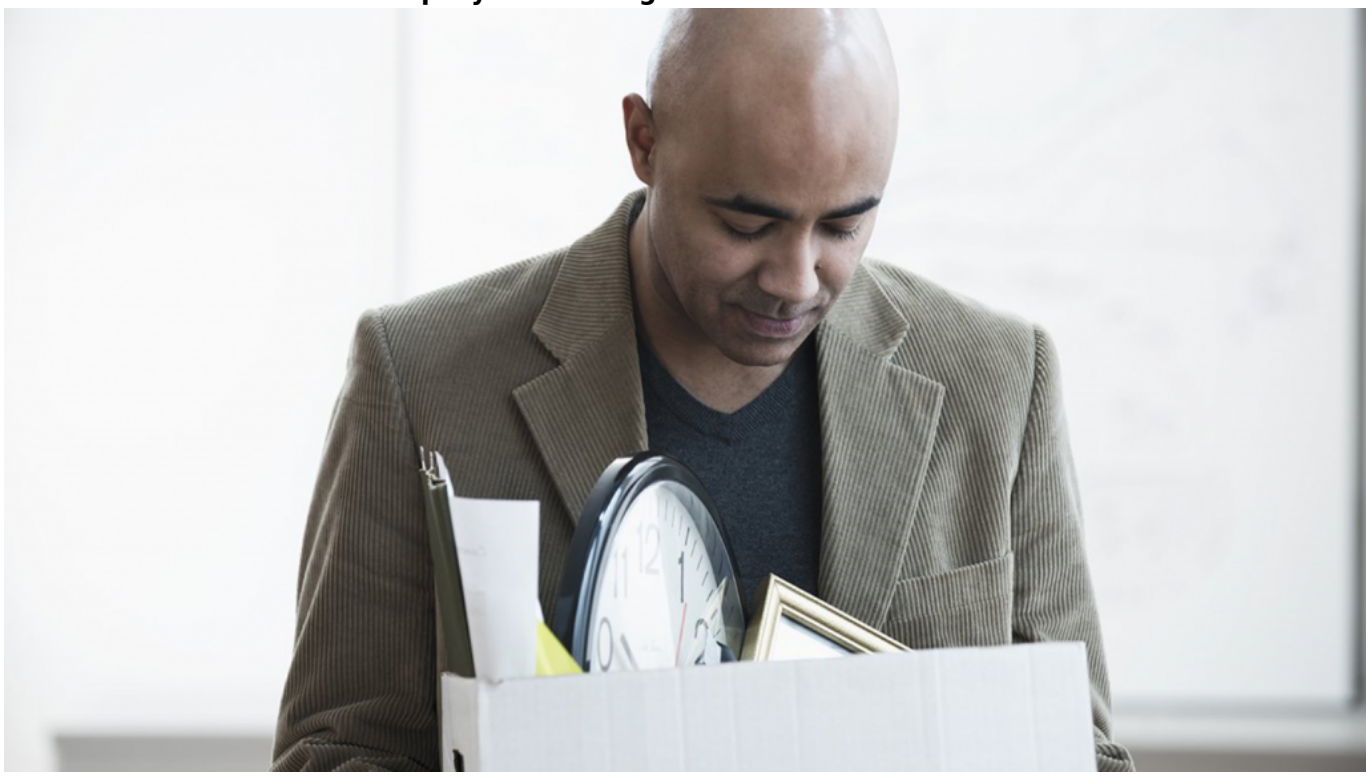
Corona Does Not Give Employer The Right To Retrench At Will



Retrenchments are a big part of the New Normal, but the new normal does not give employers the licence to retrench at will. When an employer contemplates retrenching employees it is strictly required by the Labour Relations Act (LRA) to consult first about this prospect before making any decision to retrench. Where the relevant employees belong to a trade union the employer is required to consult with that union on a number of issues, the most important of which is any means of avoiding job losses.

There are a number of reasons that retrenchment consultations may fail to take place or may fail to comply with the requirements of the LRA. These include:

The employer was unaware of its legal obligation to consult with the employees/union. Some employers are aware of the requirement to consult but are not aware of the role of the union or of the extent of the consultation requirements. It can also happen that the employer is not aware of the fact that the employees have joined a union. It is not likely that any of these reasons will suffice as an acceptable excuse for the employer's failure to consult. This is because employers are required to find out about what they do not know.

The employer may have urgent reasons for needing to retrench such as:

Dire financial circumstances threatening the immediate survival of the business

A pressing need to get rid of employees pending a hastily arranged takeover by another entity. The prospective buyer may have set a very tight deadline for the date of the takeover and may have made it a condition of the deal that workforce numbers be reduced before the conclusion of the sale

The employer may have no money to pay salaries during a consultation exercise (which exercise may be very protracted especially where the employer has more than 50 employees). The employer may therefore need to curtail retrenchment consultations.

Once again, none of these reasons will be accepted by the courts as an excuse for failure to consult fully and properly.

Where the employer has truly exhausted every effort to locate and contact the union without success it may consider the possibility of consultation with the employees/shop stewards directly. In the case of Numsa vs Ascoreg (CLL Vol.12 July 2008) the Labour Court found that the employer could consult directly with the employees where the union refused to consult. However, the employer will need solid

proof of such trade union refusal as consultation with employees instead of their union is forbidden under normal circumstances.

The trade union may be purposely delaying the consultation process. If a court finds that the union unreasonably delayed the consultation process the courts may well refuse to find against the employer despite the implementation of retrenchments without proper consultations.

However, the law clearly gives the employer the onus of ensuring, as far as it possibly can, that proper consultations take place. Therefore, despite difficulties in getting the union to cooperate, the employer must do everything in its power to gain the union's cooperation. It is only where the employer has proved that the union has been unreasonably uncooperative despite the employer's best efforts that the courts may excuse the employer for retrenching without union consultations.

The employer's duty to consult before retrenching lies at the heart of the employer's duty to ensure procedural fairness. Despite the numerous and varied obstacles to the achievement of proper consultations the employer is likely to find that failure to consult (or to consult properly) extremely costly from a legal point of view. On the other hand, where the retrenchments are delayed due to hold ups in consultations this could be equally as costly from a salary bill point of view.

The costliness of failure to consult was highlighted in Woolworths (Pty) Ltd v South African Commercial, Catering and Allied Workers Union and others [2017] 12 BLLR 1217 (LAC). The Labour Appeal Court found that the employer could have considered, as an alternative to retrenchment of 92 employees, the freezing of future wage increases. While there was no knowing how such an alternative might have turned out, the employer's failure to consider it was enough to find that a reasonable alternative to dismissal had not been considered. It followed that the dismissal was unfair.

The Court ordered the employer to pay each of the employees' compensation equal to 12 months' remuneration.

Employers are therefore advised to obtain advice from a reputable labour law expert on:

The requirements of the law regarding retrenchment consultations
How to prepare for and conduct retrenchment consultations
How to overcome obstacles to legally compliant consultations without unduly delaying the completion of the retrenchment exercise.