

## Retrenchments and Mutual Terminations Fueling Job Losses



South African unemployment is at an all time high with 43% of people of working age unemployed. This is the harsh reality despite all the government's so called 'growth' plans. While retrenchments have risen to alarming levels over the past four years, mutually agreed terminations are also on the increase. The reasons that such a package might be offered by the employer are many and varied and include, amongst others, the following:

The employer believes that the employee and another person in the organisation are incompatible and that a mutually agreed separation would be best.

The employee is suspected of misconduct but the employer cannot prove it.

The employee has committed misconduct but the employer does not want the 'hassle' of a disciplinary hearing.

The employer's operational needs change.

The employee is so incapacitated as to be unable to do his/her job.

The boss wants to create a vacancy for a family member.

Where a separation package is accepted by the employee, the parties might agree that the amount of the payment will be calculated in the same or similar way to that used for calculating a retrenchment package in terms of section 41 of the Basic Conditions of Employment Act (BCEA). That is, the calculation might be based on the number of years of service of the employee.

However, this does not mean that the employee has been retrenched in terms of section 189 of the Labour Relations Act (LRA). In terms of that section, if the employer has operational requirements that might necessitate terminations, the employer is required to consult with the employees who may be affected or with their representatives. Section 189 allows the employer to retrench employees if there is

a good enough basis for this and if the consultation process has been conducted properly.

In a section 189 retrenchment the employer does not have to get the agreement of the employees or employee representatives to carry out the retrenchment. Instead, it need only comply with the provisions of the LRA. On the other hand where there is a mutually agreed separation this, by definition, involves an agreement. A section 189 retrenchment is concluded by a letter from the employer giving the employees notice of termination of employment. However, a termination by mutual consent is concluded by a legal agreement.

Employers are warned that they should not get these two types of termination confused. A termination concluded by a genuine and legally binding contract is not classed as a dismissal in the LRA. Whereas a section 189 retrenchment is a type of dismissal and may, in certain cases, be viewed as an unfair dismissal.

In a case decided by the Labour Appeal Court [ABSA Investment Management Services (Pty) Ltd vs Crowhurst 2006, 2 BLLR 107] Ms Crowhurst's employment was terminated. She went to Labour Court claiming unfair retrenchment. ABSA lost the case and, on appeal, claimed that the employee's employment had been terminated via mutual agreement. Ms Crowhurst claimed that she had been led to believe that her position had become redundant and that she would have to be retrenched as there were no other positions available for her. However, according to Ms Crowhurst, she discovered that there were several vacancies that would have suited her qualifications.

The employer's version was that Ms Crowhurst had been offered two alternatives to retrenchment. Confronted with these two conflicting versions the Court had to look closely at the document that implemented the termination of Ms Crowhurst's employment. It stated that, due to the redundancy of her position, her employment was being terminated. The letter neither bore content that indicated a mutually agreed termination nor referred to the alternatives to retrenchment that the employer had claimed had been offered to her.

The Court decided that Ms Crowhurst had in fact been retrenched and that this dismissal was unfair. The employer was therefore required to pay Ms Crowhurst six months' remuneration in compensation and also to pay her legal costs.

As the stakes are high when employment is terminated employers are warned:

To formulate their mutual termination documents to make it clear that the termination is not a dismissal  
Record their retrenchment consultations so as to make sure that they are able to prove to the courts what really was and was not said

Ensure that termination strategies and processes are managed by those properly versed in labour law.

**To attend our November seminar in Cape Town on CHANGES AND DANGERS IN LABOUR LAW  
2013 please contact Ronni at [ronni@labourlawadvice.co.za](mailto:ronni@labourlawadvice.co.za) or on 0845217492.**