

Unfair Dismissal - Operational Requirements (2004) 25 ILJ 896

2004 ILJ p896

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Introduction

When a court is asked to adjudicate the substantive fairness of a dismissal for operational requirements, it is tasked with resolving a dispute that is essentially economic: a dispute about the distribution of cost and benefit between owners of the enterprise and workers employed in it. That dispute has more in common with a classic dispute of interest than one of right. There is seldom, if ever, a right or wrong answer to the question whether a particular dismissal is necessary or justified by the business imperative on which it is grounded. The enquiry is not a fact-finding one, but rather takes the form of a review of the norms that the employer is seeking to establish - norms that determine the distribution of cost and benefit. A 'business line call is at stake'. Because of this, the courts 'instinctively look for ways of avoiding being drawn into the economic merits of a decision, and the natural response has been to give employers a hefty margin of grace in this quarter'.¹

This approach of the courts to the substantive fairness of operational requirements dismissals, sometimes described as deferential, has attracted attention in recent decisions of the Labour Appeal Court (LAC), and appears to be under attack. The question is, in each case, whether dismissal is fair, both in that the reason for the dismissal is fair, and that a fair procedure is followed. Some anxiety has been expressed by courts that giving employers 'a hefty margin of grace' fails to give full recognition to the requirement of fairness. Unresolved (or unsatisfactorily resolved) questions about the relationship between collective bargaining (and in particular the automatically unfair dismissal provided for in s 187(1)(c))² and the operational requirements dismissal have, to some extent, compounded the uncertainty.

In our view, a deferential approach, if properly understood and properly applied, is appropriate and fully satisfies the requirement of fairness. The relationship between collective bargaining and dismissal is less easy to resolve, and it seems to us that further legislative intervention may be necessary. But first, we deal with the less controversial

2004 ILJ p897

area of procedural fairness, where the law appears to have reached some kind of equilibrium.

Procedural Fairness

The duty to consult prior to retrenching employees was soon established by the Industrial Court (IC) under its general unfair labour practice jurisdiction.³ Consultation was required prior to retrenchment actually taking place.⁴ But the extent of the duty was limited, and consultation was clearly distinguished from bargaining.⁵ Whereas bargaining contemplated the notion of haggling or wrangling with a view to arriving at some agreement through a process of give and take, consulting merely contemplated taking counsel or seeking information or advice, without implying that any kind of agreement was being sought.⁶

The content of the consultation requirement was fleshed out in subsequent decisions of the IC and LAC. Divergent views were expressed on the question of whether consultation was required before management made the decision to retrench.⁷ In a number of cases the courts ruled that consultation was not necessary until after management had taken the decision to retrench, a decision that fell firmly within managerial prerogative. Consultation was then required only in relation to the implementation of that decision.⁸

This approach was articulated, though with reference only to a decision 'in principle', in *Building Construction & Allied Workers Union v Murray & Roberts Buildings (Tvl) (Pty) Ltd*:⁹

'When it comes to retrenchment common sense indicates to us that the employer will first sense the need to retrench.

That then will be discussed on managerial level and a decision in principle will be taken. Only thereafter will the matter be discussed with labour.'

In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*¹⁰ the LAC stated the following:

2004 ILJ p898

'An employer, who senses that it might have to retrench employees in order to meet operational objectives, must consult with employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reasons for it. The employees or their representatives must then be invited to suggest ways of avoiding terminations of employment, and should be placed in a position in which they are able to participate meaningfully in such discussions. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward. The final decision will, however, remain with the employer.'

The view of the court in *Atlantis Diesel Engines* (the employer who 'senses that it might have to retrench employees' must consult 'at the earliest opportunity') appeared to contrast with the views of the court in *Murray & Roberts* (once the employer senses the need to retrench this issue would, as a matter of common sense, first be discussed at a managerial level and a 'decision in principle' would be taken before consultation was initiated). The AD¹¹ rejected the approach in *Murray & Roberts*, finding that it tended 'to negate the need to consult as a necessary prerequisite to a decision at managerial level to retrench'.¹² Instead, the AD endorsed the views of the LAC in *Atlantis Diesel Engines* (in the extract quoted above) which, the AD considered, envisaged 'a final decision being taken by management only after there has been consultation in good faith'.

Atlantis Diesel Engines was concerned at the LAC stage primarily with the question whether consultation was required at all prior to a decision being taken by management to retrench. It ruled decisively that it was. It also found that the LAC decision in *Murray & Roberts* did not in fact provide support for the contrary view. The approach the court had contemplated in that case was, first, an 'in principle' decision taken by management without consultation, and second, a proper process of consultation before any 'final decision' was taken to retrench. There is some merit in the view, expressed in *Murray & Roberts*, that as a matter of common sense the need to retrench will first be discussed at management level. And it follows, also as a matter of common sense, that management will adopt at least a preliminary or initial view before labour is approached. There would be little point in approaching labour to discuss possible retrenchments if management had not at least decided that it seriously contemplated retrenchment as an option.

This approach can be reconciled with the decision in *Atlantis Diesel Engines*. Both the LAC and AD in that case clearly articulated or endorsed the view that consultation should commence at the earliest opportunity and in any event before a final decision was taken by management to proceed with retrenchment. Management is not required to initiate a consultation process with labour merely because

2004 ILJ p899

retrenchment lurks in the background as a remote possibility. But as soon as retrenchment looms as a possibility being contemplated by management, the duty to consult arises. The migration from 'lurking in the background' to 'looming as a possibility being contemplated' will necessarily not take place without some discussion of the issue at a management level. Management can hardly 'contemplate' retrenchment without discussing it first. But once retrenchment is contemplated, management must not spend a prolonged period working out the finer details of its proposals before first broaching the subject with labour, so as to produce without consultation an 'in principle' decision that is extremely difficult to dislodge. It will seldom be possible to embark on a joint problem-solving exercise in good faith under the watchful eye of an 'in principle' decision. What is required is that management must engage labour at the earliest opportunity so that labour may become involved in the decision-making process in a real sense.¹³

The debate about whether or not consultation was required prior to management's taking a decision to retrench reflected a fundamental difference of opinion about the existence and scope of the employer prerogative. That question is one which remains of importance in the ongoing developments in the law concerning the substantive fairness of operational requirements dismissals, a matter to which we return when we consider the extent to which 'deference' is appropriate when assessing the fairness of the employer's reason for retrenchment.

Whereas the early decisions of the IC contemplated consultation as engagement in a very limited sense,¹⁴ the decision in *Atlantis Diesel Engines* established that a far more wide-ranging consensus seeking exercise was required. The AD clearly considered that the employer's duty to consult 'extended beyond merely providing the affected employees with an

adequate opportunity of being heard'. Instead, the endeavour to avoid retrenchment, or minimize its consequences,

2004 ILJ p900

should amount to a joint problem-solving exercise with the parties striving for consensus where possible.¹⁵

The provisions of s 189 of the LRA capture in essence the consultation obligation articulated in *Atlantis Diesel Engines*. The procedural requirements for a fair retrenchment may, but for the amendments introduced in 2002 by s 189A, be said with a reasonable degree of certainty to have been settled.¹⁶

The enactment of s 189A of the LRA impacts in two material respects on pre-retrenchment procedures in the case of the larger scale retrenchments contemplated by that section. First, and in conjunction with its effort to encourage the parties to make use of facilitation, the section imposes minimum time periods for the consultation process to take effect. If a facilitator is appointed, a minimum time period of 60 days is prescribed for the consultation process. If a facilitator is not appointed, the minimum period is 30 days plus the statutory conciliation period.¹⁷ Secondly, the section compels early dispute resolution over procedural matters by providing trade unions with direct access to the LC provided that those proceedings are initiated within 30 days of the date of dismissal. Complaints about procedural non-compliance must be dealt with in this way, and procedural fairness may not be raised as an issue for consideration in any subsequent unfair dismissal proceedings that may be initiated in the usual way.¹⁸

Substantive Fairness

The most important question that arises from a consideration of the cases dealing with the substantive fairness of retrenchments concerns the degree of deference to be shown by the courts in their assessment of the employer's business decisions, and the impact on that assessment

2004 ILJ p901

of the requirement of fairness. The application of fair selection criteria also impacts on the substantive fairness of retrenchments, but we do not intend to deal with selection criteria in this article.

Early decisions of the IC and LAC made it clear that, as a general rule, once the court was satisfied that the decision to retrench was based upon sound economic considerations it would not interfere with that decision.¹⁹ The 'primary (managerial) economic decision' was regarded as being one of exclusive managerial prerogative. The court would examine whether that decision was taken in 'a businesslike and bona fide manner'. If it was, the court would not interfere with it.²⁰ The employer enjoyed a 'sole managerial prerogative' in making that economic decision:

'The only prerequisites for a proper exercise of such prerogative are that it must be bona fide and that a business rationale must exist. (We are somewhat doubtful about the second requirement - after all in business frequently not always the best, nor the correct decision is taken. Perhaps management has the right to be foolish as long as it is strictly bona fide in its deliberations.)'²¹

The rationale for this deferential approach in assessing the company's decision to retrench appeared to be two-fold. First, the judicial officers adopted the view that they were not necessarily the best qualified people to assess the merits of business decisions to determine whether those decisions were based on sound business or economic principles. Secondly, there was a distinct reluctance to allow the fair labour practice jurisdiction to restrict or limit the range of possible economic decisions that could be taken by managers of a business in the genuine belief that they were pursuing the best interest of the business. The essence of the dispute being adjudicated was the distribution of cost and benefit as between employer and workers, classically matters of mutual interest.²²

On this approach, it was sufficient that the business rationale relied upon reflected a genuine belief on the part of the managers of the business that there was a commercial rationale for the decision. It did not matter that the decision could later be shown to have been a bad one for the business. And there was no requirement to weigh up

2004 ILJ p902

the benefit to the business against the harm caused to workers in the form of job losses.

The LAC in *NUMSA v Atlantis Diesel Engines* rejected this approach, though its reasoning was not fully explained. It interpreted the approach of the IC to be that the court's function was 'merely to determine whether or not the decision had been correct'. In fact, the IC's approach had clearly not been concerned with the question whether or not the decision was correct. On the contrary, it had recognized that business decisions could not readily be categorized as correct or incorrect. Some business decisions may be considered better than others on a relative scale.

In any event, the LAC rejected the IC's deference to the employer's bona fide business decisions. It focused its enquiry instead on the question of fairness:

'[W]e respectfully differ from [the presiding officer's] suggestion that the decision to retrench could be fair simply because it is bona fide and made in a business-like manner. . . . What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances.'²³

Termination for economic or operational reasons had to be a 'measure of last resort'.²⁴ And the court rejected the IC's suggestion that even a foolish decision may be unimpeachable. This 'ignores the hardships caused by termination of employment and disregards the fact that the rights of employees are also affected in the process'.²⁵

These aspects of the LAC's decision were not challenged on appeal. However, this far more exacting approach (that dismissal should be the 'only reasonable option in the circumstances') has not been followed in subsequent decisions.²⁶ Thompson, too, suggests that it goes too far:²⁷

'Testing the fairness of a decision does indeed go further than a cursory look at its bona fides and commercial rationale. But it surely cannot go as far as setting up the requirement that the "termination of employment is the only reasonable option in the circumstances". If the decision is based on a demonstrably sensible business analysis that has been probed in the consultative process, is not unreasonable in context nor disproportionate in the trade-off between gains and hardships, it should withstand scrutiny.'

2004 ILJ p903

In *SA Clothing & Textile Workers Union v Discreto - A Division of Trump & Springbok Holdings*²⁸ the LAC described its role as being similar to that of a court dealing with the judicial review of administrative action. In doing so, it clearly did not follow the more exacting approach contemplated by the LAC in *NUMSA v Atlantis Diesel Engines*:

'The function of a court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham. . . . The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process had been followed, and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision, properly taking into account what emerged during the consultation process.'

In *BMD Knitting Mills (Pty) Ltd v SACTWU*²⁹ Davis AJA expressed some doubt as to whether the degree of deference inherent in this approach was appropriate in the light of the requirement that a dismissal must be for a fair reason:

'The word "fair" introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision, but rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

In the light of the facts in *BMD Knitting Mills*, the court did not, however, consider it necessary to decide whether or not the test in *SACTWU v Discreto* was too narrow.

Most recently, in *CWIU v Algorax (Pty) Ltd*,³⁰ the LAC reiterated that 'the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court'. Nevertheless the court rejected the proposition that it should show deference to the

2004 ILJ p904

employer in assessing the fairness of the rationale proffered for the retrenchments. The court appeared to consider that if it showed deference to the employer this would mean allowing the employer to decide whether its own conduct was fair or not, a task clearly entrusted to the court. The court went on to scrutinize the employer's rationale for the dismissals and took the

view that there had been such an obviously better solution available to the employer than the one it had chosen to adopt that the dismissals were considered to be unfair.

In an effort to resolve the apparent differences in approach in these decisions, and to set out what we submit are the applicable principles to be applied, we set out a number of propositions that are either clearly established or, we submit, reflect an appropriate statement of the law.

There is seldom, if ever, a right or wrong answer to the question whether an employer should take a particular decision that it considers to be in the business interests of the enterprise.³¹ Provided that it engages properly with workers, if consensus cannot be achieved the employer is entitled to decide what the interests of the business require. The employer has the right to make business decisions, and it enjoys the ultimate discretion to determine what decisions are in the best interests of the business.³² In this sense management enjoys a prerogative, though it must make decisions in the exercise of that prerogative in a procedurally fair manner, and those decisions may be challenged either through the use of industrial action or, where the decisions fail to meet requirements prescribed by law, through adjudication.³³

A wide variety of matters may properly be said to concern the 'operational requirements' of a business. The LRA defines operational requirements as 'requirements based on the economic, technological, structural or similar needs of an employer'.³⁴ Operational requirements

2004 ILJ p905

of a business that may justify dismissal extend beyond traditional notions of redundancy. They include employer initiatives prompted by external market factors as well as internally conceived initiatives to improve business performance. Significantly, they extend to efforts to improve the profitability of an already profitable business, and are not limited to measures aimed at curbing sliding profits or eliminating losses.³⁵

One employer faced with particular economic or operational circumstances might take one approach, while another might take a different approach. An employer will be presented at any one time with a whole range of different options and alternatives as to how best it may pursue the commercial or other interests of the business or enterprise. It may choose to buy assets or sell assets, increase volumes of production or reduce volumes of production, buy a factory or sell a factory, increase or decrease its prices, choose a new supplier. Employers take a large number of decisions on a daily basis that affect the economic performance of the business. The courts should be slow to interfere to direct those decisions.

But this should not be taken to mean that the court will abrogate responsibility for assessing those decisions on the basis of factors which the law imposes as constraints on the employer's decision making. Employer's decisions must, of course, be legal (in the sense that they are not criminal). They may also not be unconscionable or contrary to public policy. In the context of retrenchment, the employer's decisions must, if they result in job losses, be fair. These considerations constitute limitations on the manner in which the employer is entitled to make business decisions, and the content of those decisions. This means that the employer does not have an absolute discretion as to how to run its business. But there remains a range of options that the employer may permissibly pursue that fall within these limitations or constraints imposed by the law. The courts must, in our view, show deference to the employer's decisions in the sense that the enquiry is limited to the question whether or not the employer decision under scrutiny falls within the parameters set for it.³⁶

2004 ILJ p906

One of the requirements imposed on employer decisions that result in dismissals is that they must be fair. There can, of course, be no doubt that the fairness of the decision to retrench must be assessed, and that this involves assessing (as stated in *BMD Knitting Mills*) whether a 'reasonable basis exists' for the dismissals, and an investigation as to whether the decision was taken 'in a manner' that is fair to affected employees. None of this indicates a more exacting test than was contemplated in *SACTWU v Discreto*, which requires that dismissal must be 'operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process'. It does not mean that the enquiry must be extended to weighing up whether the dismissal fairly balances the respective commercial interests of employers and employees in the enterprise. That would require the court to pronounce on what are classically matters reserved for collective bargaining, the 'wage-work deal'. Fairness

in this context demands rationality, but does not require adjudication of 'the trade-off between gains and hardships'.³⁷

This should not be taken to mean that the court must simply accept whatever the employer says about its business decisions. On the contrary, if it is to satisfy itself of the commercial rationality of the decision, the court must 'examine the content of the reasons given by the employer'.³⁸ And it will declare the dismissals to be unfair if they will not reasonably result in the achievement of the business objectives being pursued, or if the decision to dismiss is not reasonably supported on the facts or is not reasonable in the light of the reasons given for it. In our view, this kind of judicial scrutiny, which involves the application of a test similar to that applied in cases of judicial review, fairly balances the respective interests of employer and employees in the enterprise. Fairness in this context requires that rational business decisions be made, and not more. By contrast, the absence of rationality on the part of the employer will almost certainly render the decision to dismiss unfair.³⁹

It is essential to recognize that one employer may fairly make one decision and another may fairly make a different business decision when faced with the same circumstances. The court may itself decide that it would have taken a third decision in the circumstances. All

2004 ILJ p907

three decisions may, depending of course on the circumstances, properly be described as fair. To take an example: an employer has an option to introduce new machinery that will improve efficiency but will result in ten jobs becoming redundant. The employer may fairly decide to introduce the new machinery and retrench all ten redundant workers. A different employer, faced with the same situation, may decide before introducing the new machinery to give workers the opportunity to improve their own productivity to such an extent that the new machinery would have little real effect and its introduction is therefore unnecessary. The court, with the benefit of hindsight, may take the view that the introduction of new machinery was appropriate, but that the employer should have foreseen that increases in efficiency would result in increased demand, creating five new jobs. It may take the view, therefore, that the employer should have dismissed only five of the redundant workers. None of these views is either right or wrong. None is obviously unfair. All may reasonably pass the test of what may be described as being fair. The court is not enjoined to determine whether it would have chosen the route followed by the employer, and is not required to decide whether the employer's decision was 'correct'.⁴⁰ In these circumstances the court cannot declare the decision of the first employer to be unfair merely because it (the court) would have made a different decision at the time that could have saved jobs. The court must necessarily recognize that there may be a range of possible decisions that the employer may take, some of which may be fair and some of which may be unfair. The court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair.⁴¹

2004 ILJ p908

The court will, of course, not defer to the employer on the question whether or not the dismissals in question were fair. The court will never find the dismissals fair because the employer believes them to be fair. No-one would seriously contend for deference of this kind.⁴² There may be situations where there is only one decision that an employer could fairly have taken. That appeared to be the basis for the court's obiter views in *Algorax* that the retrenchments were in any event unfair.⁴³ But these situations are likely to be rare. Retrenchment need not be 'necessary' in an absolute sense to be fair. Nor need it be 'unavoidable'. In *NUMSA v Atlantis Diesel Engines* the LAC appeared to suggest that since dismissal must be a matter of last resort, an employer's decision to retrench would be fair only where dismissal was unavoidable. This cannot of course be taken at face value. Most decisions to retrench can be avoided if the employer is willing to accept continuing inefficiency in its business, lower levels of profit than could otherwise be achieved, or if it is willing to continue sustaining losses. The primary purpose of the LAC's statement was to articulate the importance of engagement with workers in a joint problem-solving exercise with a view to avoiding retrenchment if possible. What must be accepted is that the court must necessarily make a judgment call as to whether the objective that the employer seeks to pursue may legitimately give rise to retrenchment. If the employer's objective is one that is legitimate in the sense that it is motivated by genuine commercial considerations, then retrenchment need

be unavoidable only in the sense that the employer's objective cannot otherwise reasonably be achieved by consensus.

When, in 1999, Thompson enjoined the LC to be more rigorous in its assessment of the substantive fairness of the operational requirements dismissal, his reasoning was materially influenced by the fact that the LRA at the time outlawed strikes in opposition to retrenchments.⁴⁴ This removal of workers' right to express opposition to

2004 ILJ p909

retrenchment through power-play justified, in Thompson's view, greater judicial intervention in the employer's business decisions. This concern has now largely been addressed by the introduction of s 189A. Workers faced with large-scale retrenchments (that fall within the parameters of the section) are given the right to strike in opposition to the retrenchments. The opposition, it must be assumed, is to the decision to retrench, the substance of the retrenchments rather than the procedure being followed, since a separate course of action is prescribed for remedying complaints about procedure. But if workers have recourse to strike action to oppose retrenchments regulated by s 189A, they forfeit the right to seek adjudication of the substantive fairness of the dismissals. They must make an election. If workers choose adjudication this must be presumed to be a consequence of their own assessment of the relative strength of the employer's commercial rationale on the one hand, and of the workers' industrial muscle on the other.⁴⁵

Section 189A has a further provision whose effect has not, as far as we are aware, yet been tested. Subsection (19) states that when certain requirements are met the LC seized with a dispute about the substantive fairness of a dismissal must find the dismissals to be fair. The question that arises is whether this provision should be understood to limit the extent of judicial scrutiny of the rationale for the dismissals. Other than in relation to the use of selection criteria, a separate requirement of fairness is conspicuously absent. What the subsection expressly requires is that, to be fair, the dismissal should be to give effect to an operational requirement, the dismissal should be operationally justifiable on rational grounds, and the dismissal should have been preceded by a proper consideration of alternatives. In addition, selection criteria must have been fair and objective. There is no separate requirement that the court should embark on the hazardous exercise of weighing up relative gains and hardships that result from the dismissals, an exercise that is plainly to be left in the realm of collective bargaining and power-play. The legislature has sent a clear signal that the court should give a wide berth to the distributive questions that this enquiry inevitably entails. In short, while judicial scrutiny remains necessary to ensure that the prescribed parameters are adhered to, deference to bona fide business decisions of the employer is clearly asserted.

The question may be asked whether a more intrusive test is implicitly required in the case of smaller scale retrenchments, to which the provisions of s 189A are not applicable. This would be the case only if it could sensibly be established that the provisions of s 189A have the effect of narrowing what would otherwise be a more wide ranging

2004 ILJ p910

enquiry. In our view they do not. *SACTWU v Discreto* establishes (correctly in our view) the applicable test. It has not been substituted or amended. The provisions of s 189A neither alter the approach set out in that case, nor provide any basis to conclude that a more intrusive test is appropriate for retrenchments to which that section does not apply.

Dismissal for Operational Requirements and Collective Bargaining

What remains for us to consider is the relationship between dismissal for operational requirements and collective bargaining. The courts have generally had little difficulty in accepting the commercial rationale for retrenchments where it is apparent that workers are superfluous to requirements because their jobs no longer exist. But the requirements of a business are far more complicated than that. Employers may rationally seek to reduce losses or increase profits by changing the way they do business and the way employees do their work or are paid for their work. These considerations affect the economic viability or performance of a business just as much as paying salaries to workers who have no jobs.

Prior to the enactment of the LRA 1995 there was no attempt to restrict or prohibit retrenchments that arose where the employer's purpose was to change the way that its

employees did their work or were paid for it. To take a simple example: an employer finds that due to increased demand it needs periodically, and at unpredictable times, to extend the working hours of a particular production shift into overtime. The increased demand and its unpredictability militates against the employment of new workers. Instead, the periodic increases in demand could best be met by requiring existing workers to work overtime from time to time. The employer approaches the workers to secure their agreement to some kind of overtime regime and the parties embark on extensive negotiations about the working time regime and about the rate that workers will be paid for working overtime. Negotiations reach deadlock. At this point of impasse, the employer was generally considered, under the LRA 1956, to be entitled to introduce the change unilaterally by giving contractual notice to the workers of the new terms.⁴⁶ In fact what was happening, although it was seldom articulated in this way, was that the employer, by giving contractual notice, was terminating the existing contracts under which the workers served and offering to engage them on new terms with the overtime requirements that the employer was imposing. Provided the employer had a valid (or, put differently, fair)

2004 ILJ p911

commercial rationale, provided it had negotiated in good faith to deadlock on the issue, and provided it had given reasonable notice (at least contractual notice), then this would not be found to constitute an unfair labour practice. If employees refused to accept the new conditions their employment would come to an end, either because they simply would not accept the new contract, and the notice given by the employer would serve to terminate their employment, or because they could justifiably be disciplined and ultimately dismissed, having continued to tender their services under the new regime, for failing or refusing to work the overtime when it was required.

The LRA 1995 appears to seek to regulate this kind of situation in a different way, inter alia, by the introduction of the automatic unfair dismissal in s 187(1)(c). It has, however, been no easy task for the LC to determine the precise meaning and effect of this provision, and in particular what effect it has had on the right that an employer has to dismiss workers for fair reasons relating to operational requirements.

A useful point of departure is, perhaps, *Schoeman v Samsung Electronics (Pty) Ltd*.⁴⁷ Ms Schoeman and Ms Rossouw were sales executives paid a salary package consisting of a basic salary, commission and fringe benefits. As a result of certain structural changes to their employer which resulted in substantial increases in sales volumes that were not related to improvement in their own performance, Ms Schoeman and Ms Rossouw began to earn substantially larger amounts of commission than had been anticipated when the basis for the calculation of commission had been agreed. The employer considered that the amounts of the commission payments were not justified when one considered what the company would have to pay 'in the market' to replace them. After negotiations reached impasse, the employer attempted, unsuccessfully, to lock them out in an effort to persuade them to accept a lower basis for the calculation of commission.⁴⁸ The employer then embarked on retrenchment consultations and ultimately dismissed both employees.

The LC ruled that while an employer may not dismiss employees in order to compel acceptance of a demand, this did not prevent the employer from resorting to dismissal for operational requirements in a genuine case.⁴⁹ In the view of the court, a dismissal for operational requirements could be used not only in relation to an employer's need to change the 'work obligation' but also the remuneration of an

2004 ILJ p912

employee.⁵⁰ In the employer's bona fide view, the court found, the employees' previous commission structure was 'out of kilter with the market' and the employees were 'not worth the old package to the company'. That being the view of the employer 'it is not for [the court] to judge whether this was valid or not. The remuneration which an employer wishes to pay to its employees, in the absence of statutory regulation, is a matter above and beyond the purview of the law. Whether it is fair or unfair is a consideration which the bargaining parties will doubtless consider but it is plainly none of the court's business'.⁵¹ The court found that the employer was 'motivated by commercial reasons in making its offer and in dismissing the applicants' and concluded that the dismissal was substantively fair.⁵²

This decision of the LC preceded the publication of the article by Thompson referred to earlier.⁵³ In that article Thompson set out to describe how the prohibition on the use of dismissal as a weapon in collective bargaining was to be reconciled with the operational requirements dismissal. Thompson was correct, in our view, to state that the debate over the operational requirements of a business is essentially an economic one, not a legal one, and that the debate should, therefore, begin in the bargaining arena.⁵⁴ This means that the distributive issues that determine the economic viability or success of the enterprise may at one stage form the subject of collective bargaining, but may in time become the subject of consultations over retrenchment. Thompson attempted to establish the principles that may be used to determine how the engagement between management and labour could 'migrate' from the arena of collective bargaining to the arena of dismissal.

Thompson pointed out that 'the world of work and business defies sharp categorization', and that the LRA appeared to 'pursue competing policy objectives in successive breaths'. He distinguished two areas of interaction between labour and management. The first concerned the 'core subject-matter of collective bargaining', what Thompson referred to as 'the wage-work deal'. The second, which Thompson considered to be distinct from the first, concerned business restructuring for survival or growth in the product and services market, the operational requirements of an employer. While recognizing that business restructuring could also be regarded as an appropriate subject-matter for collective bargaining, Thompson took the view that 'an exchange over employment changes driven by operational requirements

2004 ILJ p913

does not fit comfortably within the conventional bargaining framework'. This was because 'the wage-profit split is not directly at stake, and precipitating factors are often beyond the parties' control'.⁵⁵ It is, Thompson appeared to consider, for this reason that a separate process has been designed to deal with business restructuring, namely the information sharing and consultation process provided for in s 189 of the LRA.

Thompson's analysis remains the most comprehensive and valuable analysis of these difficult issues that has been presented and it is unfortunate, perhaps, that the labour courts have not grappled with it more closely.⁵⁶ Nevertheless, we differ from Thompson in two material but related respects. First, we do not think that a valid distinction can be drawn between the subject-matter of the engagement between labour and management over classic mutual interest matters (those matters that Thompson describes as being 'purely' over the wage-work bargain) and those matters that constitute the employer's 'sheer operational requirements'. Secondly, we think it is no longer tenable, or appropriate, to maintain a conceptual distinction between the process of collective bargaining and the process of consultation envisaged in s 189 of the LRA. We deal with these issues in turn.

No conceptual distinction can properly be drawn between matters of mutual interest and the 'matters' that cause employers to contemplate retrenchments. All of these matters impact ultimately on the 'wage-work bargain' and should (or may) be discussed in the same process of engagement between management and labour.⁵⁷ It is therefore artificial to talk of the 'migration' of engagement from the arena of bargaining to the arena of dismissal.⁵⁸ That there is no proper distinction to be drawn between matters that are in a pure sense the subject of the wage-work deal and the employer's operational requirements is perhaps best and most obviously illustrated by the following example. An employer employs a hundred workers in its factory. It introduces new machinery.⁵⁹ In

2004 ILJ p914

consequence of the introduction of the new machinery, the employer requires ten fewer employees. It can clearly identify that ten members of its current workforce are redundant. It initiates a retrenchment consultation process. This would, classically, be an operational requirement and few would argue that it is a typical matter of mutual interest, and that it requires an engagement about the 'wage-work bargain'. But the workers may immediately respond: 'We think the business will grow in time and that you will need all of us again. We propose that the remuneration of each of us be reduced by ten percent, achieving the same cost reduction as if you retrenched ten of our number, and we will share the work between us.' The discussion then focuses on whether this wage reduction will meet the company's profit objectives and the parties ultimately agree that it will. This discussion has traversed the very matters that the parties will need to consider when they meet at their next annual round of

wage negotiations. What are the company's profit objectives? What business structures are best suited to meet those objectives? How many workers does it need? What are the earning needs of workers? What are the needs of workers in regard to leave, time off and the like?⁶⁰ The point can be developed further. The litigation in both *Fry's Metals and Algorax* resulted from changes that the employer wished to introduce to existing shift systems. This is classically a response by an employer to changing patterns of production or demand, to the pursuit of improved efficiency and ultimately to the better achievement of its profit objectives. But questions of working hours and payment for those hours, the proportion of working hours which constitute overtime and are paid for at higher rates are classically, too, matters of mutual interest which impact directly on the workers' earnings and working conditions (their hours of work and time off) and certainly fall within what is generally contemplated as matters of mutual interest. There is no conceptual reason why discussions about shift systems should not form part of annual wage negotiations and take place at the same time and in conjunction with discussions around wage increases. Improved efficiencies achieved through a change to a shift system might enable the employer to pay higher wages and the converse might also be true. But, by the same token, a change in the shift system might be what is required to save jobs, and might therefore be put up as an alternative to retrenchment in the course of

2004 ILJ p915

retrenchment consultations. There is, in our view, no conceptual distinction between the matters which form the subject of engagement in negotiations over conditions of service and typical retrenchment consultations.⁶¹

If this is correct, there is no need to conceptualize a 'migration' from the arena of collective bargaining to the arena of dismissal. The potential alternatives and the permutations of different decisions may be put on the table upfront. In fact, fairness dictates that they should be.⁶² 'If we dismiss ten per cent of the workers we may afford a higher wage increase.' 'If we moderate the wage increase this year we may avoid retrenchments.' 'If we agree to a freeze on wages this year, we may win additional orders that increase employment.' These are all fundamental economic matters that go to the heart of the commercial needs of the business. Secondly, and apparently part of the reason for maintaining the conceptual distinction between matters of interest and operational requirements of the employer, is the fallacy that separate processes are in fact involved in negotiating matters of mutual interest (bargaining) and in 'consulting' over possible retrenchment. That distinction can no longer be maintained. Bargaining requires information sharing and a good faith commitment jointly to reach outcomes or solutions, consensus, or agreement in relation to the subject-matter of bargaining. Consultation over retrenchments requires precisely the same process. Those who believe that bargaining is necessarily adversarial and imposes a greater duty to compromise than consultation of the kind envisaged by s 189 are simply mistaken. Modern theories of collective bargaining recognize the value of mutual gains negotiations which are approached from the outset as a joint problem-solving or consensus seeking exercise.⁶³ And employers and trade unions should recognize that the factors impacting on the viability or success of the enterprise must be viewed in a holistic way in the course of collective bargaining negotiations if 'win-win' collective bargaining outcomes are seriously sought. There is no added compulsion or incentive to reach agreement

2004 ILJ p916

merely because the engagement is styled as bargaining or negotiation rather than consultation. By contrast, the notion that retrenchment consultations merely present an opportunity for workers or their representatives to make representations was rejected by the AD as long ago as 1994.⁶⁴ The requirements of s 189 require something more than this: a joint problem-solving or consensus seeking exercise.⁶⁵

If we are correct that no conceptual distinction can properly be drawn between the subject-matter of collective bargaining and the subject-matter of retrenchment consultation, and that no proper distinction can be maintained between the processes required to be followed, then the provisions of s 187(1)(c) of the LRA would make no sense if they prohibited the kind of dismissal that took place in *Fry's Metals*. The distinction between what is and what is not permissible would become difficult if not impossible to draw. Interpreted broadly, the s 187(1)(c) prohibition would make very far-reaching inroads into the employer's ability to use retrenchment to effect workplace restructuring. For in almost every restructuring exercise

some workers at least are faced with a choice of accepting changes to their contracts in one form or another or being dismissed. And, as the example used earlier illustrates, dismissals can be avoided even in the 'pure redundancy' situation if workers (those that are redundant and others) are willing to contribute to the cost of retaining superfluous workers by accepting a wage cut. The employer contemplating restructuring is under a duty to consider measures to minimize the number of dismissals, to avoid dismissals, or to mitigate the adverse effects of dismissals. This invariably entails, where the restructuring is strongly indicated, giving consideration to accommodating workers within the restructured enterprise on different terms. Section 187(1)(c) does not purport to prohibit a dismissal where the reason for the dismissal is the failure of workers to accept a change to their contracts. Nor does it prohibit using dismissal, or the threat of dismissal, as a means of persuasion in the collective bargaining process. It prohibits a dismissal where the reason for the dismissal is to compel workers to accept a collective bargaining demand. Collective bargaining conduct may, it seems, be calculated to induce (through force of argument) acceptance of a demand, but nevertheless falls short of an attempt to compel that acceptance. When is the line crossed? What is the difference between inducing acceptance and compelling acceptance of a demand? It seems to us that a party who seeks, in the context of collective bargaining, to induce the other party to accept a proposal is using in a classic sense the force of argument to achieve its objective. By contrast, an attempt to compel acceptance of a demand by definition involves some action designed to force the other party's hand.

2004 ILJ p917

The action goes beyond mere persuasion. A lock-out is action of this kind. Dismissal is too. The LRA prohibits the use of dismissal in these circumstances, where its purpose is to force the workers' hand. An employer whose real objective is to persuade its workforce to accede to new terms may not use the act of dismissal to achieve that objective. By contrast, an employer that requires workers to work on changed terms for rational and justifiable operational reasons, and that is willing to jettison its existing workforce in favour of a new workforce if that is what is required to achieve the objective, may dismiss if this satisfies the test for operational requirements dismissals, that is if it is 'operationally and commercially justifiable on rational grounds, having regard to whatever emerged from the [collective bargaining] process'.⁶⁶ It is, in our view, neither appropriate nor required to keep talk of retrenchment (or 'the threat of dismissal') away from the collective bargaining table altogether. Fairness, as a matter of common sense, indicates that the employer must play open cards. The 'wage-work deal' invariably impacts materially on the viability and profitability of the enterprise. Dismissal is the employer's ultimate weapon in the industrial arena.⁶⁷ Of course, it is unlikely to be considered fair to use that weapon if dismissals can reasonably be avoided through collective bargaining efforts. That is why a joint consensus seeking exercise is mandatory before retrenchment is permissible. And the required collective bargaining efforts may even require an attempt to force change through a lock-out.⁶⁸ But if collective bargaining solutions fail to materialize, then dismissal must be permissible where the genuine operational requirements of the business dictate this.

So it is that the LAC has held, in *Fry's Metals* and in *Algorax*, that what is prohibited by s 187(1)(c) is the so-called 'lock-out dismissal'.⁶⁹ This concept is one that contract lawyers may experience some difficulty coming to terms with. The primary conceptual difficulty is, of course, that a contract cannot simultaneously be terminated and yet remain in existence.⁷⁰ To deal with this conceptual discomfort, the LAC was constrained in *Fry's Metals* to describe the s 187(1)(c) dismissal as one distinct from the defined categories of dismissal in s 186; a special kind of dismissal. But the real problem with a prohibition on

2004 ILJ p918

the so-called lock-out dismissal is a practical rather than conceptual one. It is well illustrated by the reported facts in *Fry's Metals* and *Algorax* respectively. In *Fry's Metals*, the employer made it clear that if workers failed to signify their acceptance of the proposed new shift system by a particular date, they would be dismissed. Some effort was made to impress on them the importance of this deadline, but once it had passed the employer acted decisively. The employees were dismissed, finally, with no prospect of being re-engaged if they later changed their minds. This meant that the dismissals did not violate the s 187(1)(c) prohibition. In *Algorax*, by contrast, the employer went to conspicuously further

efforts (on the reported facts) to persuade the workers to accept the proposed new shift system. The deadline was extended on a number of occasions. Employees were implored to reconsider. Once dismissed (and there could be no doubt that the dismissal in fact served to terminate their contracts of employment) *Algorax* repeatedly offered to re-employ those dismissed workers who indicated their willingness to return on the new conditions. In the classic realm of operational requirements dismissals, this is textbook stuff - the employer exploring all possible alternatives to dismissal and continuing even after the dismissals to seek ways to mitigate their effect and to secure alternative employment for the dismissed workers. But in the realm of the lock-out dismissal, the employer's conduct was automatically unfair, and was visited with the ultimate sanction - reinstatement into the old shift systems, with several years of back pay to boot.

The effect of prohibiting the lock-out dismissal is to signal to employers that the decision to retrench may be made only at the point at which it is clear that no form of persuasion is likely to induce the workers to change their minds and accept the employer's new terms. At that point, the employer must be able to make a rational commercial decision to retrench those workers who continue to reject the required change. The decision must be defensible on the ordinary test for the substantive fairness of operational requirements dismissals. Once it reaches that point, and elects to dismiss, the employer must make it clear to workers that the dismissal will be final, that it will signal the end of efforts to persuade them to accept the new deal.

We have considerable difficulty understanding why the legislature should seek to protect workers by outlawing the lock-out dismissal. It may readily be contended that a lock-out dismissal is preferable by a considerable margin (from the point of view of workers) to a 'final' dismissal in the same circumstances. *Fry's Metals* and *Algorax* aptly demonstrate that the prohibition may have the effect of subverting conventional notions of what is fair in the context of an operational requirements dismissal, in particular that every effort should be made

2004 ILJ p919

before, during or even after the dismissal to secure alternative employment for the dismissed workers.⁷¹

The prohibition on the lock-out dismissal may have been an attempt by the legislature to prevent an employer from circumventing the prohibition on the employment of replacement labour in employer initiated lock-outs. The employer could otherwise do this by dismissing workers and then using scab labour while ultimately hoping to compel the dismissed workers to accede to its demand. But this concern could more easily have been addressed by incorporating the notion of the lock-out dismissal in the statutory definition of a lock-out. The legislative purpose appears to be more far-reaching: to limit or exclude as far as possible the use of dismissal as an act of compulsion in the collective bargaining process. The idea is to limit the options available to employers at the point of impasse. Where force of argument has failed to produce the desired collective bargaining outcome, dismissal is excluded as a means of compelling workers to accept that outcome. On the face of it, this appears to be a measure that should serve to protect workers, to promote collective bargaining and to enhance job security. But in practice it is difficult to see how it achieves these objectives.

The employer's ability to use the lock-out as a means of compulsion at the point of impasse has been severely curtailed by the prohibition on the use of replacement labour in employer initiated lock-outs.⁷² It could be argued that dismissal would, in the circumstances under discussion, not be justifiable for as long as the employer could reasonably be expected to engage temporary alternative labour in place of the existing workforce. The employer could be expected to continue with the power-play rather than dismiss for as long as it could reasonably continue its business by using replacement labour. But the prohibition on the use of replacement labour in employer initiated lock-outs has the effect that an employer may find itself more quickly at the point where it is operationally and commercially justifiable on rational grounds to jettison the existing recalcitrant workforce and go to the cost and effort of replacing it and training a new workforce, rather than continuing to hold out with the existing workforce at the point of impasse.⁷³

2004 ILJ p920

Where it is operationally and commercially justifiably on rational grounds to do so, an employer may choose to dismiss in these circumstances provided its intention in doing so is

clearly to replace those workers who refuse to accept the workplace changes demanded, and is not to attempt to force compliance with its demands. Of course replacing a workforce is unlikely to be an attractive option for most employers. The loss of accumulated skills and the cost of recruitment and training are likely to have a material impact on the business. And the employer may be obliged to pay severance benefits to the retrenched workforce.⁷⁴ But there will be a point at which the employer's commercial interest in proposed new conditions of employment outweighs these considerations. The prohibition on the use of replacement labour in employer initiated lock-outs gives rise to the probability that that point will be reached sooner than it might otherwise have been. This appears to be bad for workers. And it appears to be far less desirable for employers than having full recourse to the lock-out in an effort to compel workers' agreement to the required conditions before having to contemplate replacing them altogether.

The inflexibility (from an employer point of view) is aggravated by the fact that the employer cannot unilaterally change terms and conditions of employment (other than by improving them) without actually terminating the contract of employment.⁷⁵ A unilateral wage increase, sometimes used as an assertion of employer power in an effort to 'break' a strike over the amount of an annual wage increase, can be implemented without violating the existing contracts of workers. But a unilateral wage decrease is a contractual breach, and may constitute a repudiation of workers' contracts.⁷⁶

Workers have an election either simply to hold the employer to the original terms, and sue for the full amount of wages due under the

2004 ILJ p921

contracts, or accept the repudiation, in which event their contracts come to an end, and they may seek to allege a constructive dismissal. Although in one case a constructive dismissal in these circumstances was found not to be unfair,⁷⁷ workers may fancy their chances of arguing that a refusal to pay the contractual wage was both unfair and made continued employment intolerable. Of course, the safer option for them would simply be to refuse to accept the repudiation, continue to tender their services, and claim the full wage due under the contract.⁷⁸

It would be more sensible, in our view, for the legislature to permit the use of replacement labour in employer initiated lock-outs. This would make it more difficult for employers to argue that they have reached the point of dismissal before they have exhausted attempts at resolving the issue through industrial action. The prohibition on the lock-out dismissal would then have greater effect. The employer can dismiss only once it has reached the point in the collective bargaining process when its operational requirements justify replacing the workforce altogether, with all the cost and inconvenience that this entails to the employer. Where power-play offers a realistic possibility of achieving that result, employers will be more likely to pursue that option rather than resorting to dismissal. And dismissal may be less easy to characterize as commercially justifiable on rational grounds when the lock-out option has not been exhausted.

It should perhaps be clearly stated that the introduction of the automatically unfair dismissal in s 187(1)(c) is not intended to give rise to a more exacting test for the substantive fairness of an operational requirements dismissal, and there is no reason to conclude that it has that effect. What is prohibited by s 187(1)(c) is a dismissal whose purpose is to compel acceptance of an employer's collective bargaining demand. This removes the ability of an employer to have recourse to a particular form of power-play that was frequently used prior to 1995: the termination of contracts of employment and simultaneous offer of re-employment on changed terms and conditions where the purpose is to compel acceptance of those terms and conditions.

That this is the purpose of a dismissal may be indicated by the employer's express words to this effect, or by its conduct in, for example, indicating its willingness to re-employ those of the dismissed workers who subsequently agree to accept the demand, or by employing temporary replacement labour in place of the dismissed workers rather than replacing them with new permanent employees. However, it must be recognized that these are far from reliable indicators of the employer's purpose. An employer who is intent on replacing its workforce

2004 ILJ p922

may as a matter of good faith indicate that despite the dismissal it will re-employ workers who change their mind for as long as it has not been able to replace them with new permanent employees. It would hardly be fair to conclude that this taints the employer's real objective, which is to find a replacement workforce willing to work on the new terms. And an employer faced with litigation in which workers dispute the fairness of their dismissal might, because of the litigation, consider it unwise to replace the dismissed workers permanently until the final outcome of that litigation is known.

All of this means that a difficult factual enquiry must be conducted into the subjective intentions of the employer. The court must determine the employer's purpose in dismissing the workers. Mixed motives may abound. An employer may reach the point at which it decides, justifiably, that it must replace the workforce, and yet continues to hold out hope that the hardship that this will cause to workers will not ultimately materialize, and that the workers will capitulate. The facts of typical collective bargaining and retrenchment disputes will frequently produce a variety of conflicting signals. The employer will inevitably commence bargaining with workers in the hope that they will be persuaded to accept the changes proposed by the employer. The employer's intentions may change as the process unfolds. Despite the difficulties involved, the 'reason for the dismissal' must be discerned. That enquiry may be resolved finally only some years later. The uncertainty that this creates is not good for anyone.⁷⁹ It is clearly desirable that employers should communicate clearly and unequivocally, with a proper understanding of what is at stake, what their intentions are at all stages of the collective bargaining process. This is in their own interests, if they are to be confident of avoiding the lock-out dismissal. And clear and unequivocal communication is also required as a matter of fairness to workers. In addition, a good argument can be made for the introduction of some form of compulsory early dispute resolution in relation to the substantive fairness of dismissals of this kind.⁸⁰ This would assist both employers and workers faced with these circumstances by providing a determination at the outset, preferably even prior to the dismissal. In the absence of compulsory early dispute resolution of this kind, parties should seriously consider submitting their dispute voluntarily to some form of advisory or binding arbitration before taking irrevocable steps - in the case of workers by finally refusing to accept the employer's proposed workplace changes, and in the case of employers, by proceeding to dismiss.

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¹ C Thompson 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' [\(1999\) 20 ILJ 755](#) at 769; and see *Brassey* in *Brassey et al The New Labour Law* (Juta 1987) at 91-2.

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² of the Labour Relations [Act 66 of 1995](#) (LRA).

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³ *Shezi v Consolidated Frame Cotton Corporation (1)* [\(1984\) 5 ILJ 3 \(IC\)](#); *UAMAWU v Fodens (SA)* [\(1983\) 4 ILJ 212 \(IC\)](#); *Hadebe v Romatex Industrial Ltd* [\(1986\) 7 ILJ 726 \(IC\)](#).

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Footnote - 4

⁴ In *GWU v Dorbyl Marine* [\(1985\) 6 ILJ 52 \(IC\)](#) the employer relied on a number of consultations that took

place with the union after retrenchment had already taken place. The court did not accept that this satisfied the company's duty to consult properly. Some employers have had difficulty being persuaded by this established requirement: see *Unitrans Zululand (Pty) Ltd v Cebekhulu* [2003] 7 BLLR 688 (LAC); *Chetty v Scotts Select A Shoe* (1998) 19 ILJ 1465 (LC).

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Footnote - 5

5 *MAWU v Hart* (1985) 6 ILJ 478 (IC).

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Footnote - 6

6 *MAWU v Hart* at 493G-H; and see also *Hadebe v Romatex*. Despite continued use of the term 'consult', the LRA 1995 in fact requires bargaining before retrenchment: see below.

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Footnote - 7

7 Some of the divergent views are recorded in *Chemical Workers Industrial Union v Sopellog CC* (1994) 15 ILJ 90 (LAC) at 101B-102F.

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Footnote - 8

8 See *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC); *Transport & General Workers Union v City Council of the City of Durban* (1991) 12 ILJ 156 (IC); *Karbusicky v Anglo American Corporation of SA Ltd* (1993) 14 ILJ 166 (IC).

8 See *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC); *Transport & General Workers Union v City Council of the City of Durban* (1991) 12 ILJ 156 (IC); *Karbusicky v Anglo American Corporation of SA Ltd* (1993) 14 ILJ 166 (IC).

Footnote - 9

9 (1991) 12 ILJ 112 (LAC) at 121G.

9 (1991) 12 ILJ 112 (LAC) at 121G.

Footnote - 10

10 (1993) 14 ILJ 642 (LAC) at 649J-650C.

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Footnote - 11

11 In *Atlantis Diesel Engines v NUMSA* (1994) 15 ILJ 1247 (A).

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Footnote - 12

12 at 1252C.

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Footnote - 13

13 See *Atlantis Diesel Engines v NUMSA* (A) at 1252F-G: 'It seems to me that the duty to consult arises, as a general rule, both in logic and in law, where an employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; identification of retrenchment as a possible remedial level. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the

process leading to the final decision on whether or not retrenchment is unavoidable.' In terms of s 189 of the LRA the duty arises 'when an employer contemplates' operational requirements dismissals. The Code of Good Practice expands on this, suggesting that 'when' in this context does not mean 'at some time after'. If the consensus seeking exercise is to be effective, it points out, 'the consultation process must commence as soon as a reduction of the workforce through retrenchments or redundancies is contemplated by the employer'.

13 See *Atlantis Diesel Engines v NUMSA (A)* at 1252F-G: 'It seems to me that the duty to consult arises, as a general rule, both in logic and in law, where an employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; identification of retrenchment as a possible remedial level. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable.' In terms of s 189 of the LRA the duty arises 'when an employer contemplates' operational requirements dismissals. The Code of Good Practice expands on this, suggesting that 'when' in this context does not mean 'at some time after'. If the consensus seeking exercise is to be effective, it points out, 'the consultation process must commence as soon as a reduction of the workforce through retrenchments or redundancies is contemplated by the employer'.

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14 See for example *MAWU v Hart* at 493G-H.

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Footnote - 15

15 The AD remained concerned to distinguish this consensus seeking exercise from the process of bargaining (at 1253F). We doubt that there is any longer a valid basis to contend that there is a difference between the consensus seeking exercise envisaged prior to retrenchment, and the process of bargaining. Certainly there is no distinction to be gleaned from the fact that 'the final decision, where consensus cannot be achieved, remains that of management'. No agreement to bargain or duty to bargain may, in the absence of express provision to that effect, reasonably be construed to remove or limit whatever power management has to make decisions once the point of impasse has been reached. Management's power is curtailed only by imposition of the prior obligation to seek consensus with labour before exercising the decision-making power. Of course, if consensus is reached, the decision-making power is limited not by the duty to bargain but by the fact of being bound to comply with the agreed outcome of the collective bargaining process. We return to this issue later.

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Footnote - 16

16 See, for example, *Johnson & Johnson (Pty) Ltd v CWIU* ([1999\) 20 ILJ 89 \(LAC\)](#); *Alpha Plant & Services (Pty) Ltd v Simmonds* ([2001\) 22 ILJ 359 \(LAC\)](#); and see also *Sikhosana v Sasol Synthetic Fuels* ([2000\) 21 ILJ 649 \(LC\)](#), where the provisions of s 189(3) are identified as necessary requirements preceding retrenchment, the fulfilment of which does not necessarily produce a procedurally fair retrenchment.

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17 s 189A(7) and (8). Although this is not expressly stated in the section, it seems that an employer becomes entitled to dismiss only if a 'dispute' has been referred to the CCMA, even if there is in fact no apparent dispute in existence.

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18 s 189A(13)-(18).

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19 See, for example, *National Union of Textile Workers v Braitex* (1987) 8 ILJ 794 (IC); *Transport & General Workers Union v Putco Ltd* (1987) 8 ILJ 801 (IC); *Mo^arester Bande (Pty) Ltd v NUMSA* (1990) 11 ILJ 687 (LAC); *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC).

19 See, for example, *National Union of Textile Workers v Braitex* (1987) 8 ILJ 794 (IC); *Transport & General Workers Union v Putco Ltd* (1987) 8 ILJ 801 (IC); *Mo^arester Bande (Pty) Ltd v NUMSA* (1990) 11 ILJ 687 (LAC); *NUMSA v Atlantis Diesel Engines* (1992) 13 ILJ 405 (IC).

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20 See *NUMSA v Atlantis Diesel Engines* (IC) at 407F-H.

20 See *NUMSA v Atlantis Diesel Engines* (IC) at 407F-H.

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21 *NUMSA v Atlantis Diesel Engines* (IC) at 408A.

21 *NUMSA v Atlantis Diesel Engines* (IC) at 408A.

Footnote - 22

22 'The setting of norms is a matter on which the employer is allowed much latitude and, as we have seen, his decision is unassailable if there is a proper commercial rationale for it. The court cannot say that the employer was wrong to want to reduce his wage bill: even if he was doing very nicely, thank you, there is no reason why he should not have wanted to do better. . . . In short, consultation over retrenchment inhabits the realms of collective bargaining. It is not an adjudicative process, like the disciplinary enquiry, and its consequences do not lend themselves to judicial scrutiny. Provided the bargaining process operates, the court will not lightly interfere, and when it does, it will only be because the standpoint complained of is commercially destitute.' *Brassey* at 91-2.

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Footnote - 23

23 at 648C-D.

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Footnote - 24

24 at 648E.

24 at 648E.

Footnote - 25

25 at 649E.

25 at 649E.

Footnote - 26

26 See, for example, *SA Clothing & Textile Workers Union v Discreto - A Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC); *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 2264 (LAC).

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Footnote - 27

27 Thompson at 770.

27 Thompson at 770.

Footnote - 28

28 at para 8; and see also *Steyn v Driefontein Consolidated Ltd t/a West Driefontein* (2001) 22 ILJ 2667 (LC); *Van Rensburg v Austen Safe Co* (1998) 19 ILJ 158 (LC); *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC).

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Footnote - 29

29 at para 19.

29 at para 19.

Footnote - 30

30 (2003) 24 ILJ 1917 (LAC); [2003] 11 BLLR 1081 (LAC).

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Footnote - 31

31 See Thompson at 769; Brassey at 91-2.

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Footnote - 32

32 *Atlantis Diesel Engines v NUMSA* (A) at 1253F.

32 *Atlantis Diesel Engines v NUMSA* (A) at 1253F.

Footnote - 33

33 We do not agree with Thompson (at 758-9) that the existence of these limitations on employer decision making, and in particular the right of labour to challenge any management decisions that impact on the employment relationship, warrants the conclusion that there is in effect no such thing as the managerial prerogative. There is no 'royal prerogative', a prerogative that is theoretically subject to no restriction. But there is clearly a prerogative in the sense that there is a right and a power ultimately to make business decisions. The existence of a duty to bargain, and the requirement that where jobs are shed only rational business decisions will be countenanced are, in our view, consistent with the recognition of the existence of the managerial prerogative. This may be contrasted with the joint decision-making process contemplated in s 86 of the LRA. Where a workplace forum exists, no management prerogative exists in relation to the matters referred to in that section.

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Footnote - 34

34 The Code of Good Practice on Dismissal Based on Operational Requirements concedes that 'it is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of the posts consequent to a restructuring of the employer's enterprise'.

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35 See, for example, *Fry's Metals v National Union of Metalworkers of SA* (2003) 24 ILJ 133 (LAC) at paras 32-3.

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36 Compare *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* (unreported Constitutional Court case CCT 27/03) paras 46-8. We think that an appropriate analogy may be drawn between the deference required to be shown to an employer's business decisions that result in job losses and the deference described by the Constitutional Court as being necessary in the course of conducting a judicial review of decisions made on the basis of discretionary powers of the state, which must be made within parameters established by the Constitution and the law. Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function (at para 46): 'In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In so doing a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to the findings of fact and policy decisions made by those with special expertise in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. . . . This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker' (at para 48).

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38 *BMD Knitting Mills* at para 19.

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39 In *Mkhize v Kingsleigh Lodge* (1989) 10 ILJ 944 (IC) the employer retrenched eight workers and saved itself R282 per month as a result: a decision that may perhaps properly be described as 'commercially destitute' - see note 21. It could certainly in our view be characterized as unreasonable and irrational, and consequently could properly be described as unfair.

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40 *NUMSA v Atlantis Diesel Engines* (LAC) at 648; *SACTWU v Discreto* at para 8; *BMD Knitting Mills v SACTWU* at para 19.

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Footnote - 41

41 This approach might also resolve the difficulty that has arisen in dealing with the so-called 'reasonable employer test'. See *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC); *County Fair Foods (Pty) Ltd v CCMA* (1999) 20 ILJ 1701 (LAC); *Toyota SA Motors (Pty) Ltd v Radebe* (2000) 21 ILJ 340 (LAC); *De Beers Consolidated Mines Ltd v CCMA* (2000) 21 ILJ 1051 (LAC); *Branford v Metrorail Services (Durban)* (2003) 24 ILJ 2269 (LAC), in which the 'reasonable employer test' was respectively applied, expressly and emphatically rejected, applied (by one member of the court but not expressly) and applied. An adjudicator can readily determine whether an employer was right or wrong in finding an employee guilty of misconduct. The enquiry is whether a reasonable rule whose existence was known to the employee was broken by the employee. The adjudicator can readily declare whether the employee was or was not guilty of misconduct, and is never required to defer to an employer's incorrect decision, even if the decision was 'reasonable' in the circumstances that prevailed at the time of the disciplinary enquiry. But if the employee was guilty of misconduct and the question is whether or not the sanction of dismissal is a fair sanction, then it must readily be appreciated that more than one sanction may fall within the parameters of what may be described as being fair. One employer may fairly dismiss where another may fairly decide to give the employee one last chance. The deference required by a decision maker in determining the fairness of a sanction of dismissal in these circumstances does not require some kind of slavish adherence to what the employer decides. Rather what is required is a determination of whether the employer's decision fell within the parameters prescribed for decisions of that nature, in particular in this context, the requirement of fairness. And fairness does not necessarily point in each case to only one possible outcome.

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43 That decision illustrates the danger of entering the 'merits' of the decision in this way. While it may be difficult to characterize dismissals as fair where they could easily have been avoided, many who consider the reported facts may feel unable to agree that the solution preferred by the court was the obvious one, as the court found it to be. It was not so obvious that it occurred either to the employer, or the trade union engaged in consultations with the employer, or the court of first instance (the LC). Nor is it so clear that the solution preferred by the court would have been fairer to workers, or would have avoided retrenchments. Whereas the company's decision affected all workers to the same extent, the solution preferred by the court would have left some workers unaffected whilst others would have been faced with a far less palatable alternative to retrenchment than the alternative offered by the company.

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44 'The scheme of the LRA militates against a reading that allows a judicial vacuum to develop around the economic rationale of restructuring. The strike prohibition in respect of disputes over the fairness of dismissals is specifically counter-balanced by the power of the court to assess that fairness. If the judges shy away from a consideration of the core rationale for retrenchment, they must allow the right to strike over that issue to re-

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47 (1999) 20 ILJ 200 (LC).

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48 The lock-out was lifted in relation to Ms Rossouw, and the LC concluded that the lock-out of an individual employee (Ms Schoeman) was impermissible (see *Schoeman v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC) - a decision generally regarded to be incorrect: see for example the dicta in the second *Schoeman v Samsung* case at para 18).

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50 at para 20, citing *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC).

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Footnote - 51

51 at para 27.

51 at para 27.

Footnote - 52

52 at paras 32 and 33.

52 at paras 32 and 33.

Footnote - 53

53 (1999) 20 ILJ 755.

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Footnote - 54

54 at 760.

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Footnote - 56

56 Its influence is apparent in the decisions of the LC in *Insurance & Banking Staff Association v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC); *NUMSA v Fry's Metals (Pty) Ltd* (2001) 22 ILJ 701 (LC) and *FAWU v General Food Industries Ltd* (2002) 23 ILJ 1808 (LC).

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57 See Cheadle in *Brassey et al The New Labour Law* (1987) at 279: 'By and large the majority of retrenchment disputes are resolved through collective bargaining'; *Brassey*, in the same volume, at 279: 'In short, consultation over retrenchment inhabits the realms of collective bargaining.'

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Footnote - 60

60 Almost every writer on the subject and countless judgments dealing with the question have recognized that a wage cut is an obvious alternative to retrenchment that may be considered during the consultation process. Working short time, eliminating overtime, or changing shift systems may be too. See, for example, *Brassey* at 89-90; *Cheadle* at 293; *Shezi v Consolidated Frame Cotton Corp* at 12H; *GWU v Dorbyl Marine* at 58A-B; *Mohamedy's v Commercial Catering & Allied Workers Union of SA* (1992) 13 ILJ 1174 (LAC) at 1179G-H. It is unnecessary to cite further examples. In simple terms, dismissals must be avoided if possible. This means exploring all alternatives to dismissal, including any form of contractual or workplace change that may have that result.

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Footnote - 61

61 We disagree that the considerations referred to by Thompson (in note 11) demonstrate a need for distinct

types of engagement. In fact, the amount of the annual wage increase may be just as much influenced by extraneous 'push factors'. And job losses may well be avoided by cutting a 'conventional deal' on wages or shift systems. The reported facts in *FAWU v General Food Industries Ltd* serve to illustrate this point only too well. Criticism of the employer in that case was directed at the fact that it agreed to a wage increase shortly before embarking on restructuring (in the form of outsourcing) that was aimed at reducing employment costs. The company should have dealt with its cost cutting imperatives at the time it concluded its wage bargain. In *ECCAWUSA v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 ILJ 1347 (LC) and *Media Workers Association of SA v Independent Newspapers (Pty) Ltd* (2002) 23 ILJ 918 (LC) employers were found to be justified in treating a change to terms and conditions of employment as an alternative to retrenchment.

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69 The LAC's reasoning for this interpretation is set out in *Fry's Metals (Pty) Ltd v NUMSA* (2003) 24 ILJ 133 (LAC) at paras 23-31; and is re-enforced by the decision in *CWIU v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); [2003] 11 BLLR 1081 (LAC).

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70 The principle in *National Automobile & Allied Workers Union v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A) does not change this. That decision merely sought to give meaning to the remedies provided for in the LRA 1956, and did not establish any general proposition that contracts of employment do not come to an end once they are terminated.

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71 Article 19(1) of ILO Recommendation 166 of 1982 provides: 'All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.'

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74 This may depend on whether the workers' refusal to accept the new terms required by the employer can be categorized as unreasonable in the sense contemplated in s 41(4) of the Basic Conditions of Employment Act, or in other comparable provisions that may be contained in the employer's policies or any applicable collective agreements. Whether a refusal to accept alternative employment is reasonable will depend on the circumstances of each case. A description of the general principles that should guide that determination is beyond the scope of this article.

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75 We respectfully disagree with Thompson's suggestion to the contrary, at 764: 'Then the employer [who is seeking to cut the wage bill by 25%] should follow the deadlock breaking mechanisms of the statute - statutory conciliation must be attempted, and if that fails, it may resort to a lock-out or unilateral implementation of the wage cut.' See also the Constitutional Court - *In re Certification of the Constitution of the Republic of SA* 1996 1996 (4) SA 744 (CC) at 795F-H: 'Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral

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75 We respectfully disagree with Thompson's suggestion to the contrary, at 764: 'Then the employer [who is seeking to cut the wage bill by 25%] should follow the deadlock breaking mechanisms of the statute - statutory conciliation must be attempted, and if that fails, it may resort to a lock-out or unilateral implementation of the wage cut.' See also the Constitutional Court - *In re Certification of the Constitution of the Republic of SA 1996* [1996 \(4\) SA 744 \(CC\)](#) at 795F-H: 'Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out).'

Footnote - 76

76 *TAWU v Natal Cooperative Timber Ltd* [\(1992\) 13 ILJ 1154 \(D\)](#); *Checkers SA Ltd (South Hills Warehouse) and SACCAWU* [\(1990\) 11 ILJ 1357 \(ARB\)](#); *FAWU v Ceres Fruit Juices (Pty) Ltd* [\(1996\) 17 ILJ 1063 \(C\)](#); *Sappi Fine Papers (Pty) Ltd v Pienaar* [\(1994\) 15 ILJ 137 \(LAC\)](#); *Monyela v Bruce Jacobs t/a LV Construction* [\(1998\) 19 ILJ 75 \(LC\)](#).

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Footnote - 77

77 *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* [\(1997\) 18 ILJ 361 \(LAC\)](#).

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Footnote - 78

78 *Rigby v Ferodo Ltd* [1988] ICR 29 (HL); M Freedland *The Personal Employment Contract* (Oxford University Press 2003) at 250-2.

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79 It was certainly not good for *Algorax*, when it learned some five years after the dismissals that the dismissed workers were to be retrospectively reinstated into the shift system that had been discarded all those years ago. Nor is it desirable that workers should wait so long to know their fate. And in this context, even two to three years, a relatively short time for an appeal following a complicated trial to be finalized, is much too long.

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