

EMPLOYEE OPERATIONAL REQUIREMENTS DISMISSALS & RESTRUCTURING

What will be covered:

1. Defining and *operational requirements* dismissal
2. UKZN's employment contractual obligations
3. UKZN's Retrenchment & Redundancy Policy
4. Legal Implications for Fixed-term Contract Employees
5. UKZN's Legal Compliance with sections 189 and 189A of the LRA
6. Procedural Fairness Requirements
7. Consultation
8. Alternatives to Dismissal
9. Selection Criteria
10. Employee Assistance
11. Offers to Re-employ
12. Mass Operational Requirements Dismissals & Facilitation by CCMA Section 189A LRA
13. Notice of Termination of Employment
14. Dismissal of a single Employee for Operational Requirements Reasons

Defining an Operational Requirements Dismissal

Operational Requirements: s 213 LRA – Definitions:

- *“operational requirements” means requirements based on the economic, technological, structural or similar needs of an employer*

Code of Good Practice LRA: s (1).

- **Economic reasons** are those that relate to the financial management of the enterprise.

Defining an Operational Requirements Dismissal

- **Technological** refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace.

Defining an Operational Requirements Dismissal

- **Structural** – relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

UKZN's Employment Contractual Obligations

- Conditions of Service Perm Staff- s 18.4 Refer to compliance with the **LRA**, the UKZN's Retrenchment and Redundancy **Policy** and any applicable **collective agreement**
- Conditions of Service – create a **contractual right to severance pay and gratuities** (in excess of the s 41 BCEA provision). Refer paras 18.4.1.-18.4.5. COS.
- Making the **“Genuine Alternative Call”** and Implications For Severance Pay.

UKZN's Employment Contractual Obligations

- **Status of Policy-** is a guideline- relationship to COS.
- **Notice of intention to dismiss** must be at least 3 months prior to intended date of notice of termination (2.2. Policy).
- **Negotiation (not simple consultation),** (2.1. and 5.1. Policy (Selection Criteria).
- **Meet with Union(s) to negotiate selection criteria** at least 3 months prior to implementation of dismissal (5.1. Policy).

Legal Implications For Fixed-Term Contract Employees

- **Common law provisions** for damages (implications of *Sidimo* judgement in CC).
- Follow in detail **provisions of section 189/189A LRA**.
- **Severance pay** BCEA. Minimum of 1 week's remuneration for every continuous year of service worked.
- Employee can **declare dispute on amount of severance pay** and refer to CCMA for arbitration.
- Position where is ***reasonable expectation*** of renewal

UKZN's Legal Compliance Sections 189 & 189A of LRA

- s 189 and s 189A (as **UKZN employs more than 50 employees**).
- Dismissal is on **“no fault basis”** – what does this mean/implications ?
- **When can an employee be retrenched** ? For profit, to introduce flexible work practices, to outsource, on the loss of business, moving business to another location, financial position, redundancy, to effect a change to COS, downsizing, on closure of business, restructuring of the business and cost of compliance with labour legislation.

UKZN's Legal Compliance Sections 189 & 189A of LRA

- Reasons which are NOT operational requirements - Victimization and participation in protected strike.

Procedural Fairness Requirements

- **Substantive Sources** – collective agreement, if no collective agreement then LRA.

LRA requirements, employer must:

1. Initiate consultation process when it contemplates dismissal for operational reasons
2. Disclose relevant info to other consulting party
3. Allow other party to make representations about any matter on which they are consulting
4. Consider representations made and if not agree with them, provide reasons

Procedural Fairness Requirements

5. Select employees to be dismissed on criteria either agreed to, if not possible on fair and objective criteria.
6. Attempt to reach consensus on the objects listed in section 189 (2) of the LRA, with view to conclude an agreement on the operational dismissal.
7. Provide written notification complying with section 189 (3) of the LRA (Refer to section 189 Notice Template in your docs it complies).

Consultation

- **When does the duty arise ?** (Contemplate)
- The aim of consultation is to **seek consensus** and ultimately agreement.
- **UKZN's Policy** -“Consultation and the Consultation Process”. This policy complies with the substantive intent of the Code of Good Practice Operational Dismissals, specifically on consultation process.

Consultation

- **With whom must the employer consult ?**
 1. Any person in terms of **collective agreement**, or in absence of the
 2. **Work place forum** (none in UKZN but have JCF) – refer Recognition Agreement, or in absence of the
 3. **Registered trade union** whose members are affected, or in absence of
 4. **Employee(s) concerned.**

No need to consult both with employee and trade union.

Consultation

- **Refusal to consult**, delaying, making irrelevant objections.
- **Disclosure of information**. S189(4) provides that the provisions of section 16 apply to the disclosure of information in terms of section 189(3), employer must disclose information that will make consultation process meaningful. Need not disclose info which it does not have, is not relevant or which could harm its business interests e.g. trade secrets.

Consultation

- **Dispute can be declared** where info is refused.
- s16 of the LRA provides that in any dispute in which Court or Arbitrator is to decide relevance of info, **onus is on employer** to prove that it is not.
- If during consultation any representation is made in **writing** the employer must respond in writing (s189(6)(b)).

Alternatives to Dismissal

- Early retirement, voluntary retrenchment, unpaid leave, short time, bumping, changing terms and conditions of employment, moratorium on hiring new employees, suspension of overtime, transfer of employee to other jobs, gradual reduction of workforce, implementation of early retirement, retraining/training for other employment, implementation of unpaid leave, reduction in salary.
- Bumping sideways and down.

Selection Criteria

- Employer to **apply criteria agreed**, if no agreement and imposed must be fair.
- Selection **criteria must be objective and verifiable rather than subjective**. Avoid use of performance, adding value to company or corporate fit, as these are vague and subjective. Refer Code of Good Practice LRA, advises one to avoid criteria that cannot be objectively measured/ascertained.

Selection Criteria

- LIFO is regarded as an objective criteria. Code of Good practice provides that LIFO should not be used if it undermines an agreed affirmative action program. However, Court has held in Thekiso v IBM that the Employment Equity Act does not impose a duty on employers to retain designated employees in preference to non designated ones.
- Automatically Unfair Dismissals

Assistance to Employees

- **Alternative employment** (including alternative employment with another employer).
- **Work at another workplace** or business owned by employer.
- **Time off** to find alternative employment.
- **Counselling services** (financial/psychological).

Offers to Re-employ

- Enter into with **caution** (failure to comply is further dismissal in terms of LRA *).
- **Limit the period** of operation of the offer.
- Include a **simple procedure by which dismissed employee will be informed** of future vacancies.
- Employer is **bound to offer dismissed employees return of their previous jobs** if these become available within a reasonable period of time after the dismissal.

(*s186(2)(c) LRA provides that it is an unfair labour practice for an employer to fail or refuse to reinstate or re-employ a former employee in terms of any agreement.)

Mass Operational Requirements Dismissals & Facilitation s189A LRA

- Applies to employers **employing more than 50 employees**.
- Refer to s 189A(1)(b) – *“the numbers game”*.

Additional requirements & legal imperatives:

These are: Facilitation, notice of dismissal and strike procedures.

s189A - Facilitation

- **Request for facilitation** by CCMA, employer to decide and propose. If employer does not, other party representing the majority of employees may do so. **Notification to CCMA to be within 15 days of proposal.** Parties can agree on appointment of a facilitator.
- **CCMA to provide a facilitator within 7 days of request.**
- **Decision of facilitator is final and binding,** including decisions on orders made concerning investigation & disclosure of info.

s189A Facilitation

- **Facilitator to conduct 4 facilitation meetings** unless issues in dispute resolved in fewer. CCMA Director may order more than 4.
- **Facilitation is conducted on a with prejudice basis**, unless parties agree otherwise.
- If facilitator is appointed employer must go through process of facilitation for **60 days from the issuing of s 189(3) notice before it can given notice to terminate contracts.**

s189A Facilitation

- On receipt of notice of termination other party can give **notice of intention to strike** (s 64(1)(b) or (d), or may refer dispute about **substantive fairness of dismissal** to Labour Court.
- **If facilitator is not appointed** parties are obliged to wait 30 days from date of issuing of s189 (3) notice, then they may refer to CCMA conciliation. If not resolved at conciliation may refer to Labour court to adjudicate substantive fairness of reasons to dismiss, or employees may embark on strike action.

Notice of Termination of Employment

- **Common law position**, the position with a collective agreement, or in absence thereof the LRA.
- **Comes after compliance with collective agreement or LRA requirements.**

Dismissal of a Single Employee for Operational Requirements Reasons

- All the provisions of the UKZN's COS, Policy and LRA are applicable to individual employee.
- S191(12) of the LRA provides that a single dismissed employee may elect to refer the dispute either to arbitration (CCMA) or to the Labour Court for adjudication.

QUESTIONS