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Business restructures: How important is the first statutory consultation notice to employees?

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Human resources practitioners are often called upon to advise and lead employee consultation in a business restructure. Sometimes, a legal review of the statutory consultation notice issued under section 189(3) of the Labour Relations Act, 1995 (the LRA) is also undertaken.

When it is, there are notoriously lots of questions relating to the substantive reasons for the restructure that are asked and analysed. Is it necessary, as the Labour Courts have historically taken the view that the consultation notice and procedural compliance, which follows the issue of the notice, is not a tick box exercise? So, is a nitpicking of the draft section 189(3) notice an "overkill" or business critical? You be the judge.

On 6 November 2018 the Constitutional Court was called upon to determine the fairness of the dismissal of 44 employees under section 189A of the LRA in S*outh African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44 (the judgment is not yet reported). The dismissal for operational requirements went back six year to November 2012. The dismissal followed a CCMA facilitation process.

The sole reason advanced by Woolworths in the section 189(3) notice, contemplating the retrenchments, was: "The company needs to be in a position to employ employees who are able to be used on a flexible basis."

During the consultation process, the union agreed that its members would work the flexible hours and days required. Once this was achieved, the Constitutional Court and lower courts found that this meant that there was no longer a need for the retrenchments. The consultation process should have come to an end. The affected employees were then to be employed on the flexible terms of contract. This obviously follows as a matter of law.

Woolworths, however, argued that the court should read the section 189(3) notice holistically and that would reveal that there were additional reasons for the retrenchments, namely considerations of equity and cost efficiency. This argument was rejected by the court as the section 189(3) notice emphasised the “need to employ people who are able to work according to flexible working arrangements. This would improve both the costs and the operational efficiencies of the business”.

Accordingly, the notice revealed that the sole reason for the retrenchments was the need for flexibility, with the benefits of that flexibility being greater cost and operational efficiency and not that these were intended to serve as self-standing reasons. So, the end result being that Woolworths on its own notice was unable to satisfy the court(s) that there was a fair reason for the dismissals. The consequence under the LRA for not satisfying the court with a fair reason for dismissal is reinstatement. Despite the lengthy period since the dismissals the court awarded retrospective reinstatement.

The age-old advice rings true again - hurry slowly with a section 189(3) notice and be prepared to "cross the Ts and dot the Is" ahead of time or be ready to face the consequences.

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