High unemployment rate spurs crackdown on unfair retrenchments

Over the past decade millions of employees have been retrenched. One would have thought that, by now, companies would be so lean that further retrenchments would not be feasible. Despite this large numbers of retrenchments are still occurring; and employers need to be more cautious than ever before when implementing these. This is due to the desire of the authorities to reduce job losses.

Where conciliation has failed to resolve a retrenchment dispute and where there has been only one employee retrenched, the Labour Relations Act (LRA) allows the CCMA and bargaining councils to arbitrate the dispute. This has made it easier for employees to oppose retrenchments. That is, due to the quicker and simpler processes at the CCMA as compared to the Labour Court, employees are less likely to be put off by the intimidating prospect of taking their ex-employers to task for unfair retrenchments.

Despite the strict and clear retrenchment legislation employers are still having to pay large sums of money to employees who have been retrenched incorrectly. Three areas where employers infringe the law on retrenchment are:

Failing to follow the very detailed and rigidly enforced procedure for retrenchment. For example, many employers do not, during the lead up to the retrenchment decision, carry out genuine and comprehensive consultations aimed at trying to save the jobs of the targeted employees.

Making the decision to retrench for the wrong reason. For example, it is illegal to retrench any employee for any reason related to a takeover of a business (or part thereof) as a going concern. And ‘business’ can mean any organisation whether it is a company, sole trader, welfare organisation, NGO, government department or other employer.

Using legally unacceptable criteria for deciding on which employees to retrench. That is, targeting an employee for subjective reasons is unfair. For example, deciding to retrench Mr A because he is old, sick, injured, outspoken, strong-willed or performing badly would be considered unfair. An exception is where the employer can show that the work performance of all employees has been:

Precisely, accurately and fairly measured
Recorded in writing
Used fairly in deciding on which employees should be retrenched.
That is, the employer must:

1. Implement proper performance appraisal exercises

2. Arrive at accurate measurements of performance of all employees whose jobs might become redundant

3. Be able to show that the appraisal ratings were arrived at objectively rather than resulting merely from the manager's feelings towards the employee or unreasoned opinion of the employee's work performance

4. Have made it clear at the outset of the retrenchment procedure that work performance was going to be the criteria for selecting retrenchees.

In the case of Mokoena vs Power Man (2005, 10 BALR 1047) the employee, an electrician, was retrenched after the division he worked in was closed down. However, the employer failed to prove that there was a need to close down the division and retrench the employee. The employer also failed to follow the legally prescribed procedures for retrenchment. In addition, the employer was unable to explain why it had employed new electricians shortly before the employee's retrenchment and why the new employees had not been retrenched instead of Mokoena. Thus, in this case, the employer managed to infringe all three fairness standards namely, fair procedure, fair reason and fair criteria for retrenchment. The arbitrator ordered the employer to pay the employee eight months' remuneration in compensation.

In Vermeulen v Investgold CC and another [2015] 4 BLLR 447 (LC) the Court accepted that the reason for the retrenchment was fair. However, the Court noted the LRA requires the employer to give serious consideration to the employee's proposals even if they are not viable. In this case, the entire consultation process was concluded in two hours. The employer had accordingly failed to conduct a join consensus seeking exercise, and the dismissal was to that extent procedurally unfair. The applicant was awarded compensation equal to three months' salary.

These cases highlight the facts that employers should bring evidence at arbitration to prove all their claims, should not misuse retrenchment to get rid of undesirable employees and must follow proper procedures before dismissing employees. New case decisions continue to refine and make subtle changes to labour legislation. This means that employers and employees cannot become complacent. Employees risk losing their jobs unnecessarily and employers run the very serious risk of having to reinstate employees and/or to pay huge amounts in compensation in addition to retrenchment packages.