1.4. RETRENCHMENT: LESS THAN 50 EMPLOYEES

1.4.1. What is meant by retrenchment?

The Labour Relations Act of 1995 refers to **"dismissals based on operational requirements"**, which means dismissals based on the economic, technological, structural or similar needs of the employer. The Act does not refer to the term "retrenchment" – it has merely become a term used in layman's language. As with the case of incapacity, the employee is not at fault. The Act has very specific requirements to ensure that the affected employees are treated fairly, since the effected employees are not to blame or at fault.

1.4.2. Under what circumstances can employees be retrenched?

An employer contemplating retrenchment can do so because bad economic circumstances, technological advancements, a restructuring exercise to streamline the way the business operates, or merely because the owner wishes to close the business down.

1.4.3 Duty to consult

The employer has a duty to consult with certain parties before making a final decision to retrench. The following needs to be discussed:

a) **Who does the employer have to consult with?**

The Employer has to consult with the employee(s) likely to be affected by the proposed dismissal or their representatives nominated for the purpose. Sometimes there is a collective agreement that states who the employer must consult with in the case of retrenchment. If there is registered trade union whose members are likely to be affected by the proposed retrenchments, such union must be consulted. If there is no trade union (or the union does not represent a significant proportion of the employees), then the employer should consult with the employees or the representatives nominated by employees to represent them.

b) What to consult about

The Act provides that the parties must attempt to reach consensus on the following matters:

a. appropriate measures-
    i. to avoid the dismissals;
    ii. to minimise the number of dismissals;
    iii. to change the timing of the dismissals;
    iv. to mitigate the adverse effects of the dismissals;
b. the method for selecting the employees to be dismissed; and
c. the severance pay for dismissed employees.

Some of these issues are dealt with in more detail under the points below.

c) **Written invitation**

The Act states that, for the purpose of consultation, the employer must issue a written notice inviting to the other consulting party to consult with the employer. All

relevant information, including the following must be included in the invitation:

a. the reasons for the proposed dismissals;
b. the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
c. the number of employees likely to be affected and the job categories in which they are employed;
d. the proposed method for selecting which employees to dismiss;
e. the time when, or the period during which, the dismissals are likely to take effect;
f. the severance pay proposed;
g. any assistance that the employer proposes to offer to the employees likely to be dismissed;
h. the possibility of future re-employment of the employees who are dismissed;
i. the number of employees employed by the employer; and
j. the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

d) What does "consult" mean?

The Act describes the process as follows:

The employer must allow the other consulting party an opportunity during the consultation to make representations about any matter on which they are consulting, as well as any other matter relating to the proposed dismissals. After having heard what the other party has to say, the employer *"….must consider and respond to the representations made… and, if the employer does not agree with them, the employer must state the reasons for disagreeing."* If any representation is made in writing, the employer must respond in writing.

In other words, the issues that are disclosed in writing, as well as any other matters relating to the proposed retrenchment, are up for discussion. Although there must be an attempt to reach consensus, the employer does not have to agree to anything the other party has to say. It is the employer that ultimately makes the decisions and the employer takes responsibility for those decisions. What is important, however, is that there must be a genuine attempt to reach consensus.

1.4.4. What selection criteria should be used?

The Act provides that, if no agreement is reached on selection criteria, the employer must use fair and objective criteria to select the employees to be dismissed.

The most common criterion is that of "last in, first out" (LIFO). This does not always suit the employer's requirements. Often an employer will want to reduce staff complement only in a particular department, or retain employees who have certain skills. The important point is that the criteria must be fair and objective. This means that the criteria must not depend solely on the opinion of the person making the selection, but it must be possible to check the selection objectively against such things as experience, expertise and length of service.

1.4.5. How can retrenchments be avoided or minimised?

In order to avoid or minimise retrenchments, the following may be considered:

- ❖ moratorium on hiring new employees;
- ❖ elimination of overtime work;
- ❖ transfer of the affected employees to other jobs within the business or elsewhere;
- ❖ offering employees early retirement;
- ❖ granting extended unpaid leave or temporary lay-off; or
- ❖ a reduction in salary (by agreement and after any necessary exemption in this regard has been granted).

1.4.6. Timing of the dismissals

Employers should not delay the consultation process unnecessarily, since retrenchments have a major impact on those affected. When planning the consultation and retrenchment process, it is important to remember that after the consultation with the union or employee representatives, the employer is obliged to give the affected employees notice (or payment in lieu of notice), in addition to any severance pay that may be due to them.

1.4.7. Mitigating the adverse effects of retrenchment

Because of the adverse effects that dismissal has on the life of an employee and his/her family, there is often assistance that the employer can render. This includes: explaining to the employee how to go about claiming unemployment insurance benefits; advising the employee of where and how to go about seeking alternative employment; giving the employee an appropriate reference letter; assisting the employee with relocation; and offering the employee preference of re-employment in the event that a suitable vacancy arises.

1.4.8. Severance pay

In terms of the Basic Conditions of Employment Act of 1997, there is an obligation to pay severance pay to employees who are dismissed for operational reasons. The amount and circumstances are discussed below.

(a) The amount

- ➢ The Basic Conditions of Employment Act provides that where an employee is dismissed due to operational requirements, severance pay equal to at least one week's remuneration for each completed year of service must be paid to the employee. This provision requires further explanation.

- ➢ Although the Act prescribes at least one week's remuneration for each completed year of service, this is a minimum and the consulting parties might agree on more (e.g. one week's remuneration for the first three years of completed service and two week's remuneration for every year in excess of that).

- ➢ Remuneration means "payment in money or in kind, or both in money and in kind". This refers not only to a salary or wage, but would include other payments and benefits that are not merely subsidiary.

- Completed year of service means that, although the employee's service might have been interrupted, he/she would have completed a year of service if the employment contract has not been interrupted for more than one year.

(b) When is an employee not entitled to severance pay?

An employer can be exempted from the obligation to pay severance pay. This can be done by application to the Minister of Labour, for example in cases where the employer cannot afford severance pay. When an employee unreasonably refuses to accept an offer of alternative employment with that employer or any other employer, the employee is not entitled to severance pay. What amounts to an "unreasonable" refusal, depends on the circumstances and in cases of doubt it would be advisable to seek professional advice.