EMPLOYMENT LAW

Retrenchment

Retrenchment is a form of dismissal due to no fault of the employee, it is a process whereby the employer reviews its business needs in order to increase profits or limit losses, which leads to reducing its employees

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For all your retrenchment answers, follow our guide below:

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1. What is retrenchment?

- Retrenchment is a form of dismissal due to no fault of the employee, it is a process whereby the employer reviews its business needs in order to increase profits or limit losses, which leads to reducing its employees.
- The employer must give fair reasons for making the decision to retrench and follow a fair procedure when making such a decision or the retrenchment may be considered unfair.

2. When may employees be retrenched?

- An employer may retrench employees for “operational requirements”.

- Operational requirements are requirements based on the economic, technological, structural or similar needs of an employer, in other words, the “business needs” of the employer:
    - An example of economic needs would include a drop in sales or services of the employer, or closure of business.
    - An example of technological needs would include new technology developed that can replace some employees.
    - An example of structural needs would include restructuring the business.

- When the court has to decide whether or not the employer’s decision to retrench was fair, it looks at:
- whether there was a real reason; and
- whether it was unavoidable. This means that retrenchments must be considered as a last resort.

3. What is considered to be a fair procedure for retrenchment?

- The employer must consult with the employees who are likely to be affected by the retrenchment, or their workplace forum, registered trade union or elected representatives, or any person elected in terms of a collective agreement (“consulting employees”).
- The employer must issue a written notice inviting the consulting employees to consult and disclosing all the necessary information for such consultation.
- The employer and consulting employees must engage in a consensus-seeking process on certain matters contained in the notice.
- The employer must allow the consulting employees to make representations about the matters contained in the notice and other matters relating to the proposed retrenchment.
- The employer must respond to the consulting employees’ representations. If the employer disagrees with the consulting employees, it must state the reasons for disagreeing with them.
- The employer must select the employees to be dismissed based on a selection criteria agreed with the consulting employees or a selection criteria that is fair and objective.
- After the consultation process has been exhausted, the employer may make its decision to retrench, and then issue a notice of retrenchment to the affected employees.
- The law provides for additional procedures that the employer, employing more than 50 employees, must follow when deciding to retrench.

4. What must the notice to consult look like?

- The employer must give notice to the affected employees of the need for the *proposed* retrenchment.
- This notice must be in writing and contain the necessary information for the consulting employees to make representations at the consultation.
- The necessary information includes, but is not limited to:
- the reasons for the proposed retrenchment;
- options considered by the employer to avoid the proposed retrenchment and the reasons for rejecting these options;
- the number of employees likely to be affected and their positions;
- the proposed selection criteria for selecting employees for retrenchment;
- the time when the retrenchment is likely to take effect;
- the proposed severance pay;
- any assistance that the employer proposes to offer the employees who are retrenched;
- the possibility of future employment of the employees who may be retrenched;
- the number of employees of the employer; and/or
- the number of employees that have been retrenched for the last 12 months.
- If the information on the notice is not sufficient, the consulting employees may request the employer to disclose more information. For example, the employees may request the employer's audited financial statements, where the reason for the proposed retrenchment is for cutting costs.

5. What does it mean to consult?

- Consultation is a joint consensus-seeking process between the employer and the consulting employees. This means that the consulting employees have to come up with suggestions in respect of the proposed retrenchments and the employer has to respond.
- During the consultation there are certain matters that must be discussed, such as:
- suggestions to:
    - avoid retrenchment, for example, no new appointments, early retirements, voluntary retrenchment, adjusting work hours or no overtime;

        - decrease the number of employees to be retrenched;
        - change the timing of the retrenchment, for example, the time needed to understand the information, make representations, and contribute in a meaningful way;
        - mitigate effects of retrenchment, for example, when the employer decides to retrench the employees, the employer may provide time off to attend interviews, training, or issuance of reference letters;

- the selection criteria of which employees are to be retrenched, for example, the principle of “last in, first out” (“LIFO”), length of service, skills, qualifications and/or experience can be used;
- severance pay for the retrenched employees. Employers are required by law to pay 1 week’s pay for each completed year of continued employment as severance pay, however, the consulting employees may suggest a bigger amount.

6. What payments must be made to a retrenched employee?

- Severance pay – a retrenched employee must at least be paid 1 week’s pay for each completed year of ongoing service. However, the employer must pay the retrenched employee the amount specified in any policy or his/her employment contract, if that amount is larger. If an employee refuses alternative employment with the employer or other employer, s/he will not be entitled to severance pay.
- Leave – an amount of money equal to the annual leave, or time off, that has not yet been taken by the employee must be paid out.
- Notice pay instead of working the employee’s notice period -
    - if the employee was employed for less than 6 months, s/he must be paid 1 weeks’ notice pay;
    - if the employee was employed for more than 6 months but less than 1 year, s/he must be paid 2 weeks’ notice pay;
    - if the employee was employed for more than 1 year, s/he must be paid 4 weeks’ notice pay.
- Other pay – depending on the employment contract this would be any pro-rata payment of a bonus, pension and so on.
- Once an employee is retrenched, s/he is entitled to claim unemployment benefits (“UIF”).

7. What remedy does an employee have if s/he has been unfairly retrenched?

- An employee that feels s/he has been unfairly retrenched may refer his/her dispute to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) or a bargaining council.
- The employee must refer a dispute to the CCMA or bargaining council within 30 days from date of retrenchment.
- If the dispute is not resolved at conciliation, the employee may refer the dispute to the Labour Court.
- An employee may claim that the employer:
- reinstates him/her (with or without back pay);
- re-employs him/her, either in the work in which s/he was employed before the retrenchment or in another reasonably suitable work (without back pay); or
- pays compensation to him/her.
- The claim made by the employee must be practically possible. For example, the employee cannot claim for reinstatement or re-employment if the business closed.
- The Commissioner will decide to either dismiss the employee’s claim or grant it in full or partly.
- There is a limit on the compensation that may be given to the employee, being a maximum of 12 months, depending on the circumstances.

8. How can LegalWise assist you?

Should you require an explanation of your rights on this topic, please contact your nearest LegalWise Branch , call, e-mail or WhatsApp us. For more information about our membership options visit our legal services page or visit our join now page.

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