrenchment is the last resort.

What is retrenchment?

Apart from the dismissal of an employee for misconduct or for incapacity, an employer may dismiss employees for reasons based on the employer’s operational requirements. This is the technical term for a “no fault dismissal”, and what is generally referred to as retrenchment.

“Operational requirements” means requirements based on economic, technological, structural or similar needs of an employer. These factors affect the ability of a business to continue operating in a financially viable and profitable manner. The Code of Good Practice on Dismissal Based On Operational Requirements explains these terms:

- **Economic reasons** are those that relate to the financial management of the enterprise. For example, when the high cost of manufacturing reduces the financial viability of a business.
- **Technological reasons** refer to the introduction of new technology that affects the work relationship either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. For example, an automated payment system in a parking garage.
- **Structural reasons** relate to the redundancy of posts as a consequence of restructuring the employer’s business. A merger between two businesses or two or more departments or outsourcing certain functions are examples of structural reasons.

Small-scale and large-scale retrenchments

There is a difference in the law applicable to small-scale and large-scale retrenchments. A large-scale retrenchment occurs when an employer employs more than 50 people and retrenches a certain number of people over a 12-month period. It is regulated by section 189A of the Labour Relations Act 66 of 1995 (the LRA).



In this guide we will only be dealing with the law relating to small-scale retrenchments; in other words, where an employer employs less than 50 employees, or employs more than 50 employees but contemplates retrenching fewer employees than the limits stated in Section 189A(1).

See CCMA Information Sheet: Large Scale Retrenchments [3.8G]

See CCMA Information Sheet: Small Scale Retrenchments [3.8H]

Checks and balances

The LRA places checks and balances on both the employer's reason to retrench and the way in which it goes about the retrenchment to ensure that the employee is treated fairly. In this way the law is designed to ensure that an employer does not resort to retrenchment if it can possibly be avoided.

The law places certain duties on all employers that are considering the retrenchment of one or more employees. Before taking any decision to retrench, the employer is required to consult with employees. Consultation requires joint meaningful engagement in an attempt to reach agreement. The employer must listen and after proper consideration respond to the input of the employee, but has the discretion to make the final decision.

Who must the employer consult with?

The employer is required to consult with employees, either directly or via an employee representative body / trade union. If there is a collective agreement specifying any person the employer must consult with, the employer must comply with this. If there is no collective agreement regulating consultation, the employer must consult with:

- A Workplace Forum (if such a body has been established) as well as any registered trade union whose members are likely to be affected by the proposed dismissals
- If there is no Workplace Forum, the employer must consult with any registered trade union whose members are likely to be affected.
- If there is no registered trade union representing employees, the employer must consult directly with the employees concerned or their nominated representatives.
- If some of the employees are represented by a trade union and others are not, an employer must consult with both the trade union, and the unrepresented employees, or their nominated representatives.

The consultation process

The LRA describes consultation as a "joint consensus-seeking process". The consultation process must start as soon as the possibility of retrenchment is contemplated.

The purpose of consultation is to try to reach consensus on appropriate ways-

- to avoid the dismissals;
- to find possible alternatives to dismissal

- to minimise the number of dismissals;
- to change the timing of the dismissals;
- to mitigate the adverse effects of the dismissals;
- to determine the method / criteria for selecting those to be retrenched;
- to determine the amount of severance pay to be paid to dismissed employees.

The process begins with a written Invitation to Consult, which must set out the information required by section 189(3) of the LRA.

See Template: Invitation to consult (union) [3.8C]

See Template: Invitation to consult (individual) [3.8D]

Relevant information for a meaningful consultation process

In order to allow for meaningful consultation, the LRA requires that the employer makes a written disclosure of relevant information, including, but not limited to, the reasons for the retrenchment, alternatives to retrenchment that have been considered, the possibility of future re-employment, and the provision of any other reasonable assistance to employees who are to be retrenched such as time off to find alternative work; the proposed method for selecting which employees to retrench; the period during which the dismissals are likely to take place; and the severance pay proposed. If the reason for retrenchment is financial hardship, the employer should be prepared to disclose financial information to support this.

The employer is also required to disclose how many people it employs, and how many have been retrenched in the last twelve months, since these figures (together with the number now contemplated) will determine whether the retrenchment is a large-scale or small-scale one.

Consultation meeting

The submission of the invitation to consult is followed by a consultation meeting on reasonable notice, where the employees and/or their representatives can make proposals to avoid retrenchment or to mitigate the effect of the retrenchments. If the employer does not agree with the proposals made by the employees, it must give reasons. If the employees' proposals are made in writing, the employer must respond in writing. It may be necessary to hold several consultation meetings in order to allow for proper discussion of all of the issues.

See Checklist: How to consult in a fair manner [3.8F]

Reasonable alternatives to avoid retrenchment

Alternatives to avoid retrenchment may take a variety of forms. For example, it may be possible for the employer to arrange job sharing, short time, or make an arrangement for the employee/s to take unpaid leave for educational purposes.

Employers who are facing financial distress are encouraged to **adopt preventative measures** by, for example, engaging the services of Productivity South Africa (PSA). PSA's services include a "Business Turnaround & Recovery Programme", an intervention that delivers turnaround and contingency plans for businesses that are facing financial ruin, job loss and business sustainability challenges.

See Information Sheet (other): Productivity South Africa Business Turnaround & Recovery Programme [3.8L]

PSA also offers an "Enterprise Competitiveness and Sustainability Programme" that serves, amongst others, to identify ways for businesses of all sizes to increase productivity, increase profitability by reducing costs and improving resource utilisation, and to enhance the efficient use of resources.

See Information Sheet (other): Productivity South Africa Brochure [3.8I]

In addition, employers who are facing business distress are encouraged to contact the CCMA to determine whether they comply with the requirements of the Temporary Employer/Employee Relief Scheme (TERS). [This is not to be confused with the Covid-19 TERS that operated for part of 2020 and in response to business distress caused by the Covid-19 lockdown.]

See CCMA Information Sheet: Temporary Employer / Employee Relief Scheme [3.8K]

Selection Criteria

One of the more contentious areas for consultation is the selection criteria or - the method of selecting those to be retrenched. Employers will often want to retrench those that they regard as being less productive or poor performers, but this is not advisable. Retrenchment is a no-fault dismissal and should not be used as an excuse for employers to rid themselves of those they subjectively regard as "dead wood". The criteria for selecting those to be retrenched must be fair and objective. A criterion which is often used and is widely accepted as being fair is "Last In, First Out" ("LIFO") – in other words, those with the shortest service will be selected first for retrenchment. This can be applied per job category and provision can also be made for the retention of scarce skills. Other criteria that may be used are experience, skills and capability. It is always important to take into account the impact of selection on employment equity and transformation. Criteria may not include any which could amount to unfair discrimination e.g. pregnancy, race *etc.*

What is Severance Pay?

Severance Pay is a statutory entitlement in terms of the Basic Conditions of Employment Act No. 75 of 1997, as amended (BCEA), which an employee is entitled to upon retrenchment. It should not be confused with "service pay" which is not recognised by the law but refers to a gratuitous payment or gift that an employer may present to an employee for long service according to the employer's discretion, policy or in terms of a contract.

The minimum amount of severance pay in terms of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) is one week's remuneration per completed year of continuous service, but employees are free to try

to negotiate more than this. Note that “remuneration” includes, but is not limited to, the value of any benefits the employee received, such as accommodation, payments in kind e.g. free canteen lunches, the employer’s contribution to any medical aid, pension, provident fund, death or funeral benefit schemes or similar schemes, shift allowances and car allowances (for work purposes). The law does not recognise pro rata severance pay for incomplete years of service, but again this may be negotiated between the employer and employees

Although, every employee who has completed at least one year of continuous service with the employer is entitled to be paid severance pay if retrenched, an employee who unreasonably refuses an offer of alternative work **by the employer** (either with the same employer or with a different employer) instead of retrenchment, loses his/her entitlement to claim severance pay.

Employees cannot insist that they be retrenched to claim severance pay if the employer offers them reasonable alternative jobs to avoid their retrenchment. Similarly, employees who accept alternative employment cannot claim severance pay on the basis that the new position is less favourable than the previous one.

[See Information Sheet \(other\): What is severance pay \[3.8B\]](#)

Conclusion of the consultation process.

The consultation process may result in an agreement being reached with some or all of the employees, or in the worst case scenario, no agreement being reached at all. In either case the employer may then start to give formal notice to those who are affected by the retrenchments. Where no agreement has been reached the employees may then exercise their rights to challenge the dismissals; it is thus preferable for employers to make every effort to reach a retrenchment agreement with the employees.

[See How to Guide: How to end the employment relationship by retrenchment \[4.7A\]](#)

