Revisiting dismissal for operational requirements under South African Labour Law

HANNY LEPHAI KELAOTSWE
Student Number: 22417095

A dissertation submitted in fulfilment of the requirements for the degree Master of Laws in Mercantile Law at the Mafikeng Campus of North-West University

Supervisor: Prof. M.L.M MBAO

March 2016

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DECLARATION

I, Hanny Lephai Kelaotswe, do hereby declare that this dissertation for the LLM degree/ Master of laws is my own original work and that it has never been submitted by me or any other person at any other university. I also declare that there is a proper acknowledgement of all material contained herein.

Signature_______________________

Date __________________________

DECLARATION BY SUPERVISOR

I, Professor M.L.M Mbao, do hereby declare that this dissertation of Hanny Lephai Kelaotswe for the LLM degree/ Master of laws in Labour Laws is ready for examination and may be submitted as such.

Supervisor:

Signature ________________________

Date ____________________________

ACKNOWLEGDEMENTS

My gratefulness goes to:

The good God of Mount Zion, had it not been of his love I would not have been able to complete this dissertation.

My family which comprises of my Father (Mr. Griffiths Kelaotswe), Mother (Mrs. Gabonewe Kelaotswe), brother (Thabiso Kelaotswe), sisters (Kefilwe Mashoba, Oratile Kelaotswe, and Puseletso Kelaotswe) and niece (Phatsimo Kelaotswe) for their support and encouragement;

My diligent supervisor, Prof. M.L.M Mbao and co-supervisor, Mr R.W Nkhumise for their motivation and efforts; and

Everyone who had and still has contribution on my achievements and in the completion of this dissertation.

DEDICATION

This dissertation is dedicated to my parents; Mr. Griffiths and Mrs. Gabonewe Kelaotswe; and to the sleeping souls of my late grandparents; Mr. Christopher and Mrs. Hannie Kelaotswe, and Mr. Tatolo and Mrs. Lulu Mashoba.

LIST OF ABBREVIATIONS, ACRONYMS AND LATIN PHRASES

AJ	Acting Judge
AJA	Acting Judge of Appeal
A quo	Of first instance
BALR	Butterworths Arbitration Law Reports
BLLR	Butterworths Labour Law Reports
Casu	In the present case
CCMA	Commission for Conciliation, Mediation and Arbitration
CILJSA	Comparative and International Law Journal of Southern Africa
CLC	Canada Labour Code
CLL	Contemporary Labour Law
CWIU	Chemical Workers Industrial Union
DOR	Dismissal based on Operational Requirements
ACCAWUSA	Entertainment Catering Commercial and Allied Workers Union of South Africa
EEA	Employment Equity Act
Fait accompli	Accomplished fact
HILJ	Harvard International Law Journal
ILJ	Industrial Law Journal
ILO	International Labour Organisation
Inter alia	among others
IRLR	Industrial Relations Law Report
J	Judge
JBL	Journal of Biblical Literature

LA	Labour Act
LAC	Labour Appeal Court
LC	Labour Court
LIFO	Last-In-First-Out
LLP	Labour Law Publications
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
Modus operandi	Mode of operation
Obo	On behalf of
PELJ	Potchefstroom Electronic Law Journal
Prima facie	On the face of it
SACCAWU	South African Commercial, Catering and Allied Workers' Union
SACTWU	Southern African Clothing and Textile Workers' Union
SAHR & LLY	South African Human Rights and Labour Law Yearbook
SALB	South African Labour Bulletin
SATAWU	South African Transport and Allied Workers Union
t/a	Trading as
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg.
UPUSA	United Peoples Union of South Africa

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The Constitution of the Republic of South Africa, 1996

Botswana Statutes

Employment Act CAP 47:01

Canadian Statutes

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Employment Standard Act, 2000

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ABSTRACT

The Labour Relations Act of 1995 succinctly sets out factors which the employer ought to consider when dismissing employees based on operational requirements. Non-adherence to these considerations usually results in the whole or substantial part of the process being rendered invalid on grounds of unfairness by the courts. The two pronged significance of adhering to the prescribed procedure is mainly to, firstly, reassure retrenched employees, as well as the courts, that objective selection criteria was used and secondly, to eliminate suspicions of subjectivity towards employees who were already on the negative side of the employer.

Notwithstanding the authoritativeness of the LRA, the courts have seen a proliferation of disputes emanating from dismissals for operational requirements. Therefore, it could be a challenge that the LRA still leaves latitude for employers to establish and implement their own criteria of selection so long as they are fair and objective. However, this ratiocination is, under the circumstances, an acceptable connotation of the right to freedom of trade, occupation and profession, as required by the Constitution. The courts are more often than not disinclined to run businesses of employers inside the court room. The rationale for this is mainly to avoid second-guessing the decisions of the employers.

In light of these submissions, the thorny and problematic aspect underpinning this dissertation is that there are instances where employers embark on the process of dismissing employees for operational requirements without having a good plan of action on how the process ought to be conducted or managed. Alternatively, when a good plan is in place, the challenge becomes that of implementation in accordance with the prescribed procedure. This dissertation seeks to revisit the law regulating dismissal for operational requirements, together with the inherent challenges cordoning off the proper implementation of such laws.

Chapter One: Introduction

1.1 Background to the study

The trend of restructuring companies in South Africa has profusely taken the labour market to an uncharted territory in which employers have the liberty to make their employees apply or reapply for jobs under the new structure in the very same company. This transition has equally taken a profound toll that resulted into employees working with fear of losing their jobs due to the "roller coasting" economy.[1] It is common cause that the labour market is currently volatile and every employer ought to have a plan for the survival of the business. Such a plan is inclusive of cutting down the workforce by way of dismissal based on operational reasons.[2]

In the light of the above, the focus on this dissertation is therefore on dismissal for operational requirements.[3] Dismissal for operational requirements (hereafter referred to as DOR) is one of the grounds for dismissal that are provided for by the *Labour Relations Act*[4] (hereafter referred to as the LRA). The purpose of DOR is, *inter alia*, "to get rid of employees who do not meet the business requirements of the employer so that new employees who will meet the business requirements of the employer can be employed".[5] This meaning has given rise to intricate questions and as a result, this dissertation seeks to discuss the jurisprudence which arises from the concept of DOR.

Against the above background, the dissertation addresses, as the centrepiece of the work, controversial issues pertinent to the substantive and procedural aspects of DOR. Operational requirements entail "requirements based on the economic, technological, structural or similar needs of the employer".[6] By necessary inference, DOR refers to the dismissal of employees based on economical, technological,

1 Rycroft 2002 *ILJ* 678.

2 Be it the dismissal for misconduct, incapacity or operational requirements as provided for by the *Labour Relations Act* 66 of 1995.

3 Provided for by section 189 of the LRA.

4 66 of 1995.

5 *Fry's Metals (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (2003) 24 *ILJ* 133 (LAC) 30.

6 Section 213 of the LRA 66 of 1995.

structural or similar needs of the employer. Unlike other types of dismissals, DOR refers exclusively to the above four components. Comparably, there is a difference between DOR and dismissal for misconduct[7] or incapacity.[8] With regards to DOR, the reasons emanate from the needs and requirements of the employer in relation to his or her business, while with the dismissal for misconduct and incapacity the reasons emanate, by and large, from the employee's misconduct and incapacity.[9]

When regard is had to the four components of DOR as contemplated by the definition in the Act,[10] it is by necessary inference that the legislature acknowledges the challenges and difficulties that might be encountered by employers due to economic considerations, which among others are: the need for structural over-hauling, inevitable technological development and similar needs of employers.

Various scholars have taken the initiative of defining these four components of DOR. Basson[11] *et al.* have noted that operational requirements denote a variety of circumstances. According to them, the 'economic needs' entail the economical standing of the business. This economical standing encapsulates the financial constraints experienced by the business because of the economy's relapse or drop in the subsidies by the government. It is also inclusive of the difficulties in complying with the *Basic Conditions of Employment Act*, 75 of 1997.[12]

These researchers have noted that 'technological needs' denote the implementation of advanced technology such as new machinery and other technological means which will ultimately result in some of the employees becoming redundant. They have further noted that 'structural needs' entail the restructuring of the business which usually follows from merger or amalgamation and has the propensity of

7 Misconduct relates to unacceptable behaviour.

8 Incapacity relates to illness or injury including circumstances unconnected with the employee's physical or mental health that prevent an employee from working. See Grogan *Workplace Law* 265.

9 Basson *Essential Labour Law* 151.

10 Section 213 of the LRA.

11 Basson *op.cit* note 9.

12 *Democratic Nursing Organisation of South Africa and Others v Sornersef West Society for the Aged* (2001) 22 *ILJ* 919 (LC) D the court accepted that the respondent had financial burdens which necessitated the dismissal of some employees for operational requirements. Thus the BCEA's demands would add on the business's financial difficulties. It then held that the implementation of the BCEA could add on the burdens.

leaving some of the posts redundant as well. Further to this, according to them, 'similar needs' of the employer, is a very broad concept that encapsulates various factors and the list is not exhaustive. There is no clear cut approach as to what constitutes similar needs, and the concept creates latitude for employers to become subjective as far as dismissals due to 'similar needs' are concerned.

It is submitted that these concepts form an integral part of the components of operational requirements. Arguably, the inexhaustible meaning attached to 'similar needs' of the employer might sometimes lead to subjectivity on the part of the employer. Moreover, this position will clearly defy the intentions and purpose of the LRA. However, there is no much difference between the employer's 'similar needs' and 'economic needs'. The two often overlap.[13]

Previously under the repealed LRA, 28 of 1956, it was practically difficult and rare for employers to retrench employees as legislation required the Industrial Court to impose upon employers an obligation to pay large sums of money in severance packages to retrenched employees. The 1995 LRA presently provides for a fair and balanced approach as far as retrenchment benefits are concerned.[14]

It has introduced restrictions that make it possible for employees to forfeit their severance packages upon retrenchments. This approach is therefore elucidated through decided cases. Perceptibly, the courts regularly endeavour to take into cognisance the ever-changing circumstances of the society as well as the frequent developments experienced by the labour market.[15]

A good example of this assertion is noted in the precedent set by Zondo J.P (as he then was) in *Irvin and Johnson Ltd v CCMA.*[16] In *casu,* the learned judge held that an employee who had refused an employer's offer of reasonable employment for no sound reason could not be paid severance packages. It is submitted that DOR is regulated, to a large extent, by judicial decisions and legislation and the LRA, as one

13 Basson *op.cit* note 9 151-152.

14 Grogan *Dismissal Discrimination and Unfair Labour Practices* 427.

15 (2006) 27 *ILJ* 935 (LAC) *in Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* (JA 40112) 120131 *ZALAC* 19; (2014) 35 *ILJ* 140 (LAC) (22 August 2013) 21.

16 *Irvin and Johnson Ltd v CCMA* (2006) 27 ILJ 935 (LAC).

of the legislation regulating DOR, has taken primacy over other legislation as far as the process is concerned. Just like any other ground for dismissal, DOR should be procedurally and substantively fair and conform to the existing laws. This type of dismissal is usually classified as a "no fault" dismissal, which entails that there is no fault on the part of the employee.[17]

However, the requirement of fairness obliges the court to carefully examine a dispute founded on an unfair dismissal for operational requirements.[18] Therefore, in *SACTWU and Others v Discreto (A Division of Trump and Springbok Holdings)*[19], the court held that the requirement of procedural fairness was met by holding consultation which occurred prior to the final decision. It held that the purpose of such procedure was to find an acceptable justification for the decision to dismiss, based on operational requirements.

1.2 Problem statement and substantiation

Section 189 of the LRA requires from employers who dismiss employees for operational requirements to select them according to the recommended criteria for selection. Such criterion must be mutually agreed upon between the employer and the consulting parties. If both parties are not in *ad idem* vis-à-vis the criteria, the employer must use a criterion that is fair and objective.[20] This assertion provided for by the LRA serves as a guideline and it is neither exhaustive nor conclusive.[21]

The provision still leaves latitude for employers to establish and implement their own criteria so long as they are fair and objective. Given the law on how to go about dismissing employees for operational requirements, there are yet disputes regarding the dismissal, by and large on procedural and substantive issues. The thorny and problematic aspect underpinning this dissertation is that there are instances where employers embark on the process of dismissing employees for operational requirements without having in place a good plan of action on how the process is to

17 *Irvin and Johnson Ltd v CCMA op.cit* note 15.
18 South African Labour Guide http://www.labourguide.co.zaldiscipline-dismissal.
19 (J495/97) [1998] *ZALAC* (9 June 1998) 8.
20 Section 189(7) of the LRA.
21 Searle *Without Prejudice* 70.

be conducted or managed. On the other hand, when they have a good plan of action, the challenge then becomes one of implementation in accordance with the prescribed procedure. Accordingly, employers persist in getting the process wrong and it results in them being ordered by the courts to pay an enormous amount of compensation.[22]

An example illustrating the seriousness of this problem and emphasising the need to comply with the prescribed procedure was set out by Gush J in the case of *Mawer v Nortech International (Pty) Ltd*[23] wherein the learned judge succinctly said,

> The process prescribed by section 189 of the Labour Relations Act however requires compliance with all aspects of the consultation process. The respondent's failure to comply with this aspect thereof constitutes serious procedural unfairness. It is not sufficient for an employer to simply establish the need to retrench and identify the candidate for dismissal. The consultation process is at that stage incomplete.[24]

There are factors which should be considered and put in place by the employer before dismissing. Failure to adhere to these considerations usually results in the whole process being rendered invalid on grounds of unfairness. The significance of adhering to the prescribed procedure is two pronged. It is mainly to reassure retrenched employees, as well as the courts, that the criterion which was used is not arbitrary and subjective towards employees who were already on the negative side of the employer.

The existence of a fair and objective criterion is complex to determine where the employer premeditated the dismissal of an employee(s) due to an intolerable employment relationship or for personally related reasons. It is practically possible and seemingly the case that employers hide behind the notion of operational requirements as a ground for the dismissal of certain employees who by virtue of substantive reasons are not supposed to be dismissed. The problem emanates from

22 Israelstam http://www.labourguide.co.za/retrenchment/735-whats-the-right-retrenchment-procedure.

23 [2014] JOL 32512 (LC). In this case the learned judge expressed a warning that, "when contemplating the dismissal of an employee for operational requirements, [employers] should comply fully with the provisions of section 189 of the Labour Relations Act, 1995, or face the possibility of the maximum punishment from the courts". Burman *Without Prejudice* 68.

24 *Mawer v Nortech International (Pty) Ltd ibid* note 23 at 30.

the fact that there is no clear criterion that is binding upon employers to adhere to when dismissing employees for operational requirements. The question that the courts ought to ask from employers is whether or not there are certain measures the latter could have taken as alternatives before dismissing those employees? In instances where the employer disregarded those measures, the substantive aspect of the dismissal should not be left entirely un-scrutinised.

With regard to the disputes about substantive fairness relating to DOR, which the courts had to adjudicate on, it still remains a concern whether the guidelines on the selection criteria are sufficient to deter employers from dismissing employees subjectively under the disguise of DOR. Given that there are several cases where the courts have had to determine the fairness or otherwise of DOR, the concern now is on the adequacy and effectiveness of the law regulating dismissal for operational requirements.

The focus should be on the purpose that the legislation is attempting to pursue as well as the means and methods of achieving that purpose. The courts are therefore faced with an obligation to "regard the operational requirements claim with a healthy measure of scepticism, and use the fairness filter to sort the chaff from the corn",[25] in order to curb the uncertainties and disputes associated with DOR. This concern lies at the heart of this dissertation.

1.3 Aims and objectives of the study

1.3.1 This dissertation seeks:

- to analyse the considerations that the employer must take into account before dismissing employees for operational requirements, as adumbrated by case law;
- to revisit the substantive and procedural aspects of the DOR;
- to evaluate the difficulties and problems associated with the DOR, owing to an escalating number of cases the courts have had to deal with, particularly

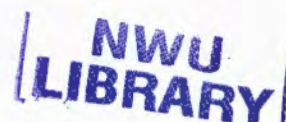
25 Thompson 2006 *ILJ* 710.

those concerned with non-compliance with the law relating to dismissals by employers;

- to compare other countries' laws and regulations on DOR and provide a significant contrast to those of South Africa, and
- to provide recommendations on how to manage and deal with the unfairness, arbitrariness and subjectivity associated with the DOR.

1.3.2 The research questions are as follows:

- what could be the reasons behind many employers failing to adhere to proper procedure when dismissing their employees for operational requirements and ending up being ordered by the courts to pay compensation to the dismissed employees?
- what constitute DOR for the purposes of a fair dismissal under the LRA?
- whether most DOR are indeed necessitated by operational requirements;
- whether the selection criteria provision is adequately authoritative and what could be done to ensure that employers comply with the correct procedure in future?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1.4 Justification and rationale for the study

The LRA is authoritative when regard is had to the DOR.[26] However, there are instances where employers fail to take these regulations into consideration before dismissing employees for operational requirements. There have been several cases brought before the courts dealing with the substantive and procedural aspects of dismissals based on operational requirements. A number of them have been decided against employers wherein they were ordered to pay compensation.[27]

The challenges faced by employees when dismissed for operational requirements, and failure by the employer to have a proper plan of action in place before invoking DOR is the rationale behind this dissertation. This dissertation seeks to develop a clear understanding of the concept of DOR. It further endeavours to address the

26 See section 189 of the LRA.
27 Israelstam *op.cit* note 22.

lacunae in the South African labour law as far as this type of dismissal is concerned. In this way, it is hoped that this study will make a moderate contribution to the body of knowledge in this area of law.

1.5 Literature review

There are various perceptions and reflections in theory that are expressed by different writers about the concept of DOR. These perceptions and reflections, including the decisions of the courts, are incorporated into this study with the view to substantiating the writer's findings in this dissertation.

Mischke[28] has pointed out that the then Industrial Court and Labour Appeal Court have had to deal with the issue of reasons for retrenchments and the latter had proved to be a highly contentious area that was predominantly associated with 'inconsistencies'. These courts have further pointed out that the employer was permitted to restructure his or her business and in doing so, he or she could dismiss employees whose positions were redundant. The controversy finds place where the reasons for the dismissal are not *bona fide* and justifiable.

Roskam and Singh[29] have argued that the courts should not make decisions for the employer in cases of retrenchments. They should not frustrate the decisions made in the best interest of the business. Our economy must not be seen to be run in and by the courts, but, they must actually determine the existence of a fair reason that led to DOR. According to them, the problem in operational requirements dismissal arises if the consulting parties have established "viable alternatives to retrenchment".[30]

Further, the element of fault on the part of the employer eventually leads to the business being ordered to compensate employees who have been wrongfully dismissed. If there is a foreseeability of a business being run to the ground due to mismanagement, and there are prospects of dismissals of employees for operational reasons, such dismissal must be declared substantively unfair. This finding acts as a

28 Mischke 1994 *JBL* 28.
29 Roskam and Singh 2001 *SALB* 8-9.
30 Roskam *ibid note* 29.

deterrent to both employers and managers, to ensure that retrenchments do not occur unnecessarily.[31] Grogan[32] holds that an enquiry into the compliance or otherwise by the employer with section 189 of the LRA has both substantial and procedural angles. Israelstam,[33] on the other hand, argues that even though the LRA is authoritative on the procedure to adopt and follow when dismissing employees for operational requirements, some employers are still "caught out in the CCMA and the Labour Court" for non-compliance with the prescribed procedure.

According to Landman A.J.A;[34] in *Super Group Trading (Pty) Ltd v Janse van Rensburg*, the consultation that was conducted in this case, given the merits, was a "charade" and the court *a quo* believed that it might have been "a sham". It was thus aimless for the employer to conduct consultation. This is due to the fact that it deprived the respondent of the opportunity to save his post or even advance good reasons for the prevention of his retrenchment.

The employer had made the dismissal a *fait accompli.*[35] By coming up with meaningless complaints and subjecting the employee to disciplinary hearing, wherein he was sanctioned, particularly during consultation, was an unfair conduct to opt for. These assertions provided by the learned judge are particularly among some of the concerns that emerge at the crux of this study.

It is by necessary implication that most employers tend to ignore the stipulated procedure that should be followed when dismissing for operational requirements. Not only do they get the procedure wrong, but they also deliberately confuse the requirements to dismiss for operational requirements with those of other types of dismissals. Observation as derived from case law shows that, this has resulted in them being ordered by the courts to remedy the situation, either by paying compensations or reinstating employees concerned. It is particularly a problem of

31 Roskam *ibid note* 29.
32 Grogan *op.cit* note 8 at 225.
33 Israelstam *op.cit* note 22.
34 (JA50/09) 120121 *ZALAC* 7 (25 Apnl 2012). Super Group Trading (Pty) Ltd (the appellant) retrenched Andries Hendrik Janse van Rensburg (the respondent). The Labour Court (Molahlehi J) found the dismissal to be procedurally and substantively unfair and awarded the respondent compensation equivalent to 12 months remuneration. The appellant, with the leave of the court *a quo*, appeals against the decision.
35 Meaning "an accomplished fact or a thing already being done". Dictionary.com http://dictionary.reference.com/browse/fait+accompli.

disguise, a sham reason for dismissal. Israelstam[36] has pointed out that some employees are dismissed for being undesirable and accordingly placed in a pool of redundancy. Furthermore, it has also been argued that many employers do so then subsequently require retrenched employees to apply for vacancies and still reject them due to their undesirability. By and large such situations succeed because employers are able to prove that the dismissals were necessitated by the prevailing circumstances and that the employees concerned acceded to the dismissal and there was no ulterior motive on the part of the employers.

He has also pointed out that this approach is surrounded by many pitfalls. He has noted that the courts are currently digging, exposing and sanctioning hidden agendas by employers and the test which they use is tougher than the previous one. Accordingly, regarding non-compliance by the employers with the procedure as envisaged by section 189 of the LRA, which is the main problem concerning this study, Basson J. has succinctly elaborated in *Maritz v Calibre Clinical Consultants (Pty) Ltd and Another*[37] that:

> ...the courts have consistently required a high degree of fair treatment in retrenchment cases because it is recognized that the employee is being dismissed through no fault of the employee. Integral also to the whole retrenchment process is the requirement that the employer approaches the process *bona fide* and with an open mind especially with regard to measures and proposals to avoid retrenchment. An employer who approaches *mala fide* or with a closed mind in respect of alternatives or measures to avoid retrenchment can hardly come to court and argue that the dismissal was substantively and procedurally fair.[38]

Pursuant to these theoretical and judicial perceptions and reflections, it is submitted that the concept of DOR is a contentious and disputable area owing to its nature and complexity. Notwithstanding this, legal scholars such as Israelstam are of the view that the courts are currently doing a good job by digging, exposing and sanctioning employers who use DOR in disguise or for ulterior purposes. The common challenge that these writers have underlined is that of inconsistencies found within the practice of DOR. There is no adequate transformation as far as DOR is concerned since the

36 Israelstam *op.cit* note 22.
37 (2010) 31 *ILJ* 1436 (LC).
38 *Maritz v Calibre Clinical Consultants (Pty) Ltd and Another ibid* note 37 at 1452A-B.

inception of the 1995 LRA. The majority of the changes have been in relation to severance pay as compared to other aspects pertinent to this type of dismissal. It then boils down to the issue of 'inconsistencies' in relation to how DOR is practised or implemented.

1.6 Research methodology

Due to time and space constraints, this dissertation is predominantly based on a qualitative method of research. It is desktop based in that the researcher endeavours to find, as much as possible, the unfairness and challenges associated with DOR through theoretical perceptions and reflections. The nature of the problem under investigation requires a theoretical approach. The study is largely theoretical in nature and the researcher will collect and analyse data qualitatively in order to consolidate the work.

Various legal sources including those by renowned scholars, case law, legislation, international instruments and internet sources were used.[39] Thereafter, the latter was followed by a comparison and an analysis of those sources from a legal perspective as well as recommendations. The qualitative method of research provides reliability in a sense that when research instruments are used in a different event they mostly provide the same conclusions and outcomes.[40]

This mode of writing will however depend on the aims of the research, methods of conducting it and the 'reasoning behind key decisions made'. With qualitative method, the data and its analysis are 'grounded'. The qualitative method denotes a sense of reality and a clear analysis and presentation of complex social occurrences. Qualitative method accommodates ambiguity and contradiction as far as social existence is concerned. It further provides alternative explanations in that various researchers can differ in opinion and conclusions while using the same source.[41] Although it has its disadvantages such as presenting a less representative data, the objective interpretation of concepts by the researcher, taking words out of their

39 Mbao 2007 "Guidelines to Research Students" (unpublished) 3.
40 Denscombe *The Good Research Guide* 273-274.
41 Denscombe *ibid* note 40 273-274.

context and oversimplification of explanations, this method is convenient for this dissertation because of time constraints, financial implications and the scope of work to be done.[42]

1.7 Study delimitations

This dissertation is limited only to the dismissal based on operational requirements, to the exclusion of dismissals on grounds of misconduct and incapacity. This dismissal based on operational requirements is also limited to a 'small-scale'[43] dismissal as opposed to the 'large-scale'[44] dismissal.

1.8 Scope of the study

This dissertation consists of five integrated and interrelated chapters. Chapter one covers the background to the study as well as the definition of the concept of DOR and a descriptive notes of each key phrase or element constituted by the concept of DOR. Chapter two traces the historical background and regulatory framework in relation to DOR as well as the international instruments regulating this type of dismissal. Chapter three covers the substantive aspect of DOR and the inherent challenges which have been encountered by the courts and legal scholars as far as this phenomenon is concerned.

Chapter four covers the procedural aspects of the DOR and the inherent challenges which have been encountered by the courts and legal scholars as far as this aspect is concerned. Chapter five covers a comparative study of the labour laws which regulate DOR in Canada, Botswana, and Namibia. Chapter six summarises the study and provides some recommendations to the problem as outlined by the study.

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42 Denscombe *op.cit* note 40 280.
43 See section '189 of the LRA.
44 See section 189A of the LRA.

1.9 Ethical Considerations

The researcher is well conversant with the North West University policies regarding plagiarism. Furthermore, this dissertation does not involve a quantitative analysis therefore interviews of persons do not form part of this study.

1.10 Summary

It is evident that the South African Labour Law allows the employer to dismiss employees for reasons provided for by the legislative prescript, in particular the LRA, which are misconduct, incapacity and operational requirements. When dismissing for operational requirements, the employer must adhere and conform to the provisions of the very Act. However, as explained, the problem arises when the employer fails to do so or develops an oversight towards the proper procedure. The next chapter will thus deal with the historical backdrop of the DOR and laws set in motion to safeguard the interests of both the employer and employees when regard is had to the DOR.

Chapter Two: Historical developments and the regulatory framework governing DOR

2.1 Introduction

This chapter focuses on two aspects that are the foundation to the entire study. The purpose of this chapter's is two-legged. The first purpose is to trace the historical antecedents that relate to the practice of DOR. However, the chapter does not (albeit the magnitude of the history) provide a chronological backdrop of historical events, rather, a cross-reference will be made to provide a clear and coherent understanding of the relevant stages in the developments of the labour laws and labour relations with particular reference to DOR.

The second purpose is to discuss the regulatory framework that governs DOR. This chapter is therefore predominantly concerned with the evolution of the laws governing DOR. These laws include within their ambits, the national as well as international legal prescripts. It is significant to note that ever since diamonds and gold were discovered in South Africa around 1867 and 1884 respectively, there has been and continues to be disputes arising from employment relations among various racial groups. These disputes have had an adverse impact on the labour spectrum.[45]

This discovery of diamonds and gold minerals has brought about an introduction of a formal system of labour relations. It is submitted that this formal system of labour relations was an aid in resolving the employment disputes which existed among racial groups. The purpose of this formal system is therefore to ensure that there is a fair and equitable sharing of resources, and to recognise and promote the employment rights of these racial groups. Among other issues which resulted from the discovery of these minerals is the introduction of mining and related industrial developments that eventually established labour relations.[46]

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45 Basson *op.cit* note 9 at 4.

46 Labour relations entails "a system in which employers, workers and their representatives and, directly or indirectly, the government interact to set the ground rules for the governance of work relationships @ Anne Trebilcock *Labour Relations and Human Resources Management: an Overview* http://www.ilo.org/safework_bookshelf/english?content&nd=857170237.

People from various racial groups were engaged as labourers in the mines and associated industries and therefore labour relations system was established between those persons and the persons who utilised their services. Without any chronological narration of stages, those employment relationships that were established were in some instances susceptible to unilateral termination and in many occasions it was upon the employer's own initiative. This termination was then referred to as the 'dismissal of employees' or 'termination of the employee's employment contract'.[47] The dismissal took place in various ways.

However, the point of departure in this study is the termination that occurred as a result of the employer's economic, structural, technological reasons and similar needs. It should be noted that the concept 'DOR' is, in terms of history, one of the recently emerged concepts in the South African labour law. Previously, this concept existed under the notions of 'retrenchment' and 'redundancy'.[48] Both concepts are however still applicable and existent in labour law and they have similar denotations. Although they are not one and the same concepts, redundancy has nonetheless been confused with retrenchment as can be gleaned from the authorities below.

This confusion is shown in the case of *Frame Cotton Corporation Ltd v The President Industrial Court.*[49] In *casu,* it was held that retrenchment was not concerned mainly with the cutting down of posts but with reducing the number of employees due to their posts being redundant owing to their excessive number. However, this ruling was later corrected by the Industrial Court (hereinafter referred to as the IC) in *Hlongwana and Another v Plastix (Pty) Ltd*[50] when the difference between the two concepts was explicated as follows:

> Retrenchment is when the employer terminates employees' employment as they have become superfluous due to an economic down-turn. The employees consequently lose their jobs but not necessarily on a permanent basis. Once there is an economic uprising they might possibly get their old jobs back. Redundancy on

47 Smith and Van Eck 2010 *CILJSA* 60.

48 Retrenchment entails cutting down of employees by employer due to the economic downturn. Termination in this instance does not become permanent but for as long as the economy is still down. Redundancy entails the cutting down of position of employees due to the new introduced machinery or technology or structure in Zondo 1990 *SAHR and LLY* 339,340.

49 (1986) 7 *ILJ* 489 [A] 289G-I.

50 (1990) 11 *ILJ* 171 IC.

> the other hand means that an employee becomes redundant as a result of, for example, the introduction of new machinery or technology or the restructuring of the business. In the case of redundancy, the employee loses his job permanently.[51]

Du Plessis *et al.*[52] have, however, explained the concept of redundancy as a valid reason for getting rid of employees, provided sufficient notice is given to them. They have noted that redundancy only occurs where the mandate regarding the post concerned cannot be performed by any employee. It is evident that the concept of dismissal for operational requirements was previously known as "retrenchment" and the law that governed retrenchment then has now been developed and expanded to regulate DOR in a broader sense.

According to Grogan,[53] the term "retrenchment" was previously used loosely by the courts. He points out that the concept of retrenchment was somehow confused with the concept of redundancy. This learned writer holds that retrenchment emerges from "termination of employment on the ground of superfluity of workers due to economic downturn". From this assertion, it is common cause that most legal writers have accepted the definitions of both "redundancy" and "retrenchment" and used them interchangeably.

It should be noted that for the purpose of this study, the concept of 'DOR' and 'retrenchment' are used interchangeably. Be that as it may, before the notion of 'unfair labour practice' was introduced as a concept into the South African labour law, retrenchment was regulated by the common law. Furthermore, in contrast to the current position, previously the labour relations spectrum did not provide for a proper procedure to follow when an employer sought to dismiss an employee.

Under the common law, dismissals of employees was a process which both the employer and employee could agree to verbally without undergoing the steps of securing alternative employment or attempting to save the post by suggesting

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51 *Hlongwana and Another v Plastix (Pty) Ltd ibid* note 48 at 175J-176B.
52 Du Plessis *A Practical Guide to Labour Law* 17.
53 Grogan *op.cit* note 14 at 428.

alternative remedies to dismissal. The employer was not obliged to grant any severance packages to the dismissed employees. Employees could not seek recourse in courts concerning disputes about retrenchments which followed as a result of redundancy.[54]

2.2 The introduction of the concept of unfair labour practice in South Africa

On 01 October 1979, the Industrial Court[55] was established following the recommendations of the Wiehahn Commission.[56] The Commission carried out a comprehensive duty of dealing, *inter alia*, with the labour unrests and curbing unfair labour practices that existed and were concomitant with the labour disputes attendant to the nascent industrialisation. It established some of the guidelines that regulated the dismissals between the employer and employees.[57]

The IC was among one of the initiatives by government to prevent unfair labour practices. The concept of unfair labour practice was introduced to curb industrial unrests that were created by lack of consultation, co-operation and negotiation between employers and the unions or employees.[58] Unfair retrenchments were also part of the unfair labour practices that had contributed to the labour unrest that existed within the labour relations system.

A few years after coming into operation of the IC, it had to deal with cases concerning unfair retrenchments. The first case was *United African Motor and Allied Workers Union and Others v Fodens*[59] and the second was *Shezi v Consolidated*

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54 Zondo 1990 *SAHR and LLY* 340.

55 This court is a creature of statute which can merely carry its functions in terms of section 17 of the LRA and which has the power; "to grant urgent interim relief eg an interdict, pending a *status quo* order, to grant a *status quo* order in a dispute concerning an alleged unfair labour practice as interim relief pending a final determination, to make such final determinations, to decide any appeal from a decision of the industrial registrar and appeals by an employer or registered employer's organisation or registered trade union who feels aggrieved by the refusal of his or its application for admission as a party to an industrial council, to conduct arbitrations and to determine any question which relates to demarcations between industries".

56 The Wiehahn Commission was set up by the government pursuant to the Soweto uprising of 1976 and the Durban strikes of 1973 to look into the industrial relations system in South Africa @ South African History Online http://www.sahistory.org.za/dated-event/wiehahn-commission-report-tabled-parliament.

57 Smith and Van Eck 2010 *CILJSA* 60-61.

58 De Villiers DJ 1991 *Consultus* 54.

59 (1983) 4 *ILJ* 212 IC.

Frame Cotton Corporation.[60] These two cases were adjudicated under the Labour Relations Amendment Act.[61] According to the amendment,[62] the IC had the powers to decide whether a person complaining of unfair retrenchment should be reinstated.[63] The provision of reinstatement as a remedy was an initiative to deter employers from making unilateral decisions regarding dismissals, and to also grant employees their posts back where they had been unfairly dismissed.[64]

The IC accepted and considered the International Labour Organisation's (hereinafter ILO) approach in dismissal cases and subsequently brought it within the scope and application of its jurisdiction in retrenchment cases. It then condemned the unilateral actions which are taken by employers in retrenchments cases. It provided guidelines on how employers ought to deal away with employees who were found to be drowning in a pool of redundancy due to recession or technological changes.[65]

2.2.2 Concomitance of unfair dismissals and unfair labour practices

The definition of unfair labour practices for the purpose of this study will be looked into from the perspective of the then Labour Relations Amendment Act[66] (herein after the LRAA). This is mainly because the amendments which were introduced by this Amendment Act created many challenges. They created a situation in terms whereof many disputes were encountered. The concept of "unfair labour practice" was, by necessary implication, meant to encapsulate any act or omission which unfairly encroached or impaired on the labour relationship that exists between the employer and employees.[67]

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The encroachment or impairment related to terminating the employment contract not on disciplinary grounds unless, as the case might have been, a notice of termination

60 (1984) 5 *ILJ* 3 IC.
61 51 of 1982.
62 Section 8 *ibid* note 59.
63 Section 43 of the LRA 28 of 1956.
64 Van Themaat *The Protection of Workers in the Case of Business Tranfers: a Comparative Study of the Law in USA,UK and South Africa* 40.
65 See *Shezi v Consolidated Frame Cotton Corporation* (1984) 5 *ILJ* 3 IC 12H-13A.
66 83 of 1988.
67 The definition of the notion of unfair labour practice as per section 186(2) of the LRA was also noted in the case of *Protekon (Pty) Ltd v CCMA & Others* (2005) 26 *ILJ* 1105 (LC) 10.

had been issued, there was a consultation held prior to termination, termination itself took place in accordance with the relevant agreement or contract of employment which contained in it the terms of terminating such particular employment, and where termination occurred due to the need of the employer to reduce the workforce or cut down on the number of employees due to operational requirements or other related reasons.[68]

Moreover, the definition as given above continued to provide that any other employment practice or change in practice which had the effect of prejudicing the work security or employment opportunity of an employee or class of employees; or creating or prompting labour unrest; or adversely affecting the employment relation between employer and employee, was an unfair labour practice.[69] This proviso together with the aforementioned dismissal guidelines and other guidelines which were developed by the courts, governed the labour relations before the 1995 LRA.[70]

The common law by then required that an employee be granted a termination of employment notice prior to the actual retrenchment, and that at least a notice pay be given to the employee where termination of his or her employment contract was not due to misconduct or fault on his or her part. In situations where the employer had omitted to comply with this common law demand, the law rendered such termination unlawful and unfair.[71]

It was not only the common law that provided for the invalidity of a termination where proper protocol was disregarded by the employer. The then *Basic Conditions of Employment Act*[72] also required the employer to furnish the employee or his or her representative with sufficient notice in order to prepare for the process of termination of his or her employment contract. It thus rendered the employer's inaction to comply with this proviso a criminal conduct.[73] The IC then had to adopt all the regulatory

68 Section 1 *ibid* note 65.
69 Section 1 *Ibid* note 66.
70 Zondo *op.cit* note 46 at 347.
71 *NTE Ltd v South African Chemical Workers Union and Others* (1990) (2) SA 488 (N) 11 *ILJ* 43 (N) 43H wherein which the employer had locked out employees in an attempt to force them to accede to his terms and conditions and subsequent to their refusal to do so he then terminated their employment contract.
72 3 of 1983.
73 Section 14 *ibid* note 70.

frameworks and invoke them during adjudications on unfair retrenchment cases. Following hereon is the developmental stage in the IC.

2.2.3 The approach to dismissals cases post the UAMAWU and Shezi decisions

The *United African Motors and Allied Workers Union*[74] and *Shezi*[75] cases are both instructive for the purpose of this historical backdrop. They were the first two cases to be adjudicated by the IC as far as retrenchment is concerned. It is thus by necessary implication that they have pride of place in the development of the law governing DOR and have both created history as it is seen today. These cases were distinguishable in facts, but had a common legal issue which concerned a complaint emanating from unfair retrenchments. In both these cases, the IC held that the employer's failure to follow generally accepted principles could constitute an unfair labour practice.

In both cases, the IC developed a system of guidelines to use when faced with complaints of unfair retrenchment. It held that retrenchment must exist as a measure of last resort and all possible avenues must be explored prior to retrenchment. There

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74 *United African Motor and Allied Workers Union and others v Fodens* (1983) 4 *ILJ* 212 IC 212-213. In this case the employer revealed a hostile attitude towards a trade union and humiliated its employees, the following labour practices, which detrimentally affected the relationship between employer and employee, were found by Ehlers DP to constitute unfair labour practices:

(a) The failure to negotiate with a registered trade union which is representative of, and chosen by, the employees.
(b) The interference with the freedom of association by attempting to persuade employees by various means not to belong to a trade union.
(c) The use of derogatory language to employees.
(d) The failure to furnish an unconditional undertaking not to victimize within a reasonable time of a demand to do so.
(e) The failure or refusal to discuss, negotiate and introduce a disciplinary code and grievance procedure in circumstances where a representative trade union has approached the employer with such a request.
(f) The refusal to refund unlawful deductions after an undertaking to do so.
(g) The retrenchment of shop stewards without explaining why the generally accepted principles applicable to retrenchments were not followed.

75 *Shezi v Consolidated Frame Cotton Corporation* (1984) 5 *ILJ* 3 IC. In this case the employment of applicants has purportedly been terminated in the case of the first application on 5 October 1983, and that of Margaret Nxumalo (2) and Zandile Mncube (2) on 10 October 1983 and of Zodwa Goba (2) on 17 October 1983 all allegedly through retrenchment; and in the case of the third application on 19 September 1983 because applicants allegedly refused to accept a transfer from the department in which they had been working to another department to avoid their retrenchment, since redundancies had occurred in the department in which they had been working.

had to be a consultation process wherein the employer and the trade union[76] representing employees met to brainstorm the selection criteria to use when dismissing employees. Other factors extrinsic to the decision to dismiss must be considered prior to the dismissal. In their endeavour, the employer must grant all persons to be affected by the retrenchments adequate notice. Furthermore, the selection of employees to be dismissed must be in accordance with fair criteria and be fair under the circumstances. They must also be given proper consultation. All these assertions were part of the decisions from the above two cases.

Soon after these guidelines were passed, the court started to experience a torrent of litigation pertaining to various labour principles. These guidelines were adequately emphasised in various decisions since 1983. Pertaining to the viability of a termination agreement entered into between the employer seeking to dismiss and the employee being dismissed, the IC took into account such agreement irrespective of its non-compliance with the standards of the court.[77]

Severance package, which was and still is an important aspect concomitant with DOR also warrants discussion in this chapter. The provision for severance packages was introduced during that era in a form of a guideline by the IC wherein it held that an employer should not only give retrenched employees notice pay, but also give them severance pay in order to sweeten the bitter pill of retrenchment.[78]

Consultation prior to retrenchment was also a factor which was said to have the most effect on the outcomes of retrenchment. It did not only entail affording employees or their representative a chance to have a say on the concluded decision to retrench, but it also encompassed many factors and the list is not exhaustive.[79] These guidelines were developed by the IC on several occasions and they are not dealt with in their entirety here in this chapter. Some of them have been incorporated into the LRA as they are while some have been modified to suit the current standards and circumstances.

76 In terms of section 231 of the LRA a trade union means "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations".

77 *Ngwenya and others v Alfred Mcalpine and Son Ltd* (1986) 7 *ILJ* 442 (IC) 447H.

78 *Masondo and others v Bestform South Africa (Pty) Ltd* (1986) 7 *ILJ* 448 (IC) 450E.

79 *Hadebe and others v Romatex Industrials* (1986) 7 *ILJ* 726 (IC) 735J.

2.3 The English law approach to retrenchment

In contrast to the guidelines adumbrated above, the common law and the LRAA of 1983 exonerated the employer from engaging with both the employee/s and representative trade union. Both the LRAA and common law allow the employer to engage with either or both the employee/s or representative trade union. Notwithstanding that, the guidelines provided that consultation ought to be with both an employee/s and the trade union.

The emphasis was laid down in the English case of *Huddesfield Parcels Ltd v Sykes*[80] wherein the court held that even when the employer has consulted with the union, he or she also had to consult with employees affected. According to the court, consultation with the union did not exonerate the employer from the obligation to engage with the individuals concerned. The English law classifies retrenchment and redundancy guidelines as mere "standards of behaviour" and not "rules of law" *per se*.

It, by necessary implication, entailed that failure to comply with these guidelines would not be a mistake in law or error of law, but it would be highly advisable and reasonable for the employer to consider them when retrenching employees.[81] It should be noted that the afore-discussed history of retrenchment, to the stage where it was commonly known as dismissal, has had a major role to play in the development of South Africa's labour law and labour relations.

It is through it that there had to be a transition in the legal principles and frameworks governing dismissal for operational requirements. It is therefore equally important to discuss the current legal prescripts and have an overview on the transformation or otherwise that has taken place since the introduction of the 1995 LRA and the constitutional dispensation. A subsequent discussion concerns the regulatory frameworks established to adequately address dismissals based on operational reasons.

80 (1981) IRLR 115EAT.
81 *Rolls-Royce Motors Ltd v Dewhurst* (1985) *IRLR* 184 EAT.

2.4 Regulatory framework in DOR

As already discussed under the historical background, DOR has been a common feature in our labour relations. It was nonetheless known as 'retrenchment' which in some cases was due to redundancy. What is of importance in this chapter is the law that regulate DOR within the current constitutional and democratic dispensation.

Prior to the enactment of the LRA in 1995, the then LRA which was the 1956 LRA, applied subject to its Amendments. The 1995 LRA then repealed all other Labour Relations Amendment Acts that had existed before 1995, as well as the 1956 LRA. The purpose of the current LRA is, *inter alia*, to change the law governing labour relations.[82] Thus, it is apposite to now focus on the laws governing DOR according to their hierarchy.

2.4.2 Constitutional framework

The Constitution[83] is the supreme law of the country and any law inconsistent with it is invalid to the extent of its inconsistency.[84] The LRA is subject to the 1996 Constitution regardless of the fact that it was enacted pursuant to the 1993 Constitution.[85] It preceded the 1996 Constitution in a sense that it was enacted against the backdrop of the Interim Constitution. Without discussing the provisions of the latter, the purpose[86] of the LRA, *inter alia*, is to give effect to and regulate the fundamental rights conferred by section 27 of the Interim Constitution, which is now incorporated under section 23 of the 1996 Constitution.

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82 Section 1 outlines the purpose of this Act as "to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are; to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;[2] to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; to provide a framework within which employees and their trade unions, employers and employers' organisations can, collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and formulate industrial policy; and to promote orderly collective bargaining; collective bargaining at sectoral level; employee participation in decision-making in the workplace; and the effective resolution of labour disputes".

83 The Constitution of the Republic of South Africa, 1996.

84 Section 2 of the Constitution.

85 Herein after the Interim Constitution, 1993.

86 As provided for by section 1 of the LRA.

There is, however, not much departure from section 27 of the Interim Constitution when regard is had to section 23 of the final Constitution. Both provisions incorporate the same idea and purpose however, with minor alterations in section 23 of the final Constitution. Due to the fact that this is a constitutional dispensation and all laws are subject to the Constitution, the focus now is on the constitutional prerogative conferred upon persons within the labour sector.

The first important right is the right to choose a trade, occupation and profession.[87] This right is supposed to be provided for by the legislation enacted to extensively regulate how the right is to be exercised and protected. It is submitted that the inference sways towards the probability that DOR is more often than not implemented against all employees who are employed and enjoy the right to choose a trade, occupation and profession.

This type of dismissal is sometimes used indiscriminately even in the existence of fault on the part of the employees. The second right is the one envisaged by section 23 of the Constitution,[88] which is the right to fair labour practices. This provision is essentially the one that led to the enactment of the LRA. It is, therefore, the section that gave birth to the LRA and other labour legislation.

In relation to labour relations there are several organisations that one can approach in pursuit of recourse where one or more of his or her rights have been violated. They include, to name but few, a competent court of law, the Commission for Conciliation, Mediation and Arbitration, a forum established under the employment law and so forth. This is where the aforementioned right finds application. The Bill of Rights also confers the above privilege to persons involved in labour relations.

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87 Section 22 of the final Constitution.

88 It provides that (1) everyone has the right to fair labour practices. (2) Every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right (a) to form and join an employers' organisation; and (b) to participate in the activities and programmes of an employers' organisation. (4) Every trade union and every employers' organisation has the right (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

For the enforcement of the aforementioned rights, the Constitution makes it possible for trade unions to represent their members or employees in disputes concerning labour practices. For the purpose of this discussion, the instance where a trade union can exercise its right to represent employees is in a dispute concerning the dismissals of employees for operational requirements.[89]

An example is therefore seen on many cases that have been adjudicated by the CCMA, LC and LAC, which include but not limited to the case of *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union.*[90] In *casu,* the respondent trade union had referred the matter to the LAC on behalf of its members who were dismissed for operational requirements by the appellant. The court had found the respondent trade union to be having the required *locus standi.*

The requirement of representation was then adopted and incorporated into the current LRA.[91] All the aforementioned rights have a *nexus* with the DOR, be it directly or indirectly. It does not, however, negate the other rights in the Bill of Rights from having a link with this type of dismissal, but such rights, in as much as they are not mentioned herein, do not warrant a discussion for the purpose of the relation that exists between the Constitution and the LRA.

2.4.3 Legislative framework

The LRA is currently the principal legislation that regulates DOR. Chapter 8 of the LRA deals with matters pertinent to unfair dismissal and unfair labour practices. It

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89 Section 38 of the Constitution provides that, "anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) & (b) [...]
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) [...]
(e) an association acting in the interest of its members".

90 *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union op.cit* note 15.

91 Under section 14(4) (a) wherein it is provided that a trade union representative has the right to perform a functions at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings.

prohibits substantive and procedural unfairness in the dismissals of employees.[92] Given that the LRA allows certain types of dismissals, it also makes it unlawful and unfair for employers to exercise the right to dismiss arbitrarily or unjustifiably.[93] It has enumerated certain types of conducts that automatically amount to unfair dismissals.

Among those conducts is, the dismissal of an employee by an employer owing to the employee's participation in or intention to participate in or support a strike or protest action that complies with the provisions of the LRA; to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee; that the employee took action, or indicated an intention to take action, against the employer by exercising any right conferred by the Act; or participating in any proceedings in terms of the Act; the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy; that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground.[94]

These conducts are those of the employer and even if any kind of conduct falls short of these specified conducts, it will still be unfair to the extent that the employer in question fails to prove that such conduct was due to operational requirements. This entails that the employer must prove that the dismissal of an employee emanated from operational requirements. Failure to prove such renders the dismissal unfair. The crux of the discussion lies in the provision of the LRA which deals extensively with dismissal for operational requirements.[95]

It has been averred in chapter one that this research focuses only on small-scale dismissals as opposed to large-scale dismissals, of which the latter envisaged in section 189A. On that premise, an employer who dismisses or contemplates on dismissing one or more of his or her employees based on the operational requirements ought to ensure that the provision of section 189 is adhered to in all material respects. First of all, a consultation with the person referred to in the collective agreement[96] must be held.

92 Section 185(a) of the LRA.
93 Section 188 of the LRA deals with other unfair dismissals.
94 As provided for by section 187 of the LRA.
95 Section 189 of the LRA.
96 Section 213 of the LRA defines a collective agreement as "a written agreement concerning terms

In instances where there is no collective agreement, consultation must be between the employer, workplace forum[97] if there is any, and a registered trade union[98] on behalf of its members who are to be affected by the dismissals. Where there is no workplace forum, consultation must be with the registered trade union concerned. However, if both the workplace forum and registered trade union are not in existent, the employer must consult with employees to be affected or representatives who have been nominated to represent the employees.[99]

Secondly, the purpose of consultation must be to seek consensus or an attempt thereof, on matters pertinent to the whole dismissal process. This should be done in an endeavour to avoid dismissals, decrease the number of dismissals, alter the dates and times of dismissals, propose mitigating factors and mitigate the adverse effects of the dismissals. They must reach or attempt to reach an agreement on the methods of selecting employees to be dismissed as well as on the severance packages such employees ought to receive.[100]

Thirdly, while attempting to reach consensus on the aforesaid aspects, the employer must furnish parties to the consultation with written notice inviting them to consult with him or her. Additionally, the notice must also contain relevant information which encompasses but not limited to the following; the reasons for the proposed dismissals, other resorts the employer considered prior to the dismissals and reasons for the rejection of each of those, the number of employees to be dismissed as well as their job categories.

Furthermore, the proposed selection criteria for employees to be dismissed, the period during which dismissals are to occur, the severance packages proposed, the

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and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations".

97 Section 213 defines a workplace forum as "a workplace forum established in terms of Chapter V".

98 Section 213 of the LRA defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations".

99 Section 189(1) of the LRA.

100 Section 189(2) of the LRA; see *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union op.cit* note 15.

means proposed to assist employees to be affected by the dismissals must be discussed during consultation. The employer must state whether there is a possibility of future re-employment for employees to be dismissed. This should also include, the number of employees he or she has and a number of employees who have been dismissed for operational requirements in the past twelve months by that employer.[101]

The rules regarding disclosure of information as provided for by section 16 also apply to this provision and should a dispute relating to the relevance of such information arise, the Labour Court or an arbitrator should decide whether the information is relevant. The onus rests on the employer to prove non-relevance of the information for the purpose for which it is sought.[102]

The employer is required to afford each consulting party an opportunity to put forward its views regarding the aforementioned factors and any other matter pertaining to the dismissals.[103] For each view put forward, the employer must issue a response. However, when the employer disagrees with any of the views, she or he ought to give reasons for his disagreement. The employer must thus respond in writing for any view issued in writing.[104]

Lastly, as far the context of this provision is concerned, the employer must use selection criteria to select employees to be dismissed. The criteria must be the one agreed upon by the consulting parties, or where there is no selection criteria agreed upon, the employer must follow criteria that are fair and objective.[105] The above provision was enacted to guide employers when contemplating to dismiss employees based on operational requirements. It is a step-by-step guide to initiating DOR.

Be that as it may, other provisions were enacted to provide clarity and emphasis on some of the aspects featured within the context of section 189. These provisions

101 Section 189(3) of the LRA.
102 Section 189(4) of the LRA.
103 Section 189(5) of the LRA.
104 Section 189(6) of the LRA.
105 Section 189(7) of the LRA.

have either a direct or indirect link with the provision in discussion, and therefore, it is necessary that they be dealt with below. The second provision that needs focus is section 190 which deals with the date of dismissal. The date upon which employees are dismissed should be earlier to the date on which the employment contract was terminated or during which the employee left the service of the employer.[106] During a dispute regarding the consultation procedure that was carried out in terms of section 189, which applied to that employee's dismissal only, the latter may choose to refer the matter to either arbitration or Labour Court.[107] It will be upon the employee to prove the dismissal and the duty of an employer to prove fairness of such dismissal.[108]

The court or arbitrator, before which a dispute is heard may, once it finds that the dismissal was unfair, order reinstatement or re-employment of, or compensation to the employee concerned.[109] Owing to the nature of DOR, the court may in addition to the above three remedies order any other remedy that it considers appropriate under circumstances.[110] When regard is had to monetary compensation as the other method of remedying an unfair dismissal, the amount must be just and equitable in all circumstances. However, it should not be more than the equivalent of twelve months' remuneration calculated at the employee's rate of remuneration on the date of dismissals.[111]

This applies when operational reasons were not proved by the employer and therefore the DOR found to be unfair. Severance pay on the other hand must be equal to at least one week's remuneration for each completed year of continuous service with the employer, only to the extent that the employer is not exempted from the provisions of the subsection.[112] The Labour Court adjudicating on the dispute emanating from DOR may enquire and determine an amount of the severance pay which the dismissed employee may be entitled to and it can order the employer to

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106 Section 190(1) of the LRA.
107 Section 191(12) of the LRA.
108 Section 192 of the LRA.
109 Section 193(1) of the LRA; see *COSAWU obo Nyakaza and Prestige Cleaning Services (Pty) Ltd* (2010) 31 *ILJ* 1950 (CCMA) 1952C.
110 Section 193(3) of the LRA.
111 Section 194(1) of the LRA.
112 Section 196(1) of the LRA.

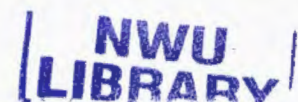
pay such an amount.[113] It should be noted that the LRA does not exclude other frameworks that provide guidance on how DOR is to be conducted, in particular, the international instruments. Focus hereon is on the international instruments which have had an impact on the running of our system and South African labour law as the Constitution so permits.

2.3.4 The Code of Good Practice on Operational Requirements

The *Code of Good Practice on Operational Requirements*[114] (hereinafter the CGPOR) is also another legal framework that has been promulgated to regulate the practice of DOR. Accordingly, it defines DOR in the same wording and understanding as section 213 of the LRA.[115] It, therefore, accepts the notion of "no fault" dismissal as an alternative to the concept of DOR and subsequently places the obligation upon the employer to ensure that alternative measures are considered prior to the dismissal and that all affected employees are given fair treatment.[116]

The Code encourages the employer to maintain procedural and substantive fairness at all times. Factors such as the appropriate proposals by employees for the purpose of avoiding dismissals, altering the periods of dismissals and so forth, which the LRA has prescribed for the employer to consider during consultation are highly emphasised by this Code.[117] The employer is encouraged by the Code to disclose all relevant information pertinent to the dismissals. It should also disclose other information that is not expressly outlined in the provisions of the LRA, but relevant for the purpose of consultation.[118]

The Code does not, however, determine the period over which consultation should take place. However, what is required is for parties to be *ad idem* about the whole process and all relevant information to be considered and reported on time to allow


NWU LIBRARY

113 Section 196(10) of the LRA.
114 CGPOR Gazette 20254 of 16 July 1999.
115 Item 1 of the CGPOR.
116 Item 2 *ibid* note 113; see also *General Food Industries D Ltd t/a Blue Ribbon Bakeries v FAWU & others* (2004) 25 *ILJ* 1655 (LAC).
117 Item 3 op.cit note 113.
118 Item 4 *op.cit* note 113.

all parties sufficient time to prepare.[119] According to the Code, consultation must be started as soon as possible to avoid having to truncate the process on a matter of urgency and pressure on the employer.[120] The Code also requires the employer to use the selection criteria that have been agreed upon between parties and if not in place, to use those which are fair and objective.[121] The employer has to invoke the selection criteria that are not inconsistent with the law in terms of being unfairly and unjustifiably discriminatory against certain employees on grounds enumerated by the Constitution, LRA and EEA.[122] Selection criteria that are accepted by the Code include, but are not limited to, the length of service, skills and qualifications, LIFO principle, and the implementation of affirmative action programme.[123]

Further, severance packages should be given to employees who have been dismissed due to the operations of the business.[124] Furthermore, upon acceptance of or unreasonable refusal to accept an offer of alternative employment, the employee would automatically be considered to have relinquished his right to severance packages.[125] Last, but not least, the employer must consider dismissed employees whenever the time is ripe for the business to hire employees with similar qualifications. They must, however, be kept abreast about the re-employment prospects and their trade union must, during consultation periods, also be informed of such intention to re-employ.[126]

It is common cause from the contents of the above Code that the latter shares the same purpose and objectives with the LRA as far as DOR is concerned. The Code reiterates what is contained in section 189 of the LRA in all material respects. The

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119 Item 5 *op.cit* note 113.
120 Item 6 *op.cit* note 113.
121 Item 7 *op.cit* note 113; see also *Nkosinathi Mbongiseni Mtshali v Bell Equipment* (DA16/12) [2014] *ZALAC* 37 (22 JULY 2014) wherein the LC held that the selection criteria that were used to select Mr Mtshali and other employees across the company's division, for retrenchment, were fair and objective according to circumstances. The decision was however later overturned by the LAC based on the reasoning that the company had failed to use 'bumping' as a selection criterion and had it done so, it would have considered the employee's years of experience, qualifications and skills. The LAC then held that the company had failed to prove that the agreed selection criteria were applied or that a fair and objective criteria were applied.
122 Item 8 *op.cit* note 113.
123 Item 9 *op.cit* note 113.
124 Item 10 *op.cit* note 113; *see also Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union op.cit* note 15.
125 Item 11 *op.cit* note 113.
126 Item 12 *op.cit* note 113.

slightest distinction that can be observed between the contents of the two sources is a thorough and broader elaboration by the Code on certain aspects which are contained in the LRA. Such aspects refer to the generally accepted selection grounds and so forth.

2.3.5 The international context

The South African Constitution obliges the courts, tribunals and forums to consider international law when interpreting the Bill of Rights.[127] This provision has caused the legislature to take into account international treaties and conventions and consider them during the enactment of national legislation. In view of the above submission, the International Labour Organisation, being the specialised agency to deal with labour relations between countries and the establishment of social peace through equal working conditions, has brought forth conventions whose purpose is to regulate various conducts by member states and/or organisations within their territories.[128]

Although South Africa withdrew its membership from the ILO in 1964 due to its apartheid policies, in so far as the constitutional dispensation requires, it re-joined in 1994 after its first democratic elections. This was encouraged by the fact that it was one of the founding members that saw the need to establish an international labour community after the First World War in 1919. When the LRA was enacted in 1995, it also acknowledged this obligation and pledged to give effect to the public international law obligations of the Republic relating to labour relations.[129]

The courts have also been actively involved in considering international law when interpreting national law such as the Bill of Rights and LRA, in particular. The Constitutional Court has upheld this principle in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[130] wherein which it held that:

127 Section 39 (b) of the Constitution.
128 Smit and Van Eck *op.cit* note 55 at 47.
129 One of the purposes of the LRA as envisaged in section 1(b) is to give effect to obligations incurred by the Republic as a member State of the ILO.
130 [2007] 12 *BLLR* 1097 (CC).

> A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 (ILO Convention) requires the same.[131]

Under the ILO the convention that warrants discussion for the purpose of this study is the *ILO Convention on Termination of Employment* 158 of 1982 (hereinafter the CTE) which came into force on the 23rd of November 1985.[132] It is worth noting that South Africa, as one of the founding members of the ILO, has not yet ratified this Convention and thus the latter's provisions do not have a binding effect upon South Africa, but they are merely persuasive to the judiciary and legislature.[133]

The concept of termination of employment as referred to in the Convention is by necessary implication meant to include within its ambit the dismissal of employee(s). Article 4 of the CTE provides 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, establishment or service.[134]

It is, therefore, also an international labour practice to dismiss employees based on operational requirements of the employer. The practice gives the court or any other body faced with the dispute pertaining to dismissal based on operational requirements the power to determine the true reason for the dismissal, whether or not it is indeed necessitated by operational requirements. However, such body is deprived of the power to determine whether those reasons warranted the dismissals,[135] unless it does so in a manner consistent with national practice, or as per a collective agreement, arbitration awards or court decisions.[136]

In so far as the economic, technological, structural or similar needs of the employer become the reasons for the dismissals of employees, the employer shall furnish

131 *Sidumo ibid* note 129 at par 61.
132 This ILO Convention C158, which is concerned with Termination of Employment at the initiative of the employer, is also known as Termination of Employment Convention, 1982.
133 Smit and Van Eck *op.cit* note 55 at 49.
134 Article 4 of C158.
135 Article 9(3) of C158.
136 Article 1 of C158.

employees' representatives with sufficient notice including in it, but not limited to, the reasons for the dismissals, number of employees to be affected by the dismissals and the time frames during which the dismissals are to occur.[137] It is evident from the provisions of this Convention that its contents are more or less the same as the contents of the LRA when regard is had to DOR.[138] The Convention had a persuasive impact on the enactment of section 189 of the LRA and by necessary implication, the object of the LRA of considering international law has also been met.

2.5 Summary

This chapter sought to provide an antecedent about the history of DOR and to discuss the framework that regulates this type of dismissal. A cross-reference analysis was made to the historical events that were associated with DOR. The main strand of thought vis-à-vis this chapter was the foundation or evolution of the laws, be it domestic or international, regarding the practice of DOR, and the developments that have sustained the practice up to this Constitutional era.

Dismissal on grounds of operational requirements has ancient foundation in labour relations. It was well developed with time and it is today one among the various labour issues which have led to the labour market unrests. In light of the above historical backdrop and legal framework, it is evident that the dismissal emanating from operational reasons has been an existing practise since the development of labour relations.

On that premise, it is seen through historical developments that retrenchment was one of the issues that caused the labour unrest prior to the 1995 era. In order to curb and regulate labour unrests, the Wiehahn Commission was established, particularly to investigate the industrial relations in South Africa. This Commission succeeded in establishing a court that would uphold the rights of parties who are involved in the labour relations, being the Industrial Court.

137 Article 13(1) of C158.
138 Section 189.

Prior to the 1995 LRA, the 1956 LRA and its amendments as well as the common law regulated the dismissals of employees by the employer based on the employer's operational reasons. However, the incessant application of the current LRA has resulted in an era of many controversies and issues around the practice of DOR. The courts are faced with a torrent of litigations emanating from this practice. There are regulations and the law is clear on how employers should conduct dismissals based on their operational reasons.

Therefore, the following chapter will focus on the substantive aspects of the DOR against the challenges encountered by the courts and legal writers. The essence of the following chapter is to narrow down and discuss the substantive challenges associated with the practice of DOR given the fact that the practice is sufficiently regulated, as this chapter has outlined.

Chapter Three: Substantive fairness and inherent challenges

3.1 Introduction

This chapter seeks to trace and discuss the substantive aspects of DOR against the inherent challenges that are burdensome on this aspect, with special reference to case law and opinions of renowned scholars in the aspect of the law. In order for the dismissal to be fair it must pass the two tests of fairness which are substantive and procedural fairness.

Substantive fairness refers to the reason for which the employer is dismissing employees. The law requires that there be operational requirements on the side of the employer. The reasons for the dismissal must fall within the statutory definition of operational requirements.[139] Van Jaarsveld and Van Eck have noted that the substantive aspect of the dismissal relates to the existence of a valid, *bona fide* or fair reason for the termination of the employees' employment contract.[140]

3.2 Components of operational requirements

First and foremost, it is pivotal to give an explanatory note on each of the various components that build-up the concept of 'operational requirements'. These components are the basis on which the substantive value of DOR emanates. It is through these reasons that the court can be able to determine that indeed the dismissal was appropriate and justified under the circumstances. They are part and parcel of the substantive aspect of DOR and are also incorporated in the LRA.[141] These components are therefore explained below.

3.2.1 Economic reasons

Economic reasons, which boil down to the dismissals of employees, concern the management or mismanagement of the business's finances. The financial standing

139 Camagu *Substantive Fairness in Dismissal for Operational Requirements Cases* 18.
140 Van Jaarsveld and Van Eck *Principles of Labour Law* 180.
141 Section 213 gives a brief explanation of the concept of Operational Requirements.

and management of the business can be adversely affected by extrinsic factors such as the economy and market status. They can cause a downturn on the financial well-being of the company which in turn may necessitate the down-sizing of the workforce.[142] In the case of *Smith and Others v Courier Freight*,[143] the respondent company experienced a downturn in its financial well-being. Some of its employees were dismissed due to operational requirements. The process was later challenged in court wherein the employees alleged that they were not consulted but merely found out about their retrenchments when they received their retrenchment letters.

The evidence before the court proved that the trade union representing the employees was the one responsible for a recalcitrant attitude, resulting in the delay in informing employees of the outcomes of the meetings between it and the employer. The union had been involved with the employer in several consultations regarding retrenchments, however, it intended to delay the process unnecessarily. The court then found the retrenchment to be substantively and procedurally fair and dismissed the claims with costs. On appeal, Mayet A.J found that a good reason existed for the employer to retrench employees based on operational requirements. The evidence before the court proved a "commercial rationale for restructuring". The LAC then upheld the decision of the court *a quo*.[144]

The cases above show that an employer can dismiss employees on the basis of operational requirements if the financial wellbeing of the company dictates. On that premise, even if the economic downturn of the business results from mismanagement of funds, the court may still find the substantive basis of 'economic reasons' to be fair and uphold the DOR.[145]

142 Camagu *op.cit* note 137.
143 (2008) 29 *ILJ* 420 (LC) 5.
144 *Smith and Others v Courier Freight ibid* note 142.
145 *Benjamin and Others v Plessey Tellumat South Africa Ltd* (1998) 19 *ILJ* 959 (LC) 4. In this case the employer retrenched 13 employees for operational requirements. after referral of the grievances by employees to the LC it found the dismissal to be substantively and procedurally fair.

3.2.2 *Advances in technology*

This aspect refers to the "introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace".[146] The dismissal of employees due to the introduction of new machinery which turns to leave posts redundant is permissible. However, such dismissals first have to be procedurally fair.[147]

In *Naiker v Q Data Consulting*,[148] the court accepted the employer's submission that the new structure of the business would only survive when the employees could "continually keep abreast of new technology and software development".[149] In this case, the employer had restructured the business and invited retrenched employees to apply for their posts under the new structure. After the applicant's failure to secure a position under the new structure, he subsequently instituted proceedings wherein he alleged that he had been unfairly discriminated against on the basis of his physical condition.[150]

The court, however, found that the reason for the employer not to retain that particular employee was solely because he was not fully acquainted with the new technology which had been introduced in the workplace; and the new structure of the business required employees who could keep up to standard with the new technology that was introduced in an attempt to assist the company in reducing its financial losses. In assessing the fairness of the dismissal, the court then found that the employer had taken reasonable measures to assist the employee, however, this was met with a feeling of discontent from the latter. The court then found the dismissal to be substantively and procedurally fair and ordered the employee to pay costs.[151]

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146 Item 1 of the Code of Good Practice on Operational Requirements.
147 Camagu *op.cit* note 137 at 14.
148 (2002) 23 *ILJ* 730 (LC).
149 *Naiker v Q Data Consulting ibid* note 146 at 7.
150 *Naiker v Q Data Consulting ibid* note 146 at 14.
151 *Naiker v Q Data Consulting ibid* note 146 at 42.

Similarly, Finnemore and van der Merwe[152] have opined that technological changes do not always result from an endeavour to reduce the workforce for the purposes of managing the financial disposition of the company, but they are sometimes brought by the need for improvement on the skills of the employees and the production of the company. They have noted that such changes may be introduced to dispense with skills shortage or even to improve on the nature of some jobs.

Managerial improvement may also ensue from these changes and may cause a more efficient competitiveness. According to these authors, technological innovations in many companies are more often than not to the advantage of the employees when taking into consideration the nature of the jobs which are brought about by these changes. They, however, do not overlook the practical realities, such as the redundancy of some employees, associated with a typical technological change.

An acknowledgement is made to the fact that some employees, who by reason of possessing a lower level of proficiency relating to their jobs, particularly at a stage of dire financial difficulties of the company, find these changes to their misfortune and disadvantage. The older and less educated employees bear the risk of facing redundancy and possible retrenchment. This stage is, in many companies, usually not coupled with the benefit of being provided with alternative employment.[153]

3.2.3 Structural reasons

The *Code of Good Practice on Operational Requirements*[154] (herein after the CGPOR) explains structural reasons as "the redundancy of post consequent to a restructuring of the employer's enterprise". Structural reasons emanate from financial restraints that the business experiences and they usually cause the employer to cut down on the workforce in order to bring the operational costs or expenses within the boundaries of its financial constraints. Structural and economic reasons are to a

152 Finnemore and van der Merwe *Introduction to Industrial Relations in South Africa* 41.
153 Finnemore *ibid* note 150.
154 Item 1 of the CGPOR.

greater extent similar in that there is no watertight distinction between the two.[155] An example is seen in the case of *Gijima Ast (Pty) Ltd v Raymond Hopley*[156] wherein the respondent had initially disputed the fairness of his dismissal. The LC decided in his favour on the basis of the dismissal being substantively unfair. In *casu* before the LAC, the appellant (Gijima Ast) was appealing against the decision of the lower court as it felt that it had a good and an appropriate reason to have dismissed some of its employees based on operational requirements.

What transpired is that in the year 2010, Gijima Ast experienced difficulties in terms of business performance. It thus had to cut-down on some of its workforce. It came up with a new organisational structure and the respondent did not form part of it as he had become redundant. The LAC also found that the respondent could not pragmatically be reinstated as his position had become redundant and had to be dealt away with owing to the financial constraints the business had. The court upheld the reasoning of the employer and affirmed the dismissal on the basis of structural reasons.

There are various instances upon which the courts have allowed the dismissal of employees emanating from structural reasons.[157] Such instances were not only concerned with the need to up the performance, but also the need to merge[158] the business with another so as to ensure business efficiency and remain competitive in the business world. All these factors ultimately require the employer to introduce a new organisational structure within the business, resulting in some of the employees being retrenched.

3.2.4 *Similar needs of the employer*

Similar needs of the employer as a notion refers to the dynamics of each employer that warrant him or her to restructure the business and retrench employees. These circumstances or dynamics vary according to the peculiar situation of a given enterprise and are broader, hence it is inappropriate for one to list them exhaustively

155 Itzkin *Operational Requirements as a Fair Reason for Dismissal in South Africa* 29.
156 (2014) 35 *ILJ* 2115 (LAC) 1.
157 *Enterprise Food (Pty) Ltd v Alien and others* (2004) 25 *ILJ* 1251 (LAC).
158 *Enterprise Food (Pty) Ltd ibid* note 155 at 7.

and conclusively. Just like structural reasons, 'similar needs of the employer' and economic reasons have no apparent distinction in between. By necessary implication, these three components are the same in nature and have the same bearing.[159] Similar needs as a component has sub-components that may not be determined conclusively. Among those sub-components are; the rationalisation needs of the employer, the conduct of the employee in impacting negatively on the operations of or the relationship with the employer, which includes within its ambit the incompatibility of the employee and other related reasons, and a breakdown in the trust relationship.[160] These sub-components require further elucidation as follows:

3.2.4.1 Rationalisation needs of the employer

When the need arises to amalgamate or merge a business with another, to restructure the workforce, or to cause changes to the *modus operandi* of the business, an employer is put in a situation where he ought to prioritise the efficiency of the business. The employer must do so while also taking into cognisance the interests of the employees. This, however, does not preclude him from effecting changes to the terms and conditions of employment in accordance with a fair and reasonable procedure.[161]

A sole decision by employer to ensure that employees are content at all times, and therefore effecting changes in pursuit of that, which result in dismissals or re-employment of other employees, is *prima facie* a similar need of the employer. Froneman J in *WL Ochse Webb and Pretorius (Pty) Ltd v Vermeulen*[162] has noted that "unhappiness can lead to problems such as labour unrests, a drop in

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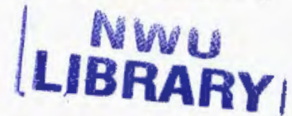
159 Basson *op.cit* note 9 at 152.
160 Van Jaarsvled and Van Eck *op.cit* note 138 at 181.
161 Basson *op.cit* note 9.
162 (1997) 18 *ILJ* 361 LAC. In *casu*, the respondent was employed by the appellant to sell tomatoes. He was earning a salary and on commission both higher than other employees selling other vegetables. Those employees were discontent with the fact that Mr Vermeulen earned higher than them while doing the same work as them. The employer thus in an attempt to curb this dissatisfaction gave the respondent an alternative to either accept the new system whereby he would be caused to earn the same amount as other employees, or present a new system which could satisfy the aggrieved employees, or resign. He however chose the old system and when it could not be continued he resigned. The court found the conduct of the employer to be fair in circumstances.

productivity and the like".[163] Therefore, it is submitted that the employer's act in pursuit of the employee's happiness is a ground for dismissal under the concept of 'similar needs of the employer'. Before the discussion on the second sub-component of 'similar need', it should be borne in mind that, similar needs (or "catch all" as Itzkin[164] explains it) has opened a torrent of debates vis-à-vis the definition of operational requirements.[165]

This component as opposed to others, allows many factors to be taken into account as part and parcel of the definition of operational requirements. However, all such factors must generally be acceptable within the scope of the LRA and the definition of DOR. A thorny and problematic aspect is that it makes it easier for each employer to differently and subjectively create his or her own reasons for retrenching employees.[166]


NWU LIBRARY

Furthermore, what can also be thorny is the approach followed by the court in *SA Chemical Workers Union v Afrox (Pty) Ltd*[167] where the court held that DOR does not have to be a result of last resort. The court however did not qualify its decision but Grogan[168] has submitted that the LAC might have intended to mean that a court before which a case of DOR is brought must not find the decision to retrench unfair merely because the employer in question did not explore other alternatives before dismissing employees for operational requirements.

The object of DOR is, among others, to deal away with the old workforce in order to employ a new workforce that will meet-up to the standards and needs of the business.[169] A further example is when an employer is left with no option but to dismiss an employee due to refusal or failure on the part of the employee to work overtime for the well-being and survival of the business. This conduct is by necessary implication also one of the 'similar needs' of the employer.[170]

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163 *WL Ochse Webb and Pretorius (Pty) Ltd v Vermeulen ibid* note at 366D.
164 Itzkin *op.cit* note 153.
165 Basson *op.cit* note 9 at 152.
166 Basson *op.cit* note 9 at 152.
167 (1999) 20 *ILJ* 1718 (LAC).
168 Grogan *op.cit* note 14 at 225-226.
169 *Fry's Metals (Pty) Ltd v National Union of Metalworkers of South Africa and others op.cit* note 5 at 147.
170 Basson *op.cit* note 9 at 154.

3.2.4.2 Incompatibility and related reasons

Incompatibility relates to the hostile conduct of the employees towards other employees and the business of the employer. An employee who is antagonistic towards other employees may be dismissed on the basis that his conduct interferes with the smooth operations of the business and thus causing it to experience financial hardships or drop in its production.[171] An example can be seen in the case of *Somyo v Ross Poultry Breeders (Pty) Ltd*[172] wherein a managerial employee was involved in a scandal of severally failing to vaccinate chickens timeously, to order feed, to adhere to the feeding schedule and to be present when chicks were delivered.

He was thus dismissed due to incompatibility but was re-instated by the Industrial Court. On appeal, the LAC overturned the IC's decision and found the dismissal to have been fair based on the reasoning that senior employees or managers were expected to have a high degree of professional skills and once there was a deviation from those skills and responsibilities, the business of the employer would suffer. Further to that, a single failure to act in accordance with the set professional standards sufficed to justify dismissal.

This case illustrates the submission that incompatibility, which is a fair reason for dismissal,[173] relates to "an employee's inability or failure to maintain cordial and harmonious relationship with his employer and/or fellow employees".[174] It is clear, in *casu,* that the conduct of the employee had a negative effect on the production of the business, and it continued to pose a threat to the prospects of production in the business.

In further illustration, reference is made to the facts in the case of *Erasmus v BB Bread Ltd*[175] wherein employees requested the employer to dismiss their manager due to his racial behaviour towards black employees. The dismissal was found to be

171 Basson *op.cit* note 9 at 169.
172 [1997] 7 *BLLR* 862 (LAC).
173 *East Rand Proprietary Mines Ltd v UPUSA and others* [1997] 1 *BLLR* 10 (LAC).
174 Mgudlwa *Without Prejudice* 49.
175 (1987) 8 *ILJ* 537 (IC).

fair by the IC and it reasoned that an employer ought to ensure a harmonious relationship among its employees, and if it is difficult to ensure harmony, the employer should eliminate the antagonistic employee from the whole equation so as to ensure that other employees were happy and delivered to the best of their abilities.

Notwithstanding these advances, there is still a thin line between incompatibility as a sub-component for DOR and the dismissal for incapacity which on the other hand also touches on the economic needs of the employer and business. It should as well be noted that in cases of incompatibility, the dismissal of an employee should be taken as a measure of last resort. The courts have encouraged employers to give employees chances of explaining their incompatibility before actually dismissing them.[176]

3.2.4.3 Breakdown in the relationship of trust

According to the common law relating to fiduciary duties, an employee is supposed to have the best interest of the employer at heart among other duties.[177] This is due to the fact that this duty has many angles and facets. Once the employee breaches this duty and his conduct has adverse bearing in the trust relationship between him and the employer, the latter is entitled to dismiss the former for misconduct or operational requirements, depending on the circumstances. One such circumstance is when the employer suspects the employee to have committed theft and dismisses him thereafter.[178]

The LAC has also accepted the conduct of employer for dismissing employees for maliciously damaging his property and sabotaging him even though the employer was not certain about the identity of employees who actually committed such acts. The court held that their dismissals would be fair if it would assist in saving the life of the enterprise.[179]

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176 *Visser and Standard Bank of South Africa Ltd* (2003) 24 *ILJ* 890 (CCMA) 891A-F.

177 Basson op.cit note 9 at 44; see also *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) 26D-E.

178 *Census Tseko Moletsane v AS Cot Diamonds (Pty) Ltd* (1993) 2 *ICD* 310 (1C).

179 *Chauke and others v Lee Service Centre CC t/a Lesson Motors* (1998) 19 *ILJ* 1441 (LAC).

3.3 Operational requirements facets against a mere cover-up

Substantive fairness in dismissal concerns the reason advanced by the employer in deciding to dismiss an employee. Substantive and procedural fairness are two aspects which were introduced by the 1956 LRA and have been adopted by the 1995 LRA.[180] However, common law requires that the dismissal contemplated by the employer be lawful at face value; it, however does not make mention of fairness as compared to the LRA. Lawfulness would then relate to an employer furnishing affected employees with the termination of employment notice prior to the dismissals. Be that as it may, the current law that to a greater extent finds application when it comes to dismissals is the LRA as opposed to the common law that merely applies subject to restriction and qualifications.[181]

It should be borne in mind that the employer is entitled to contemplate retrenching employees, preliminarily decide to dismiss them and subsequently propose the decision to them and their trade union.[182] However, this conduct is only permissible preliminarily and prior to the final decision to dismiss. The employer must have consulted with the employees concerned and their respective trade union.[183]

3.3.2 Alternatives to dismissal

It does not suffice, under the law, for the employer to dismiss employees on the basis of operational requirements without preliminarily considering alternatives to the dismissal.[184] The courts have also emphasised this requirement and they continue to promote and protect it.[185] The purpose is that the employer must not make the dismissal process a sham and a *fait accompli*.[186] Both the employer and employee must be in *ad idem* during consultation about the measures to take in avoiding

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180 Lesabe 2009 *LabourNet* 42.
181 Camagu *op.cit* note 137 at 5.
182 Van Jaarsveld and Van Eck *op.cit* note 138 at 181.
183 *Makgabo v Premier Food Industries Ltd* 2000 *ILJ* 2667 (LC).
184 Section 189(3) (b) of the LRA requires employer to state out alternative measures he or she took prior to the dismissal. This then turns to show that the LRA purport the employer to take dismissal as last resort.
185 *Kroeger v Visual Marketing* (2003) 24 *ILJ* 1979 (LC) 1979H; see also *Shezi v Consolidated Frame Cotton Corporation Ltd* 1984 *ILJ* 3 (IC).
186 *4seas Worldwide (Pty) Ltd v The Commission for Conciliation, Mediation and Arbitration and Others* CA15/2011(LAC).

dismissals.[187] Section 189(3) (b) of the LRA also requires that the employer must furnish a written notice to the consulting parties which contains in it the alternatives he considered prior to the dismissal and the reason for not sticking to those alternatives.

Be that as it may, when an employee refuses to accept an offer by the employer as alternative to dismissal, it no longer becomes the employer's main concern but that of an employee. It is necessary that the facts in the case of *Freshmark (Pty) Ltd v CCMA and Others*[188] be considered as the most appropriate authority for this submission. In *casu*, the employee had on several counts refused to work every second Saturday as other employees did due to operational reasons in their company.

The employer was duly informed by the employee's trade union that she would rather take up her severance packages instead of working every second Saturday. In the alternative, the employer had suggested that she at least work for four hours every second Saturday and get compensated at the normal hourly rate and subsequently get a one day off each month.[189]

She rejected this offer as well, and subsequently got retrenched for operational requirements. She then brought the matter before the CCMA which then rejected the employer's advancement of alternative employment in the context, reasoning that in terms of section 196(3) of the LRA, this constituted the same position coupled with a different condition. Thereafter, the LC agreed with the CCMA. This then drove the company to appeal to the LAC.[190]

The LAC held that the meaning of the phrase 'alternative employment' encapsulated employment by the same employer, however, with differing terms and conditions in the same position. It could either be that the terms and conditions differed in some or all respect but, it had to be the employment that was an alternative and not necessarily the position. The LAC upheld the appeal and held that the employee's

187 Basson *op.cit* note 9 at 158.
188 (2003) 24 *ILJ* 373 (LAC).
189 *Freshmark (Pty) Ltd v CCMA and Others ibid* note 186 at 373H-J.
190 *Freshmark (Pty) Ltd v CCMA and Others op.cit* note 186 at 374A.

refusal to accept alternative employment was unreasonable and the Commissioner's findings were unjustified. It held that the employee was, therefore, not entitled to severance pay.[191] Bearing in mind the above analysis and case law, it is now apposite to look into factors that qualify as alternatives which the employer ought to consider prior to finalising the decision to dismiss. The list of these alternatives is not exhaustive, however, most writers have focused more on the ones that shall be discussed hereafter. The first alternative the employer must consider is to endeavour to transfer employees who are likely to be affected by the dismissals to other sectors of the business if they do exist. It is evident that this option will only succeed if those other sectors are not overcrowded with too much workforce.

The case of *Masilela v Leonard Dingler (Pty) Ltd*[192] is an example of a situation where the employer had failed to adhere to the requirement of attempting to transfer an employee to other sectors of the undertaking. The court in *casu* subsequently found the dismissal to be substantively unfair. It held that there was an alternative of offering the concerned employee a junior administrative position in an attempt to avoid dismissal. The other alternative was to rule out overtime and Sunday work. On the other hand, sometimes it can be necessary to introduce overtime, Sunday or weekend work[193] in pursuit of the business operations depending on each circumstance.

However, owing to the fact that overtime and Sunday work called for extra compensation to employees, one might have to dispense with them in situations where profit runs below the normal scale. The employer must also consider issuing a moratorium in respect of hiring additional employees. This may lead to available employees having to work overtime and during weekends in order to resuscitate the financial wellbeing of the business.[194] Some of the employees can be dismissed in

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191 *Freshmark (Pty) Ltd v CCMA and Others op.cit* note 186 at 375A-B.

192 (2004) 25 *ILJ* 544 (LC) 545A-B.

193 Freshmark (Pty) Ltd v CCMA and Others *op.cit* note 186.

194 *Humphries & Jewel (Pty) Ltd v FCRAWU* 1991 *ILJ* 1032 (LAC) 1032G, 1035B-C. In this case the IC had delivered a judgment in favour of two employees whom were dismissed for various reasons. The second respondent's version of the dismissal was that he was retrenched due to the business's downturn and soon after his dismissal new employees were hired to do the same work he was doing. This version was refused by the LAC as there was no evidence to prove it neither did the employer attest to the truth of this statement. The court found that indeed the second respondent was retrenched and for operational reasons and thus his dismissal was subsequently fair.

an attempt to minimise the number of dismissals. To put it more coherently, an employer can reduce the number of employees over a long period of time and avoid effecting dismissals over a large number of employees at once or over a short period of time. An undertaking to reduce a certain number is integral to the requirement of alternatives considerations.[195]

Furthermore, it is advisable that the employer enhance the skills and performance of his employees by equipping and developing them where necessary in order to qualify them to fill-up other post within the business, upon theirs becoming redundant.[196] This can prevent unnecessary retrenchments which are concomitant to new employees being hired to perform duties which could have been performed by the old workforce.

However, one can infer that this type of alternative is in contradiction with the submission advanced in *Fry's Metals* case that the purpose of DOR is to get rid of old employees and hire new ones that can perform the duties the employer requires for sustaining or resuscitating the business. On that premise, if it is the refusal on the part of an employee to undergo training as an alternative measure, the employer will not be considered to have dismissed the employee unfairly.

The courts look into this aspect very sceptically as employees have the propensity of unreasonably refusing alternative avenues with the intention of alleging substantive unfairness. One Mr. Yika, the respondent and employee in the case of *National Union of Metal Workers of South Africa obo Yika and Schindler Lifts (SA) (Pty) Ltd*[197] had turned down the offer of alternative employment in exchange for being an apprentice. After a four year period, he sat for the prescribed test which he however failed and had to be summarily dismissed. He then alleged unfair dismissal which the arbitrator refused on the conclusion that the aspect that was unfair for such dismissal was the procedure, which he then remedied with compensation. The employer had expected Mr. Yika to pass the test in order to continue working as an artisan lift

195 Section 189(2) (a) (ii) provides that "the employer and the other consulting parties must, in the consultation [...], engage in a meaningful joint consensus-seeking process and attempt to reach consensus on appropriate measures to minimise the number of dismissals".

196 *SACCAWU v Amalgamated Retailers (Pty) Ltd* 2002 *ILJ* 165 LC.

197 (2003) 24 *ILJ* 1775 (BCA).

mechanic. When the latter could not pass the test, the former was left with no option but to do away with an unqualified mechanic, particularly, during the period of restructuring. The employer must endeavour to assist employees by accommodating them within an early retirement scheme. However, there are requirements to meet before an employee can be accommodated.

It is not all employees who qualify for this type of alternative and evidence to that can be found in the case of *Thembane v Revertex Chemicals (Pty) Ltd*[198] wherein the IC and LAC were both of the view that the employee (the appellant in *casu*) had not proven his terms of early retirement scheme, nor had he qualified to receive an early retirement based on his medical condition.

The employee, to his own detriment, had relied under the evidence of an expert witness who was a medical practitioner. This expert testified that the employee was not unable to work or drive, which was his main duty. The court found that he was actually only unable to carry heavy loads. Prior to all the above undertakings by the employee, the employer was adamant to grant him early retirement due to his post as a driver in the company, being redundant.

Among a variety of alternatives an employer must also consider is the initiative to cut down salaries, wages or other employment conditions or even lowering those employees' positions.[199] Courts have allowed employers to consider altering the terms and conditions of employment on account of *bona fide* retrenchments as an alternative measure to DOR. Where employees refuse such changes and cause the relationship between themselves and the employer to be hostile, the court in *ECCAWUSA v Shoprite Checker's t/a OK Krugersdorp*[200] held that those employees could be dismissed.

The court in *casu* was willing to accept the action of the employer in dismissing employees who refused to work new shift patterns which the employer introduced. The court described it as an alternative the employer had considered based on its

198 1997 *ILJ* 174 (LAC) 178B-C.
199 Van Jaarsveld and Van Eck *op.cit* note 138 at 183.
200 (2002) 21 *ILJ* 1347 (LC) 1347D.

operational reasons. In circumstances where the employer ought not to preliminarily effect dismissals and there is sufficient proof that it could resort to other options save dismissals, the employer can also downgrade employees based on DOR.[201] Further to that, an employer who is seeking to rely on operational requirements is allowed by law to reduce the number of days that employees normally work. This may occur in circumstances where working for longer hours or days has the possibility of costing the business much money in terms of paying employees or running its operations, than bringing profit.[202] The employer can also give employees a prolonged unpaid leave in an attempt to avoid dismissing them for operational reasons.

The above was seen in the case of *ND Engineering (Pty) Ltd v Naicker*[203] wherein the employer and employee who was the respondent reached an agreement about a period of unpaid leave other than retrenchment based on operational requirements. The employer's initiative was acceptable as an alternative measure. Notwithstanding that, the employer never again made efforts to communicate with the employee about his future employment in the company or any other matter related thereto since the period of leave had exceeded that which was initially intended.

The court *a quo* found this approach to be an unfair labour practice.[204] The LAC decided to the contrary and found the approach to be within the context of operational requirements and it accepted the employer's reasoning regarding keeping the respondent for a longer period under unpaid leave. The reasoning was that the employer did so because it was still awaiting an economic upturn before re-calling the employee to duty.

Van Jaarsveld and Van Eck[205] have noted that the employer must also, as a measure of alternative, put on hold the introduction of new mechanisation process. Although this seems *prima facie* contradictory to the primary purpose of DOR, the employer ought to avoid introducing new forms of mechanisation in the business, particularly when it has the effect of leaving many posts redundant and employees

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201 *Thembane v Revertex Chemicals (Pty) Ltd op.cit* note 196.
202 *CWIU and others v Sasol Fibres (Pty) Ltd (a division of the Sasol Group* (1999) 20 *ILJ* 1222 (LC).
203 (1996)17 *ILJ* 1118 (LAC).
204 *ND Engineering (Pty) Ltd v Naicker ibid* note 201 at 1119D.
205 Van Jaarsveld and Van Eck *op.cit* note 138 at 183.

retrenched. It needs be noted that one among various factors that lead to employees being retrenched for operational requirements is the introduction of new machinery which is known a 'mechanical reasons'. Be that as it may, the need for postponing the introduction of new forms of mechanisation should mostly arise when and if the employer's main reason to dismiss under operation requirements was not based solely on the introduction of new machinery or otherwise mechanical reasons. If the reason for dismissing the employees is solely based on the introduction of new machinery, it then becomes pragmatically impossible to postpone any mechanisation process.[206]

During consultation times, the employer ought to disclose to the consulting parties the time during which the proposed dismissals are to occur. In an event parties seek an extension of time for their dismissals, the employer must grant them the extension provided the request is qualified by good reasons and reasonable under the circumstances.[207]

In the case *of Forecourt Express (Pty) Ltd v SATAWU and Others,*[208] Mlambo A.J.A (as he then was) in a minority judgment held that the dismissal of employees who belonged to a company (herein Fauna) that had been sold to the Forecourt Express were unfair owing to the fact that Fourcourt Express had just retrenched Fauna's former employees regardless of their request to defer retrenchments. The defendant company refused to defer retrenchments and thus failed to explore and implement the use of alternative means of reducing the adverse effects of dismissals. The judge found that the failure to defer retrenchments was unfair and the dismissals were not as a measure of last resort.

Le Roux[209] opines that the majority judgment in the *Forecourt Express* case is a reflection of the court's belief that the employer's decision to dismiss should not be doubted as he knows what is in the best interest of his business. He has further opined that the minority judgment carries a view that the dismissal was operationally justified, but however occurred prematurely. According to him, it is intriguing to

206 Van Jaarsveld and Van Eck *op.cit* note 138 at 204.
207 Grogan *op.cit* note 8 at 233-234.
208 [2007] 2 *BLLR* 101 (LAC).
209 Le Roux 2012 *CLL* 57.

imagine the court's reaction had the employer deferred the dismissal for a period of six months and still ultimately dismiss employees for the reasons advanced. Another alternative known as 'bumping' was dealt with excessively in the case of *Porter Motors Group v Karachi*[210] when the court found that the dismissal of an employee was unfair taking into account the period of service the employee had with the business.

Bumping entails "the replacement of a shorter serving employee by a longer serving employee".[211] In *casu*, a long serving employee had been downgraded with a salary reduction of R 800 per month. He, however, sought to be replaced by a short serving employee with a reduction in the latter's salary by R 200. The employer refused this request and dismissed him anyway. The LA and LAC both found the dismissal to be unfair based on the failure by the employer to consider the alternative of bumping. The LAC laid out the principles to consider when contemplating on taking 'bumping' as an alternative measure. It noted that an employer must consult over the implementation of bumping.[212]

Bumping concerns the criteria of last-in-first-out. Horizontal bumping[213] should be preferred over vertical bumping.[214] It should not be a disruptive process to the employer. It can be geographically restricted and the workforce to be restricted should be motivated by the careers and flexibility and efficiency of employees. Necessary skills must be retained when implementing bumping and lastly but not least, it should occur only where the employee concerned accedes to the down-grading in their work and status.[215]

It is appropriate to mention that over and above all aforementioned factors, the employer ought to consider as alternative measures, he or she still has the liberty to

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210 [2002] 23 *ILJ* 348 (LAC).

211 Dismissal: Operational Requirements: Bumping http://catra.co.za/Downloads/Bumping.pdf 1. See also *Porter Motors Group v Karachi ibid* note 209 at 6.

212 *Porter Motors Group v Karachi ibid* note 209 at 16.

213 Horizontal bumping entails the "bumping of an employee into a similar status, condition of employment, wage and so on" Retrenchments and "Bumping" Full Article www.hrfuture.net/legal-opinion/retrenchments-and-bumping-full-article.php?itemid=718.

214 Vertical bumping refers to the bumping of an employee into a lower status , condition of employment, wage etc. Retrenchments and "Bumping" *ibid* note 212.

215 *Porter Motors Group v Karachi op.cit* note 209 at 16.

consider any other measure which she or he may deem appropriate in mitigating the dire effects of dismissals.[216] In the *Naicker*[217] case, the court had, however, accepted that employees, whether short or long serving, may compete in a newly restructured business. This was justified to be a manner of affording them an opportunity to keep abreast with the new technology and systems. It is evident that there are various measures an employer must implement as alternatives based on DOR.

The courts have also been abreast with the ever-changing conditions of the business world, particularly economic imperatives. It has been observed above, through case law, that despite all attempts and efforts to put into writing the process and criteria which must be followed before, during and after dismissing employees for operational requirements, many employers still fumble with the entire process.

3.4 A fair reason or not: second-guessing the employer's decision

The LC and LAC have on various occasions had the opportunity of listening to differing views from various litigants and have come to terms with the fact that the role of the courts in DOR cases is not to approve or disapprove the reasons advanced by the employer in proposing the dismissals. The role of the courts is just to assess if the decisions are fair and justifiable in the circumstances of each case.[218] Various courts have opined and concluded differently while justifying the findings regarding substantive fairness in DOR cases.

The view of the court in *SA Clothing and Textile Workers Union and others v Discreto (a division of Trump and Springbok Holdings*[219] is that the role of the court is not to "second-guess" the decision of the employer for dismissing employees but to see whether the decision is "genuine and not merely a sham". Previously, that is before 1995, our courts were merely concerned with establishing a *bona fide* reason to dismiss in dismissal cases when they had to scrutinize the dismissal process.

216 *See NEHAWU v University of Pretoria* 2002 *ILJ* 740 (LC).
217 *ND Engineering (Pty) Ltd v Naicker op.cit* note 201 at 731A-B.
218 Basson *op.cit* note 9 at 159.
219 (1998) 19 *ILJ* 1451 (LAC).

After the inception of the LRA in 1995, courts deviated completely from allowing dismissals on a mere justification of them being *bona fide.*[220] They now focus on fairness as a one legged test towards accepting or otherwise rejecting the reason of the employer to dismiss. By necessary implication, a court must not run the business of the employer but see to it that the dismissals of employees are fair. In addition, to see to it that the dismissals are not *mala fide* and are not coupled with ulterior motives.

In *Benjamin and others v Plessey Tellumat SA Ltd,*[221] the view of the court was that:

> ...even if the economic rationale for the retrenchment...was due to mismanagement, the court will generally still regard it as a legitimate basis for dismissal for operational requirements. After all, it is generally inconceivable that a company will mismanage itself with a view to getting rid of its employees. The *bona fides* of such employers are accordingly not suspect unless there is clear evidence of such ulterior motives.[222]

In *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union,*[223] the court stated that:

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> The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched... Viewed accordingly, the test becomes less differential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.[224]

However, the same court adopted a different approach and saw a need to thoroughly scrutinize the employer's decision of dismissing employees for operational requirements in *Chemical Workers Industrial Union and others v Algorax (Pty) Ltd.*[225] In *casu* the court, per Zondo JP (as he then was), had to consider whether the lack

220 Van Niekerk *et al Law @ Work* 271.
221 [1998] 3 *BLLR* 272 (LC).
222 *Benjamin and others v Plessey Tellumat SA Ltd op.cit* note 143 at 4.
223 (2001) 22 *ILJ* 2264 (LAC).
224 *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union ibid* note 221 at 20.
225 (2003) 24 *ILJ* 1917 (LAC).

of a fair reason based on the employer's operational requirements rendered the dismissal unfair. The employees were dismissed due to their refusal to work the rotating shift system. The court then enquired about the importance of the introduction of a new system which led to the dismissal of many employees who refused to work according to it. After considering all the evidence before it, the court held that the employer could have tried to solve his/her problems without the need to retrench a high number of employees. It held that the employer could have simply employed permanent employees.[226]

It further held that it was peculiar for the employer to not employ the natural and obvious solution to the problems it sought to address. The court then came to a conclusion that if it can examine the employer's decision for what is called a "non-fault dismissal" and establish that there were other avenues the employer could have exhausted rather than bravely heading for DOR, it could impose such alternatives on the employer as that would preserve jobs and ensure that DOR was a measure of last resort.

Basson *et al*[227] on the other hand has noted that in circumstances like those reflected by all aforementioned cases, the employer was faced with an obligation to satisfy the court that the dismissal was the only appropriate option left for him after exploring all possible alternatives to dismissals. The *Algorax* case reflects a significant transition from the previous restrictive approach which was followed. It reflects a more vigorous scrutiny by the courts before accepting the employer's justification. It also reflects a possible flexible involvement by our courts in DOR cases, the object of which contribute towards an effective administration of justice. Various cases tend to support the *Algorax* decision actively coupled with various justifications.[228]

On the other hand, Grogan and Basson's views concerning the LC and LAC's approach on DOR cases are entirely different and contradictory. According to these

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226 *Chemical Workers Industrial Union and others v Algorax (Pty) Ltd ibid* note 223 at 62-77.
227 Basson *op.cit* note 9 at 160.
228 See for example, *NEHAWU v The Agricultural Research Council* [2002] 9 *BLLR* 1081 (LC); *Decision Surveys International (Pty) Ltd v Dlamini and others* [1999] 5 *BLLR* 413 (LAC) 27; *SA Chemical Workers Union and others v Afrox Ltd op.cit* note 165.

learned writers, changes and developments in the business are exclusive to the knowledge of the management whose purpose and determination is to ensure business efficiency. Employees, by and large, tend to find such changes unfavourable, as they are of the belief that business efficiency is mainly implemented to their detriment.

Employees usually do not satisfactorily welcome decisions that are threatening towards their job security even if they are for the good of the business.[229] Grogan disagrees with the role of second guessing the employer's decision by the courts as he believes that the management of the business are in a better and appropriate state to effect necessary changes and developments in the business.

This scholar has noted lucidly that:

> The task of the court is to balance the interest of the employers and employees in a manner that encourages employers not to resort to retrenchments lightly, and yet allows them sufficient latitude to restructure, adjourn production, and determine staffing levels according to the vagaries of the market and the economic environment.[230]

Given all these reflections and perceptions by judges and writers, one can now necessarily infer that the LA and LAC are not hesitant to enquire into or scrutinize the employer's decision to dismiss for operational requirements with a high level of scepticism and where possible and compellable, impose an alternative outcome that will preserve jobs and be fair to both employer and employee. From the authorities discussed above, it is now clear that the function of the court is not to second-guess the decision of the employer in DOR cases[231], however, a court can intervene as far as finding the decision for the dismissal to be unfair (on the basis of the employer having not explored other alternatives) and subsequently imposing a more appropriate option on the employer.[232]

229 Grogan J *Dismissals* (Juta Cape Town 2013) 340.
230 Grogan *ibid* note 227 at 341.
231 *SA Clothing and Textile Workers Union and others v Discreto op.cit* note 217.
232 *Chemical Workers Industrial Union and others v Algorax op.cit* note 223.

3.5 Complexity vis-à-vis DOR and strike action

It is unlawful for employers to dismiss employees in order to compel them to accept a demand in respect of any matter of mutual interest.[233] As a norm, employees in South Africa usually resort to strike in order for their employers to recognise and accede to their demands regarding matters of mutual interest. The *LRA* therefore precludes employers from dismissing these employees due to disputes in the labour relations. However, the *LRA* on the other hand permits employers to implement DOR on employees who are on strike.[234]

On the face of it, these two provisions of the *LRA* seem controversial as it is cumbersome to dismiss employees particularly when they are embarking on a protected strike. As a norm, employer must consult with the person whom the collective agreement requires consultation with prior to the dismissal.[235] Section 67(5) encourages an employer to 'fairly' dismiss employees based on operational requirements where such employees are engaged in a protected strike. Allowing the dismissals of employees who are engaged in a protected strike defeats the purpose of a strike in a collective bargaining process.[236]

In *Black Allied Workers Union and Others v Prestige Hotel CC t/a Blue Waters Hotel*,[237] the court held that the strike would have little or no purpose if the employer against whom it was directed were to dismiss striking employees. This would be a great impairment to the rights of strikers and as part and parcel of collective bargaining. After its inception, the *LRA* re-emphasised the importance of not having to dismiss employees who were participating in a protected strike. It renders it automatically unfair to dismiss an employee for participating in or indicating an intention to participate in or even supporting a protected strike.[238]

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233 Section 187(1) (c) of the LRA 66 of 1995.
234 This is reflected under section 189 of the *LRA*.
235 Section 189(1) (a) requires that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult any person whom the employer is required to consult in terms of a collective agreement.
236 Bassoon *op.cit* note 9 at 327.
237 (1993) 14 *ILJ* 963 (LAC) 972.
238 Section 187(1) (a).

Furthermore, the employer may not dismiss an employee for embarking on a protected strike or on any act in support of a protected strike.[239] However, just like any right in the Bill of Rights, the right not to be dismissed during strike is not unlimited.[240] Two circumstances permit the dismissal of employees who are on a protected strike. The first is when employees have committed misconduct while embarking on a strike and the second is when an employer needs to restructure his or her business.[241]

Basson *et al.*[242] explains that the primary purpose of a strike is to economically pressurize the employer so that he can accede to the terms of striking employees. Be that as it may, the *LRA* on the other hand provides that a strike must not have adverse effects on the "economic viability" of the employer and, by so saying it allows an employer to dismiss striking employees on operational requirements. According to these learned writers, this provision is in itself a disputable area because it may unduly encroach on the right to strike if it is used rigidly.

Courts are obliged to consider complex factors when deciding whether there was indeed DOR during or after strike or the dismissals were just a fallacy and a disguise. Such factors include the harm suffered by the employer, the degree of such harm he or she should bear before he or she can dismiss based on operational reasons. A delicate balance between business efficiency and employees' right to strike should also be considered by the court in such cases. There is no hard and fast test that can be used in deciding these cases.[243]

However, in *National Union of Metalworkers of South Africa v Vetsak Co-operation Ltd and Others*,[244] the court held that the test could not be an enumeration of rules due to its flexibility. Fairness should prevail over lawfulness of the dismissal or strike. However, this did not declare unlawful conducts of parties or an unlawful strike inappropriate. In the case of *Northern Cape Allied Workers Union obo Sethlogelo*

239 Section 67(4).
240 *Basson op.cit note* 9 at 328.
241 Basson *op.cit* note 9 at 238.
242 Basson *op.cit* note 9 at 329.
243 Basson *op.cit* note 9 at 240.
244 (1996) 17 *ILJ* 455 (A) 459-461.

and Others v Commission for Conciliation, Mediation and Arbitration and Others,[245] the court was convinced that the company had dismissed striking employees due to operational requirements occasioned by a prolonged strike and it subsequently found it to be substantively fair.

In *casu*, the prolonged strike by employees had dire consequences on the financial well-being of the company. The company and union attempted to reach a settlement regarding matters of mutual interest which prompted the strike, however without success. They therefore started the consultation process following the proposal to dismiss for operational requirements. The company eventually effected the dismissals. The LC was then requested to rule as to whether the procedure followed was fair and whether there were indeed operational reasons which prompted the dismissals.

The union alleged that the dismissals were unfair due to the fact that they occurred during strike action and in contravention of section 187 of the LRA. The company however rebutted the argument and managed to persuade the court that the main reason why it dismissed those employees who embarked on a strike was because of the financial hardships it had endured which it could not persistently keep up with. Therefore as the court found, the "union had elicited insufficient evidence to arrive at the conclusion that the dismissal of the employees was because of their participation in the protected strike".[246] The union herein was unable to discharge the onus of proof in showing that the dismissal was substantively unfair.

3.6 DOR and affirmative action

The Code of Good Practice on Operational Requirements, as one of the key instruments regulating DOR, requires that the selection criteria of employees to be dismissed for operational requirements must be fair and non-discriminatory. Any selection based on any or more of the prohibited grounds of discrimination[247] is

245 (2009) 30 *ILJ* 1299 LC 1301D.

246 *Northern Cape Allied Workers Union obo Sethlogelo & Others v CCMA & Others ibid note* 243 at 1301A-C.

247 As provided for by section 9 of the Constitution, 1996 and section 6 of the *Employment Equity Act* 55 of 1998.

prima facie unfair and the dismissal thereunder also unfair.[248] It pronounces that selecting employees based on their length of service, skills and qualifications is generally an accepted fair discrimination. The Last-In-First-Out (LIFO) principle also qualifies as an acceptable ground. This principle, however, will not stand where it conflicts with the affirmative action measures adopted by the employer.[249] According to Burger[250], affirmative action entails:

> [T]he preference of one group or class over another [and] [t]he initial purpose of affirmative action in all jurisdictions is twofold: to compensate for past discrimination whilst also counteracting current discrimination or inequality.[251]

Be that as it may, affirmative action measures[252] are meant to ensure equality despite diversity in the workplace. During DOR the employer has restricted discretion in selecting employees to be dismissed using the criteria aforementioned and such conduct can only stand if it is of a significant value to the business operations.[253] For the purpose of effecting and introducing a new policy within the business, it is acceptable to retrench employees, demote them, and refuse to renew their contracts or perform any other conduct that has the impact of altering their conditions of employment. The employer may, during DOR, draw up selection criteria that have the effect of discriminating against employees based on their race or gender. This can happen as an initiative of accomplishing an affirmative action objective.[254]

The rationalisation of the workforce by the employer, which is founded on affirmative action, has to comply with the said affirmative action objectives.[255] It is therefore permissible for the employer to discriminate against employees on substantive merits and dismiss them for operational requirements for the purpose of effecting and implementing an affirmative action programme.[256] This permission goes to the

248 Item 8 of the CGPOP.
249 Item 9 of the CGPOR.
250 Burger *Without Prejudice*.
251 Burger *ibid* note 248 at 54.
252 Section 55 of 1998; Item 8 of the CGPOP; Item 9 of the CGPOR; Burger explains affirmative action measures as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer".
253 Item 9 of the CGPOR.
254 Van Jaarsveld and Van Eck *op.cit* note 138 at 184.
255 *Plaaslike Oorgangsraad van Bronkhorstspruit v Senekal* 2001 *ILJ* 602 (SCA).
256 *Dudley v City of Cape Town* 2004 *ILJ* 305 (LAC).

core of one of the purposes of the EEA, which it to strive to "achieve a diverse workforce broadly representative of our people".[257] However, the question that remains in one's mind is to what extent can an employer implement its affirmative action plan and promote diversity in the workplace, in pursuit of meeting his operational needs? It is then submitted that in context of the above purpose of the EEA, an affirmative action plan can also qualify to be one of the similar needs of the employer.

Some legal scholars insist that it is controversial to submit that an employer can dismiss employees for implementing affirmative action measures.[258] Their argument is premised on the provision of the LRA under section 187(1) (f) which provides that it will be automatically unfair for the employer to dismiss employees after unfairly discriminating against them on grounds listed in section 6 of the EEA and section 9 of the Constitution. The case of *McInnes v Technikon Natal*,[259] provides a supporting view to the submission that dismissals emanating from the implementation of affirmative action are substantively and automatically unfair in term of section 187 of the LRA.

However the *Dudley v City of Cape Town*,[260] case presented a *prima facie* contradictory view to the views advanced by Van Jaarsveld and Van Eck as well as the *McInnes* case. When an employer dismisses employees to make way for affirmative action as per the *Dudley* case, it must first ensure that the employee who replaces the other is a 'suitably qualified person'[261] to be able to perform the duties of the person against whom he is appointed or the obligations of the post.

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257 It was also deliberated upon in the case of *Department of Correctional Services v Van Vuuren* 1999 *ILJ* 2297 (LAC).

258 Van Jaarsveld and Van Eck *op.cit* note 138 at 300.

259 [2000] 6 *BLLR* 701 (LC) 28.

260 Dudley v City of Cape Town *op.cit* note 254.

261 Suitably qualified person is in term of section 20(3) and (4) of the EEA classified as "a person [who suitably qualifies] for a job as a result of any one of, or any combination of that person's formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable time, the ability to do the job. When determining whether a person is suitably qualified for a job, an employer must review all the factors listed [above]; and determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors".

Furthermore, all affirmative action programmes undertaken by the employer must be "fair and just".[262] These prerequisites are, however, not exhaustive; the employer must ensure that he complies with all statutory requirements. Notwithstanding the differing perceptions by various scholars and judges concerning the issue of dismissing employees for operational requirements in order to create a leeway for persons from designated groups under the notion of affirmative action sector, the current position provides that it is permissible to replace an employee by another on the basis of implementing an affirmative action programme.

It is thus submitted that an affirmative action programme can be considered as one of the 'similar needs of the employer' and the implementation thereof can be regarded as a fair reason to affirmatively dismiss certain employees in order to hire others. This approach should however only be appropriate if the person for whom the other is dismissed is a suitably qualified person as per the definition in section 20(3) and (4) of the EEA.

The complexity regarding this type of dismissal is founded in the contentions raised by the *Dydley* and *McInnes* cases as well as the views held by Van Jaarsveld and Van Eck. Both the 'similar needs' and "affirmative action" dismissals for operational requirements are problematic in their nature. One should not avoid the impact that the introduction of affirmative action programmes has had in the business world and, in many facets. This entails the need for the employer to restructure his business in order to implement the affirmative action measures.

3.7 Summary

This chapter sought to trace and discuss the substantive aspects of DOR against the inherent challenges that are burdensome to the practice. The reflections and perceptions of various learned commentators and case law were also integrated into the chapter. The main strand of thought vis-à-vis this chapter was the compliance or lack thereof by employers with the laws regarding the DOR.

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262 *PSASA v Minister of Justice* 1997 *ILJ* 241 (T) 242B.

What then follows below are the broader findings the chapter has articulated on. It has been seen through case law and through reflections and perceptions by various authors that substantive fairness plays a very important role in the whole dismissal process. The employer ought to have a fair and valid reason for dismissing employees for operational requirements.

The substantive value of this type of dismissal lies in the economic, technological, structural reasons and the 'similar needs of the employer. Each of the above components carries a certain degree of value towards building-up and complimenting the concept of operational requirements. From these components it is evident that 'similar needs' as the only complex and thorny aspect allows a leak of many extrinsic factors which might ultimately be ripped-off from the whole equation of operational requirements by the courts.

It is also evident from the study that DOR cases are controversial when compared to other types of dismissals. The role of the courts in DOR case, as determined by the LC and LAC, is thus not to second-guess the decision of the employer or run his business sitting at the court's bench, but to determine whether the employer against whom the dispute is lodged has indeed followed the prescribed procedure and implemented the decision accordingly, fairly and rationally.

On the other hand, as far as industrial actions are concerned, the implementation of this type of dismissal during or after industrial action is assessed by the courts on a very high note of scepticism as it is not supposed to be accepted and upheld on face value. This also speaks to the implementation of DOR in order to put in action the affirmative action programmes that the employer has adopted. Various views from the LC and LAC as well as the IC (as it then was) are that DOR is a 'no-fault' dismissal and therefore one court cannot wholly adopt a precedent created by a another court. The nature of this type of dismissal makes it complex and problematic to create a precedent, especially, because each case is decided on its own merits.

Litigation regarding fairness or otherwise of the DOR (the reason for which the dismissal initially emerged) has been and is still superfluous in the courts. It therefore appears that employers embark on a journey of dismissing employees for

operational requirements without having a proper plan of action and this leads to employees creating a pool of litigation as far as DOR is concerned. The significance of substantive fairness on the whole dismissal process cannot be over-emphasised. The courts have been adamant to declare dismissals unfair owing to even a mere failure by the employer to implement alternative measures. This boils down to the seriousness of fairness in dismissal cases, the object of which is to ensure economic and social stability between employer and employee.

What follows from these findings now is a chapter on procedural fairness and its inherent challenges vis-à-vis DOR. This is due to the fact that for the proper implementation and assurance of substantive fairness, there has to be a proper and valid procedure. All the reasons advanced as being the 'operational reasons' of the employer for cutting down the workforce must be occasioned by the procedure that is fair and allowed in terms of the law.

Chapter Four: Procedural fairness and the inherent challenges

4.1 Introduction

This chapter seeks to interrogate the challenges associated with the procedural aspects governing DOR, with specific reference to case law and perceptions by various learned commentators. The LRA is explicit about the procedure to follow when an employer has established the substantive ground for which he or she contemplates and proposes to dismiss the employees.[263] However, over the years,

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263 Section 189 provides that: (1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult- (a) any person whom the employer is required to consult in terms of a collective agreement; (b) if there is no collective agreement that requires consultation – (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and (ii) any registered trade union whose members are likely to be affected by the proposed dismissals; (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.
(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.
(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.
(4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3). (b) In any dispute in which in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.
(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4), as well as any other matter relating to the proposed dismissals.
(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing. (b) If any representation is made in writing, the employer must respond in writing.
(7) The employer must select the employees to be dismissed according to selection criteria- (a) that have been agreed to by the consulting parties; or (b) if no criteria have been agreed, criteria that are fair and objective.

challenges have emerged with respect to this dismissal. These challenges have become increasingly intricate and have created a torrent of litigation, some of which are from cranks and busybodies while some are relatively rationalised and comprehensible. On that premise, procedural fairness refers to the establishment of substantive grounds upon which the employer dismisses its employees. It does not operate on a single basis but in finding whether the reason for the dismissal is that which the employer avers and if so, what are the best possible ways of ensuring that the dismissal does not leave dire results. It further strives to make the dismissals' aftermaths better and endurable.[264]

4.2 The onerous nature of section 189

The most problematic and controversial area regarding DOR, owing to the magnitude of cases the courts are constantly faced with as far as this practice is concerned, has proved to be on procedural merits. The root of this problem seems to emanate from the fact that many employers wholly or partially disregard the procedures that they are supposed to follow when implementing DOR. Technically, the crux of this problem is found in the context of section 189 of the LRA, hence it is regarded as the cornerstone of DOR. This provision, predominantly, requires consultation.[265]

Basson *et al*[266] have noted that the challenges associated with this type of dismissal emerge from the fact that it does not have a watertight division between procedural and substantive aspects, as it is the case with other types of dismissals.[267] In that respect, it has been observed in the previous chapter in the case of *SA Chemical Workers Union v Afrox Ltd*[268] that the court opined that DOR should not be as a measure of last resort.

That decision, however, did not only depart from other courts' decisions on the aspect of the dismissal being the last resort, but it also differed from those decisions

264 Camagu *op.cit* note 137 at 13.
265 Gandidzee 2007 Law, Democracy and Development 83.
266 Basson *op.cit* note 9.
267 Basson *op.cit* note 9 at 160-161.
268 *SACWU v Afrox op.cit* note 153 at 1720C-E.

on the precise nature or gamut of consultation process, which is the key object of procedural fairness. The court held that the employer must prove that there was fairness throughout the process of dismissal and that the evidence would show that the dismissals occurred as a result of that employer's operational requirements. This approach has a bearing on the procedure as set out by section 189 in that the court, in *casu,* has lucidly provided that as long as the employer could prove operational requirements, the substantive merits for the dismissal will be fair, regardless of the employer's disregard of the mandate of finding alternatives to dismissal.

Another complexity has been brought by the decision in *Mamabolo and Others v Manchu Consulting CC,*[269] wherein it was noted that the court should not find the procedure to not have been followed merely because it was of the view that there existed an alternative other than DOR which the employer should have imposed. At face value, the complexity and controversy regarding procedure emanate from the different approaches that the courts follow when deciding various cases.

Owing to the fact that DOR is a 'no-fault' dismissal, it is imperative for the courts to consider each case based on its unique circumstances. In some instances, it then becomes difficult and unrealistic to follow the rigid procedure as set by section 189, thus allowing the courts to relax the rules but in the process creating further uncertainties in the law.

4.3 Characteristics of procedural fairness; the who, what, when and how approach

The purpose of section 189 was outlined in lucid terms by the LAC in *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union*[270] where in it held that:

> [T]he ultimate purpose of s189 is thus to achieve a joint consensus seeking process. In this manner the section implicitly recognises the employer's right to dismiss for operational requirements, but then only if a fair process aimed at achieving consensus has failed...The important implication of this is that a mechanical, checklist' kind of approach to determine whether s189 has been complied with is

269 (1999) 20 *ILJ* 1826 (LC).
270 (1999) 20 *ILJ* 89 (LAC).

> inappropriate. The proper approach is to ascertain whether the purpose of the selection (the occurrence of a joint consensus seeking process) has been achieved...If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving the purpose must be sought. If the employer alone frustrated the process in some way or another, there can be no compliance. If the employer was not at fault and did all it could, from its inside, to achieve the kind of consultation referred to above, the purpose of the section would also have been achieved.[271]

It is now appropriate that the various constituents and characteristics of procedural fairness, as they unfold, are dealt with in order to provide a comprehensive analysis of the core and supplementary purposes of section 189.

4.3.1 Who must partake in consultation?

The crux of consultation is to attempt to bring to the table all available measures to avoid dismissals or at least find mitigating factors to curb the dire aftermath of dismissals. On that note, the employer, being the person for whom the dismissal are implemented and having more economic power, must ensure that once he has contemplated and proposed dismissing employees, he takes efforts to consult with any person who he ought to consult with as per the collective agreement.[272]

In the case of *Mohamedy's v Commercial Catering and Allied Workers' Union* of SA,[273] the LAC held that although the employer takes the decision to retrench in principle, he must consult with the employees concerned prior to implementing the decision. It further held that there are various reasons for that, underlining that, the employee should be given the chance to persuade the employer that the dismissal is unnecessary and propose alternative measures such as reduction in wages, short time, demotion, etc.

Consultation on its own denotes the process whereby consulting parties jointly seek solutions to the problems at hand and try to be *ad idem* about issues they are

271 *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* 96-97.
272 S189(1) (a) of the LRA (1) provides that; "when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult any person whom the employer is required to consult in terms of a collective agreement".
273 (1993) 2 LCD 34.

consulting over.[274] Secondly, if there is no agreement in that regard, the employer must consult with both the workplace forum which is existent in the workplace and a registered trade union whose members are to be affected.[275] In an instance where there is no workplace forum, the employer must consult with any registered trade union and consultation must be with employees affected or their nominated representatives.[276] The court in *Metshe v Public and Allied Workers Union of South Africa*,[277] made reference to the decision in *Atlantis Diesel Engines (Pty) Ltd v NUMSA*,[278] and explicated that:

> Consultation provides employees or their union(s) with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or, if such need is accepted, the extent and implication of the retrenchment process. It satisfies principle because it gives effect to the desire of employees who may be affected to be heard, and helps serve the underlying policy of the Act, to avoid or at least minimise industrial conflict.[279]

The purpose of holding consultation with the parties referred to in the LRA has been overemphasised by the courts. Consultation has to be meaningful and conducted with relevant parties. This underlines the need for the employer to consult with the employees or any party whose primary concern is to represent the employees. Other workers such as independent contractors and so on are therefore excluded.

4.3.2 What must be consulted upon?

The consulting parties must, while fulfilling and promoting the core purpose of consultation, consult over appropriate measures to adopt in order to avoid or minimise the number of, alter the timing of, and mitigate the adverse effects of the dismissals. Additionally, they must agree on the method for selecting employees to be dismissed.[280] This aspect refers to the selection criteria the employer must follow

274 Van Jaarsveld and Van Eck *op.cit* note 138 at 188.
275 S189(1) (b) (i) & (ii) provides that; "if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and any registered trade union whose members are likely to be affected by the proposed dismissals".
276 S189(1) (c) & (d).
277 (2011) 32 ILJ 2984 (LC).
278 (1995) 3 SA 22 (A); (1994) 15 ILJ 1247 (A).
279 *Metshe v Public and Allied Workers Union of South Africa op.cit* note 272 at 11.
280 S189(2) (a) & (b) of the LRA.

when dismissing employees. Not only do these two aspects warrant consultation, but the severance packages that will be allocated to dismissed employees is also a topic which needs to be consulted on. The purpose of consulting about measures to adopt in order to avoid dismissals is basically to access the decision or proposal of the employer to dismiss and then suggest all possible solutions in avoiding the dismissals.[281]

This procedure should become the main aim and should enjoy pride of place as being the first consideration. If it is not pragmatically possible to implement the proposed measures of avoiding dismissals, such proposed measures should at least be regarded as a factor attempting to minimise the number of employees to be dismissed. Furthermore, what is of significance is that it should be the intention of the employer to ensure effective consultation by notifying employees and other interested parties about the proposal to dismiss and the reasons behind such proposal. The employer must provide the latter with all information necessary for consultation, while giving them enough chance to reflect on the proposal.

Alternatively, the employees may be granted the right to provide measures to avoid dismissals, and the employer ought to respond to them by giving reasons for disagreeing with each alternative.[282] Steenkamp J has also emphasised the meaning of consultation *in De Klerk v Project Freight Group CC.*[283] In *casu*, the employee requested to be provided with information prior to the implementation of the decision to dismiss him for operational requirements. This information related to, *inter alia*, the financial statements of the business. The employer however refused to do so and reasoned that the information was not pertinent to the applicant's dismissal. The judge explicated that:

> It cannot be said that the parties are engaged in a meaningful joint problem-solving exercise when the employer simply refuses to provide information that may be relevant.[284]

281 Grogan *op.cit* note 8 at 232.
282 *Maenetje 2000 ILJ 1534 in Le Roux* 1998 *CLL* 107.
283 (C647/2014) [2014] *ZALCCT* 44 (14 August 2014).
284 *De Klerk v Project Freight Group CC ibid* note 279 at 25.

Furthermore, the need to alter the timing of dismissals is also a legitimate subject over which consultation must be held. These measures include, but not limited to, the request by consulting parties for the employer to defer the period of dismissals. Be that as it may, the said measures must be objective and reasonable and not merely a motive to unreasonably delay the dismissals.[285]

In *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union and another,*[286] the court held that it would not regard an unmotivated proposal requiring the employer to defer the dismissal. All the aforementioned consultation topics should form the pivot of the consultation process. The courts have in various instances managed to clarify some of the loopholes and uncertainties created in the midst of trying to consult and reach a joint consensus.

4.3.3 How should consultation unfold?

It is incumbent upon the employer to furnish the consulting parties with a written notice inviting the latter to partake in the consultation. At this stage, the employer must disclose all appropriate information to the consulting parties. The information pertains to, but not restricted to, the reasons for the proposed dismissals, other measures that the employer considered prior to proposing dismissals and the reasons behind rejecting them, the number of employees who are likely to be dismissed as well as their job categories.

It further refers to the selection criteria, the period during which the dismissals are to be implemented, the proposed severance packages, the aid that the employer will offer to dismissed employees, the prospects of future re-employment for those employees, the number of employees employed and the number of employees who were dismissed for reasons based on operational requirements in the past twelve months.[287] In support of the aforementioned factors the material facts in the case of

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285 An example is seen in the case of *National Union of Mineworkers v Anglo American Platinum Ltd and Others* [2013] 12 BLLR 1253 (LC) wherein the learned Van Niekerk J held that the trade union had frustrated the consultation process with the intention to delay the dismissals. Its application was therefore dismissed.

286 (2006) 27 *ILJ* 2537 (LAC).

287 S189(3) of the LRA; see also *Malatji v Clover Cargo International* (2001) 22 *ILJ* 188 (LC) 24 and *Louw v Micor Shipping* [1999] 12 *BLLR* 1314 (LC).

Malatji v Clover Cargo International[288] are instructive. In *casu*, the applicant employee was dismissed for operational requirements due to the financial difficulties that the respondent employer were undergoing. The former alleged before the LC that he was not consulted, but was merely called to a meeting where he was furnished with a letter of dismissal and told that the company was experiencing financial difficulties, therefore, he had to be dismissed. According to the company, the LIFO principle was used to select the applicant as he was the last person to be employed in the division. In response to that, the learned Zilwa, A.J, articulated that:

> In my view, the failure to give timeous notice to enable or allow the applicant to ponder the situation and come up with suggestions on alternatives was a fatal one. The whole structure of s 189 is that there should be a notification period which enables those to be consulted to prepare and be ready to meaningfully take part in the discussions envisaged in that section. The section envisages meaningful participation. There can only be meaningful participation if those consulted have had enough time to ponder on the reasons provided as well as to prepare themselves to ask for information and to make informed suggestions. An employee who does not get the benefit of a notification period is not in a position to meaningfully take part in a proper consultation process as he or she is given no notice and he or she attends that meeting unprepared.[289]

The judge held that the consultation over severance packages should be the last item in the on-going consultation between the parties after establishing that retrenchment is the only resort to opt for in order to save the business. Further that, severance pay is not an alternative to retrenchment but merely a way of sweetening the bitter pill of retrenchment. In Zilwa AJ's view, once the employer discusses severance packages during the initial stage of consultation, it should be inferred that he had already taken the decision to dismiss and therefore consultation should be regarded as a *fait accompli*.[290]

The learned judge held further that it was not the role of the courts to second-guess the decision of the employer to dismiss, but the determination on the rationality of the decision having regard to the matters consulted upon before retrenchment, could be made by the courts. He came to the conclusion that the employer had not consulted

288 *Malatji v Clover Cargo International ibid* note 285 at 5-6.
289 *Malatji v Clover Cargo International op.cit* note 285 at 27.
290 *Malatji v Clover Cargo International op.cit* note 285 at 28-29.

"exhaustively" and in good faith with the employee and he had already decided to dismiss the employee.[291] It must be noted that in *casu* only the position of the applicant was declared redundant as he was the only employee who was dismissed. The dismissal was thus found to be procedurally and substantively unfair. The case provides a clear and thorough illustration and emphasis on the aspects to be consulted upon.

It further covers the majority of the issues and items the employer must include in his written notice when inviting the other parties to partake in the consultation. It is thus submitted that the view as held by Zilwa A.J. is correct and reaffirms the decisions in several cases including that of *Fry's Metals.*[292] It also places emphasis on the provision of section 189. This case strives to show that consultation should be thorough and meaningful. The consultation should not be a charade or a *fait accompli.*

Procedurally, all possible alternatives must be considered prior to implementing retrenchments and any act to the contrary must be justified by a *bona fide* and fair explanation in that regard. All the items as outlined by section 189(3) must be followed logically in order to avoid mixing issues and consulting over post dismissal measures in the initial stages of consultation. It therefore boils down to this: severance package is not an item to consult over during pre-retrenchment consultation.

Zilwa AJ has emphasised this point and accordingly drew an inference from the *Malatji* case where the employer had already decided to dismiss the applicant before the consultation process. In order to enable meaningful consultation, the employer must allow other consulting parties to request information they might need to efficiently partake in the consultation. It is vital that the disclosure of information be discussed hereafter, as a characteristic of procedural fairness, and to provide a coherent and integrated flow of arguments.

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291 *Malatji v Clover Cargo International op.cit* note 285 at 30, 35.
292 *Fry's Metals (Pty) Ltd v National Union of Metalworkers of South Africa and others op.cit* note 5.

4.3.4 Disclosure of information

> In the retrenchment context, employees or their representatives will obviously be unable to make sensible suggestions about the matters over which the LRA enjoins consultation unless they have sufficient information to appraise or challenge the employer's proposals, or to formulate alternatives.[293]

Accordingly, Mlambo, A.J. (as he then was) has also alluded to this requirement in the case of *National Union of Metalworkers of SA and others v Comark Holdings (Pty) Ltd*[294], and said:

> ...because the employer is always privy to all necessary and relevant information it should not only disclose information which it deems relevant. It should disclose all information requested by the consulted party subject to the limitations already enunciated. To enable employee representatives to fulfil their duty to seek alternatives through meaningful and effective consultation, it is necessary to give them an opportunity to consider not only the information which, in the employer's view, supports the view that no alternatives to retrenchment exist, but also other information which the employer has not considered to be relevant but which might be.[295]

On that premise, section 26 of the LRA provides for the disclosure of information and outlines grounds upon which the said requested information could be declined. The object of the disclosure is to ensure effective and efficient representation of employees by their trade unions and also just and fair dealings between the employer and employees. The purpose of section 16 has been adumbrated and sufficiently emphasised in many decisions of the courts as well as legal scholars.[296]

It is evident from the aforementioned decision by Mlambo AJ and the view of some writers that disclosure of information is an integral part of consultation without which the dismissal for operational requirements can be declared substantively and procedurally unfair. Furthermore, in the recent case of *De Klerk v Project Freight Group CC*,[297] Steenkamp J adopted Mlambo AJ's view as adumbrated in the

293 Grogan *op.cit* note 8 at 235.
294 (1997) 18 *ILJ* 516 (LC).
295 *National Union of Metalworkers of SA and others v Comark Holdings (Pty) Ltd ibid note* at 524D-F.
296 *NUMSA v Atlantis Diesel Engines (Pty) Ltd op.cit* note 292 at pg 644 and 651.
297 *De Klerk v Project Freight Group CC op.cit* note 281.

Comark Holdings case regarding the value and significance that the disclosure of information bears in consultation proceedings. This learned judge shared the same sentiments and reasoning as that of Mlambo AJ without differing in any manner as afore-stated.[298] It is incontrovertible that the main thrust of section 189(3) is to ensure that at the end of the consultation process both employer and employees walk away feeling that justice has been done and having exhausted all possible alternatives to the dismissal. The courts, by and large, focus on whether there existed a reason for the employer to dismiss the employee(s). The courts' focus is constantly maintained by considering the procedural fairness of each dismissal.[299]

One among those cases is the *Comark Holdings* case wherein the court concluded that the conduct of the employer in finalising the decision to dismiss, pending the resolution of a section 16(6) dispute and his failure to provide information as required by both sections 16 and 189(3) rendered the consultation process totally flawed. Further that the employer did not comply with the provisions of section 189. However, the gist of section 16 and 189(3) provisions lies in the complexity inherent in the question as to information needed to be disclosed and which is sufficiently relevant. In an endeavour to respond to this question, the purpose for which the information is sought should then be weighed up against its relevance and sufficiency.[300]

An example can then be in a circumstance where the employer alleges the introduction of new machinery as the reason for the dismissal, he will thus have to provide the consulting parties with all information proving the presence of all machinery so introduced as well as proving the redundancy of the post to be affected. It should be noted that over and above these advances, any information additional to that prescribed by the LRA can only be disclosed by the employer upon request by the consulting parties. Furthermore, disclosure of information not only allows for the parties to seek and invoke alternative measures to dismissal, but also provides a platform for them to determine whether the employer considered alternative remedies prior to proposing dismissals. On that note, the trade union and

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298 *De Klerk v Project Freight Group CC ibid* note 281 at pg 8-9 para 20-25.
299 Roskam and Singh *op.cit* note 29 at 7.
300 Grogan *op.cit* note 8 at 235.

employees should not suggest alternatives that were already considered by the employer.[301] Authority for this supporting view was enunciated in *SACCAWU and Others v Gallo Africas*,[302] wherein it was pointed out in lucid terms that, it will not be unfair for the employer to conclude the retrenchment process alone if the employees and trade union failed or surrendered their right to propose other alternatives during a consensus-seeking process. It must also be noted that the information referred to must be disclosed within a reasonable time. This will assist parties to utilise it meaningfully prior to closure of the consultation stage.[303]

Based on the notion that for every general rule there is an exception, the disclosure of information is also subject to limitations. These limitations refer to the other information that is precluded by the LRA from being disclosed due to its nature and scope. The employer cannot disclose information that is legally privileged; that cannot be disclosed without contravention of a prohibition imposed on the latter by any law or order of any court; that is confidential and, if disclosed, may cause substantial harm to an employee or the employer, or that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.[304]

4.3.5 The cornerstone of procedural fairness: selection criteria

Post the consultation over items prescribed by the LRA and other additional items that consulting parties may bring forth, there is an integral aspect which needs to be measured up against the proposed reasons to dismiss. In other words, the selection of employees to be dismissed is not a subject of the discussion during the first consultation stage. This item must only be the subject of the discussion after it is evident that all consulting parties have reached a deadlock on the methods and means of saving jobs and avoiding dismissal.

Therefore, bringing the discussion of selection criteria into the picture would entail that both the employer, employees or trade union have failed to find alternatives to

301 Gandidze *op.cit* note 263 at 86.
302 (2005) 26 ILJ 2397 (LC).
303 Gandidze *op.cit* note 263 at 87.
304 Section 16(5) of the LRA regarding disclosure of information.

the dismissal. The LRA requires the employer to select employees to be dismissed according to selection criteria that have been agreed upon by the consulting parties or if it is not in place, that which are fair and objective.[305] The Act does not provide an enumeration of what constitute a 'fair and objective criteria'. It only categorises the criteria as 'fair and objective'. The balance is usually sought between business security and business efficiency. The employer will most certainly prefer retaining employees who contribute extensively to the business due to their proficiency, qualifications or performance over their length of service. However, trade unions have shown the desire to prefer the LIFO criterion for selecting employees to be dismissed.[306]

From the case, it is perceptible that the courts do not interfere with the method that the employer uses to retrench employees. They merely seek to determine if the method used was not just another opportunity to deal away with employees for reasons not aligned to the employer's operational requirements. On that premise, the LIFO criterion is *prima facie* easily applied and it does not complicate the process by further engaging and requiring consideration of many other factors, other than retaining employees with a long period of service and discarding those with short period of service.

The employer is not precluded from invoking other criteria such as retaining employees due to their qualifications, productivity, proficiency, and so forth.[307] Another prevailing factor is that the criteria has to either be agreed upon by consulting parties, which then leaves the entire process and discretion to the consulting parties and not to the employer alone. If then the criteria are not agreed upon, that which is fair and objective must be implemented.

In the case of *Oosthuizen v Telkom SA Ltd*,[308] the LAC through Zondo J (as he then was) found the dismissal of the appellant unfair based on the ground that the employer had failed to apply the selection criteria that was fair. This resulted from the fact that during retrenchment, there were vacancies in which the appellant could

305 S189(7) of the LRA.
306 Grogan *op.cit* note 14 at 466.
307 Grogan *op.cit* note 14 at 467.
308 (2007) 28 ILJ 2531 (LAC) 2532A-C.

have been accommodated and for which he applied. The employer could not also explain whether or not the criterion he implemented was fair and objective.[309] Furthermore, the court in *casu* held that the employer generally ought to try and avoid retrenchments as much as possible, especially in circumstances where they could be avoided. It further held that courts should by and large approach disputes regarding selection criteria with closer scrutiny and even though they refrain from imposing fair and objective criteria on employers, they still measure up the need for work security against business efficiency and provide a better method which must be used in selecting employees to be dismissed.

An example is evident in the case of *Neuwenhuis v Group Five Roads and Others*,[310] in which a selection criterion was imposed upon the employer. In *casu*, the company had dismissed the applicant for reasons based on operation requirements. It became evident before the LC that the company failed to consult properly on the selection criteria and the court subsequently found his dismissal to be unfair. It held that seniority across the division of the company, what was in effect bumping, should have been considered for a selection criterion and not just the dismissal of the manager in the division affected by operational requirements.

It has, therefore, already been elaborated on in the preceding chapters that the Code of Good Practice on Operational Requirements also outlines and classifies the 'generally acceptable criteria' of selecting employees. Such criteria include, but not limited to, length of service, proficiency, qualification and LIFO.[311] Bumping[312] is also an acceptable criterion that is notably invoked by many employers as it is adumbrated by case law.[313]

On the other hand, the ILO Recommendation 166,[314] as an international legal instrument, seeks to promote objectivity and condemn subjectivity as far as selecting employees to be dismissed is concerned. The purpose of which is similar to that of

309 *Oosthuizen v Telkom SA Ltd ibid* note 306 at 19 & 23.
310 (2000) 12 *BALR* 1467 (LC) 61.
311 Item 9 Gazette 20254 of 1999.
312 Bumping as noted by Nicholson JA in *Porter Group v Karachi op.cit* note 208 at 6, entails "the replacement of a shorter serving employee by a longer serving one.
313 Levy *Is South African Law for Dismissal based on Operational Requirements Unduly Onerous for Employers?* 34.
314 Article 23(1) which provides for Criteria for Selection for Termination.

the Code. It is then preferable that employers establish the selection criteria beforehand so as to reduce the risks of subjectivity during periods of DOR.[315] It will also afford them the opportunity to develop and amend in time, the criteria they have established. During DOR, the employer should consider the conditions which each employee is inclined to, key among them being their vulnerability, in order to open room for social and economic justice to take pride of place. That is to say, if two or more employees are more or less the same in terms of their aptitude, the one with more family responsibilities should be retained as far as possible.[316]

This proposal, however, needs to be subjected to a rigorous approach as the consideration might cause employers to become inconsistent and thus somehow subjective. The LRA, among many of its purposes, strives to advance social justice.[317] Allowing and encouraging employers to consider factors such as the disability of employees, pregnant women, employees who are at the risk of not finding alternative employment and so forth, could be another way of ensuring progressive realisation of the above purpose of the LRA.

Objectivity is the second prerequisite when establishing selection criteria. Not only do the courts concern themselves with an objective manifestation of selection criteria, but also the circumstances surrounding the particular business and its employees. For example, they would not uphold a criterion of retaining proficient employees in jobs that do not require proficiency.[318] Notwithstanding this, for criteria other than LIFO and bumping, it is usually onerous for the employer to keep up with consistency in objectivity. On that note, the employer is supposed to consult with each individual employee. In some instances, the employer uses the employees' attitude to work as a selection criterion after implementing a standard criterion which applies generally.[319]

All these opportunities to choose selection criteria willy-nilly turn out to be more onerous and complex. This is particularly, so during implementation of those

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315 Recommendation 166 *ibid* note 312.
316 Levy *op.cit* note 311 at 35.
317 Section 1 of the LRA.
318 *CEPPAWU obo Gumede and others v Republican Press (Pty) Ltd* (2006) 27 *ILJ* 335 (LC).
319 *MWASA and others v SABC* (1986) 7 *ILJ* 754 (IC) 782G-H.

selection criteria. It is not a one way exercise that the employer can easily pass through and accomplish without criticism. On an objective approach, fairness ought to be coupled with objectivity and not subsist as alternative to it. In *FAWU and Others v SA Breweries Ltd*,[320] the company's structure was revamped in order to increase its profitability and become more competitive and efficient. Pursuant to that, the employer categorised employees according to their levels of performance. Those that did not *ab initio* form part of the proficient structure had to undergo training, and produce formal qualifications from the adult basic and education training (ABET) or otherwise face dismissals based on operational requirements.

The court found in circumstances that the use of ABET qualifications was not a predictive method to use in determining which employees to retain and which to discard. Literacy and numeracy had to be used in a particular workplace and not in the abstract. The court found that the method did not assess what it was meant to assess (the capability of the employee to do the job under the new structure) but provided a non-specific standard.[321]

Fairness in this case was thumped or trumped by the use of ABET literacy and numeracy skills in circumstances where their very purpose was defeated by the nature of the work those employees were to perform under the new structure. It was irrelevant for the employer to generally invoke this method without determining the purpose which it was meant to serve, in pursuit of determining the new structure. On that premise, the controversy does not relate only to the fairness and objectivity of the selection criteria during dismissals of employees whose jobs have become redundant, or when the company is experiencing economic downturn.

It extends further to the selection of employees who do not meet the employer's needs and therefore must be dealt away with under the new structure. The confusion then sets in when one has to evaluate the very purpose of DOR against the factual contexts and decisions by the courts in retrenchment cases. It is thus pivotal that the selection criteria of employees, particularly and only during restructuring of the business, be discussed below.

320 (2004) 25 ILJ 1979 (LC).
321 *FAWU and others v SA Breweries Ltd ibid* note 318 at 143.

4.3.5.2 Selection during restructuring

The trend of restructuring businesses has a profound toll in labour relations. This is influenced by the fact that currently employers have the prerogative to make their employees apply for their jobs under the new structure of the very same business.[322] In some instances, employers tend to confuse the selection of employees to dismiss for incapacity with the selection to dismiss because the company has established a new structure could entail that those who do not meet the needs of the employer need to leave the business.

Employers must take note of the fact that job modification is not on its own a factor entitling the employer to declare the job redundant, however it essentially alters the responsibilities and other attributes concomitant to those jobs. Restructuring is a very contentious exercise and in some instances employers tend to incorrectly use it for reasons unrelated to operational requirements and subsequently dismiss employees whose jobs are not *per se* redundant, but have been passed on to other persons.

Restructuring can sometimes be perceived as trying to deal away with employees who are no longer preferred by the employer but who it has been quiet difficult to deal away with by way of ordinary disciplinary hearing. This is where the employer now has to prove that the new jobs under the new structure fundamentally differ with the old ones. If the difference is not so significant, he must then satisfy the court as to why he considered retrenchment as the only option whereas equipping employees through training was available as an option.[323]

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On the other hand, when one can comprehend the generally acceptable criteria of selecting employees to be dismissed for reasons based on operational requirements, the question that still needs more clarity is whether the employer can use misconduct, not as a reason to dismiss but, as a selection criterion for those employees who do not perform according to the desired standard? This is motivated by the fact that there are many reasons under the sun that the employer can manoeuvre around and justify his method of selecting employees given that, under

322 Rycroft *op.cit* note 1.
323 Rycroft *op.cit* note 1 at 681.

the South African Labour Law, employers are given a leeway of establishing their own selection criteria.[324] A case which illustrates the point above is that of *SA Mutual Life Assurance Society v Insurance and Banking Staff Association and others*. In this case[325] the court ultimately held that there was no difference between the 'new' and 'old' structure that the company alleged to have created, and therefore there were no new jobs created. It held that the company had disguised a retrenchment exercise as restructuring based on non-delivery of services in the department. It further held that the decision to retrench was not operationally justifiable.

In *casu*, there was discontentedness at the productivity of the department. The discontentedness led to departmental restructuring and as a result some of the employees were retrenched. Davis, A.J. (as he then was) found that the restructuring of the said department was a way of dismissing the employees for incapacity and poor work performance. The court held that the employer had failed to discharge the onus of proving that the retrenchments were due to redundancy and therefore there was no rational justification to it.

It is now evident from the aforementioned cases and authorities that South African Labour Law has steered in the direction where employers can request employees whose jobs have become redundant to apply for jobs under the new company structure. However, this is not an easy process that the employer can rush through. It must only occur upon due consideration of various guiding factors.[326] First and foremost, as it has already been extensively elaborated, the employer must seek possible alternatives to avoid the dismissals.[327]

Secondly, there must be a commercial reason which supports the decision to retrench. The courts usually look into the fairness of the decision with respect to the

324 Section 189 (7) of the LRA.
325 [2001] 9 *BLLR* 1045 (LAC).
326 Rycroft *op.cit* note 1 at 679.
327 *See NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 at 648D wherein the court held in lucid terms that: "Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons".

employees. This is an intended transformation from the decision in the *Discreto (A Division of Trump and Springbok Holdings)* case which was against judicial second-guessing of the employer's decision to dismiss.[328] Furthermore, the criteria for appointment to the new jobs must be clear, justifiable and linked to the new job description. The retrenchments must always be essential to achieve the purpose of restructuring. There are other additional factors that the employer must consider before requiring employees to apply for jobs under the new structure. For instance, with regard to the general procedural requirements governing DOR, the court in the *Atlantis Diesel Engines*[329] case held that:

> In the context of disciplinary or performance-related dismissals procedural fairness generally takes the form of a disciplinary inquiry or a series of counselling sessions where the employee is allowed to state his or her case. In the context of retrenchment, we believe, the need for procedural fairness is even more acute because the employee's services stand to be terminated without any fault on his or her part. Why should an employee in the latter position be in a weaker position than one who has committed a breach of discipline or performs poorly?[330]

From this *dictum*, it is instructive that the employer must not use retrenchment exercise to discard employees whose performance is not up to standard. For employees who do not perform up to standard, other process such as disciplinary hearing must be utilised.[331]

4.3.6 Sweetening the bitter pill of retrenchment: post dismissal measures

Where it is proven that the dismissal is the only option left, the employer must then assist employees who have been subjected to retrenchments. Such assistance includes the claiming of unemployment insurance and other benefits.[332] However, key among the initiatives to assist the employees concerns the payment of severance packages and an offer of re-employment in the future once the operational reasons have faded away.

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328 *Discreto (A Division of Trump and Springbok Holdings)* 2269I-2270B; see also *Steyn and others v Driefontein Ltd t/a West Driefontein* (2001) 22 *ILJ* 231 (LC) 238F.
329 *NUMSA v Atlantis Diesel Engines (Pty) Ltd op.cit* note 276.
330 *NUMSA v Atlantis Diesel Engines (Pty) Ltd op.cit* note 276 648F.
331 *Makgabo and others v Premier Food Industries Ltd* (2000) 21 *ILJ* 2667 (LC) 2675G.
332 Nel *et al South African Employment Relations* 310.

All these efforts are primarily to sweeten the bitter pill of retrenchment as already enunciated by the court in *Masondo and Others v Bestform South Africa.*[333] The *Basic Conditions of Employment Act,* 75 of 1997 (herein after the BCEA), in section 41 provides for payment of severance packages after termination of employment of the employee. This Act is thus the principal framework providing for severance pay.

4.3.6.2 Severance packages

Section 41(2) of the BCEA requires the employer to pay to employees who have been dismissed for operational requirements, severance packages which are equal to at least one week's remuneration for each completed year of service with the employer. This has also been effectively implemented by the courts. In the case of *SACCAWU and Others v Wimpy Aquarium,*[334] the LC ordered the employer to pay severance pay as required by the BCEA.

Under the 1956 LRA it was not mandatory for the employer to pay severance pay to an employee who had been dismissed for reasons based on the employer's operational requirements. This assertion was also emphasised by various courts by insisting that the employer at least consider paying severance pay to those employees for fairness purposes.[335] However, some courts have been of the view that in the context of the 1956 LRA, employers are not per se obliged to pay severance packages as it is merely discretionary.[336] Recent evidence from BCEA shows that all employees dismissed for operational requirements are entitled to severance pay.

333 *Masondo and others v Bestform South Africa op.cit note 76.*

334 [1998] 9 BLLR 965 (LC). In this case, six employees of Wimpy who were employed as waiters, soft servers and chefs were dismissed for alleged operational requirements. They claimed their dismissals were both procedurally and substantively unfair. The employer alleged that he had to cut down on some of the staff as the profit had gone down. The court, in considering the evidence placed before it, found that the employer took sufficient means to negotiate with the employees prior to implementing the dismissals, advanced good reasons for not accepting the union's proposals, sought alternative employment for affected employees, from other companies with no success. The court held that the dismissals were fair and dismissed the application, thus ordering the payment of severance packages.

335 See *Ngwenya v Alfred McAlpine* (1986) 7 *ILJ* 442 (IC); *Hendler & Hart (Pty) Ltd v National Union of Metalworkers of South Africa* (1994) 15 *ILJ* 1285 (LAC).

336 See *Young and another v Lifegro Assurance* (1990) 11 *ILJ* 1127 (IC).

An exception is however founded under section 41(2), when the employee unreasonably refused an offer of alternative employment by the employer. Such employee loses his entitlement to severance packages. The entitlement to severance pay is without due consideration to the employee's status, it applies to all employees save for those that unreasonably reject the offer of alternative employment.[337]

The purposes of severance pay is to, *inter alia*, cause the employer to think hard and deep about the financial implications of DOR on the business before deciding to implement it.[338] The provision thereof does not, as per section 41(5), preclude and disentitle the employee from receiving other payments in terms of the law. It must thus be borne in mind that section 41 of the BCEA only applies when the dismissal emanates from the reasons related to the employer's operational requirements. If it cannot be proved that the reasons are operationally based, the employee in question will not be entitled to severance packages.

Thus, according to section 41(6) of the BCEA, any dispute that may arise regarding the entitlement of severance pay may be referred in writing to the CCMA. If the dispute still remains unresolved, it may be referred for arbitration and the LC, when deciding a dispute regarding DOR, may inquire into and determine the amount of severance packages the employee is entitled to and subsequently order the employer to pay that amount. This is in terms of section 41(9) and (10) of the BCEA.

It is submitted that severance pay is associated with too much complexity and disputes in such a way that it is now unclear whether or not severance packages serve their purposes. One among these problematic areas has been the uncertainty pertaining to the entitlement of severance pay to an employee who retires and is re-employed on a new fixed-term contract and then subsequently dismissed for operational requirements. This uncertainty has been begging for answers and clarification until the decision in the recent case of *Rodgers v Exactocraft (Pty) Ltd*,[339] which is a landmark case pertaining to severance pay after re-employment by the

337 Grogan *op.cit* note 14 at 475.
338 *NEHAWU v SA Institute for Medical Research* [1997] 2 *BLLR* 146 (IC).
339 (C 1142/10) *ZALCCT* 16 April 2014.

same employer following retirement.[340] The clarification that was explained by the court was that an employee who entered into a further employment contract after retirement started a new employment relationship and the period for which he had worked before retirement could not be considered when deciding severance pay. Under the circumstances of that case, the court held that the employee had broken service (which meant that he had left service and then later returned for a new employment) and as such, according to section 84(1) of the BCEA, would be entitled to severance pay for the period he had worked before retirement.

However, the court reasoned that such literal interpretation of the aforementioned provision would in future preclude employers from utilising the services and proficiency of retired employees whose services were still needed by the business because of the fear of liability to pay severance packages for the employee's full length of service even after retirement. In *casu*, the applicant was employed by the respondent for 21 consecutive years and then retired at the compulsory retirement age of 65.

He broke service for one day only (on the 14th of November 2008) and was re-employed on a two year fixed-term contract the subsequent day. In 2010, the company experienced financial difficulties and the applicant was retrenched in August of same year. He had not served at least a year in his new contract prior to the retrenchment. The court further held that the applicant was not entitled to severance pay for both the 21 years period he was employed by the employer and the 9 months period prior to his retrenchment. This was motivated and supported by the rigid and restrictive application of the BCEA. Further to that, the employee had taken a break for one day and the provision of section 41(2) hardened the allocation of severance pay to the applicant as he did not work for a year prior to his retrenchment.

Notwithstanding that, this case has deviated from the literal interpretation of the provision of section 84(1) of the BCEA and the court has therefore provided a correct purposive approach towards this section. It refused to consider previous employment

340 Abaram *Business Day* 8.

of the applicant with the respondent when determining the length of service owing to that the break between the period of retirement and re-employment was only a day, which was less than one year as per the wording of section 41(2). The BCEA is seemingly clear as far as payment of severance packages is concerned. It is clear that the benefit is only available to employees who have been dismissed for operational requirements and who did not unreasonably refuse an offer of alternative employment.

Severance pay therefore, is a post-dismissal measure and as far as Zilwa AJ's enunciation is concerned in the *Malatji* case, it must not form part of the items and programme of the pre-retrenchment consultation process. It must only be discussed after establishing that the dismissal is the only option post an exhaustive consultation over possible alternatives measures to avoid dismissals.

4.3.6.3 Possibility of re-employment

As a measure of curbing the dire aftermath of dismissals and assisting their affected members, trade unions usually require employers to first consider retrenched employees when new vacancies are created in the company. This request is a positive step towards the right direction, however, it should be considered sparingly.[341] The employer ought to provide the consulting parties with information regarding the possibility of future re-employment of employees who have been retrenched.[342]

However, this exercise is not conferred by the LRA and it is merely a common practice among many employers. What the LRA does is that in section 186(1) (d) it merely classifies the conduct of the employer in dismissing employees for the same or similar reasons and later offering to re-employ one or more of them but refusing to re-employ the other, as dismissal.

The employee can still rely on this provision and allege unfair dismissal in an event the employer refuses to re-employ him after DOR but has however re-employed the

341 Nel *et al op.cit* note 330.
342 Grogan *op.cit* note 14 at 481.

other employee(s) who had been retrenched based on the same reasons. However, the employer is not obliged to always consider retrenched employees for new vacancies as he still retains his discretionary powers. The employee can only challenge the employer's conduct of refusal on the basis of unfair labour practice, as per section 186(2) (c) of the LRA, provided the refusal is in dishonour of the existing agreement.

Grogan[343] is of the view that employees who are to be re-employed must be selected in accordance with the same criterion for which they were selected for DOR. His suggestion is that the LIFO criterion be invoked in reverse however, with cognisance of the employee's suitability for that vacancy.[344] It therefore would denote that those employees who were the first out of the company should be the last in when re-employing.

4.4 Summary

This chapter sought to interrogate the challenges associated with the procedure for implementing DOR. It has made reference to case law and perceptions by various scholars. The main strand of thought in this chapter was the compliance or lack thereof by the employer with the laws regarding DOR as far as procedure is concerned. What follows below are the broader findings of the chapter.

It has been noted that the heart of procedural fairness lies in the provision of section 189 of the LRA. The onerous nature of procedural fairness is attributable to several prevailing factors and components, key among them being the consultation between the parties involved. This consultation concerns the selection criteria to be used for retrenchments, disclosure of information, the after dismissal measures to adopt in pursuit of assisting retrenched employees, and other subjects.

The courts are therefore always faced with the duty of adjudicating disputes between the parties alleging procedural unfairness in DOR cases. It is also perceptible that the procedural components are contentious and employers turn to vary in their

343 Grogan *op.cit* note 14.
344 Grogan *op.cit* note 14 at 481-482.

implementation. This has been seen through the aforementioned court decisions wherein it is evident that failure by the employer to implement proper procedure renders the whole dismissal process procedurally unfair. Furthermore, in most cases employers do not determine in advance the selection criteria to implement during the DOR periods and this has been pointed out as a challenge to the principle of objectivity.

The selection criteria have to be fair and objective in all material respects and a mere abandonment or neglect of one of these aspects, as per the decision in the *SA Breweries Ltd* case, compels the courts to render the whole dismissal process unfair. The price of non-compliance therewith is enormously risky and challenging on the financial well-being of the business. In light of the above, it can be concluded that the above mentioned problem in this study has been confirmed by case law and theoretical perceptions and reflections.

After due consideration of the advances and discussions about the DOR, followed by its historical developments, its substantive merits, as well as the procedural merits as dealt with by this chapter, the following task is to trace and analyse, with the purposes of comparing and contrasting to find the differences and similarities if any, the practice of DOR in other countries and legal systems. Therefore, the following chapter seeks to rigorously compare the labour laws of Canada, Namibia, Botswana and South Africa regarding the DOR (retrenchment or redundancy).

Chapter Five: Comparative perspectives

5.1 Introduction

The primary objective of this chapter is to provide comparative jurisprudence in comparable jurisdictions in respect of their labour relation systems regarding dismissals for operational requirements. Jurisdictions that are compared in the study are those of South Africa, Canada, Botswana and Namibia. The consideration of these countries within this study has been prompted by various factors. Chief among those factors being the consideration and implementation of the provisions of the *ILO Termination of Employment Convention,* 158 of 1954 and *Recommendation* 119 of 1963 by these countries.[345]

Not only do they acknowledge the existence of these Conventions, they also use their provisions in drafting and implementing their national legislation as well as in court cases. It, however, ought to be borne in mind that South Africa, Botswana and Canada have not ratified these Conventions, they consider their provisions to be merely persuasive and not binding on their domestic laws.[346] They thus have not incurred any legal obligation under the Conventions.[347]

The purpose of comparative jurisprudence in this regard is to find both differences and similarities that exist among these various legal systems as far as DOR is concerned. Furthermore, these countries' jurisdictions can sensibly be compared owing to, *inter alia*, a common practice among them of acknowledging the existence of the International Conventions and also implementing their provisions despite non-ratification of these Conventions.

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345 Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment 2009 http://www.ilo.org/wcmsp5/groups/publics/@ed-normes/documents.

346 For example, the Botswana Industrial Court applied the ILO *Termination of Employment Convention* C158 of 1954 and *Recommendation* 119 of 1963. Since the Employment Act CAP.47:01, does not make provision for complete shutdown or closure of business but retrenchments only, the court drew inference from the above international frameworks and concluded that section 25 of the Employment Act is applicable to closure of a business as far as procedural fairness is concerned. These cases include, but not limited to the case of *Moseje and Another v United National Breweries (Botswana) (Pty) Ltd* 2008 (1) BLR 414 (IC); *Bogosi v Price and Pride* (IC 65/98); *Bosabatau and Others v The Goodies (Pty) Ltd* (IC 217/99.

347 Restructuring and Redundancy 2008 Redundancy www.dol.govt.nz/publications/research/restructuring-and-redundancy/pdf.

The other purpose is to endeavour to find reasonable recommendations to the thorny and problematic areas the study has outlined as such. This is to be done through studying these countries' approaches towards the same challenges and their endeavours to resolving and managing them. Notwithstanding this, the comparison is not based on a broader spectrum of all laws regulating DOR in these countries. It is merely focused on the fundamental procedural and substantive aspects as per legislation as well as those adumbrated by case law.

In the premises, the return of the Republic of South Africa to the family of civilised nations in 1994 paved the way for the country to consider laws by other developed countries.[348] The aim of this injunction was initially to provide a system where countries have the same motive and vision to protect, promote and respect human rights and human inter-relations. Thus, the Constitution, as of mandate, provides for the consideration of international law and, as of discretion, for the consideration of foreign law when interpreting the Bill of Rights.[349]

This consideration was argued and qualified by the late learned Chaskalson J (as he then was), in *S v Makwanyane*[350] wherein he opined and held that:

> In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to South African legal system, history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.[351]

The Constitutional Court and Supreme Court of Appeal have in a majority of their decisions fully adhered to the injunction to consider comparative law. However, they have only compared those jurisdictions that are of open and democratic societies. Moseneke, DJC has further alluded to the fact that our judges predominantly consider foreign judicial authority in decisions that support their reasoning.[352] The

348 Section 39 (1) (b) and (c) of the Constitution, 1996.
349 Section 39 *ibid* note 346.
350 1995 (2) *SACR* 1 (CC).
351 *Makwanyane ibid* note 348 at 39.
352 Moseneke 2010 *Advocate* 64.

view held by Moseneke, DCJ is appropriate when considering foreign jurisdictions in respect of the practice of dismissing employees for operational requirements. The main reasons that motivated the consideration and inclusion of these foreign countries in the study vary significantly.

5.1.1 Comparative justification

The Canadian legal system varies substantially from that of South Africa. Canada is a federal state,[353] however, its Constitution, just like that of South Africa, enjoys supremacy over all laws and precludes the application of laws that are inconsistent with its provisions.[354] Other variation is that Canada has the influence of a common law system whereas South Africa on the other hand has the influence of a Roman Dutch law system.

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These advances motivated the inclusion of Canada in the scope of this comparative study. The comparison could significantly provide a valuable recommendation to the problem as outlined by the study. The practice of retrenching employees has been developed in a mature constitutional democracy in Canada. On the other hand, the consideration of Botswana was mainly motivated by the fact that its approach towards the practice of dismissing employees for operational requirements is, to a certain extent, similar to that of South Africa, however, with notable fundamental differences which will be elucidated below.

Justification for the inclusion of the above four countries in the scope of comparison, particularly Canada, is that it is a highly developed, Western capitalist country. Its historical background results from the British colonial rule and has the constitutional heritage of the British parliamentary system. It has a highly inter-dependent economy. As far as international law is concerned, Canada has a full support structure made up of various laws.[355]

353 "A federal state is one that brings together a number of different political communities within a common government for common purposes, and separate 'state' or 'provincial' or 'cantonal' governments for the particular purposes of each community... Federalism combines unity and diversity." Forsey *How Canadians Govern Themselves* 7.

354 S 52 of the Constitution of Canada Act 1982.

355 Howard-Hessmann and Welch, Jr *Economic Rights in Canada and United States* 13.

South Africa, Botswana and Namibia are developing countries and do not have federal governments like Canada. Botswana on the other hand, enjoys the same constitutional freedoms akin to Western developed democratic countries. It has no similar political or economic standing as Canada but its Bill of Rights provides for the freedom of association, trade and other freedoms akin to those of the developed countries.[356]

However, the former three countries almost have the same practices as far as DOR is concerned. They have derived these practices from international law and continue to seek guidance from developed countries such as Canada. Their variations from the ILO Convention is important in that each country has adopted its own approach and altered the convention's provisions in a way that best suits its jurisdiction and employment laws.

5.2 Dismissal for Operational Requirements in Canada

It should be highlighted first and foremost that Canada is a federal state and therefore it has many and different legal frameworks (be it legislative or judicial), which apply territorially. Therefore, in this study, Ontario is the main area of focus whose jurisdiction is of interest to the study, to the exclusion of other provinces. It is pragmatically impossible to consider laws of all provinces due to their number and to the magnitude the comparison bears to the study. Hence, Ontario is chosen due to its populous nature.[357]

However, other federal jurisdictions have also been taken into cognisance in support of the main line of comparison and to provide an integrated and comprehensive analysis to the study. The federal parliament, in conjunction with the provincial legislatures in Canada, is responsible for the enactment of the employment statutes that regulate employment matters. These statutes together with the common law are the primary sources of employment law in that country. They were enacted in pursuit of furthering the purpose of the ILO Convention on Termination of Employment,

356 "Record of Proceedings" 17-12.
357 Tucker and Grisdale 2014 IusLabor 87.

which the country has ratified.[358] Comparatively, Canadian labour law also entitles the employer to dismiss its employees for legitimate business or economic reasons. However, the dismissals must be substantively fair and they can only succeed in the Canadian courts if they are legitimate and for which there is a just cause. The common and civil law require the employer to give reasonable notice to employees before dismissing them in pursuit of reconfiguring or reducing the workforce of the business.[359]

Regarding the sources of these rules, standards and regulations, the primary legislation on employment matters is the *Canada Labour Code*.[360] This piece of legislation governs federally-regulated industries. On the other hand, the Employment Standards Act, 2000 regulates, *inter alia*, the severance packages of employees who are dismissed for reasons related to or emanating from re-configuration or reduction of the workforce. The decisions made by the courts are thus the secondary source of the Canadian employment law.[361]

Unlike the South African law of employment regarding dismissals, the dismissal of employees for reasons related to the operations of the business such as the economic, structural, technological reasons and similar needs of the employer in Canada is not a notion that has been comprehensively defined and conceptualised.[362] The concept that is used to describe such kind of dismissal is commonly known as 'termination of employment for legitimate business or economic reasons'.[363] There are therefore various exclusionary acts of dismissals in Canada which, in countries such as South Africa and Botswana, qualify to be regarded as dismissals based on operational requirements.[364] The example of such acts among others is therefore, the 'lay-off'[365] of employees by the employer.

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358 Wilkinson and Caughey 2011 www.weirfoulds.com/working-in-canada-an-overview-if-employment-law.
359 Arthurs H *Fairness at Work: Federal Labour Standards for the 21st Century* (Human Resources and Skills Development Canada 2006) 170.
360 R.S.C 1985.
361 Wilkinson *op.cit* note 356.
362 Tuckers *op.cit* note 355 at 88.
363 Wilkinson *op.cit* note 356.
364 Wilkinson *ibid* note 356.
365 "A layoff is considered a termination of employment when the employer has no intention of recalling the employee to work. www.labour.gc.ca/termination.shtml.

5.2.1 Substantive requirements

The definition of 'business or economic reasons' has not been defined owing to the liberal market economy that is not restrictive of the employer's freedom to dismiss. The common law and minimum standards legislation, comprising the *Employment Standards Act* (hereinafter the ESA) and the *Canada Labour Code* (hereinafter the CLC), both do not require the reconfiguring employer to provide reasons to employees for their dismissals, so long as there are legitimate reasons for such dismissals.[366]

The CLC requires the provision of reasons to employees only in certain circumstances such as those that allow the employees to challenge the unjust grounds of their dismissals.[367] Both these frameworks permit dismissals due to lack of work or discontinuance of service.[368] Furthermore, collective agreement by employers and unions ought to be drafted in a way that allows unionised employers to dismiss for business reasons. What is required is that such dismissals must occur pursuant to a just cause. Similarly, the employer can dismiss in any part of the company they choose to as it is not bound to dismiss in the entire company.[369]

5.2.2 Procedural requirements

It is common cause that the Canadian legal system is federal and according to the common law, no procedure is set to regulate the dismissal for business reasons. Termination notice or pay in lieu of notice is the only implied term under the common law.[370] It is implied in the law regulating other types of dismissals that the employer ought to act in good faith and fairly, however, such is not implied in the law regulating dismissal for business reasons.[371]

The CLC in section 241 also requires the employer to provide reasons for the dismissals of employees. Therefore, after the announcement of the proposal to

366 Tucker op.cit note 355 86.
367 Canadian Labor Code R.S.C 1995 Cl-2 section 241(1).
368 CLC *ibid* note 365 at section 242 (3.1) (a).
369 Tuckers *op.cit* note 355 at 88.
370 Tuckers *op.cit* note 355.
371 *Honda Canada Inc. v. Keays* [2008] 2 SCR 362.

dismiss, the employer must sit with a joint planning committee for the purposes of establishing measures to eliminate the necessity of terminations or minimise their impact and assist dismissed employees. The committee must be constituted by at least four members, half of whom must be employees' representatives. During this process, an arbitrator may be requested to assist the parties if they cannot reach an agreement. However, the arbitrator cannot review the employer's decision to dismiss.[372]

For unionised employees, collective bargaining legislation does not prescribe procedural requirements to follow when terminating employment for business reasons. They enjoy the benefits of protection set out by the minimum standards laws when their collective agreements do not provide for the procedure to follow. With due regard to the previous definition, layoffs do not also have a particular procedure according to which they ought to be implemented. It must be considered that by necessary implication, layoff typically qualifies to form part and parcel of termination for business reasons.[373]

Over and above the substantive and procedural merits according to which the employer must conduct the dismissals, it is worth noting that the discretionary powers to terminate employment rest entirely upon the employer. The employer must however, not base his decision of selecting employees to terminate their employment contract on prohibited discriminatory grounds such as gender, age, race etc. This principle advocates for similar and equal treatment and fair dealing during dismissals.[374]

Furthermore, in instances where the employer failed to comply with the legal procedure of issuing termination notice or payment in lieu, the only available route the affected employees can pursue is to institute action for wrongful dismissal. The difference with the South African labour relations system is that under the latter, the omission of a legally prescribed procedure or the commission of a legally prohibited conduct during DOR renders the dismissal unfair and not wrong. In South Africa

372 CLC *op.cit* note 365 at s 223.
373 Tucker *op.cit* note 355 at 90.
374 Tucker *op.cit* note 355.

wrongfulness is differently contextualised and relates to the moral not legal convictions of the community.[375] The remedy therefore may be the amount of notice to which they are entitled, subject to additional amount in instances where the employer acted *mala fide* in dismissing, which then resulted in the employee suffering damages.[376]

5.2.2.1 Notice and payment for termination

The CLC in Part III seeks to regulate notice of termination and payment for termination. It provides that the employer must give employees who have been employed for at least three months, two weeks' notice of termination or payment in lieu. The common law regards such notice as a reasonable notice. However, the courts have previously applied a rule of thumb when calculating the period of reasonable notice.[377] Therefore, the purpose of a reasonable notice was outlined by the court in the case of *Mastrogiuseppe v. Bank of Nova Scotia*[378] wherein it held that:

> While the principal purpose of reasonable notice is to tide employees over during their search for employment, an additional purpose is to compensate employees for the time and effort they have invested in their employer's business.[379]

The ostensible purpose of a notice period was explained by the Ontario Court of Appeal in *Taylor v. Brown*[380] where it alluded to that:

> While the purpose of the notice period is to provide time for employees to find alternate employment, a task made more difficult while the employee undertakes to fulfil the terms of working notice,

375 Neethling 2006 *SALJ* 204; see also Neethling and Potgieter 2007 THRHR 120.

376 Tucker *op.cit* note 355 at 92.

377 Similarly, in the case of *Ansari v. British Columbia Hydro and Power Authority* 1986 CanLII 175 (BC SC), [1986] B.C.J. No. 3005 (QL), 13 C.C.E.L. 238 (S.C.), McEachern C.J.S.C. remarked that: "For reasons which are largely subjective and which I would not presume to disturb, the law requires a longer notice period for a long-term employee even though discharged employees of the same age, skill and responsibility suffering under the same economic factors must be assumed to require an equal period to obtain equivalent employment. The reasons for this anomaly may be that a long-term employee has a moral claim which has matured into a legal entitlement to a longer notice period".

378 2005 CanLII 46757 (ON SC) [2005] O.J. No. 5417 (QL) (S.C.J.), var'd on other grounds, 2007 ONCA 726 (CanLII), [2007] O.J. No. 4052 (QL), 61 C.C.E.L. (3d) 1 (C.A.).

379 *Mastrogiuseppe ibid note* at 87; see also *Rizzo and Rizzo Shoes Ltd* at 26.

380 2004 *CanLII* 39 004 (ON CA) 73 O.R (3d) 358 (C.A).

> we are of the view that there is no functional difference at law between working notice and payment in lieu of notice.[381]

On the other hand, the purpose of payment in lieu was also outlined in *Dunlop v. British Columbia Hydro and Power Authority*[382] wherein the court held that:

> [Payment in lieu of notice is seen as] an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment.[383]

These propositions by learned judges tend to show that there is no watertight difference between termination notice and payment in lieu of notice. This may be the reason why they do not apply simultaneously but optionally. Payment in lieu of notice is thus considered to be the compensation for failing to comply with the implied term of the employment contract of providing termination notice.

Moreover to the procedural aspect of termination notice or payment for termination, when dismissing an employee for legitimate business or economic reasons, the sanction for wrongful dismissal is usually the severance pay, which is preceded by a termination notice. Severance pay is also a procedural aspect the employer has to satisfy. However, it should be noted that severance pay is only injunctive upon the establishment of operationally motivated reasons to dismiss. The notice as required by the Code does not extend to employees who have worked for less than three consecutive months.[384]

In addition, the mode of communication between the employer and employees, which is the notice of termination, ought to be clear and specific. The Canadian labour law provides for various legislation, both provincially and federally, for unionised and non-unionised employees. What turns to be a reasonable notice under common law is substantially considered by looking at the length of service, age of employee, job description as well as the proficiency and qualification on the

381 *Taylor ibid* note 378 at 15-16.
382 1988 *CanLII* 3217 (BC CA), 32 B.C.L.R. (2d) 334, [1989] 2 W.W.R. 518 (C.A.).
383 *Dunlop ibid* note 380 at 338-339.
384 Employment Law in Canada: Federally Regulated Employers 2011 www.mcmillan.ca.EmploymentLawinCanada.

job of the employee. It is evident that the employer has the discretionary power to either give notice or pay in lieu of notice. Be that as it may, if payment has been opted for in lieu of notice, all the wages the employee would have been entitled to had he worked throughout the notice period must be paid to him.[385] The provision of termination notice is however not the only obligation that can be incurred by the employer. The contract of employment may also provide for further obligations. Due to the fact that the common law is also a primary source of employment law, it can also confer obligations, such as the provision of reasonable notice or any obligation that has been developed by the courts.

This obligation, should the employer fail to honour, creates an action for wrongful dismissal under the common law. The Canadian courts have in several cases[386] encouraged the employer to seek legal advice before dismissing for legitimate business or economic reasons, to avoid formulating their own procedure. The employer's statutory obligations when dismissing employees correlate with the common law obligation to do so fairly and in good faith. Fairness and good faith can be extended to the duty not to disguise just cause for reasons which are unjust. Such non-compliance usually results in the courts prolonging the notice period.[387]

5.2.2.2 *Severance benefits*

Severance pay is commonly regarded as a measure of compensating employees with long service period for their investment in the company for any other loss that ensues following the termination of their employment.[388] Under the jurisdiction of Ontario, the Ontario Employment Standards Act in section 64(1) entitles employees to receive severance pay only when they have exceeded five years of continuous services or when the employer has a pay roll of $ 2, 5 million or more. In addition, there are certain categories of employees who, due to the exclusionary provisions of the *Termination and Severance of Employment Regulations*,[389] are precluded from receiving severance pay. The sub-section enunciates their categories as employees

385 Wallace 2011 www.weirfoulds.com/working-in-canada-an-overview-if-employment-law; s 57(14) of the ESA.
386 See for example *Rizzo and Rizzo Shoes Ltd. (RC)* [1998] 1 S.C.R 27.
387 Employment Law in Canada: Federally Regulated Employers *op.cit* note 382.
388 *Rizzo and Rizzo Shoes Ltd. (RC)* [1998] 1 S.C.R 27.
389 S 9(1) of O.Reg. 288/01.

whose employment is affected because of the economic downturn which resulted from strike action and results in a permanent shutdown of the business or part thereof. The second category is those whose employment agreements have become impossible or frustrated. The third category is those that retire due to their posts being severed and receive full pension benefits. The forth category is those that unreasonably refuse the offer of alternative employment with the employer after their posts have been affected.[390]

Comparatively, with regards to the South African position vis-à-vis severance pay and unreasonable refusal of alternative employment, the LAC, in the case of *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy, Paper, Printing, and Allied Workers Union*[391] held that the employees who were dismissed for operational reasons were entitled to severance pay even though they refused an offer of alternative employment.

This proposition in the view of Mokoena AJ is not unreasonable. The learned judge reasoned that the new shift patterns *in casu* would have resulted in the employees' pay being reduced. The court held that where employees are offered alternative employment with reduced salaries, their refusal would not be unreasonable. In this instance, employees would not forfeit their right to severance pay. This is clearly not the position under the Canadian jurisdiction.

The fifth category concerns those that unreasonably refuse the offer of alternative employment, despite an alternative employment made available to them through a senior system. The sixth category relates to those that have been found guilty of wilful misconduct, disobedience or wilful neglect of duty that is major and has not been condoned by the employer. The seventh category concerns employees that work in constructions while the last one relates to those that work in the on-site maintenance of buildings, structures, roads, sewers, pipelines, mains, tunnels or other related works. It is evident form the afore-mentioned exclusions that any other employee who does not form part of the contents of the provision is entitled to severance pay, particularly under the Ontario jurisdiction.

390 *Termination and Severance of Employment Regulations ibid note* 387.
391 [2013] 12 *BLLR* 1194 (LAC) In Blur and Jefferson 2014 *De Rebus* 49.

Accordingly, the federal jurisdiction provide for a totally different approach. It requires the employer to give severance packages to employees who have at least twelve months of continuous service with the employer. At this point, the determination of the employer's payroll is inappropriate.[392] However, under the Ontario jurisdiction severance pay is injunctive if the employer terminates employment of fifty or more employees within a specified period and termination is as a result of the permanent discontinuance of all or part of the business. This occurs regardless of the amount of the payroll. It is common cause under the federal jurisdiction that the number of terminations is inappropriate for the determination of severance packages.[393]

5.3 Dismissal for Operational Requirements in Botswana

Botswana, South Africa and Canada have proved to be experiencing similar concerns and challenges with the high percentage of dismissals for operational requirements. The problematic and thorny areas in DOR cases as outlined by the study are not only rife in South Africa but in Botswana also. Various legal scholars in Botswana, one among them being Mugabe,[394] have expressed their perceptions about this problem. Mugabe has remarked that:

> Employers are regularly reminded of the factors that render their dismissals for operational requirements (retrenchments) fair and unjust. Despite this, they continue to get it wrong and, in many cases, they land up paying a very heavy price.[395]

On that premise, it is important and appropriate that the substantive and procedural merits of retrenchment, as well as other related factors, for the Botswana labour relations system be discussed with reference to the judicial decisions.

5.3.1 Substantive requirements

The labour laws of Botswana allow the employer to dismiss employees for business reasons, commonly known as retrenchments. The exercise of this right ought to be

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392 Neumann and Sack 2014 http://cnlii.org/en/commentary/wrongfuldismissal.
393 Neumann *ibid* note 390.
394 Mugabe *Without Prejudice*.
395 Mugabe *Without Prejudice* 24.

in accordance with the prescribed procedure that is provided for by the Botswana *Employment Act* CAP 47:01. This statute is the primary source of employment law in Botswana, particularly pertaining to retrenchments.[396] The significant point pertaining to the employer's freedom to retrench is that he must provide fair reasons for the decision to retrench and for the retention of those employees who will not be facing retrenchments. When this requirement is complied with, the employer ought to follow a prescribed procedure as stipulated by the Employment Act (hereinafter the EA).

5.3.2 Procedural requirements

As it has already been highlighted, procedural and substantive fairness are the main aspects that the courts look into when assessing the fairness of the decision to retrench.[397] First and foremost, when the employer contemplates dismissing employees for operational requirements, he must notify all employees who are likely to be affected. A notice must also be served to the trade union representative of at least one third of the employees. Moreover, the employer must notify the Commissioner of Labour in writing of the proposal to dismiss.[398]

The second step is for the management to disclose all relevant information to the employees or their trade union. However, confidential and privileged information ought not to be disclosed. It is procedurally required for the employer to consult with the recognised trade union or a union representative of at least one third of the employees. Measures over which they ought to consult include, but not limited to, measures to adopt in order to avoid dismissals, to minimise their number, change their timing, and mitigate their adverse effects, the selection criteria for dismissing employees and the severance benefits to be paid to the dismissed employees.

Be that as it may, with regard to the injunctive on severance packages, Ebrahim-Carstens J; has held in the case of *Moseje and Another v United National Breweries (Botswana) (Pty) Ltd*[399] that, the Botswana jurisdiction does not recognise or provide for retrenchment packages. The only remedy available to retrenched employees is to

396 Makgamatha 2013 www.into-sa.com.
397 *Labour Laws in Botswana* www.elaw.co.za/africanlegislation/Botswana.
398 S 25 of the EA CAP 47:01.
399 *Moseje op.cit* note 397 at pg 418.

negotiate those packages with the employer or otherwise seek intervention from the courts with the objective of obtaining compensation for unfair retrenchments, provided their dismissals are indeed unfair. In providing a comprehensive analysis, in *casu*, the applicants were complaining of procedural unfairness of their retrenchments and that consultation was not properly held, in that the notice period was far too short. However, evidence before the court pointed out that consultation was held although not for all the aforementioned factors. The court instantly ruled the allegation of procedural unfairness not to be appropriate and thus found the dismissals procedurally fair.[400]

It is therefore submitted that it is more often than not pragmatically challenging for employers to consider and fully comply with the procedure as stipulated by the *Employment Act* when retrenching employees. Similarly, it would be unfair for the courts to disregard the procedural attempts by the employer and render the dismissals procedurally unfair on a mere omission of a single or few procedural aspects or steps.

However, logic dictates that such condonation ought to be given in instances where the procedural aspect(s) that the employer omitted are not so material that without which the employees would suffer prejudice. Just like the South African jurisdiction, employees must make representations on issues that they are consulting on. The employer must then consider and respond to those representations and give reasons for disagreeing with each of them when he does. The response must be in writing if representations were also made in writing.[401]

Section 25(1) require the employer to select employees to be dismissed in respect of each category, and where reasonably practicable, use the FILO (hereinafter First-In-Last-Out) principle as a selection method. This approach must, however, be considered with the need for the efficient operation of the organisation and the ability, experience, proficiency and qualifications of each employee. Thereafter, upon implementation of the aforementioned procedure and upon failure to entirely eliminate the dismissals, the employer ought to furnish all employees, who are to be

400 *Moseje op.cit* note 397 at pg 417.
401 *Mugabe op.cit* note 392.

dismissed, with the notice of termination of employment.[402] This is to be done in accordance with the provisions of the contract of employment pertaining to termination notice. If the contract is silent, it must then be in accordance with the EA or payment *in lieu* of notice as per the EA, whichever is more favourable to the employee. The Commissioner must be furnished with a list of the names of employees who have been dismissed. After the implementation of dismissals, the employer must then put in place post dismissal measures.[403]

For the purposes of implementing the post dismissal measures, the procedure in Botswana is similar to that of South Africa. It requires the employer to prefer retrenched employees for re-employment in future when there are vacancies available which can be filled by those employees, taking into account their qualifications, suitability, availability and proficiency.[404]

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5.4 Dismissal for Operational Requirements in Namibia

It should be noted that unlike Botswana, South Africa and Canada, Namibia has ratified the *ILO Termination of Employment Convention*. Namibian jurisdiction can, however, be compared to that of South Africa and the aforementioned countries. The comparison is due to the fact that Namibia also enjoys constitutional supremacy and takes into cognisance the provisions of the Convention when enacting and implementing its Labour Laws. The primary source of employment law in Namibia is the *Labour Act* 11 of 2007.[405]

Namibia, as opposed to Canada, is not a federal state and the *Labour Act* (hereinafter referred to as the LA) applies to the whole country to the exclusion of the Namibian Defence Force and other institutions falling within the excluded category. The LA, being the legislative framework applicable to all employment matters and in this instance the dismissals of employees for business or economic reasons,

402 S 25 of the EA.
403 Mugabe *op.cit* note 392.
404 Mugabe *op.cit* note 392.
405 Muller 2007 www.ilo.org/dyn/eplex/docs.

stipulates that the employer must not dismiss employees without a valid and fair reason and without having followed the procedure set out by the LA.[406]

5.4.1 Substantive requirements

The underpinning object around the whole dismissal process is that the dismissal must be in accordance with a fair procedure and for a valid reason.[407] A valid reason has been explained to mean the factual evidence that caused the dismissals to occur; and it is the employer's duty to prove such facts. Additionally, a balancing of probabilities is required to prove such factual evidence. A fair reason would then connote the operational requirements of the business that are material to justify and warrant the dismissal.[408]

The substantive merits of DOR in Namibia have been dealt with by the Namibian courts in various cases. Just like in South Africa, there are lots of cases which deal with this aspect, by and large under different factual situations. This is an illustration that employers across the globe have the propensity of improvising as far as the dismissals of employees for operational requirements are concerned. One such example is found in the case of *Namibia Seamen and Allied Workers Union v Cadilu Fishing (Pty) Ltd.*[409]

In *casu*, the applicant (trade union) had obtained a relief in terms of a rule nisi, *inter alia*, interdicting the respondent from unilaterally changing conditions of employment of its members and retrenching them pending the final resolution of the dispute between the parties. The applicant had alleged that the reason for the respondent to dismiss was a mere sham and not substantively motivated in terms of section 50 of the then *Labour Act* 6 of 1992. The respondent's financial difficulties, which were the component of the operational reasons for dismissing, were upheld by the court on the basis of being fair and valid reason to dismiss. The court in this regard held that the respondent had discharged its onus of proving that it suffered severe financial

406 Section 32 (1) of the LA.
407 Van Rooyen 2011 *Namibian Labour Lexicon* 134.
408 Van Rooyen *ibid* note 400 at 138; see also *African Granite Co (Pty) Ltd v Mineworkers Union Of Namibia and Others* 1993 NR 91 (LC).
409 2005 NR 257 (LC) 257F-G.

losses as a result of the slump in the fishing industry. The court however drew a distinction between retrenchment and redundancy and it lucidly held that:

> '[R]etrenchment' and 'redundancy' do not necessarily mean the same thing. A person could be retrenched without his position being declared redundant. A person may be retrenched to economise, without his position being superfluous.[410]

5.4.2 Procedural requirements

The procedure to follow when dismissing employees for operational requirements in Namibia is well set by the LA. A prior notice is the first procedural aspect the employer ought to ensure compliance with and serve to employees who are faced with the dismissals. The period over which such notice ought to be served must be determined by the duration of the employee's service with that employer. Technically, the employer must serve a month's notice to employees who have been employed for more than a year; a one week notice for more than four weeks of employment and one day notice for less than four weeks of employment.[411]

The notice must state in writing the reasons for the dismissal as well as the date on which the dismissals will be effected. However, such notice is not allowed during employees' period of leave. Just like under the Canadian law, an employer may grant payment in lieu of notice to dismissed employees and may grant remuneration for the period the employee would have worked during the notice period.[412] For the dismissals emanating from the reduction of the workforce due to the reorganisation or transfer of business or the discontinuance or reduction of the business for economic or technological reason, the employer must give notice of the proposed dismissals to the Labour Commissioner and any trade union which the latter regards as the exclusive bargaining agent.

It goes further to stipulate that if there is no trade union recognised as such the employer must inform the elected workplace representatives. In addition to the information he ought to provide, he must disclose the number and categories of

410 *Cadilu Fishing ibid* note 403 at 257G.
411 Section 29 of the LA; see also *African Granite Co (Pty) Ltd op.cit* note 400.
412 Section 30 of the LA.

employees he needs to dismiss.[413] It is common cause that all three countries whose jurisdictions have been compared to that of South Africa have adopted the provisions of the *ILO Convention on Termination of Employment*. They have adopted the provisions that set out the factors which need to be at the heart of the consultation process. On that note, Namibia has also drawn up their consultation topics during DOR from article 3 and 4 of the Convention which are similar to that of section 189(3) of the South African LRA. The legislation also insists on agreed, fair and objective selection criteria of selecting employees to be dismissed.

A very distinctive aspect regarding the jurisdiction of South Africa and Namibia is found on the judicial and legislative determination in respect of the final reason to dismiss by the employer. In other words, South African law does not allow the courts or anybody to second guess the decision of the employer for dismissing due to operational requirements.[414] On the other hand, Namibian law allows for either party to the negotiations to approach the Labour Commissioner when they cannot reach an agreement on consultation topics.[415]

The sole purpose of the intervention is for the Commissioner, based on the prevailing circumstances, to approve or refuse the dismissal. Comparatively, the Namibian jurisdiction limits the freedom of the employer to restructure his business by allowing the Commissioner to second guess and reject the decision to dismiss. The jurisprudence in South Africa mainly focuses on finding the genuineness of the decision to dismiss and fairness to that effect, without usurping the powers and crushing the intentions of the employer in respect of his/her business. The provision requires the employer to disclose all relevant information which can be of assistance to the union or employees to engage in meaningful negotiations.

In the case of *Seebach v Tauber and Corsen Trading (Pty) Ltd and Another,*[416] the Namibian Labour Court through the learned Silungwe P held that the employer's

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413 Section 33 of the LA.

414 See SA Clothing *and Textile Workers Union and others v Discreto (a division of Trump and Springbok Holdings op.cit* note 19.

415 Section 33(4) of the LA.

416 2009 (1) NR 339 (LC) 8, in this case he appellant had been retrenched by the respondents. He was dissatisfied with his retrenchment package and laid a complaint in the district labour court for unfair dismissal. The court a quo had held that the respondents had negotiated with the appellant

duty to negotiate is coupled with the obligation to do so in good faith. Further, the employee also needs to cooperate and ensure a meaningful consultation in good faith. This was held by the court to involve "meeting, discussing and negotiating with an honest intention of reaching an agreement, if it is pragmatic".[417]

In respect of the post dismissal measures that the employer ought to put in place, as a measure of remedying the dire effects that the dismissals usually bear to the employment relationships, Namibian labour law recognises severance pay as one of those measures. Without much elaboration on this aspect, as it has already been enunciated above, severance pay is payable to employees who have been dismissed for, *inter alia*, operational reasons. Just like in South Africa, an employee who unreasonably refuses to accept employment on no less favourable terms or who unreasonably refuses to be reinstated is not entitled to severance pay.[418]

5.5 Comparison of the countries

The Canadian system of labour matters is diversified as there are various labour relations systems in place which do not enjoy similar application. In terms of the right of employers to effect changes to the employees' contract of employment, the Canadian approach is similar to that of South African and Botswana. They both empower the employer in unilaterally and fundamentally altering the employee's employment contract and even propose the 'dismissals for operational requirements' or otherwise the 'dismissal for business or economic reasons'.[419]

With regard to the freedom of the employer to dismiss for business reasons, Canadian labour law imposes limitations. Such limitations include the required

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in good faith and that the dismissal had not been unfair. The main bone of contention was the appellant's entitlement to one week's severance pay for each year he had worked. He sought more than one week's pay for every year worked. The appellant appealed against this finding. On appeal the court held that a reasonable refusal to compromise was, per se, most certainly not a 'breach of good faith'. A fortiori, this case amply demonstrated that the respondents acted within the law. Hence, the allegation that they failed to negotiate in good faith fell to be dismissed. In any event, while parties must demonstrate, throughout their negotiations, a serious intention to secure an agreement and to thereby show a willingness to compromise, a reasonable refusal to compromise was most certainly not in itself a breach of good faith.

417 *Seebach ibid* note 414 at 9.
418 Section 34(3) and (4) of the LA.
419 Ismail and Tshoose 2011 *PELJ* 166.

legitimate reasons and the just causes for the dismissals, without which there will be no freedom to dismiss. It, however, confers certain rights to employees who are to be affected by the practice. The difference between the South African and Canadian labour relations system pertaining to DOR is predominantly the distinction between unionised and non-unionised employees under the Canadian system, which is not the case in South Africa. Similarly, in Canada unionised and non-unionised employees enjoy varying degrees of protection while in South Africa these categories of employees are not differentiated and they enjoy similar and equitable protection.[420]

In Canada, unionised employees enjoy better protection. Collective agreements for unionised employees usually limit the employer's freedom to dismiss by requiring a just cause for the dismissal. This is not the object of a typical employment contract which governs the dismissal for business reasons for non-unionised employees. These individual employment contracts are regulated by the common law and minimum standards laws.[421]

Just like in South Africa, dismissals for business reasons in Canada and Botswana have a high degree of proportion over the overall dismissals in the countries.[422] Furthermore, in comparison to the South African labour relations system, the Canadian labour relations system is diversified and various laws apply territorially depending on the nature of the government. This is perceptible through the application of federal and provincial laws which do not predominantly enjoy concurrent application.

All these countries have their unique laws which govern the employer's right and freedom to retrench employees or restructure the business so as to create a leeway for financial improvement or business efficiency and competitiveness. They are all voluntarily persuaded by the non-binding provisions of the ILO Convention on Termination of Employment. This is evident from the fact that they have not acceded to the binding effect of this convention in respect of their labour laws and

420 Tucker *op.cit* note 355 at 86.
421 Tucker *op.cit* note 355.
422 Employment and Social Development Canada 2014 www.esdc.gc.ca/en/reports/ei/monitoring.

employment relations. In the event of non-compliance by the employers with the procedural requirement of issuing termination notice or payment in lieu of notice to dismissed employees, the Canadian labour law renders such dismissal wrongful on the basis of procedural wrongfulness, and not unlawfulness. However, the South African labour law renders such dismissal unlawful on the basis of procedural unfairness. Botswana labour law also recognises unlawfulness as opposed to wrongfulness. Thus, non-compliance to the procedural requirements while dismissing is also regarded as unlawful and the court will render the dismissal unlawful on the basis of procedural unfairness.[423]

5.6 Summary

This chapter sought to find out the differences and similarities that exist in the legal systems of the countries that have been included in the study. The comparison is mainly attributable to the different approaches on procedural and substantive aspects of the dismissals for operational requirements or alternatively referred to as the dismissal for business or economic reasons, or retrenchments.

It is common cause that the South African, Canadian and Botswana legal systems vary in terms of the freedom by the employer to dismiss employees for the purposes of restructuring the business, or otherwise retrenching them for purely operational reasons. The main line of discussion was predominantly focused on the legal background pertinent to the procedural and substantive requirements through which employers in these aforementioned countries are allowed to retrench employees for business reasons or similar needs. The comparison is not peculiar to the main purpose of the study. It is by far of aid in suggesting and restructuring reasonable recommendations.

In this chapter, the attention was drawn to the appropriate legal approaches or solutions by these countries in addressing and solving their respective labour challenges regarding DOR. Such approaches, depending on their persuasiveness and relevance in our industrial relations system, might be recommended to also be

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423 Mugabe *op.cit* note 392.

adopted by our judiciary and legislature when developing, construing, applying or enacting and amending the law regarding DOR. The following chapter therefore focuses on the general conclusions provided by the study on the above integrated and interrelated chapters.

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Chapter Six: Conclusions and recommendations

6.1 Introduction

The main cause of the problems identified by the study is that employers by and large engage in dismissals for operational reasons without having in place a proper plan of action on how the process ought to be carried out. Most employers are likely to get the process wrong.[424] The ancillary challenge this research has discovered relates to the incorrect implementation of a good plan on how to carry on with the process. It has been discovered that most of the time not only do employers lack proper plans in place, but they also tend to implement such plans incorrectly. They then fail to implement such plans according to the procedure provided for by section 189 of the LRA.

6.2 Broad findings and conclusions

Throughout it has been the main objective of this research to analyse the substantive and procedural requirements that the employer ought to comply with before and during dismissals of employees for operational requirements. In pursuit of this objective, the challenges and problems associated with DOR were accordingly identified and illuminated. It has come to realization that the rate of litigation due to DOR is escalating, particularly concerning non-compliance with the law by employers. Therefore, this dissertation has traced the causes of such non-compliance with the aid of decided cases.

These requirements encapsulate, more often than not, the use of fair and objective selection criteria. Reference was made to a few of the cases where courts were called to adjudicate on the fairness or otherwise of the selection criteria used by various employers. These cases relate to circumstances where there was no prior agreement between employers and employees on the selection criteria to be implemented during DOR. One example is the case of *Nkosinathi Mbongiseni*

424 Israelstam http://www.labourguide.co.za/retrenchment/735-whats-the-right-retrenchment-procedure.

Mtshali v Bell Equipment.[425] The lesson learned from this case through the LAC is that an employer who chose to rely on LIFO as a selection criterion should have consulted on the applicability and appropriateness of bumping as a method of selecting employees who were to be retrenched. Furthermore, in instances where the employer did not want to apply bumping, he or she was called upon to provide an explanation on why its application would not be fair and appropriate.

Notwithstanding the provisions of section 189(7) of the LRA, this case has deviated from the notion that the type of selection criterion to be applied is a matter that is entirely left to the discretion of the employer. The case presupposed that each employer ought to apply LIFO, specifically bumping, or alternatively provide appreciable reasons why bumping could not be appropriate and fair in the circumstances.

It is now common cause that the South African Labour Law allows the employer to dismiss employees for reasons provided for by the LRA, which are misconduct, incapacity and operational requirements. It has been seen from various cases above that the fault emanates mostly on the part of the employers as a result of their misunderstanding of the laws. When dismissing employees for operational requirements, the majority of them fail to adhere and conform to the provisions of the LRA. However, as already explained, the problem arises when the employers fail to comply with procedural and substantive grounds or requirements prior to the dismissal.

Prior to the discussion on the core issues, this research took a dimension of tracing and explaining the historical developments and previous legal framework. From such historical analysis, it is evident that the dismissal emanating from operational reasons has been an existing practise since the inception of labour relations in South Africa. On that premise, the historical development analyses have proven that retrenchment has always been a controversial subject. This type of dismissal formed part of the factors that caused the labour unrest prior to the 1995 LRA.

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425 Nkosinathi Mbongiseni Mtshali v Bell Equipment (DA16/12) [2014] ZALAC 37 (22 JULY 2014).

In order to curb and regulate the labour unrest, the Wiehahn Commission was established with the objective of looking into the industrial relations in South Africa. This Commission then recommended the establishment of the Industrial Court which upheld the rights of parties who were involved in labour relations matters. It has further been established in the analysis that before the enactment of the 1995 LRA the 1956 LRA and its amendments, in conjunction with the common law, regulated the dismissals of employees based on the employer's operational reasons.

However, under the current LRA, the practice of DOR has proven to still be more controversial and challenging. The courts are faced with a torrent of litigation as a result of this practice, some of which are intricate. Despite these challenges, there are legal prescripts such as the Constitution, LRA, and international frameworks which are drafted and implemented to facilitate and provide guidance to the parties facing DOR. Furthermore, prescripts such as company policies and agreements between the employers and employees also play a major part in providing guidance to parties in the DOR process.

These prescripts are to a larger extent clear on how employers ought to conduct dismissals based on their operational reasons. It has been seen through case law and theory that substantive and procedural fairness play a very significant role in the whole dismissal process. They are at the heart of the dismissal and they ought to be adhered to at all material times. They are the actual cornerstones of the dismissal process. It has further been noted that employers ought to have fair reasons for dismissing employees for operational requirements. This is also what the LRA requires.

The substantive value of this type of dismissal lies in the employer's economic, technological and structural reasons and 'similar needs'. 'Economic reasons' have been explained by various writers to mean the economic standpoint of the business which, more often than not, is affected by the drop in the economy. 'Technological reasons' have been explained to mean the implementation of advanced technology, such as new machinery and other technological means, which will ultimately result in some of the employees becoming redundant.

'Structural reasons' have been explained to denote restructuring of the business which usually emerges from merger or amalgamation and has the propensity of leaving some of the posts redundant. 'Similar needs' of the employer, as already adumbrated above, is a very broad concept that is made up of various concepts and it is not exhaustive. There is no clear cut approach as to what constitutes similar needs, and the concept creates latitude for employers to become subjective as far as the category of 'similar needs' is concerned. It is further evident that 'similar needs' as a component on its own is to a certain degree complex and thorny.

It invites in many extrinsic factors, some of which are intricate and courts have become less inclined to adapt them to the whole equation of operational requirements. Each of these components carries a certain degree of value towards building-up the whole concept of operational requirements. It is also evident from the above advances that litigation emanating from DOR disputes is torrential, more so compared to other types of dismissals. The role of the courts in DOR cases, as adumbrated by the LC and LAC, is thus not to second-guess the decision of the employers or run their business inside the court rooms.

The courts' competence is largely to determine whether or not the employer against whom the dispute is raised has indeed followed the prescribed procedure and implemented the decision fairly, rationally and accordingly. Furthermore, the courts' role is also to give effect to their judgments regarding such disputes.[426] However, courts have not shied away from developing the common law as far as DOR is concerned. They have also ordered amendment of certain legislative provisions which they found to be unjust and causing inconsistencies.

The implementation of DOR during or after industrial actions (such as strike or lock-out) has also been a topic of discussion in this dissertation. It was further highlighted that the courts assess the dismissals during industrial actions on a very high level of scepticism when compared to how they assess dismissals on ordinary basis. The equivalent level of scepticism is also upheld in instances where the employer intends putting in action the affirmative action programmes that it has adopted, and by so

426 *SA Clothing and Textile Workers Union and others v Discreto (a division of Trump and Springbok Holdings* (1998) 19 *ILJ* 1451 (LAC).

doing cuts down its workforce using DOR. The commonly shared view by the LC and the LAC and the IC (as it then was) is that DOR is a 'no-fault' dismissal. Therefore, it is futile for one court to entirely adopt a precedent created by another court as the nature of the dismissal makes the process a unique and distinguishable one. The courts ought to be flexible and pragmatic when resolving disputes regarding DOR. Reliance on one precedent in its entirety by another court may contentiously render the process intricate for employers especially because each employer adopts criteria which suit its circumstances.[427]

This proposition was adopted by the courts in various cases including that of *Irvin and Johnson Ltd v CCMA*, *inter alia*, as explained above. The courts have conceded that the procedural nitty-gritties of DOR are in their nature onerous to many employers. The onerosity is also evident from the ever increasing number of court cases concerning non-compliance with the prescribed procedure. It is common cause that the heart of procedural fairness lies in the provision of section 189 of the LRA.

The procedural indications as outlined by the section sets forth topics on which to consult during the consultation process. They are inclusive of, *inter alia*, the selection criteria to implement, disclosure of information for the purpose of effective consultation, post dismissal measures to adopt in pursuit of assisting retrenched employees, and other factors. The courts are therefore always faced with the duty of adjudicating on the controversial implementation and manifestation of the procedure in DOR cases.

It has also been acknowledged and conceded to by the courts that the above procedural aspects are broad and employers turn to adopt a different approach in respect of their implementations. This has been evident in the aforementioned courts decisions in which it has been evident that the courts were reluctant to approve of DOR where employers had failed to implement a proper procedure. The realm of 'selection criteria' to implement is thus to a greater extent left to employers to establish and qualify.

427 One example can be seen in the illustration of the Labour Appeal Court in the case of *Irvin and Johnson Ltd v CCMA op.cit* note 16.

In most cases, employers do not establish, in advance, the selection criteria to implement during DOR periods. They wait until the actual period of dismissals of which this, on practical basis, has negative effects on the outcome of the process of establishing selection methods. The time allocated to such process by then would either be insufficient or disproportional. This has been pointed out as a challenge to the objectivity required by the LRA. If there is no agreement between the employer and employees as to the selection criteria, the criterion implemented has to be fair and objective in all material respects.

A mere oversight on one of these factors, as per the decision in the *SA Breweries Ltd* case, more often than not compels the courts to declare the whole dismissal process unfair. The price of non-compliance thereof is enormously prejudicial to the financial well-being of the business. In other words, employers who have had an oversight on the prescribed procedure get ordered by the courts to remedy the situation with an enormous amount of money as compensation to the affected employees. This is still neither beneficial nor convenient to the economic well-being of the business. These assertions are explained by the court in the case of *Oosthuizen v Telkom SA Ltd* as stated *supra*.

The lesson that can be gleaned from the *Oosthuizen* case *supra* derives from the proposition of the learned Zondo J wherein he lucidly states:

> In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirement.[428]

Similarly, Israelstam has with regards to the judgment in *Oosthuizen*, opines that:

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428 *Oosthuizen v Telkom SA Ltd* 2535B-C.

> This case reinforces the fact that the courts are now placing a much tougher test than ever before on the question as to whether the employer is entitled to retrench employees. This means that hidden agendas are more likely to be uncovered and punished. Before employers consider dismissing employees under any circumstances they should obtain expert advice in order to ensure both effectiveness and legal compliance.[429]

It is submitted that although the duty of the court regarding DOR is not to second-guess the decision of the employer or run its business inside the court rooms, the purpose of the court therefore is neither defeated nor its duty usurped by this determination.[430] In the *Oosthuizen* case, Zondo J set out a very significant stratagem that would not only truncate the degree of disguised dismissals for operational reasons, but would alternatively curb the incongruous implementation of disguised dismissals. In order to avoid a torrent of litigation from cranks and busybodies, this approach should be adopted in all DOR cases.

It has been noted previously that, under the 1956 LRA, the court's interference was only restricted to ensuring that retrenchment was used for genuine operational reasons. The courts thus previously entertained retrenchments only when the employer concerned had consulted with the workforce for the purposes of avoiding dismissals or reducing the hardships brought about by the dismissals.[431]

After a comparative analysis of various jurisdictions and a lesson on how other countries implement their dismissals for operational requirements, our major finding has been that the freedom of employers to retrench in these countries, inclusive of South Africa, vary in respect of their restrictions and intricacy. The comparison has by far been of appreciable assistance in leading to reasonable recommendations to the problem at hand, when regard is had to the ways in which other countries address and solve their respective labour challenges as far as DOR is concerned.

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429 Israelstam http://www.labourguide.co.za/retrenchment/1484-employers-can-drown-in-their-redundancy-pools.

430 SA Clothing *and Textile Workers Union and others v Discreto (a division of Trump and Springbok Holdings) op.cit* note 217.

431 Grogan *op.cit* note 14 at 467.

Due to their persuasiveness, similarity and relevance in our industrial relations system, those approaches have been of aid in suggesting solutions and thus leading to reasonable recommendations for the research. The findings on the differences that exist in the legal systems of the countries that have been compared by the study show that these differences are mostly on the procedural and substantive aspects of the dismissals for operational requirements. It is common cause that the South African, Canadian and Botswana legal system vary in as far as the freedom by the employer to dismiss employees for the purposes of restructuring the business or otherwise retrenching them for purely operational reasons is concerned.

The main line of discussion was predominantly focused on the legal background pertinent to the procedure and substance over which employers in these aforementioned countries are allowed to retrench employees for business reasons or similar needs. The comparison is not theoretically incongruous to the main purpose of this research. It is by far of aid in suggesting and restructuring reasonable recommendations.

This being that the attention will be drawn to the appropriate legal approaches by other countries in addressing and solving their respective labour challenges regarding DOR. Such approaches, depending on their persuasiveness and relevance in our industrial relations system, might also be recommendable for adoption by our judiciary and legislature when developing, construing, applying or enacting and amending the laws regarding DOR.

6.3 Recommendations

In consideration of all the thorny and problematic factors, the study has found that it is essential that the courts should now place a much tougher test than before on the discretion of the employer to dismiss. Such approach will lead to the discovery of hidden agendas by employers and subsequently the courts can be able to apply a much stricter punishment. This will all be in pursuit of curbing the way in which employers disguise DOR for other methods of dealing away with unwanted

employees.[432] It is thus recommended that the courts ought to reinforce the fact that before employers consider dismissing employees under any circumstance, they should obtain expert advice, be it a labour law practitioner or specialist, in order to ensure both effectiveness and legal compliance. It must be a hard and fast standard rule for all employers to comply with prior to the dismissal stage. This compliance must be incorporated into section 189 of the LRA as one of the prerequisite for every employer. It is hoped that this dissertation will make a modest contribution to the body of legal knowledge in this emerging area of our labour laws and industrial relations.

432 Israelstam *op.cit* note 22.

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