FACULTY OF LAW

Mini Thesis

A MINI-THESIS TO BE SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS IN LABOUR LAW IN THE DEPARTMENT OF MERCANTILE AND LABOUR LAW, UNIVERSITY OF THE WESTERN CAPE.

UNIVERSITY of the
WESTERN CAPE

Name of candidate : Zintle Ngeyakhe

Student number : 3359329

Department : Mercantile & Labour Law

Title of Study : The Selection Criteria to be used in Dismissals for Operational Requirements: A Comparative Analysis between South Africa, Germany and United Kingdom.

Supervisor : Mrs Huysamen

Date : 12 December 2021

https://etd.uwc.ac.za/

PLAGIARISM DECLARATION

I declare that *The Selection Criteria to be used in Dismissals for Operational Requirements: A Comparative Analysis Between South Africa, Germany and the United Kingdom* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

STUDENT: ZINTLE NGEYAKHE

SIGNATURE:

UNIVERSITY of the
WESTERN CAPE

DATE: 12 December 2021

https://etd.uwc.ac.za/

DEDICATION

I dedicate this mini-thesis to my late grandfather, Mr. K.M Ngeyakhe and my parents, Mr. B.M and Mrs. N Ngeyakhe.

ACKNOWLEDGEMENTS

First and foremost I would like to thank God for giving me the wisdom, ability and strength to embark and see this journey through. It was not by my own might and intellect that I was able to finish this work.

Secondly, I would like to thank my supervisor for her vast contribution, guidance and support in the completion of this thesis.

Thirdly, I would like to show appreciation to my parents for their immeasurable support they have shown through this period. Never have they questioned my decision to further my studies.

Further I would like to show appreciation to Sivuyisiwe Olota, and my colleagues in the Graduate Lecturing Assistant (GLA) Program who have shown support and encouragement.

Last but not least, I would like to thank the Graduate Lecturing Program at the University of the Western Cape Law Faculty, for giving me such an opportunity to further my studies.

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

ABSTRACT

The Labour Relations Act 66 of 1995 (LRA) makes provision for dismissal of employees based on an employer's operational requirements (also known as retrenchments). The employer needs to meet both the substantive and procedural requirements. Substantively, the reason for retrenchment must be connected to the economical, technological, structural or similar needs of the business. Procedurally, when the employer contemplates retrenchment, it has to engage with the party as directed in s 189(1) in a meaningful joint consensus-seeking process on the topics listed under s 189(2) and (3). One of the topics that the parties must consult on, and which forms the focus of this study, is the criteria to be used to select the employee(s) who will be retrenched.

This study will evaluate the selection criteria most often used in South Africa, and the reasons therefore, after which the study will consider other possible, though less-known criteria that might be available. This will be done by looking at the criteria or similar criteria used in Jurisdictions of the United Kingdom and Germany, and what South Africa might learn from these countries.

https://etd.uwc.ac.za/

TITLE

THE SELECTION CRITERIA TO BE USED IN DISMISSALS FOR OPERATIONAL REQUIREMENTS: A COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA, GERMANY AND THE UNITED KINGDOM

KEYWORDS

Dismissal

Consensus-seeking process

Incapacity

Misconduct

Operational Requirements

Procedural fairness

Retrenchments

Selection Criteria

Substantive fairness

Unfair labour practice

https://etd.uwc.ac.za/

ACRONYMS/ABBREVIATIONS

LRA – Labour Relations Act

LIFO – Last In First Out

FIFO- First In First Out

UK – United Kingdom

SA – South Africa

LAC – Labour Appeal Court

LC – Labour Court

ILO – International Labour Organisation

CCMA – Commission for Conciliation Mediation and Arbitration

VSP – Voluntary Severance Package

IC – Industrial Court

RPA –Redundancy Payments Act

IRA – Industrial Relations Act

TULRA – Trade Union Labour Relations Act

EPCA – Employment Protection Consolidation Act

ERA – Employment Rights Act

EAT – Employment Appeal Tribunal

IT – Industrial Tribunal

ET – Employment Tribunal

TULRCA – Trade Union and Labour Relations Consolidation Act

PADA – Protection Against Dismissal Act

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

Table of Contents

PLAGIARISM DECLARATION i

DEDICATION ii

ACKNOWLEDGEMENTS ii

ABSTRACT iii

TITLE iv

KEYWORDS iv

ACRONYMS/ABBREVIATIONS v

CHAPTER ONE 1

INTRODUCTION AND BACKGROUND TO THE STUDY 1

1.1 Introduction 1

1.2 Problem statement 2

1.3 Research Question 7

1.4 Aims of the research 7

1.5 Chapter outline 8

1.6 Research Methodology 9

CHAPTER TWO 10

OVERVIEW OF THE FAIRNESS PROVISIONS UNDERLYING OPERATIONAL REQUIREMENT DISMISSALS IN SOUTH AFRICA 10

2.1 INTRODUCTION 10

2.2 THE COMMON LAW POSITION PERTAINING TO DISMISSALS FOR OPERATIONAL REQUIREMENTS 11

2.3 OPERATIONAL REQUIREMENTS DISMISSAL DEVELOPMENTS BEFORE THE FORMER INDUSTRIAL COURTS 12

2.4 SECTION 189 OF THE LABOUR RELATIONS ACT 66 OF 1995 13

2.4.1 Substantive Fairness 14

2.4.1.1 Economic Reasons 15

2.4.1.2 Technological reasons 16

2.4.1.3 Structural reasons 16

2.4.1.4 Similar need 18

2.4.1.5 Test to Determine Substantive Fairness 20

2.4.2 Procedural Fairness 21

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

2.4.2.1 Appropriate measures to avoid dismissal 23
2.4.2.1.1 Voluntary Early Retirement 24
2.4.2.1.2 Voluntary Severance Package 25
2.4.2.2 Measures to change the timing of dismissals 26
2.4.2.3 Measures to mitigate the adverse effects of dismissal 27
2.4.2.4 Methods for selecting employees to be dismissed 27
2.4.2.5 Severance pay for dismissed employees 27
2.5 Conclusion 28
CHAPTER THREE 29
SELECTION CRITERIA USED IN DISMISSALS FOR OPERATIONAL REQUIREMENTS IN SOUTH AFRICA 29
3.1 INTRODUCTION 29
3.2 FAIR AND OBJECTIVE SELECTION CRITERIA 30
3.3 COMMONLY USED SELECTION CRITERIA IN DISMISSAL FOR OPERATIONAL REQUIREMENTS 33
3.3.1 Last in First Out (LIFO) 33
3.3.2 Employee Conduct 35
3.3.3 First in First Out (FIFO) 36
3.3.4 Efficiency, Ability, Capacity, Experience, Attitude and Productivity 37
3.3.5 Bumping 38
3.4 CONCLUSION 42
CHAPTER FOUR 43
RETRENCHMENT AND SELECTION CRITERIA IN THE UNITED KINGDOM AND GERMANY 43
4.1 INTRODUCTION 43
4.2 THE UNITED KINGDOM 43
4.2.1 INTRODUCTION TO THE LEGAL FRAMEWORK IN THE UK IN RESPECT OF PROTECTION AGAINST DISMISSALS 43
4.2.2 THE EMPLOYMENT RIGHTS ACT OF 1996 45
4.2.2.1 Cessation of business 46
4.2.2.2 Employer moving the place of business 47
4.2.2.3 Diminishing Need for Employees 48
4.2.3 REDUNDANCY PROCEDURE 49
4.2.4 SELECTION CRITERIA USED IN THE UNITED KINGDOM 52
4.2.4.1 NON-COMPULSORY SELECTION CRITERIA 53
4.2.4.2 COMPULSORY SELECTION CRITERIA 54
4.3 GERMANY 57

UNIVERSITY of the
WESTERN CAPE
https://etd.uwc.ac.za/

4.3.1 INTRODUCTION TO THE LEGAL FRAMEWORK IN GERMANY 57
4.3.2 REDUNDANCY SPECIFIC LEGISLATION IN GERMANY 58
4.3.3 REDUNDANCY PROCEDURE 61
4.3.4 SELECTION CRITERIA 63
4.4 COMPARISON TO SOUTH AFRICAN LAW 66
4.4.1 Employment Protection 66
4.4.2 Meaning of Operational Requirements 67
4.4.3 Retrenchment/Redundancy Procedure 69
4.4.4 Selection Criteria 70
4.5 CONCLUSION 71
CHAPTER FIVE 72
CONCLUSION AND RECOMMENDATIONS 72
5.1 INTRODUCTION 72
5.2 OVERVIEW 72
5.3 OBSERVATIONS AND RECOMMENDATIONS 73
5.4 CLOSING REMARKS 74
6. BIBLIOGRAPHY 75

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

Section 23 (1) of the Constitution of 1996 provides that *everyone* has the right to fair labour practices.[1] In partly giving effect to this right, s 185 of the LRA provides that every employee has the right not to be unfairly dismissed.[2] Dismissal is provided a wide definition in s 186 (1) of the LRA.[3] For a dismissal to be fair in accordance with the LRA, the dismissal needs to be both substantively and procedurally fair.[4] Section 188 (1) of the LRA provides that dismissal is only permissible on the grounds of misconduct, incapacity of the employee or based on the employer's operational requirements.[5] Substantive fairness can only be shown if the dismissal takes place on one of the aforesaid grounds and whether such ground exists would depend on the circumstances of each case.[6] With regards to procedural fairness, the employee must have been given a fair opportunity to influence the decision on dismissal and the dismissal should be free of biasness.[7]

This research focuses on dismissal on the ground of operational requirements of the employer as a reason for dismissal (also known as *retrenchment* of employees). The LRA defines operational requirements to mean *'requirements based on the economic, technological, structural or similar needs of an employer'.*[8] The LRA provides that when an employer contemplates dismissing employees for reasons based on the

[1] The Constitution of the Republic of South Africa s 23 (1).

[2] Rossouw J & Conradie B *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) 1.

[3] Labour Relations Act s 186(1).

[4] Grogan J *Workplace Law* 12ed (2017) 166.

[5] Grogan J *Workplace Law* 12ed (2017) 166.

[6] Grogan J *Workplace Law* 12ed (2017) 167.

[7] Grogan J *Dismissal* (2002) 59.

[8] Labour Relations Act s 213.

https://etd.uwc.ac.za/

employer's operational requirements, the employer must first consult the relevant parties as identified by s 189 (1).[9] The LRA further provides that, the employer and the consulting parties should engage in a meaningful joint consensus-seeking process in which they attempt to reach consensus on appropriate measures (i) to avoid the dismissals; (ii) to minimise the number of dismissals; (iii) to change the timing of the dismissals; and (iv) to mitigate the adverse effects of the dismissals; (b) the method for selecting the employees to be dismissed; and (c) the severance pay for dismissed employees[10].

The study focuses on issues relating to selection criteria, i.e. 'the method for selecting the employees to be dismissed'.[11] Section 189 requires that the parties must agree on the selection criteria to be used, failing which the employer will decide on the criteria to use, which criteria must however be applied fairly and objectively.[12] Historically the principle of *Last In First Out* (LIFO) is the most commonly used selection criteria in retrenchment situations.[13] While it has its benefits, as will be highlighted below, LIFO is however not without shortcomings.

Consequently, considering other criteria for selection becomes important. It is therefore these other possible selection criteria, which might be regarded as fair and objective that the study considers. This is done by investigating the selection or similar criteria adopted by the United Kingdom (UK) and Germany in dealing with retrenchments.

UNIVERSITY of the
WESTERN CAPE

---

[9] Labour Relations Act s 189.

[10] Labour Relations Act s 189(3).

[11] Labour Relations Act *s* 189(3) *(b).*

[12] Rycroft A & Jordan B *A Guide to South African Labour Law* 2ed (1992) 237.

[13] Olivier M.P 'Retrenchment: An Overview' (1992) 1 *SALJ* 113.

https://etd.uwc.ac.za/

1.2 Problem statement

Prior to the introduction of existing labour legislation and the Constitution of 1996,[14] labour law in South Africa was generally governed by common law.[15] The contract of employment historically served as a foundation of the individual employment relationship.[16] As a result South African law viewed the employment relationship as a contractual relationship between an employer and employee, through which contractual rights were created for both parties.[17]

Termination of the contractual relationship between an employer and employee could be done by either party, by simply giving the other party the required period of notice as agreed in the contract, or effecting payment of salary in lieu of notice.[18] Terminating the employment relationship without the required notice meant that the aggrieved party could claim for breach of contract.[19] Termination without the required notice could however be justified where the reason for the short termination was shown as being in response to the other party's breach of a fundamental term of the contract.[20] Unlike the position under existing labour legislation, common law contract principles did not however require substantive or procedural fairness prior to termination of

[14] Constitution of the Republic of South Africa 1996.

[15] Conradie M 'The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of Unfair Labour Practices pre-1977' available at *http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2016000200001* (accessed 27 May 2018).

[16] Du Toit D 'Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law (2008) 1 *SALJ* 95.

[17] Du Toit D 'Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law (2008)1 *SALJ* 95.

[18] Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) 15.

[19] Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) 16.

[20] Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) 16.

https://etd.uwc.ac.za/

employment.[21] All that was required was a notice of termination in accordance with the provisions of the contract, irrespective of the reason for termination.[22]

With the introduction of the interim Constitution in the early 1990s and the birth of democracy in South Africa, it became clear that the then Labour Relations Act of 1956[23] was no longer in line with the new constitutional order.[24] In 1994 the Department of Labour appointed a Ministerial task team to draft new labour legislation which culminated in the enactment of the LRA of 1995 as the first piece of labour legislation to be promulgated after the post-apartheid elections in 1994.[25] As indicated earlier, dismissal under the LRA may only be effected on the grounds of misconduct, incapacity and operational requirements of the business, i.e. retrenchments.

Retrenchment is provided for in a fair amount of detail under section 189 (and where relevant, section 198A) of the LRA. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*[26] the court stated that 'the primary responsibility of a retrenching employer is to initiate the consultation process when it contemplates dismissals for operational reasons. It must disclose relevant information to the other consulting party, and allow the other consulting party an opportunity during consultation to make representations'. The court subsequently held that the proper approach is to ascertain whether the purpose of s 189 has been achieved.[27] Consultation should commence when an employer contemplates that it might have to retrench employees in order to meet operational objectives. Employees (or their representatives) likely to be affected must be consulted with at the earliest opportunity in order to advise them of the possibility of retrenchment and reasons thereof.[28] In

---

[21] Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) 17.

[22] Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) 17.

[23] Labour Relations Act of 1956.

[24]Bhoola U 'National Labour Law Profile: South Africa' available at http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (accessed 16 May 2018).

[25] Smit P & Van Eck BPS 'International Perspective on South Africa's Unfair Dismissal Law' (2010) 43 *CILSA* 62.

[26] 1999 20 ILJ 89 (LAC)

[27] *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union* 1999 20 ILJ 89 (LAC) 96-97.

[28] *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC).

https://etd.uwc.ac.za/

NUMSA v Comark Holdings (Pty) Ltd[29] the Labour Court prohibited the employer from retrenching individual employees. It found that the employer's act to take a final decision to retrench before affording the union the opportunity to make representations on the need for retrenchment rendered the whole consultation process fatally flawed.[30]

One of the most important issues for consultation between the parties is the selection criteria to be used in determining the workers to be retrenched. Selection criteria is often a controversial issue during consultation proceedings, but it cannot be avoided by the parties. In *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & Others*[31]*,* the Labour Court found that the employee's retrenchment was substantially and procedurally unfair and ordered reinstatement. The court concluded that the company failed to prove that it followed a fair and objective process in selecting employees for retrenchment.[32] Basson, Garbers & Christianson, confirms the legislative obligation of the consulting parties in section 189 of the LRA process, that the parties have to attempt to agree on a fair and objective selection criteria for the employees to be retrenched.[33] The scholars state that fairness with regards to selection criteria means that the criteria should not be arbitrary, but must be relevant and should relate to the attributes or qualities of employees, such as length of service, productivity and the needs of the business.[34] Objectivity entails that the criteria should not depend on the subjective prejudice of the person making the selection.[35]

Grogan highlights that the LRA does not expressly provide guidance on the criteria that would be regarded as fair and objective, which creates difficulties for employers.[36] Examples of selection criteria often used are: *Last In First Out* (LIFO), conduct, efficiency, ability, skills, capacity, experience, attitude to work, productivity, volunteers,

---

[29] (1997) 18 ILJ 516 (LC)

[30] *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC).

[31] (2004) 25 ILJ 1655 (LAC).

[32] Genera Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & Others (2004) 25 ILJ 1655 (LAC) at 689H.

[33] Basson A, Christianson M, Garbers C et al *Essential Labour Law* 3 ed (2002) 249.

[34] Basson A, Christianson M, Garbers C et al *Essential Labour Law* 3 ed (2002) 249.

[35] Basson A, Christianson M, Garbers C et al *Essential Labour Law* 3 ed (2002) 249.

[36] Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 466.

https://etd.uwc.ac.za/

non-residency, double income and *First In First Out* (FIFO).[37] Criteria such as conduct or performance,[38] creates problems as the procedures required for retrenchment are not adequately designed to give individual employees an opportunity to answer charges relating to past poor work or misconduct.[39] Grogan submits that when criteria such as capacity, ability and conduct are adopted, the employer is required to ensure that a rating system is used which can be applied fairly, consistently and objectively.[40] LIFO on the other hand has a number of advantages, including, the fact that it is seen as administratively straightforward and less expensive in terms of management time.[41] LIFO is also regarded by many as the most objective and safest means of selecting employees for retrenchment.[42] Historically the principle of LIFO has thus been the most commonly used selection criteria in retrenchment situations.[43]

While the use of LIFO as a selection criteria has benefits, it also has definite disadvantages. One main critique against LIFO is that the principle aims to retain long-serving employees at the expense of employees with shorter service, while the latter might actually possess higher skills levels or abilities.[44] LIFO for long-serving employees could also resort to the *dumping* of employees in other departments of the company, and such practice would undermine the objective application of the principle/criteria.[45] LIFO can potentially also discriminate against employees on the

---

[37] Basson A, Christianson M, Garbers C et al *Essential Labour Law* 3 ed (2002) 250-252.

[38] Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 466.

[39] Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 466.

[40] Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 465.

[41] Taylor S &Emir A *Employment Law: An Introduction* 4 ed (2015)148.

[42] Grogan J *Workplace Law* 12 ed (2017) 311.

[43] Olivier M.P 'Retrenchment: An Overview' (1992) 1 *SALJ* 113.

[44] Van Staden L *The Law Relating to Retrenchment* (unpublished LLM thesis, University of Port Elizabeth, 2003) 51.

[45] Van Staden L *The Law Relating to Retrenchment* (unpublished LLM thesis, University of Port Elizabeth, 2003) 51.

https://etd.uwc.ac.za/

grounds of age or gender. As a result it might not always be said to be a fair and objective criteria.[46]

Consequently, this study will evaluate possible fair and objective alternatives to LIFO. This will be done by also evaluating selection criteria used in the jurisdictions of the UK and Germany. The UK was chosen as a comparator because of the historic role it played in the development of the South African legal framework. Germany in turn was chosen because of the unique approach it has towards dismissals as compared to the other jurisdictions.

1.3 Research Question

Are there other fair and objective selection criteria, except LIFO available in dismissal for operational requirements in terms of s 189 of the LRA?

Which alternative selection criteria offered by the UK and Germany can be applied in SA?

Are there lessons to be learnt by SA from UK and Germany or vice versa?

UNIVERSITY of the
WESTERN CAPE

1.4 Aims of the research

Dismissal for operational requirements in SA is unfortunately observed frequently. While there are many reasons for the number of retrenchments each year, most notably financial difficulties businesses face, the focus by courts on retrenchment processes generally center around the procedural aspects thereof, as opposed to the operational reasons for the retrenchment. One of the key topics for consultation within the s189 retrenchment process is the issue of selecting which employees are to be retrenched.

[46] Van Staden L *The Law Relating to Retrenchment* (unpublished LLM thesis, University of Port Elizabeth, 2003) 51.

https://etd.uwc.ac.za/

Often workers and unions alike favour the LIFO (Last in First Out) principle which protects workers of longer standing service, whereas employers have an interest in retaining hardworking workers who have shown aptitude or potential regardless of the time they have been employed.[47] While many scholars have written on retrenchments, and more especially the selection criteria, very few, have assessed other selection criteria that might be available as a first preference over LIFO.

Consequently, this thesis aims to assess the procedural fairness of dismissals based on an employer's operational requirements in terms of s 189 of the LRA. Specifically, the thesis will consider issues around the selection criteria to be used in deciding which employees are to be retrenched. The thesis will evaluate the selection criteria often used, such as LIFO, and the reasons thereof. More importantly the thesis considers the availability of other, but perhaps less-known, fair and objective criteria that might be used as selection criteria. This might include criteria such as bumping which is often used in the United States of America and the United Kingdom,[48] though it remains a relatively novel practice in South Africa. Finally, the thesis will attempt to recommend alternatives to LIFO for selection that may be used in the South African context.

1.5 Chapter outline

The introduction, background to the study and the aims of the thesis having been discussed above, chapter two will next concentrate on the provisions of section 189 of the Labour Relations Act, more especially with regards to procedural fairness, the consultation process that must be entered into by the employer and the relevant party where retrenchment is contemplated.

Chapter three will consider the most frequent selection criteria used in dismissals for operational requirements in SA. This will include looking at the content of these criteria, the benefits and the problems they have attached to them, and the court's approach in deciding on the fairness of selection criteria.

---

[47] Rycroft A & Jordan B A Guide to *South African Labour Law* 2ed (1992) 237.

[48] Grogan J *Workplace Law* 12 ed (2017) 313.

UNIVERSITY of the WESTERN CAPE
https://etd.uwc.ac.za/

Chapter four serves as the comparative analysis on what selection criteria is generally observed in the UK and Germany as well as alternatives these countries resort to in an attempt to limit retrenchments as a whole.

Chapter five serves as the conclusion to the study. Particularly, the chapter will summarise the study and provide some recommendations available for that are implementation in SA.

1.6 Research Methodology

This thesis was conducted by reviewing South African literature published through primary and secondary sources, such as international conventions, journal articles, books, legislation, case law and internet sources. The research was also conducted by looking at the history of retrenchment, how it was done in the past and how it has changed over time.

Further, a comparative analysis was conducted to observe what UK and German legislation and case law say about retrenchment and to evaluate if there is any better selection criteria that these countries use that South Africa may adopt or try to implement.

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

CHAPTER TWO

OVERVIEW OF THE FAIRNESS PROVISIONS UNDERLYING OPERATIONAL REQUIREMENT DISMISSALS IN SOUTH AFRICA

2.1 INTRODUCTION

The recognition in South African labour law of operational requirements as a ground for dismissal can be traced to the International Labour Organisation (ILO) Termination of Employment Convention 158 of 1982.[49] Article 4 of the Convention recognises that an employer may terminate the services of employees based on operational requirements.[50]

Under the former Labour Relations Act of 1956, retrenchment implied termination of employment where an employee's services were no longer required by the employer because of economic reasons.[51] Such redundancy was however not necessarily a permanent termination of services and employees could get their jobs back once the economy improved.[52] Under the current LRA, an operational requirement dismissal is a permanent dismissal and related to the need to reduce employee numbers for any valid operational requirements as defined by the LRA.[53]

It is however established that retrenchment should only be resorted to where the employer has adhered to both substantive and procedural requirements of retrenchment.[54] As such this chapter will consider the common law position pertaining to dismissal for operational requirements. It will consider how the jurisprudence of the

[49] Le Roux P A K & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) 235.

[50] Termination of Employment Convention 158 of 1982 Art 4 – 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'

[51] Le Roux *Retrenchment Law in South Africa* (2016) 3.

[52] Le Roux *Retrenchment Law in South Africa* (2016) 3.

[53] Le Roux *Retrenchment Law in South Africa* (2016) 3.

[54] Manamela M.E 'Selection Criteria: The Dismissal of Employees Based on Operational Requirements' (2007) 19 SA*MLJ* 103.

https://etd.uwc.ac.za/

Industrial Court (IC) bought about change to the common law position. The chapter will thereafter evaluate the fairness requirement for operational reason dismissals in terms of s 189 of the LRA.

2.2 THE COMMON LAW POSITION PERTAINING TO DISMISSALS FOR OPERATIONAL REQUIREMENTS

Prior to the LRA being enacted retrenchment was governed by common law principles.[55] Under common law the rights and responsibilities of the parties to the contract were those specifically agreed to between them, either tacitly or expressly.[56] Unless otherwise agreed, the employer was entitled to terminate the contract of employment by simply giving the agreed-upon notice of termination to the employee, or by paying the employee *in lieu* of such notice period.[57] Where the employer did not provide notice of termination of the contract as agreed (or made payment *in lieu* of notice), the employee could claim damages in an amount equal to the required notice pay.[58] The reason for termination did however not matter.[59]

There was no obligation on employers to consult with employees over the reason for termination or to take any steps to avoid termination. This meant that in cases of redundancy the employer did not have to consult with affected employees or provide reasons for the selection of those employees whose services were to be terminated.[60] This approach was confirmed by the Industrial Court in the matter of *Monckten v British South African Co*[61], where the court held that an employer had no obligation to afford an employee a hearing prior to dismissal.[62]

---

[55] Zondo R 'Redundancy and Retrenchment' (1990) 1 *SAHRYB* 340.

[56] Zondo R 'Redundancy and Retrenchment' (1990) 1 *SAHRYB* 340.

[57] Le Roux R *Retrenchment Law in South Africa* (2016) 4.

[58] Le Roux R *Retrenchment Law in South Africa* (2016) 4.

[59] Le Roux R *Retrenchment Law in South Africa* (2016) 4.

[60] Zondo R 'Redundancy and Retrenchment' (1990) 1 *SAHRYB* 340.

[61] (1920) AD 324.

[62] *Monckten v British South African Co* (1920) AD 324 at 329.

https://etd.uwc.ac.za/

Given the fact that there were no detailed requirements for dismissal for operational requirements under common law principles, parties had to turn to the former Industrial Courts for guidance on the process to be followed.

2.3 OPERATIONAL REQUIREMENTS DISMISSAL DEVELOPMENTS BEFORE THE FORMER INDUSTRIAL COURTS

As the employer under common law did not have to consult with affected employees or provide reasons for the selection of those whose services were to be terminated for operational reasons, the jurisprudence of the Industrial Courts provided valuable guidance. Decisions by the Industrial Courts during the mid-1980's changed the process of retrenchment from an independent managerial decision into a process that required notice of termination, consultation, disclosure of information, exploration of alternatives to dismissal and selection of those to be dismissed in terms of objective criteria.[63]

In the matters of *United African Motor & Allied Workers Union v Fodens SA (Pty) Ltd*[64], *Gumede v Richdens t/a Richdens Foodliner*[65] and *Shezi v Consolidated Frame Cotton Corporation Ltd*[66] guidelines were established by the Industrial Court as far as retrenchment processes were concerned.

These guidelines included that the employer had to look at possible ways to avoid retrenchments through considering alternatives such as transfers of employees, reduction of overtime, working of short-time, retirement schemes, voluntary redundancy and the granting of leave to find alternative employment.[67] Sufficient notice of a pending retrenchment also had to be given to employees who were likely

---

[63] Benjamin P 'Condoning the Unprocedural Retrenchment: The Rise of the No Difference Principle' (1992) 13 *ILJ* 279.

[64] (1983) 4 ILJ 212 (IC)

[65] (1984) 5 ILJ 84 (IC) para 221B-C.

[66] (1984) 5 ILJ 3 IC para 12-13.

[67] Bean M.M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) 23 *De Jure* 273.

https://etd.uwc.ac.za/

to be affected by retrenchment.[68] Proper prior consultation before any dismissals were affected had to take place with affected employees.[69] Moreover, there had to be an establishment of acceptable and objective criteria for selecting those employees who were to be dismissed. Such criteria included the principle of *Last In First Out* (LIFO), attendance records, efficiency, and experience or length of service.[70] The employer furthermore had an obligation to assist the employees affected by retrenchment, for example, by allowing them time off to find alternative employment.[71]

When the 1995 LRA was enacted, the jurisprudence on retrenchment developed before the Industrial Courts was largely codified under s 189 of the LRA.[72] The provisions of s 189 imply that retrenchments would be measured in terms of both substantive and procedural fairness requirements.[73]

2.4 SECTION 189 OF THE LABOUR RELATIONS ACT 66 OF 1995

UNIVERSITY of the
WESTERN CAPE

Section 188(2) of the LRA provides that in considering the fairness of a dismissal, the reason for dismissal (substantive fairness) and the process followed in dismissing an employee (procedural fairness) must be considered. Employers are required to consider the guidelines for dismissals provided in Schedule 8 to the LRA, Code of Good Practice: Dismissal.[74]

---

[68] Bean M.M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) 23 *De Jure* 273.

[69] Bean M.M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) 23 *De Jure* 273.

[70] Bean M.M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) 23 *De Jure* 273.

[71]Bean M.M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) 23 *De Jure* 273.

[72]Le Roux R *Retrenchment Law in South Africa* (2016) 5.

[73]Le Roux R *Retrenchment Law in South Africa* (2016) 5.

[74] Labour Relations Act s 188(2).

https://etd.uwc.ac.za/

2.4.1 Substantive Fairness

For a dismissal based on operational requirements to be substantively fair, the dismissal must be as a result of an employer's 'operational requirements' as defined in s 213 of the LRA.

2.4.1.1 Economic Reasons

Economic reasons refer to the financial state of the business.[75] The typical example is where an employer is no longer in a position to afford the services of all employees and the only solution would be to retrench some employees.[76] The business is expected to make changes to the terms of the employment relationship to ensure that the business profits are increased.[77] This is typically the result of a decline in the demand of products or a decrease in production.[78]

Businesses might also need to consider retrenchment in order to increase business profits.[79] As an example in the matter of *Hendry v Adcock Ingram*[80] the court held that where the employer could show that a good profit was to be made in accordance with a sound economic rationale, and it followed a fair process to retrench, such retrenchment could be deemed as fair.[81]

2.4.1.2 Technological reasons

---

[75] Grogan J *Dismissal* (2002) 216.

[76] Rycroft A & Jordan B *A Guide to South African Labour Law* 2ed (1991) 240.

[77] Le Roux P.A.K & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) 235.

[78] McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) 183.

[79] McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) 183.

[80] (1998) 19 ILJ 85 (LC).

[81] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) 93C.

https://etd.uwc.ac.za/

A need to retrench might occur as a result of the introduction of new technologies, such as chemical formulas, equipment, computer packages, electronic systems and techniques that might result in reducing the need for labour.[82] When new technology is introduced the employment relationship could be affected either by way of the actual job becoming redundant or the restructuring of the workplace as a result of newly introduced technologies.[83]

2.4.1.3 Structural reasons

Structural reasons are when a business needs to retrench as a result of restructuring.[84] An example is where businesses merge or joining of departments.[85] In the case of mergers, employers also have to operate within the requirements of s 197 of the LRA.

In *Hendry v Adcock Ingram*[86] the applicant was recruited by the respondent to become its international marketing manager and, as a result, had to relocate to SA.[87] Subsequently, the company however merged with another company and the employee's position became redundant[88]. She was consequently retrenched even though, according to the employee, had been assured that the merger would not affect her position.[89]

The Labour Court had to decide whether the company had a fair reason to retrench the employee and whether it had followed a fair process in doing so.[90] The court found that owing to the merger and the resulting change in the business focus, the company's international division was taken over by the domestic division and that such

---

[82]Israelstam I 'What is a Fair Reason to Retrench? Available at https://www.labourguide.co.za/most-recent/2075-what-is-a-fair-reason-to-retrench (accessed 09 May 2019).

[83] Van Niekerk A *Unfair Dismissal* (2002) 124.

[84] Van Niekerk A *Unfair Dismissal* (2002) 124.

[85] Grogan J *Dismissal* (2002) 216.

[86] (1998) 19 ILJ 85 (LC).

[87] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) 87J.

[88] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) 88A.

[89] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) 88B.

[90] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) 91E-F.

https://etd.uwc.ac.za/

a radical change resulted in the unavoidable redundancy of the employee's position.[91] The court thus held that there had been a fair reason to retrench.[92]

The court stated that an employer is not expected to keep in existence a position, particularly a very exclusive one, if legitimate and sound business decisions have resulted in that position no longer being required.[93] The court further stated that even though an employee is entitled to fair labour practices as provided for in the Constitution it does not mean that an employee has a right to definite and permanent employment by a particular employer or that an employer will only be allowed to retrench if it can show financial ruin.[94]

The court concluded that the fact that the employee had been given the assurance that the merger would not affect her position did not render the retrenchment unfair where there had been a legitimate financial decision to retrench.[95]

2.4.1.4 Similar need

Similar needs are determined with reference to the circumstances of each case.[96] An example would be retrenchment as a result of changes to an employee's terms and conditions of employment. For example, where restructuring of the employer's business has resulted in a change in the terms and conditions of employment and employees refuse to accept such changes, such refusal might give rise to operational reasons dismissals.[97] A breakdown of trust in the employment relationship might also give rise to operational reason dismissals as employees have a duty to act in good faith and to act in the best interest of the business.[98] Another reason deemed a *similar*

---

[91] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC*)* 91H.

[92] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC*)* 91E-F.

[93] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC*)* 92A.

[94] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC*)* 92A.

[95] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC*)* 94F.

[96] McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) 183.

[97] McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) 184.

[98] McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) 184.

https://etd.uwc.ac.za/

reason for purposes of operational requirements has been where an employer suspects that an employee is guilty of theft which has created mistrust between the parties in such a way that it negatively affects the operation of the business.[99] Such was the case in *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd*[100] where the court held that the dismissal of an employee on suspicion of theft was fair.[101]

In *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others*[102] the employer sought to introduce a system whereby employees would be required to work on public holidays.[103] The employees protested against the introduction of such a system, and consequently attacked replacement labourers with knobkerries.[104] The company could not identify the perpetrators and consequently retrenched employees as it could not manage the workplace anymore.[105] The union argued that the reason for retrenchment did not fall within the definition of *operational requirements*. The Commission for Conciliation, Mediation and Arbitration (CCMA) agreed with the union and concluded that the reason for the dismissals had in fact been based on misconduct.[106] As such the dismissals were declared substantively and procedurally unfair.[107]

On review, the Labour Court (LC) concluded that the CCMA's finding was wrong and that the commissioner at arbitration had failed to consider the last part of the LRA definition of operational requirements that is requirements related to 'similar needs of

[99] McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) 184.

[100] (1993) 2 ICD 310 (IC).

[101] *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 2 ICD 310 (IC).

[102] (C104/07) (2007) ZALCCT 2.

[103] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para 6.

[104] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para 7.

[105] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para 9.

[106] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para15.

[107] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para15.

https://etd.uwc.ac.za/

the employer'.[108] The court concluded that the company's need to manage the business and protect other workers could be classified as *similar needs* and as such fell under the definition of operational requirements.[109]

The law however prohibits an employer to retrench an employee on grounds of operational needs if the actual reason for the retrenchment is the conduct or capacity of an employee.[110] In *SA Chemical Workers Union & Others v Toiletpak Manufacturers (Pty) Ltd & Others*[111] Toiletpak Manufacturers transferred its business to another company. The transfer necessitated the dismissal for operational reasons of some employees. The Industrial Court held that the real reason for the transfer was Toiletpak Manufacturers' desire to rid itself of a number of employees whom it suspected of misconduct. It had tried to avoid having to hold disciplinary hearings by disguising the dismissal as that of operational reasons.[112]

In *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa & Others*[113] the management of Fry's Metals decided to amend the business's shift system. After the employer approached the employees to accept the new system and the employees refused to do so, the employer issued the employees with notices of retrenchment.[114] The employees applied to the Labour Court (LC) for an order interdicting the employer

---

[108] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para 40.

[109] *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2 para 40.

[110] Du Toit D, Woolfrey D & Murphy J et al *Labour Relations Law: A Comprehensive Guide* 3ed (2000) 380.

[111] (1988) 9 ILJ 295 (IC).

[112] *SA Chemical Workers Union & Others v Toiletpak Manufacturers (Pty) Ltd & Others* (1988) 9 *ILJ* 295 (IC).

[113] (2003) 2 BLR 140.

[114] *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa& Others* (2003) 2 BLR 140 para 9.

https://etd.uwc.ac.za/

from dismissing them.[115] The LC found in favour of the employees and held that the dismissals were aimed at compelling the employees to agree to the new shift system.[116] The employer thereafter took the matter on appeal to the Labour Appeal Court (LAC). At the LAC the employer contended that it sought to dismiss the employees because the company's operational requirements required the changes in the shift system.[117] The LAC agreed with the employer and held that the intended dismissals were to be final in effect, and was not meant to compel the employees to accept the proposed changes.[118]

2.4.1.5 Test to Determine Substantive Fairness

The test for substantive fairness has been given different interpretations by the Labour Court and Labour Appeal Court, from recognising retrenchment as a legitimate way to maximise profits, to allowing it as a measure of last resort.[119]

In *SA Clothing and Textile Workers Union and Others v Discreto* (1998) 12 BLLR 1228 (LAC), the Court set out a test to determine whether a dismissal is for a fair reason. Froneman DJP held that, in analyzing the consultation process, the function of the Court is not to second guess the commercial or business efficiency of the employer's ultimate decision, whether it was the best decision or not, but to pass judgment on whether the ultimate decision reached by the employer was genuinely justifiable by

[115] *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa& Others* (2003) 2 BLR 140 para 17.

[116] *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa& Others* (2003) 2 BLR 140 para 19.

[117] *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa& Others* (2003) 2 BLR 140 para 20.

[118] *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa& Others* (2003) 2 BLR 140 para 45.

[119] Bhorat et al "A Synthesis of Current Issues in the Labour Regulatory Environment" (2009) *DPRU Working Paper* 9.

https://etd.uwc.ac.za/

operational requirements, and was not merely a sham, having regard to what emerged from the consultation process.[120]

In *BDM Knitting (Pty) Ltd v SACTWU* 1999 (19) ILJ 1451 (LAC), the Labour Appeal Court suggested that a higher substantive review is required. Davis AJA held that, the starting point is whether there is a commercial rationale for decision taken by the employer.[121] A court is entitled examine whether the particular decision had been taken in a manner which is also fair to the affected party, being the employees to be retrenched, rather than taking the justification at face value.[122] This means, the court is to enquire whether a reasonable basis on which a decision, and manner to dismiss for operational requirements exists.[123] This then requires the Court to examine the contents of the reasons given by the employer. The Court does not look at the correctness of the decision but the fairness rather.

On the other hand, the court needs to also look at whether there is a rational connection between the employer's organisation and its commercial objective, and through the consideration of alternative, an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them.[124]

In *SACTWU v Old Mutual* (2005) 26 ILJ 293 (LC), Murphy AJ, stated that the test for substantive fairness involves a measure of deference to the managerial prerogative, about whether the decision to retrench is a legitimate exercise of managerial authority for the purposes of attaining a commercial acceptable objective.[125] Murphy AJ sated further that the deference does not amount to abandonment, but the court should look at the content of the reasons given for the dismissal, to ensure that they are aimed at a commercially acceptable objective.[126]

---

[120] *SA Clothing and Textile Workers Union and Others v Discreto* (1998) 12 BLLR 1228 (LAC) para 8.

[121] *BDM Knitting (Pty) Ltd v SACTWU* 1999 (19) ILJ 1451 (LAC) 19

[122] *BDM Knitting (Pty) Ltd v SACTWU* 1999 (19) ILJ 1451 (LAC) 19

[123] *BDM Knitting (Pty) Ltd v SACTWU* 1999 (19) ILJ 1451 (LAC) 19

[124] *BDM Knitting (Pty) Ltd v SACTWU* 1999 (19) ILJ 1451 (LAC)

[125] *SACTWU v Old Mutual* (2005) 26 ILJ 293 (LC) para 85.

[126] *SACTWU v Old Mutual* (2005) 26 ILJ 293 (LC) para 85.

https://etd.uwc.ac.za/

2.4.2 Procedural Fairness

As stated previously operational requirements dismissals must be both substantively (a fair reason) and procedurally fair (effected in terms of a fair process).[127] The LRA provides in s 189 (1) that when an employer contemplates dismissing one or more employees based on the employer's operational requirements, the employer must consult the relevant party as identified in s 189 (1).

The party with whom the employer is required to consult as identified in s 189 (1) should be notified of the possible retrenchment by way of a notice issued in terms of section 189(3) by the employer, serving as an invitation to the party to consult with the employer.[128] This means that when an employer contemplates termination for reasons related to economic, technological, structural or similar nature, the employer shall provide the relevant consulting parties with relevant information in good time, including; reasons for terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.[129]

---

[127] Labour Relations Act s188 (1) *(b).*

[128] Labour Relations Act s189(3)- the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.

[129] International Labour Organisation 'Termination of Employment at the Initiative of the Employer' Convention No 158 (1985).

https://etd.uwc.ac.za/

Consultation should commence as soon as the employer contemplates a possible retrenchment. Contemplate is understood as meaning that the process of consultation should commence before any final decision to retrench has already been taken by the employer.[130] In *Building Construction & Allied Workers Union v Murray & Roberts Buildings (Pty) Ltd*[131] it was held that when it came to retrenchment, common sense indicates that the employer would first sense the need to retrench.[132] In *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa*, the court held that the duty to consult arises when an employer, having foreseen the need for it, contemplates retrenchment.[133] From these cases, it is clear that the employer has a duty to consult with employees, before a final decision is taken to implement changes that may result in retrenchment.

The LRA further requires that the consultation between the employer and the consulting parties should be a meaningful joint consensus-seeking process and the consulting parties should attempt to reach consensus on various issues.[134] Consultation in this sense has been interpreted as meaning more than merely granting an employee or his/her representative an opportunity to comment upon or express an

---

[130] International Labour Organisation 'Termination of Employment at the Initiative of the Employer' Convention No 158 (1985)

[131] (1991) 12 ILJ 112 (LAC).

[132] *Building Construction & Allied Workers Union v Murray & Roberts Buildings (Pty) Ltd* (1991) 12 ILJ 112 (LAC).

[133] *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa* 1995 (3) SA 22 A

[134] Labour Relations Act s189- (2) The employer and the other consulting parties must, in the consultation envisaged by subsections (1) and (3), engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –

(a) appropriate measures-

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

https://etd.uwc.ac.za/

opinion about a decision that has already been taken and which is in the process of being implemented.[135]

The former Appellant Division (AD) in the matter of *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd*[136] stated that where an employer sensed that it might have to retrench for operational reasons the employer had to consult with employees likely to be affected in order to advise those employees of the possibility of retrenchment and the reasons thereof'.[137] The court confirmed that employees should be placed in a position in which they were able to participate meaningfully in reaching any decisions, and that employers had to consult in good faith and keep an open mind in considering proposals made by the employees.[138]

The issues over which consultation in terms of s 189 (2) should take place are briefly discussed below.

2.4.2.1 Appropriate measures to avoid dismissal[139]

In reaching appropriate measures to avoid dismissal, or minimising the number of dismissals, unions or workplace forums or employees are invited by the employer to make representations on possible ways to avoid dismissals or reduce the number of employees likely to be dismissed.[140] Such measures could include a delay on hiring new employees, elimination of Sunday work and overtime, voluntary retrenchment, extended unpaid leave, early retirement, voluntary reduction in working hours[141] and training or retraining of employees to enable them to take up alternative positions in

---

[135] Bean M M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) *De Jure* 275.

[136] (1993) 14 ILJ 642.

[137] *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC).

[138] *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC).

[139] S 189 (2) *(a)* (i)

[140] Rossouw J & Conradie B *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) 62.

[141] Rossouw J & Conradie B *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) 62.

https://etd.uwc.ac.za/

the same business.[142] In *Mkhize & Others, v Kingsleigh Lodge*[143] the court stated that reduction of wages is a possible alternative to retrenchment.[144]

2.4.2.1.1 Voluntary Early Retirement

A sufficient number of employees indicating an interest to retire early can generally bring a s 189 consultation process to a halt. This is because a need for further retrenchments of remaining employees might not be contemplated at that stage by the employer.[145] Provided the employer acts in accordance with the agreed voluntary early retirement agreement terms, employees who volunteer and agree to early retirement cannot subsequently complain of unfair retrenchment since technically, they were not dismissed.[146] In the matter of *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co*[147] the defendant offered employees who qualified for early retirement, retrenchment packages or early retirement during the retrenchment consultations.[148] The court held that since the employees' elected early retirement it could not be argued that the employer had dismissed them.[149]

UNIVERSITY of the

2.4.2.1.2 Voluntary Severance Package

WESTERN CAPE

Employers may also avoid the need to retrench or limit the number of forced retrenchments by offering employees voluntary severance packages (VSP's).[150] Where VSP's is a possibility, the offer and its terms should be included as one of the topics for consultation during the s 189 process.[151] Employees need to be able to

---

[142] Basson A, Christianson M & Garbers C et al *Essential Labour Law* 3 ed (2002) 247.

[143] (1989) 10 ILJ 944 1 (LC).

[144] *Mkhize & Others v Kingsleigh Lodge (1989) 10 ILJ 944 1 (LC).*

[145] Le Roux R *Retrenchment Law in South African* (2016) 116.

[146] Le Roux R *Retrenchment Law in South African* (2016) 116.

[147] (2005) 26 ILJ 293 (LC).

[148] *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co* (2005) 26 ILJ 293 (LC).

[149] *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co* (2005) 26 ILJ 293 (LC) para 78.

[150] Le Roux R *Retrenchment Law in South African* (2016) 116.

[151] Le Roux R *Retrenchment Law in South African* (2016) 117.

https://etd.uwc.ac.za/

make an informed decision on whether to apply for a VSP package. In *SATU v The Press Corporation of SA Ltd*[152], the Labour Court stated that no consultation between the company and the employees with regards to a VSP offer had taken place in terms of s 189 (2) (a) (i) and (ii). The VSP offer sent to employees had been a unilateral offer.[153] As a result an application for an order requiring the respondent to withdraw the VSP was granted.[154]

If a VSP offer is accepted by employees, and the employer acts in accordance with the terms of the offer, termination of the employment relationship ends by a mutual agreement. There is thus no dismissal and the employees cannot claim unfair dismissal.[155] In *Elliot International (Pty) Ltd v Veloo & another*[156] the respondents were employed by the appellant and they were affected by the contemplated retrenchment.[157] The employer communicated that affected employees would be paid more than what was prescribed by law as a minimum if they agreed to a voluntary retrenchment.[158] The affected employees were given a voluntary retrenchment agreement to consider and sign.[159] The respondents did not sign the agreement but were subsequently retrenched in accordance with the terms of the VSP in any event.[160]

The union alleged that the dismissals were unfair.[161] The appellants however submitted that if the respondents were opposed to the voluntary retrenchments they would not have kept the retrenchment packages, despite the fact that they did not sign the VSP agreement.[162] The LAC did not agree with the employer. According to the

---

[152](1998) 11 BLLR 1173 (LC).

[153] *SATU v The Press Corporation of SA Ltd* (1998) 11 BLLR 1173 (LC) 1178J.

[154] *SATU v The Press Corporation of SA Ltd* (1998) 11 BLLR 1173 (LC) 1188E.

[155] Le Roux R *Retrenchment Law in South African* (2016) 117.

[156] (2015) 36 ILJ 422 (LAC).

[157] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 7.

[158] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 8.

[159] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 8.

[160] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 15.

[161] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 13.

[162] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 17.

https://etd.uwc.ac.za/

court the respondents had not agreed to be retrenched in terms of the VSP as they did not sign the agreement, hence the termination of the employment relationship constituted a dismissal in terms of the LRA.[163] The LAC further held that the respondents' receiving of the retrenchment package did not signal an election to accept the retrenchment agreement.[164] Also there was no evidence before the court that the employer had demanded repayment of the VSP, which the employees refused to do.[165]

2.4.2.2 Measures to change the timing of dismissals[166]

The employer has to give an indication of when it proposes to terminate the proposed employees' services, either at the commencement or during the consultation process.[167] Appropriate measures to change the timing of the dismissals could work in favour of the employees. This is because if the dismissal is delayed the employees selected for retrenchment are given time to seek alternative employment.[168]

2.4.2.3 Measures to mitigate the adverse effects of dismissal[169]

Measures that can be put into place in order to mitigate adverse effects of dismissal could include providing the employees to be retrenched with the necessary training to make them marketable, assist them in finding new employment, or giving them the first priority should any position be available in future in the company again.[170]

[163] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 31.

[164] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 37.

[165] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC) 37.

[166] S 189 (2) *(a)* (iii).

[167] Grogan J *Workplace Law* (1996) 126.

[168] Rossouw J & Conradie B *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) 62.

[169] S 189 (2) *(a)* (iv).

[170] Rossouw J & Conradie B *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) 63.

https://etd.uwc.ac.za/

2.4.2.4 Methods for selecting employees to be dismissed[171]

Section 189 (7) provides that the employer must select employees to be dismissed according to criteria that have been agreed upon by the consulting parties.[172] Or failing such, the parties should agree on a criteria that is fair and objective.[173] Unions usually favour objective criteria such as *Last in First Out* (LIFO).[174] Selection criteria will however be discussed fully in chapter three.

2.4.2.5 Severance pay for dismissed employees[175]

Section 41 (2) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) requires that an employer must pay an employee who is dismissed for operational reasons severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.[176] Severance pay serves as a token of appreciation for services rendered and also compensation for employees who have lost their jobs on a no-fault basis.[177] The amount that is paid out is determined by the length of service that an employee has rendered and the formula applies to every employee irrespective of status.[178] While the employer as a minimum has to provide the severance pay above as determined in the BCEA, parties are free to agree on more severance pay during the consultation process under s 189.

---

171 S 189 (2) *(b)*

172 Grogan J *Dismissal* (2002) 244.

173 Grogan J *Workplace Law* (1996) 128.

174 Grogan J *Workplace Law* (1996) 129.

175 S 189 (2) *(c).*

176 Basic Conditions of Employment Act s 41(2).

177 Grogan J *Workplace Law* (1996) 129.

178 Grogan J *Workplace Law* (1996) 130.

https://etd.uwc.ac.za/

2.5 Conclusion

When retrenchment was governed by common law, employers had no obligation to consult or give reasons for dismissing an employee where such dismissal was based on operational requirements. Subsequent to the jurisprudence of the industrial courts and later the enactment of the LRA, employers now have a duty to consult with employees or their representatives before retrenchment may occur. The LRA also provides for the substantive requirements that the employer must adhere to in order for the dismissal to be fair. Substantively, dismissals for operational reasons must be related to the employer's economic, technological, structural or similar needs.

Procedurally the employer has to adhere to s 189 (2) & (3) of the LRA, which requires the employer to consult with the relevant parties when the employer contemplates retrenching an employee. The employer will need to consult on all prescribed topics, such as appropriate measures to avoid dismissal, measures to minimise the number of dismissals, the method for selecting those employees to be retrenched and severance pay to be made affected employees.

As far as selection criteria is concerned, s 189 requires that the selection criteria has to be fair and objective. This means that an employer can not dismiss an employee simply because the employer does not like the employee or simply because the job favours a certain gender. The next chapter will in further detail address the issue of selection criteria.

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

CHAPTER THREE

SELECTION CRITERIA USED IN DISMISSALS FOR OPERATIONAL REQUIREMENTS IN SOUTH AFRICA

3.1 INTRODUCTION

The selection of employees for retrenchment is a compulsory topic for consultation during any s 189 process.[179] Selection criteria refer to the criteria to determine which employees will be retained and which will be dismissed as a result of operational requirements.[180]

The LRA provides that the consulting parties[181] must attempt to reach consensus on the method to be utilised for selecting the employees to be dismissed.[182] Whether an agreement is reached or not, the selection criteria ultimately applied must be both fair and objective.[183] Failure to consult on selection criteria or implementing criteria which is not fair and objective, could render the retrenchment substantively and procedurally unfair, or both.[184] The employer has an onus to initiate consultation over the selection criteria even if the employee party shows no interest to consult.[185]

---

[179] Ferreira A 'Selection Criteria for Retrenchment: The fair and Objective Requirement' available at https://www.golegal.co.za/selection-criteria-retrenchment-fair-objective-requirement/ (accessed 09 October 2018).

[180] Ferreira A 'Selection Criteria for Retrenchment: The fair and Objective Requirement' available at https://www.golegal.co.za/selection-criteria-retrenchment-fair-objective-requirement/ (accessed 09 October 2018).

[181] As identified in s 189(1) of the LRA.

[182] Labour Relations Act s 189(2) *(b).*

[183] Davies B 'Fair Selection in Retrenchments- Can your Employer Make you Re-Apply for your Job?' available at https://www.werksmans.com/legal-updates-and-opinions/fair-selection-criteria-retrenchments-can-employer-make-re-apply-job/ (accessed 15 October 2019).

[184] Le Roux R *Retrenchment Law in South Africa* (2016) 122.

[185] *Kelly v Transnet* (1998) 1 BLLR 62 (LC) 67; *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC* (JS 207/12) [2015] ZALCJHB para 11.

https://etd.uwc.ac.za/

This chapter will consider what is generally regarded as fair and objective selection criteria in South Africa, and will also consider the most commonly used selection criteria in dismissals for operational requirements.

3.2 FAIR AND OBJECTIVE SELECTION CRITERIA

Section 189 (7) of the LRA requires employers to select those employees to be dismissed for operational reasons according to criteria that are either agreed upon by the consulting parties,[186] or in the absence of such agreement, criteria chosen by the employer that are both fair and objective.[187] Using an agreed criteria will eliminate the element of unfairness.[188] The employer, however, would be found to have acted unfairly should it subsequently depart from using the subjective criteria as agreed between the parties.

In *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd*[189], the consulting parties did not agree on the selection criteria to be used.[190] Consequently s 189 (7) (b) became applicable which provides that 'in the absence of agreed criteria, the employer may decide on criteria that are both fair and objective'.[191] The employer used qualifications, skills, performance and disciplinary records, years

[186] Labour Relations Act s 189 (7) *(a).*

[187] Labour Relations Act s 189 (7) *(b)* of the LRA, see also *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 where the court held that 's189 (7) means that where the consulting parties agreed on a selection criteria, the employer is obliged to use such criteria. If however there is no agreed on criteria then a fair and objective criteria must be used.

[188] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 86.

[189] (2006) 27 ILJ 292.

[190] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 87.

[191] Labour Relations Act s 189(7) *(b),* see also *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 87.

https://etd.uwc.ac.za/

of service, willingness and interviews to select employees for dismissal.[192] The LAC held that the criteria of willingness and interviews were important to be considered regardless of the fact that the respondents admitted that such criteria's were subjective and were not to be considered in determining as to whether the dismissal was unfair.[193] The LAC held further that the criteria's were therefore not supposed to be utilised as there was no agreement between the consulting parties to use such criteria.[194] The LAC held consequently that the employee's dismissals were substantively and procedurally unfair since the selection criteria utilised by the employer were neither fair nor objective.[195]

It is important to note that *objective and fair* does not mean the same thing. Criteria can be objective, yet unfair and vice versa.[196] It is thus important to understand the difference between these two concepts.[197] Ultimately, fair and objective criteria should not have the effect of discriminating against particular groups of employees.[198]

Fairness means there should be a clear rationale between the chosen selection criteria and the operational requirement informing the need to retrench, while also considering the interests of all affected parties.[199] The Code of Good Practice: Dismissal Based on Operational Requirements, issued in terms of s 189 of the LRA, stipulates that an applied criterion that infringes a fundamental right protected by the LRA is unfair.[200]

[192] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 89.

[193] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 92.

[194] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 92.

[195] *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 para 96.

[196] Grogan J *Workplace Law* (1996) 128.

[197] Grogan J *Workplace Law* (1996) 128.

[198] Davies B 'Fair Selection Criteria in Retrenchments: Can your Employer make you re-apply for your job? available at https://www.golegal.co.za/fair-selection-criteria-retrenchments/ (accessed 09 October 2018).

[199] Le Roux R *Retrenchment Law in South Africa* (2016) 126.

[200] Code of Good Practice: Dismissal Based on Operational Requirements Item 8.

https://etd.uwc.ac.za/

Objectivity in turn means that the selection criteria should not depend on the subjective conception of the person making the selection.[201]

Examples of unfair criteria have been held to include where the selection was based on union membership or pregnancy (or any other unfair discriminatory ground).[202] In *CWIU v Johnson & Johnson (Pty) Ltd*[203] the employer selected females for retrenchment as it was of the view that the remaining jobs would be physically too demanding for them. The Labour Court held that the selection criteria was discriminatory and based on unsubstantiated and arbitrary assumptions.[204] The court held that sex was not a fair and objective criterion for selection and using such criteria could also give rise to an automatically unfair dismissal under s 187 (1) (f) of the LRA.[205] In *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC*[206] the managers of the company decided on which employees to retrench and which to retain.[207] The employer stated that the selection criteria it chose to apply was dependant on what was deemed *special skills*. Yet the employer subjectively decided who possessed such undefined special skills and who did not.[208] No input was sought from the union, nor affected employees before selecting employees for retrenchment based on the criteria of special skills.[209] The court

---

[201] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[202] Code of Good Practice: Dismissal Based on Operational Requirements Item 8.

[203] (1997) 9 BLLR 1186 (LC).

[204] *CWIU v Johnson & Johnson (Pty) Ltd* (1997) 9 BLLR 1186 (LC) 1196.

[205] *CWIU v Johnson & Johnson (Pty) Ltd* (1997) 9 BLLR 1186 (LC 1197.

[206] (JS 207 /12) [2015] ZALCJHB 96.

[207] *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC (JS 207 /12) [2015] ZALCJHB 96* para 5.

[208] *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC (JS 207 /12) [2015] ZALCJHB 96* para 6.

[209] *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC (JS 207 /12) [2015] ZALCJHB 96* para 16.

https://etd.uwc.ac.za/

consequently held that the dismissals of the applicants were substantively unfair since no consultation had taken place and the selection criteria was not fair and objective.[210]

3.3 COMMONLY USED SELECTION CRITERIA IN DISMISSAL FOR OPERATIONAL REQUIREMENTS

While the LRA facilitates the consultation process and the topics for consultation, it does not prescribe the exact selection criteria that may be used. Generally accepted selection criteria according to the Code of Good Practice on Operational Requirements include the *last in first out* (LIFO) approach length of service, skills and qualifications.[211] Employers are allowed to use a combination of criteria, e.g. skills combined with length of service,[212] provided all criteria are separately and combined fair and objective.[213]

There is no closed list of allowed selection criteria. Where employers however fail to give consideration to other available fair and objective criteria,[214] especially where such criteria are raised by affected employees, such failure might result in a finding that a fair-criteria was not applied, and that the retrenchment process was consequently procedurally unfair.[215] What follows below is a brief analysis of the most commonly used criteria which have generally been regarded as fair and objective, and implemented as such, in South Africa.

---

[210] *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC (JS 207 /12) [2015] ZALCJHB 96* para 16.

[211] Chakarisa O 'Retrenchment, Today's Reality' available at https://saia.org.za/newsletter/243.php (accessed 21 October 2019).

[212] Taylor & another v ILC Independent Loss Consultants CC (2001) 32 ILJ 2006 (LC).

[213] Taylor & another v ILC Independent Loss Consultants CC (2001) 32 ILJ 2006 (LC).

[214] Werkgewersorganisasie Employers Organisation 'Retrenchment- Who Stays and Who Goes' available at http://lwo.co.za/2018/03/22/retrenchment-who-stays-who-goes/ (accessed 21 October 2019).

[215] Werkgewersorganisasie Employers Organisation 'Retrenchment- Who Stays and Who Goes' available at http://lwo.co.za/2018/03/22/retrenchment-who-stays-who-goes/ (accessed 21 October 2019).

https://etd.uwc.ac.za/

3.3.1 Last in First Out (LIFO)

The LIFO criteria entails that long-serving employees are retained over employees who are employed in similar or less-skilled categories of work but with shorter service records.[216] This criteria is. The criteria is regarded by some as one of the most, if not the most objective and fair methods of selecting employees for retrenchment[217], and is often favoured by unions as it protects long-serving workers and minimises the chances of employers implementing subjective views in deciding who will be retrenched.[218]

In the matter of *Porter Motor Group v Karachi*[219] LIFO's valuing of long-serving employees was confirmed. Their value was shown through retaining them as a result of their devotion to the company.[220] Their experience and expertise acquired over time also made them important assets to the company.[221] The court held that fairness included that employees' loyalty be rewarded.[222]

That having been said, in as much as LIFO is regarded as an objective and fair method of selecting employees for retrenchment, it should not be utilised in instances where an establishment would lose critical or core skills as a result of LIFO.[223] For instance, the IT industry would prefer new and young employees who have better skills in more recent technological developments than the long-serving, often older, employees. In

[216] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[217] Mtshali v Bell Equipment (DA 16/12) [2014] ZALAC 37 para 21.

[218] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[219] (2002) 23 ILJ 348 (LAC).

[220] *Porter Motor Group v Karachi (2002) 23 ILJ 348 (LAC)* para 16.

[221] *Porter Motor Group v Karachi (2002) 23 ILJ 348 (LAC)* para 16.

[222] *Porter Motor Group v Karachi (2002) 23 ILJ 348 (LAC)* para 16.

[223] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa* (unpublished LLM thesis, University of Johannesburg (2011) 92.

https://etd.uwc.ac.za/

such an instance the better approach would be to use LIFO in conjunction with a skills requirement.[224]

3.3.2 Employee Conduct

While not without criticism, employee conduct as selection criteria could be regarded as fair and objective where such conduct can objectively be determined through, e.g. attendance records and previous warnings.[225] In *Manqindi & Others v Continental Barrel Plating (Pty) Ltd*[226], the respondent faced financial difficulties and concluded that increasing productivity through introducing a night-shift system could be a solution.[227] After the system was implemented, the night-shift workers simply stopped working without providing any explanation to management.[228] As a result of the employees' continued refusal to work, they were ultimately retrenched.[229] The applicants alleged that their retrenchments were unfair,[230] arguing that the respondent had failed to apply criteria which was fair and objective in selecting the applicants for retrenchment.[231] The Industrial Court found that the respondent had largely considered the applicants' productivity and conduct in deciding who to retrench.[232] The respondent had erred by not providing the applicants an opportunity to challenge their alleged misconduct and poor work performance prior to dismissing them.[233]

---

[224] Le Roux R *Retrenchment Law in South African* (2016) 129.

[225] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[226] (1994) 15 ILJ 400 (IC)

[227] *Manqindi & Others v Continental Barrel plating (Pty) Ltd 15 ILJ 400 (IC)* 402A-C.

[228] *Manqindi & Others v Continental Barrel plating (Pty) Ltd* 15 ILJ 400 (IC) 402D.

[229] *Manqindi & Others v Continental Barrel plating (Pty) Ltd 15 ILJ 400 (IC)*402H

[230] *Manqindi & Others v Continental Barrel plating (Pty) Ltd 15 ILJ 400 (IC)* 402I.

[231] *Manqindi & Others v Continental Barrel plating (Pty) Ltd 15 ILJ 400 (IC)*403A.

[232] *Manqindi & Others v Continental Barrel plating (Pty) Ltd 15 ILJ 400 (IC)* 407H.

[233] *Manqindi & Others v Continental Barrel plating (Pty) Ltd 15 ILJ 400 (IC)* 408B.

https://etd.uwc.ac.za/

Similarly, the Industrial Court in *Engineering Industrial and Mining Workers' Union & another v Starpak (Pty) Ltd*[234] held that productivity and conduct were fair selection criteria, on condition that the affected employees were given the opportunity to challenge the assessment of their conduct.[235] Misconduct and incapacity as

3.3.3 First in First Out (FIFO)

The criteria of FIFO is the opposite to that of LIFO. In the matter of *United People's Union of SA v Grinaker Duraset*[236] the union suggested that the longer serving employees should be the first to be selected for retrenchment. The suggestion was based on the fact that most of its members had only recently started working for the employer.[237] The union also submitted that, unlike the newer and generally younger employees, older employees already had good pension and provident funds in place that could assist them on retrenchment.[238] The court however did not agree with the union and held that it was not an acceptable criteria, it fell afoul of acceptable international norms and labour standards, as it discriminated against age.[239]

In *Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema & others*[240] the employers' justification for implementing FIFO was that because of the experience acquired over the years by longer employed employees, they stood a better chance of finding new employment when compared to shorter service record employees.[241] The Labour Appeal Court (LAC) however concluded that this criteria was neither fair

---

[234] (1992) 13 ILJ 655 (IC).

[235] *Engineering Industrial and Mining Workers' Union & another v Starpak (Pty) Ltd* (1992) 13 ILJ 655 (IC) 660B-C.

[236] (1998) 19 ILJ 107 (LC).

[237] *United People's Union of SA v Grinaker Duraset* (1998) 19 ILJ 107 (LC) para 112D

[238] *United People's Union of SA v Grinaker Duraset* (1998) 19 ILJ 107 (LC) para 112D

[239] *United People's Union of SA v Grinaker Duraset* (1998) 19 ILJ 107 (LC) para 119G.

[240] (2010) 31 ILJ 361 (LAC) .

[241] *Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema & others* (2010) 31 ILJ 361 (LAC) para 24.

https://etd.uwc.ac.za/

nor objective as required by s 189 (7) of the LRA.[242] According to the court the criteria was subject to abuse as an employer could use it to 'get rid' of a long serving employee and employ a new employee while there would be no need for such .[243]

3.3.4 Efficiency, Ability, Capacity, Experience, Attitude and Productivity

While unions generally favour LIFO, many employers tend to favour a combination of efficiency, ability, capacity, experience, attitude and productivity.[244] Employers generally regard such criteria as indicative of hardworking individuals who have shown potential regardless of their length of employment with the business.[245] Such criteria must however be objectively determined, and not be solely and subjectively dependent upon the opinion of the person making the final selection. The criteria must also be open to objective testing.[246] This will be achieved by using such a combination in circumstances where there is already an assessment system in place, in terms of a pre-existing agreement, and that the same system should be used, preferably with reference to pre-existing assessment of performance and/or conduct. The should also be an assurance that he employees would have an opportunity to dispute and/or object to the assessments.[247]

In *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another*[248], the department within which the second respondent was employed

[242] *Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema & others* (2010) 31 ILJ 361 (LAC) para 25.

[243] *Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema & others* (2010) 31 ILJ 361 (LAC) para 26.

[244] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[245] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[246] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[247] National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd.

[248] (JA65/14) [2015] ZALAC 27.

https://etd.uwc.ac.za/

was operating at a loss and productivity was low.[249] As a result, one of the two foremen who worked there was to be retrenched.[250] The appellant decided to retrench the second respondent because it was of the opinion that the other foreman had better qualifications and was overall more productive than the second respondent.[251] None of this was however disclosed to the second respondent[252] nor was he given an opportunity to defend himself based on the claims of low productivity.[253] The LAC found the retrenchment to be substantively and procedurally unfair.[254]

3.3.5 Bumping

While regularly being applied in the USA and the UK, bumping remains a fairly new practice in South Africa. Bumping refers to where an employee is retrenched even though that employee's specific position is not redundant. This is done in order to move another employee (often a more senior employee) whose post has actually become redundant into the retrenched employee's position.[255]

There are two kinds of bumping, i.e. horizontal and vertical.[256] Horizontal bumping is where the retained employee is transferred into a position of similar status, conditions of service and pay[257]. Vertical bumping is where an employee occupying a redundant

[249] *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27 para 25.

[250] *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27 para 26.

[251] *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27 para 26.

[252] *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27 para 27.

[253] *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27 para 22-31.

[254] *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27 para 31.

[255] Le Roux R *Retrenchment Law in South Africa* (2016) 132.

[256] Le Roux R *Retrenchment Law in South Africa* (2016) 132.

[257] Le Roux R *Retrenchment Law in South Africa* (2016) 132.

https://etd.uwc.ac.za/

position moves into the position of a more junior employee.[258] Where a more senior employee cannot however perform the work of the more junior employee, vertical bumping should not take place.[259] In *Porter Motor Group v Karachi*[260] the court stated that horizontal bumping should always be considered before vertical bumping is applied.[261] This is so as to protect the long serving employees.

Until fairly recently employers in South Africa had no obligation to consider bumping as a possible selection criterion, unless employees raised it during the retrenchment consultation process. This was because the employers would not consider bumping at all; instead they would apply LIFO, being the most commonly used selection criteria.[262] The issue of bumping however came to the forefront in the Labour Appeal Court matter of *Nkosinathi Mbongiseni Mtshali v Bell Equipment.*[263] The appellant was employed as a production supervisor.[264] During 2009 the respondent ran into financial difficulties and profits dropped.[265] The respondent issued a retrenchment consultation notice to its employees in terms of s 189 of the Act and the CCMA facilitated the retrenchment consultation process.[266]

During the consultation process, transferring employees to the respondent's operations in KwaZulu-Natal, the Free State and the Northern Cape was considered.[267] However, in the employer's view this was not achievable given the relocation costs related to moving employees.[268]The consulting parties agreed on the

---

[258] Le Roux R *Retrenchment Law in South Africa* (2016) 132.

[259] Le Roux R *Retrenchment Law in South Africa* (2016) 133.

[260] (2002) ILJ 348 (LAC)

[261] *Porter Motor Group v Karachi* (2002) ILJ 348 (LAC) 16.

[262]Searle N 'Bumpy Road Ahead for Employers Appling LIFO' available at https://www.labourguide.co.za/most-recent/1993-893-amendment-of-schedule-4-act-no-130-of (accessed 14 March 2019).

[263] (DA16/12) [2014] ZALAC 37.

[264] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 3.

[265] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 3.

[266] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 4.

[267] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 5.

[268] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 5.

https://etd.uwc.ac.za/

geographical location of the position, qualifications, competency and experience, and LIFO as the selection criteria to be applied.[269]

The company had 19 production supervisors in its employ but only required the services of eight.[270] In the appellant's division, there were only two supervisors, the appellant and Mr. Naidoo.[271] Mr. Naidoo was however employed at a level higher than the appellant and had more experience. The respondent also only needed one supervisor in that specific division.[272] Based on the agreed selection criteria the respondent selected the appellant for retrenchment.[273] The appellant then challenged the fairness of his dismissal in the Labour Court.

The Labour Court held that the selection criteria was fair and objective and had been fairly applied across the various divisions within the company.[274] On the subject of bumping, the appellant's counsel was of the view that the dismissal was unfair because the respondent did not consider bumping.[275] The Labour Court concluded that the evidence was against the application of bumping as the respondent had no previous practice of bumping. Furthermore, since the respondent had operations in KwaZulu-Natal, the Free State and the Northern Cape it was not practicable to move employees from one operation to another.[276]

The appellant appealed against the judgment of the Labour Court on the basis that his retrenchment was neither in accordance with the agreed selection criteria nor criteria that was fair and objective.[277] The appellant argued that the retrenchment agreement did not provide for the selection criteria to be applied selectively in separate production

---

[269] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 5.

[270] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 7.

[271] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 7.

[272] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para 7.

[273] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 *para* 9.

[274] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para14.

[275] *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37 para15.

[276] *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37para15.

[277] *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para19.

https://etd.uwc.ac.za/

lines but between geographical locations.[278] The company's implementation of the criteria to separate production lines was thus an unfair application of the agreed selection criteria.[279]

The Labour Appeal Court considered the fact that it was not in dispute that the appellant had identified other employees who, according to him, should have been retrenched if LIFO together with bumping had been applied.[280] While those employees did have fewer years of service with the company in comparison with the appellant, the respondent's argument was that those employees were not retrenched because they were the existing incumbents in their current positions.[281]

The court held that the company had not led any evidence to show that the employees who were retained in their existing positions were better skilled, qualified or experienced than the appellant. Some of those employees had also only been appointed to their positions a few months prior to the commencement of the retrenchment consultation process.[282]

The court found that the company did not produce any evidence to prove that the Retrenchment Agreement prohibited the consideration and application of bumping across different production lines or moving employees from one geographical area to another.[283] The court found that the company had simply unilaterally decided not to consider applying bumping across different production lines, or at all.[284]

The court stated that bumping formed part of LIFO and it was therefore incumbent upon the company to consult on its application to determine whether it would have been appropriate to apply bumping in the circumstances of the case.[285]

---

278 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para 20.

279 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para 20.

280 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para 27.

281 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para *27.*

282 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para28.

283 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37para 29.

284 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37para 28..

285 *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37para 30.

https://etd.uwc.ac.za/

Consequently, the court decided that the appellant had proven on a balance of probabilities that if bumping had been applied he would not have been retrenched because of, amongst others, his years of experience, qualifications, and skills.[286] The court found that the company had failed to show that the agreed selection criteria had been applied and that the criteria applied was fair and objective. The court, therefore, held that the appellant's dismissal had been substantively unfair.[287]

3.4 CONCLUSION

In terms of s 189 of the LRA, one of the topics that employers have to consult on in retrenchment proceedings is the selection criteria to be used in deciding who will be dismissed. The consulting parties have to agree on a selection criteria to be used, failing which the employer will decide on the criteria to be used, which criteria must however be both fair and objective. Failure to consult on selection criteria will render the dismissal substantively and/or procedurally unfair. Upon identifying fair and objective criteria the consulting parties have to make sure that the criteria does not unfairly discriminate against a particular group of people such as employees who are members of a union, pregnant women or a specific gender.[288]

In South Africa the most fair and objective criteria is typically considered to be LIFO as it protects and awards long serving employees. Other criteria considered to be fair and objective include the objectively determined conduct of employees, qualifications and skills, FIFO, early retirement, voluntary retrenchment, and bumping.

Chapter four will next consider the selection criteria most often used in retrenchment in the jurisdictions of the United Kingdom and Germany and how it compares to the selection criteria most often observed in South Africa.

---

[286] *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para 31.

[287] *Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC* 37 para 35.

[288] Davies B 'Fair Selection Criteria in Retrenchments: Can your Employer make you re-apply for your job? available at *https://www.golegal.co.za/fair-selection-criteria-retrenchments/* (accessed 09 October 2018).

https://etd.uwc.ac.za/

CHAPTER FOUR

RETRENCHMENT AND SELECTION CRITERIA IN THE UNITED KINGDOM AND GERMANY

4.1 INTRODUCTION

This chapter will provide an overview of the processes followed (including the selection criteria utilised) in the United Kingdom (UK) and Germany in cases of, what is known in SA as, dismissals for operational requirements (retrenchments). The UK was chosen as a comparator as it has played a historic role in the development of the South African legal framework.[289] South Africa was for many years a British colony[290] with many traditions and rules in the South African legal system thus adopted from the UK legal system.[291]

Germany in turn, was chosen as a comparator for its unique approach towards dismissals. There is a unique focus in German labour provisions on the social impact dismissal has on employees, including the dependents of employees.[292] Finally, SA, the UK and Germany are all members of the International Labour Organisation (ILO).

---

[289] Smith P & van Eck BPS "International perspectives on South Africa's unfair dismissal law" (2010) 43 *Comp. & Int'l L.J.S. Afr.* 54.

[290] Smith P & van Eck BPS 'International perspectives on South Africa's unfair dismissal law' (2010) 43 C*omp. & Int'l L.J.S. Afr.* 54.

[291] Hahlo & Kahn *The Union of South Africa: Development of its laws and Constitution* (1960) 443.

[292] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 106.

https://etd.uwc.ac.za/

4.2 THE UNITED KINGDOM

4.2.1 INTRODUCTION TO THE LEGAL FRAMEWORK IN THE UK IN RESPECT OF PROTECTION AGAINST DISMISSALS

Workers in the UK historically did not enjoy much protection against dismissals. Though common law viewed the employer and employee as free and equal contracting parties, an employer could dismiss an employee for any reason, provided only that the employer had given the employee the proper or agreed notice of dismissal.[293] It was only when an employee had been dismissed without such required notice having been provided, that an employee was able to institute action against the employer for wrongful dismissal.[294]

In 1963, the ILO adopted the first instrument dealing with termination of employment in the form of Recommendation No. 119: Termination of Employment which Recommendation was later replaced by the Termination of Employment Convention 1982 No.158 and the accompanying Termination of Employment Recommendation 1982 No. 166.[295] Recommendation 158 stipulates that the employment of a worker shall not be terminated unless there is a valid reason for such termination, connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.[296] The UK did not ratify the Convention, however, the Convention carries a persuasive value even though it is a non-binding instrument, and it continues to play an important role in establishing international standards in the UK[297]. Over the years, various employment protection legislation have been passed in the UK. The

---

[293] Zall T 'Unfair Dismissal in the United States and the United Kingdom: A Procedural Comparison of Remedies' (1998) 9 *Comparative Labour Law Journal* 434.

[294] Zall T 'Unfair Dismissal in the United States and the United Kingdom: A Procedural Comparison of Remedies' (1998) 9 *Comparative L abour Law Journal* 434.

[295] Rico L 'Legislating against Unfair Dismissal: Implications from British Experience' (1986) 8 *Berkeley Journal of Employment & Labor Law* 459.

[296] ILO Convention No. 158, art. 4.

[297] Smit P.A 'Pre-dismissal procedures in terms of ILO Convention 158: South African and comparative perspectives' available at https://www.researchgate.net/publication/281105593 (accessed 25 August 2020).

https://etd.uwc.ac.za/

Redundancy Payments Act of 1965 (RPA) provided for payment of severance pay to employees who lost their jobs due to economic reasons.[298] The Industrial Relations Act of 1971 (IRA) was passed[299] with the aim of protecting employees against unfair dismissal by requiring employers to provide a valid reason for dismissal.[300] Under the IRA all qualifying employees could apply to an Industrial Tribunal to evaluate whether his or her dismissal had been fair.[301] The Act was later repealed by the Trade Union Labour Relations Act of 1974 (TULRA). The Employment Protection (Consolidation) Act of 1978 (EPCA) was also passed, which required employers to provide justification for any employment decisions.[302] In 1996 the Employments Rights Act of 1996 was enacted, which provided for the protection of employees with two years of continuous and uninterrupted service with the same employer against unfair dismissal[303]. The ERA, the most relevant existing legislation in the UK as far as redundancy is concerned will be discussed more fully below.

4.2.2 THE EMPLOYMENT RIGHTS ACT OF 1996

UNIVERSITY of the
WESTERN CAPE

For purposes of this research, *redundancy* in the UK context refers to the closure of the business or a cessation or diminution of the requirements of the business for employees to carry out work of a particular kind.[304]

---

[298] Cosio R & Curcuruto F *Collective Dismissal in the European Union: A Comparative Analysis* (2017) ch 28, see also Paul K 'Employment Termination Reform: What Should a Statute Require before Termination- Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 637.

[299] Zall TA 'Unfair Dismissal in the United States and the United Kingdom: A Procedural Comparison of Remedied' (1988) 9 *Comparative Labour Law* 434.

[300] Newman GD 'The Model Employment Act in the United States: Lessons from the British Experience with Uniform Protections against Unfair Dismissal' (1991) 27 *Stanford Journal of International Law* 417.

[301] Bennett M 'Interpreting Unfair Dismissal and Redundancy Payments Law: The Judicial Reluctance to Disapproe Employer Decisions to Dismiss' (2002) 23 *Statute Law Review* 136.

[302] Newman GD 'The Model Employment Act in the United States: Lessons from the British Experience with Uniform Protections against Unfair Dismissal' (1991) 27 *Stanford Journal of International Law* 417.

[303] Employment Rights Act s108 (1).

[304] Hepple B 'European Rules on Dismissal Law' (1997) 18 *Comp.Lab.L.J* 207.

https://etd.uwc.ac.za/

Redundancy in the UK is governed by the Employment Rights Act of 1996 (ERA). Protection under this Act is available to employees who have two years of continuous and uninterrupted service with the same employer.[305] According to the Act, redundancy occurs where the dismissal is wholly or mainly attributable to:

> '(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes for which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or [306]
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.'[307]

This means that redundancy may occur in three situations: the employer ceased business altogether; the employer moves the place of business; or the employer reduces the labour force.[308]

UNIVERSITY of the WESTERN CAPE

4.2.2.1 Cessation of business[309]

This is where an employer has stopped, or intends to stop, to carry on the business in which the employee was employed.[310] The industrial tribunal is required to assess if

---

[305] Employment Rights Act s108 (1), see also s94.

[306] Employment Rights Act s 139 (1) *(a).*

[307] Employment Rights Act s 139 (1) *(b).*

[308] Lockton D.J 'Redundancy' available at *https://link.springer.com/chapter/10.1007/978-1-349-15002-1_10* (accessed 25 September 2019).

[309] Employment Rights Act s139(1) *(a)* (i)

[310]Martin Searle Solicitors 'Redundancy Advice for Employers' available at *https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/* (accessed 25 September 2019).

https://etd.uwc.ac.za/

the business has in fact been shut down.[311] There is however no need for the industrial tribunal to know the rationale behind the closing down of the business.[312]

In *Moon v Homeworthy Furniture [Northern]* [313] a factory closed down and all employees were declared redundant.[314] The employees contested that their dismissals had been unfair.[315] The industrial tribunal confirmed that it did not have to have knowledge as to the reason behind the employer's decision to declare redundancy.[316] Furthermore on appeal, the Employment Appeal tribunal said that, employment tribunals have no power to investigate the reasons for why an employer decided the matter was a redundancy situation, as it is not up to the tribunal to judge what the best course of action for a company is.[317]

4.2.2.2 Employer moving the place of business[318]

Redundancy in this instance will occur where an employer moves, or intends to move, the place of business from the place where the employee has traditionally been employed.[319] The test to determine the place of employment is to look at where the employee predominantly actually works, and not where the employee might be

---

[311] Lockton D.J 'Redundancy' available at https://link.springer.com/chapter/10.1007/978-1-349-15002-1_10 (accessed 25 September 2019).

[312] Lockton D.J 'Redundancy' available at https://link.springer.com/chapter/10.1007/978-1-349-15002-1_10 (accessed 25 September 2019).

[313] (1976) IRLR 298.

[314] *Moon v Homeworthy Furniture [Northern]* (1976) IRLR 298.

[315] *Moon v Homeworthy Furniture [Northern]* (1976) IRLR 298.

[316] *Moon v Homeworthy Furniture [Northern]* (1997) ICR 117.

[317] *Moon v Homeworthy Furniture [Northern]* (1976) IRLR 298, see also James W Cook & Co (Wivenhoe Ltd) v Tipper and others (1990) ICR 716.

[318] Employment Rights Act s139(1) *(a)* (ii)

[319] Martin Searle Solicitors 'Redundancy Advice for Employers' available at https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/ (accessed 25 September 2019).

https://etd.uwc.ac.za/

required to work based on the contract of employment.[320] The distance between the old and new place of work, together with the level of inconvenience caused to the employee by the move, are the important factors to establish whether the move amounts to a redundancy.[321] Whether redundancy could be argued is also dependent on whether the move is significant and significantly affects the employee's travelling costs,[322] and the presence or absence of a mobility clause in the employee's contract of employment.[323] A mobility clause is a contractual provision which specifies that the employer reserves the right to change the place of work and that an employee may be required to work from any other office or location as the need arises.[324]

In *Managers (Holborn) Ltd v Hohne*[325] it was held that no redundancy had occurred as the old and new employer premises were located in the same city and the employees' work and travelling expenses were not seriously affected by the relocation.[326]

In *United Kingdom Atomic Energy Authority v Claydon*[327] it was held that if an employees' contract included a clause that required the employee to work at any of the employer's establishments, the employee would be in breach of contract if he/she

---

[320]Martin Searle Solicitors 'Redundancy Advice for Employers' available at https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/ (accessed 25 September 2019).

[321]Martin Searle Solicitors 'Redundancy Advice for Employers' available at https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/ (accessed 25 September 2019).

[322] Lockton D.J 'Redundancy' available at https://link.springer.com/chapter/10.1007/978-1-349-15002-1_10 (accessed 25 September 2019).

[323] Lockton D.J 'Redundancy' available at https://link.springer.com/chapter/10.1007/978-1-349-15002-1_10 (accessed 25 September 2019)

[324] Dentons 'Mobility clauses in employment contracts, reasonableness is key' available at https://www.dentons.com/en/insights/newsletters/2017/june/29/uk-employment-law-roundup/uk-employmnet-newsletter-june-edition/mobility-clauses-in-employment-contracts-reasonableness-is-key (accessed 14 August 2020).

[325] (1977) IRLR 230.

[326] *Managers (Holborn) Ltd v Hohne* (1977) IRLR 230.

[327] (1974) IRLR 6.

https://etd.uwc.ac.za/

refused to move and could consequently be dismissed for disobedience rather than redundancy.[328] In this instance, the phrase ‘in the place where the employee was so employed’ was understood to mean a place where an employee could be required to work as per the employee’s contract.[329]

4.2.2.3 Diminishing Need for Employees[330]

Redundancy can occur where an employer requires fewer employees going forward to carry out the work.[331] In such a situation an employment tribunal will not only look at the availability of actual work the employee did at the time of dismissal, but also the availability of work the employee could be required to perform under the contract of employment.[332]

In *Safeway Stores plc v Burrell*[333] the employee was employed by Safeway Stores as a petrol station manager.[334] The employer indicated that it was going to reorganise departments, with the result that the employee’s position was going to be replaced by a petrol filling station controller.[335] The employee was advised to apply for this new post, but he refused to do so since the new position would have resulted in a salary reduction. As a result the employee was found redundant and dismissed.[336] The employee was successful with his claim at the Industrial Tribunal (IT),[337] subsequent

---

[328] *United Kingdom Atomic Energy Authority v Claydon* (1974) IRLR 6.

[329] *United Kingdom Atomic Energy Authority v Claydon* (1974) IRLR 6.

[330] Employment Rights Act s139 (1) *(b)*.

[331]Martin Searle Solicitors ‘Redundancy Advice for Employers’ available at https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/ (accessed 25 September 2019).

[332]Martin Searle Solicitors ‘Redundancy Advice for Employers’ available at https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/ (accessed 25 September 2019).

[333] (1997) IRLR 200

[334] *Safeway Stores plc v Burrell* (1997) IRLR 200.

[335] *Safeway Stores plc v Burrell* (1997) IRLR 200.

[336] *Safeway Stores plc v Burrell* (1997) IRLR 200.

[337] *Safeway Stores plc v Burrell* (1997) IRLR 200.

https://etd.uwc.ac.za/

to which the employer appealed to the Employment Appeal Tribunal (EAT).[338] The EAT held that the IT had used the wrong test for determining redundancy as provided for under the ERA. The correct test was, first to determine whether the employer's need for employees had in fact diminished and, secondly, whether such reduction in workers was the true reason for dismissal.[339] The EAT also noted that the focus should be on the actual decrease of employees and not the decrease of the work to be done.[340] The case was subsequently referred back to the IT for re-hearing.

From the aforesaid discussion it is clear that the circumstances under which redundancy may occur in the UK are different from the accepted circumstances for retrenchment under SA labour law. In the UK redundancy can occur under one of the three circumstances discussed, namely; ceasing of the business, moving the place of business, and a reduction of the labour force. In SA retrenchment may only occur as a result of an employer's operational requirements which are defined in s 213 of the LRA, as requirements based on the economic, technological, structural, or similar needs of an employer.[341] In the UK the employment tribunals are also not required to examine what caused (the rationale) the redundancy, whereas in SA the courts are required to consider the underlying reason(s) (rationale) that resulted in retrenchment.

UNIVERSITY of the
WESTERN CAPE

4.2.3 REDUNDANCY PROCEDURE

While in the UK redundancy is recognised as a valid reason for dismissal, such dismissal could still be unfair if an employment tribunal is not satisfied that redundancy was the real reason for dismissal, or the employer did not follow a fair process. An unfair process would be where the employer failed to consult affected employees prior to redundancy, the employer failed to select those to be made redundant in a fair way,

---

338 *Safeway Stores plc v Burrell* (1997) IRLR 200.

339 *Safeway Stores plc v Burrell* (1997) IRLR 200.

340 *Safeway Stores plc v Burrell* (1997) IRLR 200.

341 Labour Relations Act s213.

https://etd.uwc.ac.za/

and/or the employer failed to adequately consider the possibility of alternative employment.[342]

The Trade Union and Labour Relations (Consolidation) Act of 1992 (TULRCA) provides that 'when an employer proposes to dismiss as redundant 20 or more employees within a period of 90 days or less, the employer is required to consult with the trade union representative of the employee(s) who may be affected by the proposed dismissals or the measures taken in connection with the proposed dismissals'.[343] The TULRCA further provides that the employer should attempt to reach consensus with the representatives on measures to avoid dismissals, reduce the number of employees to be dismissed and mitigate the consequences of the dismissal.[344]

The employer must also disclose in writing the reason(s) why the affected employees were selected for redundancy.[345] Further information that the employer is required to provide to the employees include information on the number and descriptions of employees to be dismissed,[346] the proposed method of selection,[347] proposed method of carrying out the dismissals and over what period of time,[348] and the proposed method of calculating the amount of contractual redundancy payments to be made.[349]

In *Mugford v Midland Bank*[350] the Employment Appeal Tribunal (EAT) held that if the employer failed to consult with either the trade union or the employee, the dismissal

---

[342]Jacobson B Redundancy Dismissals: Procedure for Fair Dismissal available at https://www.brownejacobson.com/-/media/files/pdf-documents/2/redundancies-guidance.ashx?la=en (accessed 4 October 2019)

[343] Trade Union and Labour Relations (Consolidation) Act s188 (1).

[344] Trade Union and Labour Relations (Consolidation) Act s188 (2).

[345]Trade Union and Labour Relations (Consolidation) Act s188 (4) *(a).*

[346] Trade Union and Labour Relations (Consolidation) Act s188 (4) *(b).*

[347] Trade Union and Labour Relations (Consolidation) Act s188 (4) *(c).*

[348] Trade Union and Labour Relations (Consolidation) Act s188 (4) *(d).*

[349]Trade Union and Labour Relations (Consolidation) Act s188 (4) *(e),* see also Clarke A *Women's Rights at Work: A Handbook of Employment Law* (2001) 182.

[350] (1997) ICR 399,

https://etd.uwc.ac.za/

would be unfair unless the tribunal decides that consultation would have been a futile exercise.[351]

In *UK Coal Mining Ltd v National Union of Mineworkers*[352], UK Coal informed the employee representatives that the mine would be closing as a result of circumstances related to safety reasons. The Employment Tribunal (ET) held that though there was no obligation on the employer to consult about the reason for the closure, as UK Coal chose to provide information pertaining to such reasons, such information should have been truthful and shared in good faith.[353] The ET found that there was no credible evidence which indicated that the reason for the dismissals was related to safety issues and the misleading evidence consequently involved a breach of s 188 (4) (a) of the TULRCA.[354] On appeal, the Employment Appeal Tribunal (EAT) held that UK Coal had failed to comply with the duty to consult by providing a deliberately misleading reason for the closure.[355] The EAT also confirmed that it is the proposed dismissals that are the subject of consultation, and not the closure itself. For example, if an employer planned a closure but believed that redundancies would be avoided, there would be no need to consult over the closure itself.[356]

UNIVERSITY of the WESTERN CAPE

4.2.4 SELECTION CRITERIA USED IN THE UNITED KINGDOM

Similar to the position in SA, in the UK the selection of employees for redundancy has to be according to criteria which is fair and objective.[357] Selection criteria such as an

---

[351] *Mugford v Midland Bank* (1997) ICR 399. S 188(4) *(a)* stipulates that 'the employer must also disclose in writing the reason(s) why the affected employees were selected for redundancy'.

[352] (2008) IRLR 4

[353] *UK Coal Mining Ltd v National Union of Mineworkers* (2008) IRLR 4 para 48.

[354] *UK Coal Mining Ltd v National Union of Mineworkers* (2008) IRLR 4 para 49. Section 188 (4) *(a)* stipulates that 'For purposes of the consultation the employer shall disclose in writing to the appropriate representatives, the reason(s) why the affected employees were selected for redundancy'.

[355] *UK Coal Mining Ltd v National Union of Mineworkers* (2008) IRLR 4 para 61.

[356] *UK Coal Mining Ltd v National Union of Mineworkers* (2008) IRLR 4 para 87.

[357]ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019) and *Williams v Compair Maxam Ltd* (1982) ICR 83.

https://etd.uwc.ac.za/

employee's gender, marital status, family status, sexual orientation, religion, age, disability, race, or membership of the traveling community will immediately render the selection process and resultant redundancy unfair as it will amount to discrimination under the Employment Equality Act.[358] In *Williams v Compair Maxam Ltd*[359] the EAT stated that the employer should 'seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against attendance record, efficiency at the job, experience or length of service'.[360]

Dismissal for redundancy may also be declared to be unfair where other employees who fall within the selection pool for redundancy have not been considered for redundancy selection.[361] Consequently, employers need to show that in selecting a particular employee for redundancy, have they considered the employee in terms of the agreed selection criteria against other employees who fell within the same pool as determined by the selection criteria.[362]

In SA the position is slightly different, as a duty is placed on both consulting parties.' Section 189 (7) of the LRA provides that employers must select the employees to be retrenched in accordance with selection criteria that have been agreed to by the consulting parties or failing any agreement criteria that are fair and objective'. [363]

The selection criteria to be used in the UK will be briefly discussed below. In the UK, selection criteria are grouped as either non-compulsory or compulsory. Sometimes an employer may use a combination of criteria.

---

[358]ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

[359] (1982) ICR 156.

[360] *Williams v Compair Maxam Ltd* (1982) ICR 156.

[361]UNISON 'Fighting Redundancies in Local Government' available at https://www.unison.org.uk/content/uploads/2014/10/On-line-Catalogue226742.pdf (accessed 26 July 2019).

[362]UNISON 'Fighting Redundancies in Local Government' available at https://www.unison.org.uk/content/uploads/2014/10/On-line-Catalogue226742.pdf (accessed 26 July 2019).

[363] Labour Relations Act s 189 (7).

https://etd.uwc.ac.za/

4.2.4.1 NON-COMPULSORY SELECTION CRITERIA

(a) *Voluntary redundancy*

A popular method for redundancy is for employees to volunteer themselves to be considered for redundancy and for the employer to then select from the list of volunteers who will be retrenched.[364] When accepting employees for voluntary redundancy, it is important that the employer considers what skills and experience it will still require in the workplace for the efficient operation of the business.[365] Employers may thus restrict those who can apply for voluntary redundancy to selected categories of employees.[366]

(b) Early retirement

Early retirement is however considered to be a more expensive non-compulsory redundancy option. It involves longer-term financial commitments such as, pension payments, in comparison to a once-off payment associated with voluntary redundancy.[367] As an alternative to redundancy, early retirement does however have a less harmful effect on workforce morale.[368] Employers should however bear in mind that, dependent on the number of older employees who retire early there might be no

---

[364]ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

[365]ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

[366]ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

[367]GOV.UK 'Making Staff Redundant' available at https://www.gov.uk/staff-redundant/noncompulsory-redundancy (accessed 26 July 2019).

[368]ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

https://etd.uwc.ac.za/

natural retirement for some time.[369] This could in turn lead to poor career prospects for those remaining employees if there is little future employee turnover.[370]

4.2.4.2 COMPULSORY SELECTION CRITERIA

(a) *Last in First Out (LIFO)*

Many employees and trade unions prefer that employers select those to be retrenched on the basis of length of service, that is, selection by way of LIFO. This is due to the fact that LIFO is generally considered as an impartial, fair and objective selection criteria.[371]

The advantages of LIFO are that it is administratively straightforward and not expensive for employers.[372] LIFO also protects older workers who might otherwise find it harder to secure alternative employment.[373] At the same time, however, a disadvantage of LIFO is that employees who perform well could be made redundant before longer serving employees with poorer performance records.[374] LIFO also diminishes an employer's discretion in selecting who to dismiss.[375] Arguments have also been made that LIFO might be in breach of the Age Discrimination Act of 2006 since it often results in the redundancy of younger employees.[376] In *Rolls Royce plc v Unite the Union*[377] the Court of Appeal ruled that using LIFO to determine redundancy

---

[369] ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

[370] ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019).

[371] Holland J & Burnett S *Employment Law* 4ed (1997) 240.

[372] Taylor S & Emir A *Employment Law: An Introduction* 4ed (2015) 148.

[373] Sargeant M 'Age Discrimination, Redundancy Payments and Length of Service' (2009) 72 *Mod.L.Rev* 628.

[374] Taylor S & Emir A *Employment Law: An Introduction* 4ed (2015) 148.

[375] Sargeant M 'Age Discrimination, Redundancy Payments and Length of Service' (2009) 72 *Mod.L.Rev* 628.

[376] Taylor S & Emir A *Employment Law: An Introduction* 4ed (2015) 148.

[377] [2009] EWCA Civ 387.

https://etd.uwc.ac.za/

could amount to age discrimination. In the specific case the use of LIFO was however justified as a 'proportionate means of achieving a legitimate aim'.[378]

(b) *Performance and ability*

Performance and ability assess an employee's performance, skills, quality and flexibility.[379] Using this as a selection criteria is regarded as fair provided the criteria is clearly and reasonably defined and the assessment of performance and ability has been objective.[380]

(c) *Bumping*

Bumping occurs when an employee whose job is not at risk of being redundant is nevertheless dismissed for redundancy. The vacant position is then filled by another employee whose own job was in fact redundant.[381] The dismissal in this scenario is still considered to be as a result of redundancy.[382] In *W Gimber & Sons Ltd v Spurrett*[383] it was confirmed that where a redundant employee is transferred to another section in the business, the replaced and subsequently dismissed employee is dismissed by reason of redundancy.[384]

It has been held that it may in fact be unfair not to consider bumping a more junior employee even if the more senior employee never indicated that he or she would be

---

[378] *Rolls Royce plc v Unite the Union* [2009] EWCA CIV 387.

[379] Thompsons Solicitors 'Selection of Employees' available at https://www.thompsonstradeunion.law/news/lelr/weekly-issue-123-archive/selection-of-employees (accessed 23 July 2019).

[380] XpertHR 'How to Choose Apply Redundancy Selection Criteria' available at https://resources.xperthr.co.uk/surveys/respondents/XpertHR_article_10476.pdf (accessed 26 July 2019).

[381] Grunfeld C *The Law of Redundancy* 3ed (1989) 128.

[382] Landau Law Solicitors 'Redundancy' available at https://www.landaulaw.co.uk/redundancy/ (accessed 23 July 2019).

[383] (1976) I.T.R 308 (D.C).

[384] *W Gimber & Sons Ltd v Spurrett* (1976) I.T.R 308 (D.C)

https://etd.uwc.ac.za/

willing to accept a more junior position.[385] Employers should therefore not automatically assume that an employee would not be willing to take a more junior position, even if such position comes with a reduced salary and status.[386] In *Lionel Leventhal Ltd v North*[387] the EAT provided factors that have to be taken into account to consider whether or not there is an obligation to consider bumping in a particular case.[388] These factors include: how different the two roles are, the relative length of service of the two respective employees; the qualifications of the employee at risk of redundancy; and whether or not the other employee would consider voluntary redundancy.[389]

While there is no fixed rule in this regard, if bumping might be an option, then this must be raised by either party as a possibility during consultation meetings.[390] In *Mirab v Mentor Graphics (UK) Ltd*[391] the employee argued before the Employment Tribunal (ET) that the respondent should have considered transferring him into a more junior account manager role.[392] The employee had however failed to raise this during the consultation process.[393]

The ET ruled that the employer would only have been obliged to consider 'bumping' if the employee had raised the issue himself during the consultation process.[394] The employee appealed the ET's decision to the Employment Appeal Tribunal (EAT). The EAT found that there was no strict rule which required the employee to raise 'bumping'

---

[385] Landau Law Solicitors 'Redundancy' available at https://www.landaulaw.co.uk/redundancy/ (accessed 23 July 2019).

[386] Landau Law Solicitors 'Redundancy' available at https://www.landaulaw.co.uk/redundancy/ (accessed 23 July 2019).

[387] (2004) (UKEAT/0265/04).

[388] *Lionel Leventhal Ltd v North* (2004) (UKEAT/0265/04).

[389] *Lionel Leventhal Ltd v North* (2004) (UKEAT/0265/04).

[390] Landau Law Solicitors 'Redundancy' available at https://www.landaulaw.co.uk/redundancy/ (accessed 23 July 2019).

[391] (2018) (UKEAT/0172/17/DA).

[392] *Mirab v Mentor Graphics (UK) Ltd* (2018) (UKEAT/0172/17/DA) 26G.

[393] *Mirab v Mentor Graphics (UK) Ltd* (2018) (UKEAT/0172/17/DA) 26G.

[394] *Mirab v Mentor Graphics (UK) Ltd* (2018) (UKEAT/0172/17/DA) 26G.

https://etd.uwc.ac.za/

before the employer would be expected to consider it. Instead, the question was whether the company's decisions fell within the range of reasonable options open to an employer.[395]

South Africa recognises two kinds of bumping, being horizontal and vertical bumping, and that horizontal bumping should always be considered before vertical bumping is applied, so as to protect long serving employees.[396] The courts stated that bumping formed part of LIFO, therefore the consulting parties should also consult its application, and it should not be the duty of the employee to raise it.

4.3 GERMANY

4.3.1 INTRODUCTION TO THE LEGAL FRAMEWORK IN GERMANY

Similar to the UK, the employment relationship in Germany was historically treated as a contract and thus, subject to contract law.[397] The employer and employee were free to unilaterally terminate the employment relationship, subject to observing the agreed term of notice.[398] The Works Councils Act of 1920 became the first legislation in Europe that established Works Councils in workplaces that had at least 20 employees.[399] Germany was the first country to enact this legislation, and the Act was the first legislation in Europe that required an employer to have an objective reason

---

395 *Mirab v Mentor Graphics (UK) Ltd* (2018) (UKEAT/0172/17/DA) 62A.

396 *Porter Motor Group v Karachi* (2002) ILJ 348 (LAC).

397 Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 632.

398 Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 632.

399 Rohr S *German Works Council: A Model for South African Workplace Forums* (unpublished LLM thesis, University of Cape Town 2017) 41.

https://etd.uwc.ac.za/

for dismissal.[400] Subsequently the Protection Against Dismissal Act of 1951 (PADA) was enacted, which remains in force to this date.[401] The PADA reinstated and reinforced most of the provisions of the Works Councils Act.[402] It confirmed the principle that employees should not be dismissed without just cause.[403] The PADA also introduced the principle that dismissals are permitted only for misconduct, repeated absences which are due to illness and economic constraints i.e. restructuring.[404]

The Works Constitution Act of 1952 was subsequently passed; with the aim of trade unions and Work Councils to co-exist.[405] The Act provided some legal powers to trade unions to influence the work council systems.[406]

4.3.2 REDUNDANCY SPECIFIC LEGISLATION IN GERMANY

UNIVERSITY of the
WESTERN CAPE

[400]Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 634.

[401]Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 635.

[402] Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 635.

[403] S 1(1) of the Act, Dose-Digenopoulos A & Holand A 'Dismissal of employees in the Federal Republic of Germany' (1985) 48 *Mod.L.Rev* 542.

[404] Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 636.

[405] Rohr S *German Works Council: A Model for South African Workplace Forums* (unpublished LLM thesis, University of Cape Town 2017) 41.

[406] Rohr S *German Works Council: A Model for South African Workplace Forums* (unpublished LLM thesis, University of Cape Town 2017) 41.

https://etd.uwc.ac.za/

Redundancy in Germany is governed by the PADA, and the German Civil Code depending on whether there was an ordinary or extraordinary termination.[407] Ordinary termination refers to when employment terminates upon the expiration of a notice period.[408] Extraordinary termination refers to immediate termination of employment.[409] Dismissal based on operational requirements falls under ordinary terminations due to the existence of terms of notice, consequently, that would mean PADA protects ordinary terminations and the Civil Code provides protection for extraordinary terminations.[410]

Initially PADA was only applicable to enterprises who employed more than five employees,[411] and also only to employees who had to be working at the employer for more than six months.[412] In 2004 the Act was amended to be applicable to employers who employ more than ten employees, who have been continuously employed for six months by the same employer.[413]

With the Civil Code contrary to the above, employment protection is not limited neither to the size of the business enterprise nor the period the employee has been employed but whether there has been extraordinary termination based on operational requirements or not.[414]

---

[407] Berger H & Neugart M 'How German Labour Courts Decide: An Econometric Case Study (2011) 13 *German Economic Review* 56.

[408] Civil Code s 622.

[409] Civil Code s 626.

[410] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 108.

[411] Protection Against Dismissal Act s 23(1).

[412] Protection Against Dismissal Act s 1(1).

[413]Protection against Dismissal Act s 23(1), see also Seifert A & Funken-Hotzel E 'Wrongful Dismissals in the Federal Republic of Germany' (2005) 4 *JUSLabo*r 6;Vaate V 'Achieving Flexibility and Legal Certainty Through Procedural Dismissal Law Reforms: The German, Italian and Dutch Solutions' (2017) 8 *European Labour Law Journal* 9.

[414] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011)109.

https://etd.uwc.ac.za/

PADA further provides that the dismissal should be socially justifiable.[415] A socially justified dismissal relates to dismissals for incapability, bad conduct and urgent operational requirements, all of which hinder the continued employment of the employee in the establishment.[416] Unlike the position in SA, dismissals based on operational requirements are not defined by the PADA and, as such in Germany the existence of an operational requirement depends on a structural entrepreneurial decision on the employer's part.[417] Operational reasons that may provide a basis for socially justified dismissals can include circumstances which are internal and external to the business.[418] Examples of internal circumstances would be capacity reductions due to rationalisation, the introduction of labour saving technology, or plant closure.[419] External circumstances typically include economic slowdown, reduced turnover or customer demand, changed market structures, or withdrawal of subsidies.[420]

In as much as the employer has a wide discretion on which measures to take under these internal or external circumstances, such discretion is limited by the principle of proportionality that needs to be complied with for the dismissals to be socially justified under German law.[421] The principle of proportionality requires the employer to explore

[415] Protection Against Dismissal Act s 1(2).

[416] Protection Against Dismissal Act s 1(2), see also Digenopoulos A & Holand A 'Dismissal of Employees in the Federal Republic of Germany' (1985) 48 *Modern Law Review* 543.

[417] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 110.

[418] Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

[419] Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

[420] Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

[421] Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

https://etd.uwc.ac.za/

all alternative options available before dismissing.[422] Such options would include transferring of employees in other parts of the business or retraining employees who lack the necessary skills required for the alternative position.[423]

When exploring alternative employment, the employer must consider positions that are currently or foreseeably vacant in the business.[424] The employer needs also to consider whether alternative employment similar to the employee's previous job is available. However if there is no similar position vacant, the employer can offer the employee an inferior position.[425] If alternative employment is not available, the employer must then engage in a process of fair selection on social grounds for workers who are to be dismissed, and the need in retaining employees with specific skills should not be disregarded.[426]

4.3.3 REDUNDANCY PROCEDURE

UNIVERSITY of the
WESTERN CAPE

In 1972 another Works Constitution Act was introduced. This Act currently regulates Work Councils and is based on the 1952 Act. Section 1 of the Act provides that every establishment that has at least five permanent employees, older than 18 years can

---

422 Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

423 Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

424 Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

425 Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

426 Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at *www.monash.edu>pdf-file* (accessed 17 September 2020).

https://etd.uwc.ac.za/

establish a workplace council.[427] A workplace council is obliged to ensure that all laws, rules and health provisions are applied correctly and to the benefit of the employees.[428] The Act further requires that in businesses where a works council exists, the employer must inform and consult the council before any decision to dismiss is made.[429] If however, a notice of dismissal is given without consulting with the works council, then such notice would be void[430] The employer further has to inform the works council of the individual to be dismissed, the type of dismissal, whether it is ordinary or extraordinary dismissals, the reason for the dismissal, the effective date of the dismissal, the criteria applied for selection, and the examination of possibilities of transfer.[431] Essentially the council has to be informed of conditions which the employer considers in justifying an urgent operational requirement.[432]

If the works council is of the opinion that the dismissal is socially unjustified under the PADA the council may object to the dismissal in writing.[433] The works council can object to the notice within 7 days.[434] However if it happens that the works council does not object, the employer must continue to pay the employee's wages up until a final decision has been made by the Labour Court[435]. If the Works Council objects to the

[427] Works Constitution Act s 1(1).

[428] Peter Furnthaler " German Workplace Organisations and Associations" available at https://www.howtogrmany.com/pages/german-workplace-organizations.html#council (accessed 1 December 2022)

[429] Work Constitution Act s 102(1).

[430] Work Constitution Act s 102(2).

[431] Weiss M 'Individual Employment Rights: Focusing on Job Security in The Federal Republic of Germany' (1988) 67 *Nebraska L Rev* 89.

[432] Dose-Digenopoulos A & Holand A 'Dismissal of employees in the Federal Republic of Germany' (1985) 48 *Mod.L.Rev* 544.

[433] Vaate V 'Achieving Flexibility and Legal Certainty through Procedural Dismissal Law Reforms: The German, Italian and Dutch Solutions' (2017) 8 *European Labour Law Journal* 9.

[434] Eger T 'Opportunistic Termination of Employment Contracts and Legal Protection Against Dismissal in Germany and the USA' (2004) 23 *International Review of Law and Economics* 393.

[435] Eger T 'Opportunistic Termination of Employment Contracts and Legal Protection Against Dismissal in Germany and the USA' (2004) 23 *International Review of Law and Economics* 393.

https://etd.uwc.ac.za/

dismissal and the employee proceeds with the legal action, the employer is obliged to continue the employee's employment until the end of the legal action.[436]

In workplaces that has no Work Councils; employees may institute legal proceedings against a notice of termination before the local Labour Court.[437] In that way an employee would be invoking his or her rights under the PADA, and such a claim must be filed within three weeks of service of the notice of termination.[438] The motion can be for reinstatement only. A dismissal claim will succeed if the employer fails to show that the notice of termination is justified under the PADA.[439]

PADA also imposes on employers who see a need to terminate for economic reasons a duty to take into account the social aspects of termination when they select the employees to be dismissed.[440] Social aspects refer to age, seniority, maintenance obligations and severe disability of the employees.[441]

UNIVERSITY of the
WESTERN CAPE

4.3.4 SELECTION CRITERIA

In Germany, employment protection legislation necessitates social criteria in determining which workers are to be dismissed.[442] This means the employer has to

---

[436] Work Constitution Act s 102(5).

[437] Lexology 'Employment and Labour Law in Germany' available at https://www.lexology.com/library/detail.aspx?g=dc1738cd-23f3-43cc-b27d-62cfd8da4cf2 (accessed 29 May 2021)

[438] Lexology 'Employment and Labour Law in Germany' available at https://www.lexology.com/library/detail.aspx?g=dc1738cd-23f3-43cc-b27d-62cfd8da4cf2 (accessed 29 May 2021)

[439]Lexology 'Employment and Labour Law in Germany' available at https://www.lexology.com/library/detail.aspx?g=dc1738cd-23f3-43cc-b27d-62cfd8da4cf2 (accessed 29 May 2021)

[440] Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 636.

[441] Rausch Jacqueline 'Social Justification of the Termination of Employment' available at https://www.grin.com/document/300047 (accessed 30 May 2021)

[442] Protection Against Dismissal Act s1 (3).

https://etd.uwc.ac.za/

select employees with the strongest social background for dismissal and compare them to those with the least social protection.[443] This is done by considering the employees' length of service in the company, their age, family maintenance obligations and any severe disability that an employee might have, and then the employer may terminate the employment of those who require least social protection, i.e. have no family responsibility, young and healthy.[444] Personal characteristics of the employees are also considered when it comes to selection criteria, more especially the impact dismissal has on the employees and people who are dependent on the employees are taken into consideration.[445]

Such is made clear in a decision of the Federal Labor Court (Federal Labor Court decision of 29 January 2015 – 2 AZR 164/14). In this case, the judges found that an employee who had financial responsibilities towards his wife and two children and who had been working in the establishment for a period of six years was more worthy of being protected than a female employee who had been working in the establishment for nine years but had no maintenance obligations.[446] Thus, according to the judges, three years more seniority cannot balance out three financial obligations.[447]

In as much these social criteria's are used when selecting employees to be dismissed, the law does not weigh these criterions, meaning no criteria is more important than the

[443] Radina Stefanie 'What is the latest on employees' rights in the event of redundancy in Germany?' available at *https://www.globalworkplaceinsider.com/2017/08/what-is-the-latest-on-employees-rights-in-the-event-of-redundancy-in-germany/* (accessed 25 April 2019).

[444] Weiss M *Labour Law and Industrial Relations in Germany* (1995) 93.

[445] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011)112.

[446] European American Chamber of Commerce 'Germany: Update on Social Selection in Dismissal Cases' available at *https://eaccny.com/news/member-news/germany* (accessed 6 June 2021), see also Federal Labor Court decision of 29 January 2015 – 2 AZR 164/14.

[447] European American Chamber of Commerce 'Germany: Update on Social Selection in Dismissal Cases' available at https://eaccny.com/news/member-news/germany (accessed 6 June 2021), see also Federal Labor Court decision of 29 January 2015 – 2 AZR 164/14.

https://etd.uwc.ac.za/

other.[448] It is vital to note that failure to consider these social factors jeopardise the validity of the dismissals, dismissals would be unjustified.[449]

When applying the social factor test for selecting the employees for redundancy, the employer has to first categorise employees.[450] This is done by considering all employees with identical or comparable personal and technical qualifications and who are working in the same or similar jobs.[451] If the employer has made a selection among the comparable employees according to social considerations, the employer can then take into consideration social criteria together with the employer's operational interests in the selection decision.[452] This means that, those employees whose employment is in the legitimate interest of the employer are not to be included in social selection.[453] This would be in instances where an employee is needed for his skills, abilities and performances and employees who need not to be dismissed in order to balance the age structure of staff.[454] If, due to economic, technical, or other justifiable reasons it is necessary to keep specific employees who on the basis of "*social aspects*" would otherwise have to be dismissed, the criterion of "social aspects" does not apply. It must, however, be pointed out that conditions for such an exemption, by court interpretation, have become very difficult to satisfy.[455]

---

[448] Radina Stefanie 'What is the Latest on Employees Rights in the Event of Redundancy in Germany' available at *https://www.globalworkplaceinsider.com/2017/08/what-is-the-latest-on-employees-rights-in-the-event-of-redundancy-in-germany/* (accessed 25 April 2019).

[449] Mikes G 'German Labor and Employment News: Employers do not Always have to Lose at the Game of Dominoes' available at *https://eaccny.com/news/member-news/germany-update-on-social-selection-in-dismissal-cases/* (accessed 13 September 2020).

[450] Ardizzoni M *German Tax and Business Law* (2005)12022.

[451]Ardizzoni M *German Tax and Business Law* (2005)12022.

[452] Seifert A & Funken-Hotzel E 'Wrongful Dismissal in the Federal Republic of Germany' (2005) 4 *IUSLabour* 10.

[453] Seifert A & Funken-Hotzel E 'Wrongful Dismissal in the Federal Republic of Germany' (2005) 4 *IUSLabour* 10.

[454] Seifert A & Funken-Hotzel E 'Wrongful Dismissal in the Federal Republic of Germany' (2005) 4 *IUSLabour* 10.

[455]Weiss M 'Individual Employment Rights: Focusing on Job Security in the Federal Republic of Germany' (1988) 67 *Neb.L.Rev* 88.

https://etd.uwc.ac.za/

When an employer considers years of service, it is similar to SA and UK with LIFO often used to select employees.[456] Relating to age, in Germany, employers consider the fact that older employees may find more difficulties in securing employment in the near future than young employees.[457] Relating to the obligation of family responsibility, cognisance is given to the employees' dependants and the impact that dismissal of those employees might have on them.[458] Relating to severe disability, cognisance is given to employees who are differently able, the hardships that they are probably going to endure if they are dismissed compared to those with no disabilities.[459] One of the hardships that disabled people are likely to face is similar to what older people may face, like not being able to secure jobs in the near future, due to those jobs requiring employees with physical capabilities.[460]

4.4 COMPARISON TO SOUTH AFRICAN LAW

The discussion below will be a comparison of the above mentioned jurisdictions to SA, focus being on the employment protection afforded to employees in each country, secondly, the meaning of operational requirements in each country, thirdly, the retrenchment procedure used in each country and finally, the selection criteria utilised to select employees to be dismissed.

4.4.1 Employment Protection

[456]Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 113.

[457]Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 114.

[458]Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 114.

[459]Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 114.

[460]Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 114.

https://etd.uwc.ac.za/

In both South Africa and the UK, dismissals based on operational requirements must be substantially and procedurally fair; while in Germany, dismissals must be socially justified. Prior to the introduction of legislation, labour law in all three jurisdictions was governed by common law principles. In South Africa the employment relationship was viewed as a contractual relationship between an employer and employee [461] and termination of this relationship could be effected by either party through giving the other party the required period of notice as agreed in the contract.[462]

In both the UK and Germany, the employment relationship was also subject to contract law. The employer and employee were viewed as free and equal contracting parties who were free to unilaterally terminate the employment relationship.[463] The employer could however dismiss an employee for any reason provided only that the agreed notice of termination was given to the employee.[464]

Employment relationships in all three jurisdictions are now governed by domestic legislation. In South Africa the LRA provides that *every employee* has the right not to be unfairly dismissed.[465] This is in line with the Constitutional provision affording *everyone* the right to fair labour practices.[466] In Germany the employment relationship is governed by the PADA and the German Civil Code of 1900. Even though the PADA limits its protection to establishments with at least 10 employees, and to workers who have been employed for a minimum period of six months,[467] employees not protected by PADA are protected by the Civil Code. In the UK, the employment relationship is governed by the ERA of 1996 which provides protection to employees that have been

---

[461] Du Toit D 'Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law (2008)1 *SALJ* 95.

[462] Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) 15.

[463] Paull K 'Employment Termination Reform: What Should a Statute Require before Termination-Lessons from the French, British and German Experiences.' (1991) 14 *Hastings Int'l & Comp L Rev* 632.

[464] Zall T 'Unfair Dismissal in the United States and the United Kingdom: A Procedural Comparison of Remedies' (1998) 9 *Comparative Labour Law Journal* 434.

[465] Labour Relations Act s 185.

[466] The Constitution of the Republic of South Africa s 23(1).

[467] Protection Against Dismissal Act s 1(1).

https://etd.uwc.ac.za/

employed for more than a year. There is however no threshold for applicability based on the size of the business enterprise.[468]

When comparing the UK and Germany with South Africa, South Africa has displayed a broad scope of employment protection. This is as a result of the LRA providing protection to *all employees* and not limiting the applicability of the Act with reference to employer size or the years an employee has been working for an establishment in order to be protected by legislation. In the case of Germany, even though all employees are afforded protection by either PADA or the Civil Code, having only one piece of legislation that protects all employees against unfair dismissal, as is the case in South Africa is less onerous and confusing.

4.4.2 Meaning of Operational Requirements

In Germany operational requirements are not defined by PADA or the Civil Code. Rather the existence of an operational requirement is dependent on a structural entrepreneurial decision of the employer which would result in the reduction on the volume of work or personnel needs of the business establishment.[469] In the UK the ERA provides that redundancy may occur in three circumstances: where the employer ceased business altogether; where the employer moves the place of business; or where the employer reduces the labour force.[470] Unlike the position in South Africa, employment tribunals in the UK do not examine the reasons for redundancy. This was confirmed in *Moon v Homeworth Furniture [Northern]* (1976) IRLR 298 where the industrial tribunal confirmed that it did not have to know the reason behind the employer's decision to declare redundancy.[471]

---

[468] Employments Rights Act s 108 (1).

[469] Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa (unpublished* LLM thesis, University of Johannesburg 2011) 110.

[470] Employment Rights Act s 139 (1) *(a) – (b).*

[471] *Moon v Homeworthy Furniture [Northern]* (1976) IRLR 298.

https://etd.uwc.ac.za/

In South Africa operational requirements are defined as the economic, technological, structural or similar needs of the employer.[472] The employer has to prove the presence of operational requirements as defined by s 213 and show that these are indeed the reason for retrenchments. Operational needs of the employer have been provided a rather wide interpretation in South Africa with the courts having confirmed that an increase in profit also sufficed as an acceptable operational reason for retrenchment.[473] In light of the above, proving the fairness of an operational requirements dismissal in South Africa has shown to be offering more protection to employees when compared to the UK and Germany as the reason for the dismissal must not only fall within the definition of operational requirements as defined in s 213 of the LRA, but must also be shown to have been the actual, or real, reason for such dismissals.

In the Old Mutual case, the Court allows for managerial prerogative as well as the needs of the employee, which is not the case in UK and Germany.

UK and Germany can learn from SA, as the court in *SATAWU v Old Mutual* stated that the test for substantive fairness involves a measure of deference to the managerial prerogative; however the court is still entitled to look at the content of the reasons given to ensure that they are indeed aimed at a commercially acceptable objective.[474] This will move away from an approach where courts are given some input as to what is good for the business, though courts are not privy to or involved with the day-to-day operations of the business. At the same time, the freedom afforded to the employers to retrench employees must also not be so wide that employees are subjected to exploitation.

4.4.3 Retrenchment/Redundancy Procedure

[472] Labour Relations Act s 213, see also The Code of Good Practice on Dismissal based on Operational Requirements, and Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at www.monash.edu>pdf-file (accessed 17 September 2020).

[473] *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) 93C.

[474] *SATAWU v Old Mutual*(2005) 26 ILJ 293 (LC) para 85.

https://etd.uwc.ac.za/

In all three jurisdictions consultation is regarded as an important step before dismissal for operational requirements is effected. Where the countries do however differ, is when it comes to the timing of such consultations. In the UK consultations occur when the employer *proposes* to dismiss the affected employees.[475] Employment Tribunals provide that to *propose* means that consultations should commence when the closure of the business is certain, and not when it is merely a possibility.[476] In Germany, similar to the UK consultations have to occur *before* any decision to dismiss is made.[477] In South Africa consultation must however commence when the employer *contemplates* retrenching employees.[478] This seems to be based on the premises that an employer would first sense the need to retrench before making an actual final decision that retrenchment is unavoidable.[479] Thus the requirement is that consultation must commence once possible retrenchment is only considered still.

The nature of the consultations in the UK and SA are however similar. In both jurisdictions the consulting parties have to attempt to reach consensus. In South Africa it is however specifically stated that the consultations should be a meaningful joint consensus-seeking process in an attempt to reach a consensus. Germany does not stipulate the nature of the consultations at all.

Compared to both the UK and Germany, it appears as if South African retrenchment law is more stringent in making sure that dismissals are fair. This is particularly so in as far as when consultations with employees should commence. South Africa is the only one of the three jurisdictions which requires that such consultation must commence once retrenchments are only considered, and not when a final decision has been reached.

UNIVERSITY of the
WESTERN CAPE

[475] Trade Union and Labour Relations (Consolidation) Act s188 (1).

[476] *UK Coal Mining Ltd v National Union of Mineworkers* (2008) IRLR 4 para 86.

[477] Work Constitution Act s 102 (1).

[478] Labour Relations Act s 189 (1).

[479] *Building Construction & Allied Workers Union v Murray & Roberts Buildings (Pty) Ltd* (1991) 12 ILJ 112 (LAC).

https://etd.uwc.ac.za/

4.4.4 Selection Criteria

With regards to the selection criteria to be used to effect retrenchments, the UK and South Africa are rather similar with the criteria used, which criteria must be fair and objective. South Africa and the UK both consider LIFO as the most favourable criteria as it eliminates an employer's possible subjective views toward individual employees and is thus regarded as the most objective criteria.[480] Where LIFO is not utilised it is normally because the employer's interest is to retain employees with more skills and abilities who might otherwise be lost to the business under LIFO.

Where the process slightly differs, is with regards to the agreement between the consulting parties on the selection criteria to be utilised.[481] The Employment Tribunals provide that the employer should seek to establish selection criteria which do not solely depend upon the person making the selection.[482] While in SA, the legislation is more extensive as it allows for several consulting parties and not one consulting party to agree and/or decide on a selection criteria to be utilised.[483]

In Germany, a social criteria is used in determining which workers to be dismissed.[484] A social criteria is a selection criteria which requires the employer to take certain social factors into account when deciding which employees to dismiss. The social criteria of years of service is similar to LIFO. Unlike the position in the UK and South Africa, it does not however form a single criteria for selection, but is only one of a few factors that must be considered together. Germany, like SA and the UK, however also permits employers to disregard the prescribed criteria's to preserve employees who are likely to be dismissed but possess skills and abilities that the employer needs.

---

[480] Sargeant M 'Age Discrimination, Redundancy Payments and Length of Service' (2009) 72 *Mod.L.Rev* 628.

[481] ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019) and *Williams v Compair Maxam Ltd* (1982) ICR 83.

[482] *Williams v Compair Maxam Ltd* (1982) ICR 156.

[483] Labour Relations Act s 189(7).

[484] Protection Against Dismissal Act s1 (3).

https://etd.uwc.ac.za/

In all three jurisdictions it is thus clear that retainment of skills or expertise can favour the use of selection criteria which is not dependent on years of service, but the selection criteria then used must still be fair and objection in the UK and South Africa.

Germany however focuses mostly on the circumstance of individual employees and the effects that dismissal might have on an employee and his/her dependents. Considering the impact retrenchment is likely to have on individual employees is perhaps something that both South Africa and the UK can take away from the German approach.

4.5 CONCLUSION

This chapter considered the legal framework that brought about worker's employment security in both UK and Germany. Both countries recognise that a dismissal for operational requirements is a genuine and fair reason to dismiss. Both countries also have procedures in place to make sure such dismissals are conducted fairly. Amongst those procedures is the selection criteria used to effect dismissal. From this chapter, it could be noted that the selection criteria's used in the UK are similar to the ones used in SA, with both also providing for compulsory and non-compulsory redundancies. However, in Germany, they are limited to only three, with years of service being similar to LIFO which is used both in SA and the UK.

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The aim of the research was to evaluate the procedural fairness of dismissals based on an employer's operational requirements in terms of s 189 of the LRA in South Africa and more specifically, the fairness of the selection criteria most utilised, i.e. LIFO. The research set out to establish which other fair and objective selection criteria, outside of LIFO, is available. This was done by discussing selection or similar criteria utilised in the United Kingdom (UK) and Germany in retrenchments proceedings.

This concluding chapter will now provide a brief overview of the most important findings made in the preceding chapters with the aim of providing some recommendations as far as retrenchments and selection criteria are concerned in South Africa.

UNIVERSITY of the
WESTERN CAPE

5.2 OVERVIEW

Chapter two of the study discussed the fairness provisions underlying operational requirements dismissals in South Africa.[485] Under common law principles, an employer was not obligated to provide reasons or consult with affected employees prior to dismissals for operational requirements.[486] Where such a dispute arose the parties had to turn to the former Industrial Courts for guidance on the processes to be followed. The Industrial Courts required notice of termination, consultation, disclosure of information, exploration of alternatives to dismissal and the selection of those to be

[485] See Chapter two.

[486] Le Roux R *Retrenchment Law in South Africa* (2016) 4.

https://etd.uwc.ac.za/

dismissed.[487] Sections 188 and 189 of the LRA now provide that for dismissal for operational requirements to be fair, it has to be both substantively and procedurally fair.[488]

Chapter three evaluated what is regarded as fair and objective selection criteria in South African retrenchment law, and also considered the most commonly used selection criteria in dismissals for operational requirements.[489] The discussion indicated that LIFO was most often implemented, while early retirement, conduct of employees, qualifications and skills, FIFO and bumping, were used at times.[490]

Chapter four provided an overview of the processes for retrenchment required in the UK and Germany.[491] In UK, employees are protected by the Employment Rights Act of 1996[492]. In Germany, employees are protected by the Protection against Dismissal Act of 1951 (PADA)[493] and the Civil Code.[494] Both countries have procedures in place to make sure dismissals are conducted fairly, which includes the selection criteria used.

UNIVERSITY of the
WESTERN CAPE

5.3 OBSERVATIONS AND RECOMMENDATIONS

Overall, the procedures followed by South Africa, the UK and Germany in effecting dismissals for operational requirements seem to be fairly similar. The procedures in

---

[487] Benjamin P 'Condoning the Unprocedural Retrenchment: The Rise of the No Difference Principle' (1992) 13 *ILJ* 279.

[488] Manamela M.E 'Selection Criteria: The Dismissal of Employees Based on Operational Requirements' (2007) 19 SA*MLJ* 103.

[489] See Chapter three.

[490] Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) 213.

[491] See Chapter four.

[492] Employment Rights Act s 139.

[493] Protection Against Dismissal Act s 23.

[494] Civil Code s 622 & s 626.

https://etd.uwc.ac.za/

all three jurisdictions are aimed at ensuring that dismissals for operational requirements are effected fairly.

In this study it has become clear that South Africa has displayed a wide and clear scope of employment protection, this is due to the fact that the LRA does not limit the applicability of the Act to the size of the employer or the years the employee has be employed in order to be protected.

In light of the above, in view of the fact that SA is still a developing country, the recommendations that may be suggested are that, SA should consider amending the LRA, for it to prescribe a closed list of allowed, fair and objective selection criteria's to be used. This is so that there could be consistency, and consultations not be prolonged, resulting the consulting parties not agreeing on selection criteria's to be used.

SA should also consider amending the LRA, to require employers to consider employee's circumstances and the social impact retrenchment is likely to have on them, as Germany does, however such should be in conjunction with objective criteria's to eliminate discrimination.

.

UNIVERSITY of the
WESTERN CAPE

5.4 CLOSING REMARKS

In comparison to the position in the UK and Germany, it seems as if, overall, South Africa's employment security in the case of operational requirements dismissals is slightly more clear and extensive. The LRA seems to be progressive as employers are being provided with some more freedom in deciding what is good for their business, as is the case in Germany and the UK. However with the high rate of unemployment and the need for job creation while preserving the existing ones, there should be limitations placed by the law on employers with the freedom they have in dismissing employees

.

https://etd.uwc.ac.za/

6. BIBLIOGRAPHY

Books

- Ardizzoni M *German Tax and Business Law* (2005) London: Sweet & Maxwell.
- Basson A, Christianson M, Garbers C et al *Essential Labour Law* 3 ed (2002) Houghton: Labour Law Publications.
- Bennett C *A Guide to the Law of Unfair Dismissal in South Africa* (1991) Johannesburg: Lexicon.
- Brassey M, Cameron E, Cheadle H et al *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South Africa* (1987) Kenwyn: Juta & Co, Ltd.
- Cheadle H & Le Roux PAK et al *Current Labour law* (1994) Cape Town: Juta.
- Christianson B, Le Roux G & Strydom M *Essential Labour Law: Individual Labour Law* 2ed (2000) Cape Town: Labour Law Publication.
- Clarke A *Women's Rights at Work: A Handbook of Employment Law* (2001) Pluto Press.
- Cosio R & Curcuruto F *Collective Dismissal in the European Union: A Comparative Analysis* (2017) Netherlands: Kluwer Law International B.V.
- Du Toit D, Woolfrey D & Murphy J et al *Labour Relations Law: A Comprehensive Guide* 3ed (2000) Butterworths Law.
- Grogan J *Dismissal* (2002) Cape Town: Juta.
- Grogan J *Workplace Law* (1996) Cape Town: Juta & Co (Pty) Ltd.

https://etd.uwc.ac.za/

- Grogan J *Workplace Law* 8 ed (2005) Cape Town: Juta & Co (Pty) Ltd.
- Grogan J *Workplace Law 12 ed* (2017) Cape Town: Juta & Co (Pty) Ltd.
- *Grunfeld C The Law of Redundancy* 3ed (1989) London: Sweet & Maxwell.
- Hahlo H.R & Kahn E *The Union of South Africa: Development of its laws and Constitution* (1960) London: Stevens & Sons.
- Holland J & Burnett S *Employment Law 4ed* (1997).
- Le Roux P A K & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) Kenwyn: Juta & Company Ltd.
- Le Roux R *Retrenchment Law in South Africa* (2016) South Africa: Lexis Nexis.
- McGregor M, Dekker A & Budeli M et al *Labour Law Rules* 2ed (2014) South Africa: Siber Ink.
- Rossouw J & Conradie B *A Practical Guide to Unfair Dismissal Law in South Africa* (1999) Durban: Butterworths.
- Rycroft A & Jordan B *A Guide to South African Labour Law* 2ed (1992) Kenwyn: Juta & Co, Ltd.
- Taylor S & Emir A *Employment Law: An Introduction* 4 ed (2015) United Kingdom: Oxford University Press.
- Van Niekerk A & Le Roux P.A.K *The South African Law of Unfair Dismissal* (1994) University of Virginia: Juta.
- Van Niekerk A, Smit N & McGregory M et al *Law at Work* 3 ed (2014) South Africa: LexisNexis.
- *Weiss M Labour Law and Industrial Relations in Germany* (1995) Kluwer Law International.

UNIVERSITY of the WESTERN CAPE

https://etd.uwc.ac.za/

Case Law

GERMANY

- Federal Labor Court decision of 29 January 2015 – 2 AZR 164/14.

SOUTH AFRICA

- *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1995) 1 BLLR 1 (A).
- *Baloyi v M & P Manufacturing* 2001 (4) BLLR 389 (LAC).
- *BDM Knitting (Pty) Ltd v SACTWU* 1999 (19) ILJ 1451 (LAC) 19.
- *Building Construction & Allied Workers Union v Murray & Roberts Buildings (Pty) Ltd* (1991) 12 ILJ 112 (LAC).
- *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 2 ICD 310 (IC).
- *Chemical Workers Industrial Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292.
- *CMH Luxury Motors (Pty) Ltd t/a Lyndhurst Auto v Motor Industry Staff Association and another* (JA65/14) [2015] ZALAC 27.
- *CWIU v Johnson & Johnson (Pty) Ltd* (1997) 9 BLLR 1186 (LC).
- *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 ILJ 422 (LAC).
- *Engineering Industrial and Mining Workers' Union & another v Starpak (Pty) Ltd* (1992) 13 ILJ 655 (IC).
- *Fry's Metals (Pty) Ltd v National Union of Metal Workers of South Africa& Others* (2003) 2 BLR 140.
- *Generl Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & Others* (2004) 25 ILJ 1655 (LAC).
- *Gumede & Others v Richdens (Pty) Ltd T/A Richdens Foodliner* (1984) 5 ILJ 84(IC).

https://etd.uwc.ac.za/

- *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC).
- *Kelly v Transnet (1998) 1 BLLR 62 (LC) 67; National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC* (JS 207/12) [2015] ZALCJHB.
- *Manqindi & Others v Continental Barrel plating (Pty) Ltd* 15 ILJ 400 (IC).
- *Matabane and Others v Betta Sanitaryware* (1987) ICD (1) 342.
- *Mkhize & Others v Kingsleigh Lodge* (1989) 10 ILJ 944 1 (LC).
- *Monckten v British South African Co* (1920) AD 324.
- *Morester Bande (Pty) Ltd v NUMSA & Another* (1990) 11 ILJ 687 (LAC).
- *Mtshali v Bell Equipment* (DA 16/12) [2014] ZALAC 37.
- *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC).
- *NUMSA v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC).
- *National Union of Metal Workers of South Africa Obo Hlongwana and others v Wilro Supplies CC* (JS 207 /12) [2015] ZALCJHB 96.
- *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] ZALAC 37.
- *Nzuza and Others v CG Smith* unreported case no / (24 February 1989).
- *Oosthuizen v Ruto Mills* (1986) 7 ILJ 608 (IC).
- *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LAC).
- *S v Makhatini* 1995 (2) BCLR 226 (D).
- *SA Chemical Workers Union & Others v Toiletpak Manufacturers (Pty) Ltd & Others* (1988) 9 ILJ 295 (IC).
- *SA Clothing and Textile Workers Union and Others v Discreto* (1998) 12 BLLR 1228 (LAC).
- *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co* (2005) 26 ILJ 293 (LC).
- *SATAWU v The Press Corporation of SA Ltd* (1998) 11 BLLR 1173 (LC).
- *SATAWU v Old Mutual* (2005) 26 ILJ 293 (LC).

https://etd.uwc.ac.za/

- *Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema & others* (2010) 31 ILJ 361 (LAC).
- *Shezi v Consolidated Frame Cotton Corporation* (1984) 5 ILI 3 IC.
- *Taylor & another v ILC Independent Loss Consultants CC* (2001) 32 ILJ 2006 (LC).
- *Tiger Foods Brand Ltd t/a Albany Bakeries v Levy NO and Others* (C104/07) (2007) ZALCCT 2.
- *United African Motor & Allied Workers Union v Fodens* (1983) 4 ILJ 212 (IC).
- *United People's Union of SA v Grinaker Duraset* (1998) 19 ILJ 107 (LC).

UNITED KINGDOM

- *Lionel Leventhal Ltd v North* (2004) (UKEAT/0265/04).
- *Managers (Holborn) Ltd v Hohne* (1977) IRLR 230.
- *Mirab v Mentor Graphics (UK) Ltd* (2018) (UKEAT/0172/17/DA) 26G.
- *Moon v Homeworthy Furniture [Northern]* (1976) IRLR 298.
- *Mugford v Midland Bank (1997)* ICR 399.
- *Rolls Royce plc v Unite the Union* [2009] EWCA CIV 387.
- *Safeway Stores plc v Burrell* (1997) IRLR 200.
- *UK Coal Mining Ltd v National Union of Mineworkers* (2008) IRLR 4.
- *United Kingdom Atomic Energy Authority v Claydon* (1974) IRLR 6.
- *W Gimber & Sons Ltd v Spurrett* (1976) I.T.R 308 (D.C).
- *Williams v Compair Maxam Ltd* (1982) ICR.

Delegated Legislation

https://etd.uwc.ac.za/

- GN 1517 GG 20254 of 16 July 1999.

Internet Sources

- ACAS 'Redundancy Handling' available at http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf (accessed 10 July 2019) and *Williams v Compair Maxam Ltd* (1982) ICR.
- Bhoola U 'National Labour Law Profile: South Africa' available at http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (accessed 16 May 2018).
- Chakarisa O 'Retrenchment, Today's Reality' available at https://saia.org.za/newsletter/243.php (accessed 21 October 2019).
- Conradie M 'The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of Unfair Labour Practices pre-1977' available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2016000200001 (accessed 27 May 2018).
- Davies B 'Fair Selection in Retrenchments- Can your Employer Make you Re-Apply for your Job?' available at https://www.werksmans.com/legal-updates-and-opinions/fair-selection-criteria-retrenchments-can-employer-make-re-apply-job/ (accessed 15 October 2019).

https://etd.uwc.ac.za/

- DeJager D 'Selection Criteria for Retrenchment' available at https://regsdienste.solidariteit.co.za/en/selection-criteria-retrenchments/ (accessed 21 October 2019).

- Dentons 'Mobility clauses in employment contracts, reasonableness is key' available at https://www.dentons.com/en/insights/newsletters/2017/june/29/uk-employment-law-roundup/uk-employmnet-newsletter-june-edition/mobility-clauses-in-employment-contracts-reasonableness-is key (accessed 14 August 2020).

- European American Chamber of Commerce 'Germany: Update on Social Selection in Dismissal Cases' available at https://eaccny.com/news/member-news/germany (accessed 6 June 2021).

- Ferreira A 'Selection Criteria for Retrenchment: The fair and Objective Requirement' available at https://www.golegal.co.za/selection-criteria-retrenchment-fair-objective-requirement/ (accessed 09 October 2018).

- Forsyth A 'Protection Against Economic Dismissals: How Does Australian Law Compare with ILO Standards and Five Other OECD Countries?' available at www.monash.edu>pdf-file (accessed 17 September 2020).

- GOV.UK 'Making Staff Redundant' available at https://www.gov.uk/staff-redundant/noncompulsory-redundancy (accessed 26 July 2019).

- Hogan Lovells Publication 'Test to determine substantive fairness in a dismissal for operational requirements' available at https://www.hoganlovells.com/publications/test-to-determine-substantive-fairness-in-a-dismissal-for-operational-requirements (accessed 20 March 2019).

- Jacobson B Redundancy Dismissals: Procedure for Fair Dismissal available at https://www.brownejacobson.com/-/media/files/pdf-documents/2/redundancies-guidance.ashx?la=en (accessed 4 October 2019).

- Landau Law Solicitors 'Redundancy' available at https://www.landaulaw.co.uk/redundancy/ (accessed 23 July 2019).

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

- Lexology 'Employment and Labour Law in Germany' available at https://www.lexology.com/library/detail.aspx?g=dc1738cd-23f3-43cc-b27d-62cfd8da4cf2 (accessed 29 May 2021).
- Lockton D.J 'Redundancy' available at https://link.springer.com/chapter/10.1007/978-1-349-15002-1_10 (accessed 25 September 2019).
- Martin Searle Solicitors 'Redundancy Advice for Employers' available at https://www.ms-solicitors.co.uk/employer/redundancy-advice/factsheet-redundancy-advice-for-employers/ (accessed 25 September 2019).
- Mikes G 'German Labor and Employment News: Employers do not Always have to Lose at the Game of Dominoes' available at https://eaccny.com/news/member-news/germany-update-on-social-selection-in-dismissal-cases/ (accessed 13 September 2020).
- Potgieter T 'All aspects of Employment/Labour Law' available at http://www.tdplabourlaw.co.za/history-south-african-labour-law/ (accessed 16 may 2018).
- Radina Stefanie 'What is the latest on employees' rights in the event of redundancy in Germany?' available at https://www.globalworkplaceinsider.com/2017/08/what-is-the-latest-on-employees-rights-in-the-event-of-redundancy-in-germany/ (accessed 25 April 2019).
- Rausch Jacqueline 'Social Justification of the Termination of Employment' available at https://www.grin.com/document/300047 (accessed 30 May 2021).
- Schregle J & Jenks C.W 'Labour law' available at https://www.britannica.com/topic/labour-law (accessed 16 May 2018).
- Searle N 'Bumpy Road Ahead for Employers Appling LIFO' available at https://www.labourguide.co.za/most-recent/1993-893-amendment-of-schedule-4-act-no-130-of (accessed 14 March 2019).

https://etd.uwc.ac.za/

- Smit P.A 'Pre-dismissal procedures in terms of ILO Convention 158: South African and comparative perspectives' available at https://www.researchgate.net/publication/281105593 (accessed 25 August 2020).
- Thompsons Solicitors 'Selection of Employees' available at https://www.thompsonstradeunion.law/news/lelr/weekly-issue-123-archive/selection-of-employees (accessed 23 July 2019).
- UNISON 'Fighting Redundancies in Local Government' available at https://www.unison.org.uk/content/uploads/2014/10/On-line-Catalogue226742.pdf (accessed 26 July 2019).
- Werkgewersorganisasie Employers Organisation 'Retrenchment- Who Stays and Who Goes' available at http://lwo.co.za/2018/03/22/retrenchment-who-stays-who-goes (accessed 21 October 2019).
- XpertHR 'How to Choose Apply Redundancy Selection Criteria' available at https://resources.xperthr.co.uk/surveys/respondents/XpertHR_article_10476.pdf (accessed 26 July 2019).
- Yamanda D 'Minding the Workplace' available at https://newworkplace.wordpress.com/2013/09/23/master-and-servant-the-roots-of-american-employment-law/ (accessed 20 March 2018).

UNIVERSITY of the WESTERN CAPE

Journal Articles

- Bean M.M 'The Influence of English Law on the Decisions of the Industrial Court Dealing with Retrenchment' (1990) 23 *De Jure* 270 270 - 284.
- Berger H & Neugart M 'How German Labour Courts Decide: An Econometric Case Study (2011) 13 *German Economic Review* 56 – 70.
- Benjamin P 'Condoning the Unprocedural Retrenchment: The Rise of the No Difference Principle' (1992) 13 *ILJ* 279 - 293.

https://etd.uwc.ac.za/

- Bennett M ‘Interpreting Unfair Dismissal and Redundancy Payments Law: The Judicial Reluctance to Disapprove Employer Decisions to Dismiss’ (2002) 23 *Statute Law Review* 136 - 146.
- Cheadle H ‘Retrenchment: The New Guidelines’ (1985) 6 *ILJ* 127 127 - 139.
- Dose-Digenopoulos A & Holand A ‘Dismissal of Employees in the Federal Republic of Germany’ (1985) 48 *Mod.L.Rev* 539-563.
- Du Toit D ‘Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law’ (2008)1 *SALJ* 95 - 133.
- Eger T ‘Opportunistic Termination of Employment Contracts and Legal Protection Against Dismissal in Germany and the USA’ (2004) 23 *International Review of Law and Economics* 381- 403.
- Gandidze T ‘Dismissals for Operational Requirements’ (2007) 11 *LDD* 83 - 96.
- Hepple B ‘European Rules on Dismissal Law’ (1997) 18 *Comp.Lab.L.J* 204 – 228.
- Manamela M.E ‘Selection Criteria: The Dismissal of Employees Based on Operational Requirements’ (2007) 19 *SAMLJ* 103 -108.
- Newman GD ‘The Model Employment Act in the United States: Lessons from the British Experience with Uniform Protections against Unfair Dismissal’ (1991) 27 *Stanford Journal of International Law* 417.
- Olivier M.P ‘Retrenchment: An Overview’ (1992) 1 *SALJ* 104 - 121.
- Paul K ‘Employment Termination Reform: What Should a Statute Require before Termination- Lessons from the French, British and German Experiences.’ (1991) 14 *Hastings Int’l & Comp L Rev* 619 - 668.
- Rico L ‘Legislating against Unfair Dismissal: Implications from British Experience’ (1986) 8 *Berkeley Journal of Employment & Labor Law* 547- 582.
- Sargeant M ‘Age Discrimination, Redundancy Payments and Length of Service’ (2009) 72 *Mod.L.Rev* 628 – 634.

UNIVERSITY of the WESTERN CAPE
https://etd.uwc.ac.za/

- Seifert A & Funken-Hotzel E 'Wrongful Dismissals in the Federal Republic of Germany' (2005) 4 *JUSLabor* 1 - 34.
- Smit P & Van Eck BPS 'International Perspective on South Africa's Unfair Dismissal Law' (2010) 43 *Comp. & Int'l L.J.S.Afr.* 46 - 67.
- Weiss M 'Individual Employment Rights: Focusing on Job Security in The Federal Republic of Germany' (1988) 67 *Nebraska L Rev* 82 - 100.
- Vaate V 'Achieving Flexibility and Legal Certainty Through Procedural Dismissal Law Reforms: The German, Italian and Dutch Solutions' (2017) 8 *European Labour Law Journal* 5 -27.
- Zall T 'Unfair Dismissal in the United States and the United Kingdom: A Procedural Comparison of Remedies' (1988) 9 *Comparative Labour Law Journal* 433 - 449.
- Zondo R 'Redundancy and Retrenchment' (1990) 1 *SAHRYB* 239 - 348.

Legislation

UNIVERSITY of the
WESTERN CAPE

GERMANY

- Civil Code of 1900.
- Protection Against Dismissal Act 1951.
- Works Constitution Act 1989.

SOUTH AFRICA

- Interim Constitution Act 200 of 1993.
- Labour Relations Act 28 of 1956.

https://etd.uwc.ac.za/

- Labour Relations Act 66 of 1995
- The Constitution of the Republic of South Africa, Act 108 of 1996.

UNITED KINGDOM

- Employment Rights Act 1996
- Trade Union and Labour Relations (Consolidation) Act 1992

Reports and Policies of Government Bodies

- Code of Good Practice: Dismissal Based on Operational Requirements.
- International Labour Organisation '*Termination of Employment at the Initiative of the Employer*' Recommendation No 166 (1982) Geneva.
- International Labour Organisation '*Termination of Employment at the Initiative of the Employer'* Convention No 158 (1985) Geneva.

UNIVERSITY of the
WESTERN CAPE

Theses

- Itzkin R *Operational Requirements as a Fair Reason for Dismissal in South Africa* (unpublished LLM thesis, University of Johannesburg (2011)
- Rohr S *German Works Council: A Model for South African Workplace Forums* (unpublished LLM thesis, University of Cape Town 2017) 41.
- Van Staden L *The Law Relating to Retrenchment* (unpublished LLM thesis, University of Port Elizabeth, (2003).

https://etd.uwc.ac.za/

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/