

**Is South African labour law for dismissal based on operational requirements unduly onerous for employers?**

**An international perspective on retrenchment based on the application of international labour standards (ILO 'Termination of Employment' Convention 158 and ILO 'Termination of Employment' Recommendation 166)**

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***Introduction***

A popular myth about South African law for dismissal based on operational requirements is that it is unique, unduly onerous on employers and over-regulated. The myth is accompanied by the misconception that the consultation provisions of the Labour Relations Act<sup>1</sup> (LRA) put a bar on job creation, efficiency and competitiveness and are neither in touch with the global labour market nor in alignment with prevailing international labour standards.

This dissertation tries to dispel the misconceptions surrounding dismissal based on operational requirements – an area of labour law seen by many employers as among the most onerous in the current dispensation. It will look at mandatory consultation, which is perceived by many critics as unduly harsh on employers, from an international perspective based on the application of ILO ‘Termination of Employment’ Convention 158 (1985), ‘Termination of Employment’ Recommendation 166 (1982) and comparative ILO source material based on the General Survey of 1995.<sup>2</sup>

Following the LRA’s step-by-step process for dismissal based on operational requirements, the first part of this paper examines the statutory requirement for an employer to justify dismissal in terms of s 188(a)(ii) of the Act and asks whether South Africa’s law is unique and out of alignment with that of its global competitors.

Then, focusing on the loosely-worded definition of operational requirements (under s 213 of the LRA), part two of this paper, examines the concept’s originality with reference to the relevant ILO standards and the law in other countries. It seeks to establish whether South Africa’s definition of the concept, so often in need of judicial clarification, is more onerous than those of other jurisdictions or just a clone of international labour standards.

Turning to the most controversial aspect of such dismissal legislation – the obligation to consult outlined in s 189(2) of the LRA – part three of this paper looks

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<sup>1</sup> Act 66 of 1995.

<sup>2</sup> ILO *Termination of Employment Digest: A Legislative Review* (2000) Geneva, International Labour Office.

at legislation from other countries to contextualize the ‘should we or shouldn’t we consult’ debate and examines whether a new generation of rights has emerged since the 1990s. It questions whether the LRA’s obligation to consult is unduly onerous for employers or a legal duty implemented, in different ways, around the world.

Moving to the substantive detail of the consultation requirements of the LRA in s 189(3)(a)-(j), part four of this paper joins in the current debate on the consultation procedure’s suitability for small employers. It assesses the merits of the allegedly unduly onerous step-by-step process for small and medium-sized enterprises and questions the wisdom of selective application and special Codes of Practice advocated in recent concept papers by leading labour lawyers Halton Cheadle,<sup>3</sup> André van Niekerk,<sup>4</sup> and Anton Roskam.<sup>5</sup>

Parts five to eight of this paper, consider the legislative flexibility for employers to reach their desired goals through the ‘meaningful joint consensus-seeking process’ envisaged by s 189(2) of the LRA.<sup>6</sup>

Part five looks at measures taken around the world to avoid or minimise dismissals based on operational requirements (a requirement of s 189(2)(a)(i)-(ii) of the LRA). In particular, it considers innovative ways of finding alternatives to retrenchment. It also reviews the current debate on whether such dismissal should only be used as a last resort.

Part six compares national measures to mitigate the adverse effects of such termination, a requirement under LRA s 189(2)(a)(iii)-(iv),<sup>7</sup> with the legislation of other jurisdictions. For example, the obligation to rehire a retrenched employee – required in some jurisdictions – is far more onerous for employers than the

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<sup>3</sup> Cheadle Halton, *Regulated Flexibility: Revisiting the LRA and the BCEA* (December 2006) unpublished concept paper.

<sup>4</sup> van Niekerk André, *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA. A Response to Halton Cheadle’s Concept Paper* (March 2007) Development Policy Research Unit 07/119.

<sup>5</sup> Roskam Anton, *An Exploratory Look into Labour Market Regulation* (January 2007) Development Policy Research Unit 07/116.

<sup>6</sup> It should be stressed that the issue of written notice inviting the other party to consult under s 189 (3) of the LRA requires the employer to have already done some considerable soul-searching *before* the parties meet for consultation.

<sup>7</sup> LRA s 189(2)(a)(iii): to change the timing of the dismissals; s 189(2)(a)(iv): to mitigate the adverse effects of the dismissals.

obligation to consider ‘the possibility’ of rehiring a worker, which is the legal requirement in South Africa.<sup>8</sup>

Part seven evaluates the flexibility of selection criteria under s 189(2)(b) of the LRA<sup>9</sup> for employers to make the retrenchment decisions of their choice, and examines the scope available under the ILO instruments and the laws of other countries to protect the most vulnerable workers.

Part eight of this paper compares severance pay under s 189(2)(c) of the LRA<sup>10</sup> and s 41 of the Basic Conditions of Employment Act<sup>11</sup> with that in other jurisdictions. Using extensive data from the ILO Termination of Employment Digest, this section provides statistical evidence to prove that the financial burden of retrenchment for South Africa’s employers is significantly lower than in many other jurisdictions. (While debate comparing the legislative provisions for extended notice pay in different jurisdictions is beyond the scope of this paper, ILO data is provided in Annexure 6.)

Part nine, the final part of this dissertation, looks at notification of the administrative authorities – an international obligation in many countries for collective dismissals but not a statutory requirement in South Africa except in the case of miners (under s 52 of the Mineral and Petroleum Resources Development Act of 2002). This part of the paper seeks to dispel the myth of over-regulation in South Africa by contrasting the flexibility afforded South Africa’s employers under the LRA with more onerous legal requirements in other countries.

### ***1. Justification***

The need for an employer to justify a dismissal decision is not unique to South Africa. Key to international law on the termination of employment is that employees have the right not to be unfairly or unjustifiably dismissed.<sup>12</sup> The LRA appropriates its terminology, concepts and ingenuity on grounds for dismissal from the International Labour Organisation circa 1985. Indeed, s 188 of the LRA, is adopted

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<sup>8</sup> LRA s 189(3)(h): the possibility of the future re-employment of the employees who are dismissed.

<sup>9</sup> LRA s 189(2)(b): the method for selecting the *employees* to be dismissed; LRA s189 (3)(d): the proposed method for selecting which *employees* to dismiss.

<sup>10</sup> LRA s189(2)(c): the severance pay for dismissed *employees*; s 189(3)(f) the severance pay proposed.

<sup>11</sup> Act 75 of 1997.

<sup>12</sup> Rubin Neville, *Code of International Labour Law; Law, Practice & Jurisprudence*, vol 2, book 1 (2005) 485 at para 1.

almost verbatim from ILO ‘Termination of Employment’ Convention 158 and its accompanying ILO Recommendation 166. Article 4 of ILO Convention 158 states:

The employment of a worker shall not be terminated unless there is a valid reason for such a termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.<sup>13</sup>

The LRA’s s188 uses identical grounds for dismissal as the Convention (see words highlighted in bold):

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –
- (a) that the reason for dismissal is a fair **reason**
    - (i) related to the employee’s **conduct** or **capacity**; or
    - (ii) **based on the** employer’s **operational requirements** and
  - (b) that the dismissal was effected in accordance with a fair procedure.

The main variation between the two instruments is that the LRA uses the word ‘fair’ and the ILO Convention uses the word ‘valid’. The Cambridge Dictionary defines valid as ‘based on truth or reason’ and fair as ‘treating someone in a way that is right or reasonable’. Although it could be argued that the LRA’s fair is more subjective and onerous for employers than the ILO Convention’s valid, experience shows that the word fair has not proved an obstacle to South African business.<sup>14</sup>

Extensive data from the Termination of Employment Digest (2000) produced by the ILO in Switzerland, reveals that South Africa’s grounds for justification of unfair dismissal are consistent with those of the majority of countries. For example whether the reason for dismissal is ‘valid’ (ILO Convention 158, Article 4), ‘fair’ as in South Africa (s 188 LRA) or on ‘well-founded and on valid grounds’ as in France (s L122-3-8, Labour Code, 1974),<sup>15</sup> the culture of justification is an international norm.<sup>16</sup>

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<sup>13</sup> See Annexe 1: ILO ‘Termination of Employment’ Convention, No 158 (1985); ILO ‘Termination of Employment’ Recommendation, No 166 (1982).

<sup>14</sup> The only other variation between the LRA s 188(1)(a) and ILO Convention 158, Art 4, is that the Convention uses the words ‘connected with’ the conduct or capacity of the worker while the LRA uses ‘related to’ the employees conduct or capacity. ‘Connected with’ means to be ‘joined with something else’ while ‘related to’ means ‘to find or show the connection between two or more things’. It is debatable whether the looser wording of the LRA affords employees any more protection than the ILO instrument: citing *Cambridge Dictionary Online*.

<sup>15</sup> ILO Digest, op cit (note 2) at 147.

<sup>16</sup> The rise of the labour movement, industrial unrest and the growing recognition of the need to protect workers prompted a change in the thinking of legislators, who, at the beginning of the 20<sup>th</sup> century, started to modify the substantive provisions of regulation in this area: idem at 9.

The right *not* to be unfairly dismissed can be seen in most national legal systems, albeit in different forms. In some countries, it is given the status of a constitutional right. For example, the Mexican Constitution established in 1917 that dismissal should be based on ‘valid’ reasons.<sup>17</sup> In Latin America, 13 out of 20 national constitutions have incorporated labour rights as fundamental rights – Argentina, Bolivia, Brazil, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Venezuela.

Section 23 of the South African Constitution, 1996, includes the right to fair labour practices, which incorporates the right not to be unfairly dismissed. Section 39(1) of the Constitution requires the courts or arbitrations to ‘consider international law’ when interpreting the Bill of Rights. The courts have had recourse to ILO Convention 158 and Recommendation 166 when interpreting the right not to be unfairly dismissed, although it should be emphasised that South Africa has not ratified ILO Convention 158 (see Annexure 2 listing the 34 countries that have ratified the Convention).<sup>18</sup>

While the analysis above shows that the grounds for justification of dismissal in South Africa are consistent with those in most other jurisdictions, Article 4 of the ILO Convention is more rigorously applied in South Africa because of the wide scope of who is an employee under the LRA. However, experience shows this has not opened the floodgates to claims of unfair dismissal. South Africa follows international best practice in terms of its broad definition of employee. It should be emphasised that the LRA covers all employees in both the public and private sectors, with the exception of members of the defence force and the state intelligence agencies.<sup>19</sup>

The consequence of limiting the scope of the LRA means that there is no statutory remedy for unfair dismissal if an employee falls within the excluded categories.<sup>20</sup>

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<sup>17</sup> ILO Digest, op cit at 9.

<sup>18</sup> See Annexure 2. List of 34 countries which have ratified Convention 158 with dates: Antigua and Barbuda, Australia, Bosnia and Herzegovina, Brazil (denounced), Cameroon, Central African Republic, Democratic Republic of Congo, Cyprus, Ethiopia, Finland, France, Gabon, Latvia, Lesotho, Luxembourg, the former Yugoslav Republic of Macedonia, Malawi, Republic of Moldova, Montenegro, Morocco, Namibia, Niger, Papua New Guinea, Portugal, Saint Lucia, Serbia, Slovenia, Spain, Sweden, Turkey, Uganda, Ukraine, Venezuela, Yemen, Zambia: ILO.

<sup>19</sup> LRA s 213: An ‘employee’ is defined as ‘any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive any *remuneration*’.

<sup>20</sup> In addition to the LRA definition of ‘employee’, the Basic Conditions of Employment Act 75 of 1997 – which deals with minimum periods of notice and severance pay - is similarly limited except

However, because s 23(1) of the national Constitution entrenches the right to fair labour practices for ‘everyone’, the unfair dismissal of such an employee may give rise to a constitutional claim.<sup>21</sup>

In other countries where the right to justify dismissal is created by statute, for example in the United Kingdom, there is no statutory remedy for unfair dismissal until an employee has served a qualifying period of one year.<sup>22</sup> While this allows employers greater flexibility to hire and fire, the provision is offset by greater protection for the worker in the form of social security benefits.<sup>23</sup>

However, the existence of regulation does not ensure its practical application. In France,<sup>24</sup> a country which ratified ILO Convention 158 in 1989, an ILO complaint against new contracts of employment (referred to as CNEs) was received last year for inter alia breaching Article 4 of ILO Convention 158. The CNEs allow employers to dismiss employees under the age of 26 without a valid reason.<sup>25</sup>

While dismissal law may be more rigorously applied in South Africa than in some other countries, also because of recourse to the CCMA, the LRA justification for dismissal (under s 188) is in alignment with most other jurisdictions, which use the same ILO template that requires an employer to justify a dismissal decision on grounds of ‘conduct’, ‘capacity’ or ‘operational requirements’.

There are only a handful of countries where an employer does *not* need to justify a dismissal, for example, Austria, Belgium and the United States.<sup>26</sup> In the USA, no legislative mechanism exists for unfair dismissal. The employment relationship is

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that there is an additional general limitation of scope (regarding unpaid volunteers working for charitable organisations) and several specific limitations for merchant seamen (only the provisions on severance pay apply). Moreover, the BCEA does not apply to people receiving vocational training to the extent that their terms and conditions are regulated by other laws; and employees who work less than 24 hours a month (s 36 of BCEA).

<sup>21</sup> ILO Digest, op cit at 300.

<sup>22</sup> In the UK, the qualifying period has recently been reduced from two years to one year.

<sup>23</sup> It is also worth noting that during the economic expansion of the 1960s and 1970s, a number of European countries introduced statutory restrictions on the termination of certain workers such as shop stewards: Digest, idem at Part I.

<sup>24</sup> The restriction of dismissal ‘without cause’ was gradually broadened in countries whose legal systems were based on the Napoleonic Code and by the 1940s most states within this legal tradition had introduced legislation on the justification of dismissal that required notice and severance pay: idem at 9 (See Annexure 3).

<sup>25</sup> ILO, Governing Body, Sixth Supplementary Report: Report of the committee set up to examine the representation alleging non-observance by France inter alia of the Termination of Employment Convention 1982 (No158) made under article 24 of the ILO Constitution by the Confederation Générale du Travail Force Ouvrière, (November 2007): See Annexure 3.

<sup>26</sup> ILO Digest, ibid.



considered to be ‘at the will’ of the parties. However, since the 1970s, the courts in the US have restricted the use of ‘at will’ powers<sup>27</sup> to bring national law more into alignment with international labour standards.<sup>28</sup>

## ***2. The definition of operational requirements***

The definition of operational requirements (s 213, LRA) as requirements based on ‘the economic, technological, structural or similar needs of an employer’ provides ample elasticity for South African employers to make the business changes of their choice – ranging from basic viability to abundant profit – and can be regarded as one of the least onerous aspects of the Act.<sup>29</sup>

The LRA definition is so broad that the concept has almost become an expedient open to abuse, according to Clive Thompson. All an employer need do is re-classify a demand as an operational requirement<sup>30</sup> and he or she can transform collective bargaining into a consultation about retrenchment.<sup>31</sup>

However, international research reveals that the original concept of operational requirements was never defined, only explained at an ILO Conference 27 years ago and then incorporated into the South African statute. What is intriguing is why a concept as important as operational requirements was left undefined by the ILO in Convention 158 and no guidelines provided in Recommendation 166.<sup>32</sup> Only a report presented for discussion at an ILO conference in 1981 (a year before the Recommendation was written) stated that these reasons ‘generally include reasons of an economic, technological, structural or similar nature’.<sup>33</sup> It is from this report that

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<sup>27</sup> American courts have been restricting ‘at will’ powers by applying exceptions based on the principles of implied contract, good faith and civil liberty: ILO Digest, op cit at 9.

<sup>28</sup> American collective agreements often contain clauses that provide employees will not be discharged except for ‘just cause’ and establish grievance and arbitration procedures in alignment with South Africa’s: supra.

<sup>29</sup> ‘A legal bar on downsizing for greater efficiency is not compatible with the dynamics of domestic and international labour market. Business has an operational requirement to be competitive. Business that anticipate prosper,’: citing Benjamin Paul, ‘Downsizing for Efficiency and Improved Profit’ in Thompson Clive and Benjamin Paul, *South African Labour Law* vol 3 (updated since 1965) at 430.

<sup>30</sup> On the migration of interest disputes to disputes of right: ‘When parties engage in economic bargaining, one of them should not lightly be allowed to pull the plug on the process by threatening the demise of the other if it does not get its way. The courts should look especially critically at the claim that a fair reason based on the operational requirements of a business permits an employer engaged in bargaining to throw the dismissal lever if its entire package is not accepted’: citing Thompson Clive, *Bargaining over Business Imperatives: the music of the spheres after Fry’s Metals* (2006) 27 ILJ 704.

<sup>31</sup> Roskam, op cit (note 5).

<sup>32</sup> Rubin, op cit (note 12) 491 at para 1.

<sup>33</sup> Idem, at para 2, citing ILC, 67<sup>th</sup> Session, 1981, Report VIII (1), at 23.

the vast majority of countries, including South Africa, take their lead. While South Africa's definition may be in urgent need of clarification it is in alignment with that of many other countries.

According to Neville Rubin in 'Code of International Labour Law; Law, Practice & Jurisprudence', Volume II Book I (2005), the ILO's Committee of Experts has pointed out that reasons 'relating to' the operation of the undertaking are generally defined by reference to redundancy or reduction of the number of posts for economic or technical reasons or due to force majeure or accident.

Rubin cites rationalisation, modernisation, a fall in production, changed market or economic conditions requiring the dismissal of one or more workers and failure of the worker to adapt to work techniques<sup>34</sup> as examples. Such dismissals can be individual or collective and may involve a reduction of the workforce or closure of the undertaking<sup>35</sup> – providing a lot of flexibility for the employer, which South Africa adopts.

In France, the courts have ruled that a termination of employment is not for an economic reason if the result of a reorganisation is not in the interests of the business.<sup>36</sup> This test for substantive fairness is more onerous for employers than South Africa's. Section 189A(19) of the LRA, see below, does not dispute the employers' rationale provided that:

The Labour Court must find that the employee was dismissed for a fair reason if –

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was *operationally justifiable on rational grounds*;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.

For enterprises with fewer than 50 employees, South African judgments differ<sup>37</sup> regarding the extent to which the courts have been willing to second-guess the employer's rationale for retrenchment.<sup>38</sup> As a general rule, once a court is satisfied

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<sup>34</sup> Citing Chile as an example of a country where failure to adapt to a work technique is valid grounds for dismissal; Rubin, op cit (note 12) at 492.

<sup>35</sup> Idem at para 4.

<sup>36</sup> Idem at para 5.

<sup>37</sup> Different definitions led to anomalous results in court: citing Roskam, op cit (note 5).

<sup>38</sup> Five approaches taken by the courts ranging from *Fry's Metals (Pty) Ltd v NUMSA* recognising the employers' desire to increase profits as a legitimate operational requirement to the more interventionist stance of *CWIU v Algorax* as a measure of last resort: supra.

that the decision to retrench is based upon sound economic considerations it will not interfere with that decision.<sup>39</sup> Roskam, however, observes the courts' difficulty in determining a consistent test for substantive fairness where smaller enterprises have decided to retrench.

Rubin is helpful here when he states that reasons relating to the operational requirements of the undertaking can also be defined in negative terms as those *not* connected with the capacity or conduct of the worker.

In the final analysis, case law has played a key role in shaping the ILO concept and LRA definition of operational requirements. A comparative analysis of jurisprudence on the definition of the concept is beyond the scope of this paper, but it is worth noting a few key national cases that illustrate the immense flexibility for employers of South Africa's definition of operational requirements.

In *Johnson v Johnson (Pty) Ltd v CWIU*,<sup>40</sup> the Labour Appeal Court found that '[operational requirements] do [not] always flow from the local needs of an employer' but may also arise from the impact of global developments on the profitability of the parent company of a South African subsidiary.'

In *NUMSA v Driveline Technologies (Pty) Ltd and another*,<sup>41</sup> the Labour Appeal Court held that the distinction between retrenchment (ie dismissal based on economic need) and redundancy (ie dismissal due to the disappearance of an employee's job) both fall under the definition of operational requirements. An employer's inability to pay a transport allowance was accepted as an economic need. Similarly, a merger has been found to be both an economic and a structural need, with the aim of improving profitability being accepted as an economic and a structural need.<sup>42</sup>

Nor are the effects of a protected strike excluded from the scope of the LRA's definition of operational requirements. In *SACWU & Others v Afrox Ltd*, the Labour

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<sup>39</sup> It only becomes substantively unfair if it will not result in the business objective and dismissal is not supported on the facts; Benjamin, op cit (note 29) at 430.

<sup>40</sup> [1998] 12 BLLR 1209 (LAC) at paras 1-2.

<sup>41</sup> [2001] 2 BLLR 203 (LC).

<sup>42</sup> *SATU v The Press Corporation of SA Ltd* [1998] 11 BLLR 1173 (LC) at 1180; LexisNexus, *Labour Law Through The Cases* at [LRA 9-20].

Appeal Court held that even operational requirements caused by a protected strike may justify such a dismissal.<sup>43</sup>

By contrast, in *CWIU & Others v Algorax (Pty)*<sup>44</sup> the Labour Appeal Court suggested that operational requirements ‘may include the desire to reduce the cost in the absence of any necessity to do so’. In the example given by the court, employees may be fairly dismissed if they refuse to comply with an employer’s demand to work short-time as a cost-saving measure.<sup>45</sup>

### **3. The obligation to consult**

The currency of mutual persuasion, formidable as it may seem to the uninitiated, is in alignment with that of other jurisdictions. Such consultation is ideally based upon tripartite participation through dialogue and self-regulation. It is part of a new generation of rights and culture of justification when the loss of livelihood is anticipated that emerged throughout the world in the 1990s.

Considerable research and rigorous scrutiny of South African and international standards reveals that the eloquently phrased objectives of consultation in s189(2) of the LRA are not South Africa’s pearls of wisdom but those of the ILO. All national consultation measures – simplistically referred to as the ‘employers’ burden’ in leading text books – just codify ILO Convention 158 and ILO Recommendation 166. The obligation to consult is an international duty implemented in different ways across the globe.

Most countries have statutes requiring consultation with employee representatives for collective dismissal.<sup>46</sup> The ILO Termination of Employment Digest lists 45, including: Argentina, Australia, Austria, Belgium, Brazil, Cambodia, Cameroon, Canada, Caribbean Community, China, Côte d’Ivoire, Czech Republic, Ethiopia, France, Gambia, Germany, Guinea, India, Indonesia, Italy, Kenya, Korea, Mauritius, Namibia, Netherlands, Nigeria, Peru, Philippines, Poland, Russian Federation,

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<sup>43</sup> ‘The employer’s right to fair labour practices in the form of a right to a fair dismissal based on operational requirements... must come into play when the exercise of the right to strike threatens the continued operation of the employer’s enterprise’ [1998] 2 BLLR 171 (LC), citing *Labour Law Through the Cases*: *ibid*.

<sup>44</sup> [2003] 11 BLLR 337 (LC).

<sup>45</sup> ‘Operational requirements’ for purposes of s189 LRA refers to those of the current employer and does not include the operational requirements of a third party to whom the employer intends to transfer its business, *Western Province Workers Association v Halgang Properties* CC [2001] 6 BLLR 693 (LC).

<sup>46</sup> See Annexure 4, ‘Statutory regulation of unfair dismissal’: ILO Digest op cit 384-387 at table 1.

Senegal, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Thailand (with employees not employees' representatives), Tunisia (commission for the supervision of dismissals), United Kingdom, United States of America ( if covered by WARN Act), Venezuela, Vietnam and Zimbabwe (with tripartite committee).

Under such statutes, the ILO Digest states, the employer is 'generally expected to consult workers' representatives on the measures it intends to adopt'. Article 13 of ILO Convention 158 and Article 19 of ILO Recommendation 166 form the basis for much of this similar legislation (see words highlighted in bold).

#### Division A. Consultation of Workers' Representatives

##### Article 13:

(1) When the employer contemplates terminations for reasons of an **economic, technological, structural or similar nature**, the employer shall:

(a) provide the workers' representatives concerned in **good time** with **relevant information**, including the **reasons** for termination contemplated, the **number** and **categories** of workers likely to be affected and **the period over which** the terminations are intended to be carried out;

(b) give in accordance with national law and practice, the workers' representative concerned, as early as possible, an opportunity for consultation on **measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects** of any termination on the workers concerned such as **finding alternative employment**.

The statutory obligation for South African employers to consult employees when they are 'contemplating' dismissals is in s 189(1) of the Act, while s 189(2) of the LRA sets out the subject matter of consultation based on Article 13(b) of ILO Convention 158.<sup>47</sup> Section 189A of the LRA, an amendment introduced in 2002, imposes additional obligations on employers with more than 50 employees in dismissals of more than 10 workers to consult under the auspices of the CCMA in the form of facilitation. Section 189A of LRA must now be read together with Facilitation Regulations (2003).

The timing of consultation envisaged under Article 13(1) of the ILO Convention – when the employer 'contemplates'<sup>48</sup> retrenchment – is identical to s 189(1)(a) of the LRA (see below, words highlighted in bold), which states:

**When an employer contemplates** dismissing **one or more** employees for reasons based on the employer's operational requirements, the employer **must consult**.

<sup>47</sup> Grogan John, *Dismissal Discrimination and Unfair Labour Practices*, 2ed (2007) 443.

<sup>48</sup> Definition of 'contemplates': 'to spend time considering a possible future action, or to consider one particular thing for a long time in a serious and quiet way': *Cambridge Dictionary Online*.

The opportunity for workers to be consulted reflects a situation which differs from mere information. According to Rubin, consultation should have some influence on the decisions taken.<sup>49</sup> To have a chance of making a positive contribution, Rubin points out, the Convention stipulates under Article 13(1)(b) that consultation must take place as ‘early as possible’, which allows the measures to be contemplated without haste and with circumspection. ILO Recommendation 166, Rubin observes, adds a further component to the ILO Convention. It proposes consultations *before* the stage where retrenchment becomes inevitable.

While there is no definition of ‘consultation’ in s 213 of the LRA, the purpose of it is spelt out in the preamble to s 189(2) of the LRA, which states that the consulting parties must engage in ‘a meaningful joint consensus-seeking process and attempt to reach consensus’.

Here it should be emphasised that the ‘consensus-seeking process’ envisaged under s 189 and s 189A of the LRA requires the employer to do no more than consider suggestions from the employees or their representatives, and, if they are not seen as practical, give reasons for rejecting them. All the process does is to impose a culture of justification on employers for dismissal based on operational requirements.

Consultation in this context differs from negotiation, which involves a willingness by the parties to *compromise* to reach agreement.<sup>50</sup> The s 189(2) LRA interpretation of the concept is codified from jurisprudence under the previous 1956 Act.<sup>51</sup> Then, the courts required consulting parties ‘to attempt to reach consensus’ – a process which went beyond the meaning of ‘consultation’ in the sense of ‘merely taking counsel’.

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<sup>49</sup> Rubin, op cit 536 at para 6.

<sup>50</sup> ‘There is a distinct and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement in terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement’: *Metal & Allied Workers Union v Hart* [1985] 6 ILJ 478 (IC).

<sup>51</sup> Industrial Conciliation Act 28 of 1956.

The courts regarded pre-retrenchment consultations as ‘an exhaustive joint problem-solving or consensus-seeking process between the employer and consulted parties’ involving the provision of all relevant information.<sup>52</sup>

‘Consultation’ it has been held must therefore be ‘exhaustive’ and ‘not sporadic, superficial or a sham’ to be meaningful.<sup>53</sup> The courts act as monitors of the process. Social dialogue is a two-way process. An employer cannot reasonably be expected to consult a trade union that evades dialogue or seeks to drag it out for no good reason. And a trade union cannot be blamed for failing to consult an employer if, from the outset, it was confronted with a *fait accompli*.<sup>54</sup> The Code of Good Practice on Dismissal Based on Operational Requirements<sup>55</sup> codifies this when it states: ‘The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.’<sup>56</sup>

South Africa, it transpires, has not reinvented the wheel when it comes to mandatory consultation for dismissal based on operational requirements, just followed international labour standards and reshaped a couple of spokes. A unique part of the LRA is s 189(3)(a)-(j) with its inspired step-by-step approach to written notice and built-in rights to disclosure of information.<sup>57</sup> However, even this part of the Act, widely perceived as unduly onerous by employers, is just a codification of ILO Convention 158 and Recommendation 166 – albeit an inspired one. The substantive detail of LRA s 189(3) adds nothing new to the ILO blueprint, although

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<sup>52</sup> The current s 189(1) echoes the words of *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* [1999], op cit: Grogan, op cit (note 47) 444 at note 77.

<sup>53</sup> *Hadebe & Others v Romatex Industrials Ltd* [1986] 7 ILJ 1718 (LAC).

<sup>54</sup> *NUM & Others v Alexcor Ltd* [2005] I BLLR 1186 (LC).

<sup>55</sup> GG 2054 GN 1517 (16 July 1999).

<sup>56</sup> Code of Good Practice was written before the 2002 amendment to s 189A of the Act and is therefore out of date in regard to this section: idem at para 3. The CCMA is currently updating its training manual on facilitation because ‘a lot has changed since the introduction of s 189A’: Senior Commissioner Leon Levy, CCMA, Western Cape.

<sup>57</sup> LRA s 189 (3): The employer must issue a written notice inviting the other consulting parties to consult with it and disclose in writing all relevant information, including but not limited to – (a) the reason for the proposed dismissals; (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives; (c) the number of employees likely to be affected and the job categories in which they are employed; (d) the proposed method for selecting which employees to dismiss; (e) the time when, or the period during which, the dismissals are likely to take effect; (f) the severance pay proposed; (g) any assistance that the employer proposes to offer to the employees likely to be dismissed; (h) the possibility of future re-employment of the employees who are dismissed; (i) the number of employees employed by the employer, and (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

it serves as a good summary and workable model of the new generation of rights that emerged in the 1990s.

By contrast, s189A of the LRA, with its process-driven requirements for facilitation under the auspices of the CCMA, is far more innovative. The six-year-old section adds a new, home-grown version of the rights-based approach of the ILO Convention. It has, according to a senior CCMA Commissioner,<sup>58</sup> saved thousands of jobs since its introduction in 2002 with its innovative solutions to finding alternative employment.

Paradoxically, s 189A of the LRA despite its requirements for third-party intervention, is not as unpopular with employers as s 189(3) of the LRA. Facilitation is reportedly requested by at least 30 per cent of employers contemplating dismissal based on operational requirements and is regarded as a model of international best practice by the ILO.

It should be emphasised that the facilitation provisions under LRA s189A are in alignment with international labour standards. Article 19 of ILO Recommendation 166 at paragraph 2 states:

Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

The ILO Recommendation gives a more active role to the competent authority than the ILO Convention in that it calls upon the authority to help the consulting parties find solutions to the problems raised by the proposed terminations, according to Rubin.

Section 189A(3) of the LRA gives effect to Article 19 of the ILO Recommendation by allowing either party the option of a CCMA facilitator to chair the consultation process.<sup>59</sup> Facilitation, as opposed to ad hoc consultation, follows a more formal workshop structure with up to four meetings between the parties unless a settlement can be reached sooner. Facilitation meetings<sup>60</sup> are conducted on a 'with prejudice'

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<sup>58</sup> Levy, op cit (note 56).

<sup>59</sup> The consent of only one party is required for facilitation to take place under LRA s 189A, unlike at the Advisory Conciliation and Arbitration Service (ACAS) in the United Kingdom where the agreement of both parties is necessary.

<sup>60</sup> Facilitation Regulations (2003).



basis and the process has been described as a ‘sea change’<sup>61</sup> by CCMA Commissioners. The procedure is relatively popular with unions and employers, according to one CCMA facilitator in the Western Cape, who estimates that about 70 per cent of requests for facilitation are brought at the instigation of unions and 30 per cent by employers.<sup>62</sup>

Facilitation in South Africa is essentially a time-driven process with a statutory 60-day moratorium on consultation. Swift provisions for disclosure under the LRA (s 16 and s 189(3)-(4)) and Facilitation Regulations (s 5)<sup>63</sup> ensure that deadlines are met.

By contrast, in countries with no statutory obligation to consult employees, such as Cyprus, retrenchment procedures can be more protracted, regulated and complex for employers.<sup>64</sup> In Israel, consultation provisions can be found in an array of collective agreements – as is the case in Japan, although the courts there also play a role. In New Zealand, where there is no statutory obligation to consult, the same consultation principles are considered the justification for dismissals in common law.<sup>65</sup>

Research indicates that countries with *no* statutory or other provision for consultation in this area are less in alignment with international labour standards than those that have such provisions. The ILO Digest identifies countries without provisions as: Bangladesh, Bulgaria, Chile, Hong Kong, Colombia, Dominican

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<sup>61</sup> CCMA, *s189 Facilitation Under the LRA; 2003 update for CCMA Commissioners* (2003) at 2.

<sup>62</sup> Levy, *op cit* (note 56).

<sup>63</sup> Facilitation Regulations s 5: Power to order disclosure of information (1) If there is a dispute about the disclosure of information the facilitator may, after hearing representations from the parties, make an order directing an employer to produce documents that are relevant to the facilitation.

<sup>64</sup> Cyprus: The Termination of Employment Law, 1967, as amended 1994 requires the employer to notify the Minister of Labour and Social Insurance of the proposed redundancies at least one month prior to the date they are implemented (s 21 TEL). The notification must include the number of employees likely to become redundant (and, where possible, their occupation, names and responsibilities), the branch which is affected and the reasons for the retrenchment. The TEL, however, does not require employers who are contemplating retrenchment to consult with and provide information to employee representatives. Provision for such information and consultation is made in Part II of the Industrial Relations Code (IRC) of 1977. The Code is not binding, so no legal sanctions can be imposed for not complying with its provisions. The IRC stipulates that the employer should notify the trade union at least two months before the date of retrenchment. After notification, consultations should be – as early as possible – carried out with the unions and employees in accordance with the provisions of the ILO Termination of Employment Recommendation 166: ILO Digest, *op cit* at 125.

<sup>65</sup> New Zealand: Where the employer contemplates termination for reasons of an economic, technological, structural or similar nature, he or she must discuss the proposed redundancy with the affected employees and any relevant union representative before the final decision is made. There must be true consultation which includes giving the employees and their representatives a real opportunity for making an input and considering any constructive suggestions they may submit. In addition, adequate information about the nature of the proposed ‘redundancy’ must be given to the employees before such consultation, citing *idem* at 27.

Republic, Egypt, Ghana, Iran, Iraq, Jamaica, Malaysia, Mexico, Nepal, Pakistan, Panama, Singapore, Syria and Zambia.

However, many of these countries, such as Mexico and Nepal, require notification and approval of the administrative authorities for retrenchment to be valid. Such statutory provisions are far more onerous for employers than South Africa's mandatory obligation to consider alternatives. In addition, some of these countries, such as Mexico, pay far higher rates of severance pay than South Africa.

#### ***4. The obligation to consult and small business***

While analysis shows that most countries have statutes requiring employers to consult employees' representatives when they are contemplating retrenchment, the general application of such consultation procedures in South Africa under s 189 of the LRA is controversial in so far as it affects small businesses. The same consultation procedure is applied to the retrenchment of a single domestic worker as a case involving the dismissal of 49 employees.

Section 189(1)(a) of the LRA gives full application to the ILO instrument where it stipulates:

When an employer contemplates dismissing *one or more* employees for reasons based on the employer's operational requirements, the employer must consult.

It should be stressed, that such general application of consultation practices under LRA s 189 to all 'employees' is in alignment with international labour standards. Article 13 of ILO Convention 158 sets no quantitative criteria for consultation procedures to apply.<sup>66</sup> The obligation to consult can apply to a single worker, if national methods state, according to Rubin.

However, the Committee of Experts, Rubin notes, observes that national legislation and collective agreements frequently exclude small and medium-sized enterprises from information and consultation procedures by introducing a minimum threshold to which these procedures apply, and that these excluded firms account for many, if not most, of the enterprises in some countries.

Such an exclusion is in accordance with Article 13 of the ILO Convention at paragraph 2 where the instrument states:

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<sup>66</sup> Rubin, *idem* at 535 para 1 citing General Survey, 1995 at para 277.

(2) The application of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1<sup>67</sup> of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

The ILO mechanism of limitation – to a specified number or percentage of the workforce – is used in some advanced economies to simplify the consultation process and make it less onerous for small enterprises. Halton Cheadle is not out of alignment to have initiated a debate in South Africa over whether small business ‘must consult’. It is quite legitimate, in terms of international standards, for unfair dismissal laws to exclude certain categories of employees from their application. In some countries, such as Italy, regulations for small businesses have been relaxed.<sup>68</sup> In South Africa, by contrast, the Labour Appeal Court has held that only one category of employees may not be retrenched – those on fixed-term contracts whose contracts have not yet expired.<sup>69</sup>

Leading South African labour lawyer André van Niekerk,<sup>70</sup> writing from a business perspective, contends that many other jurisdictions exclude categories of employees from dismissal laws because of the constraints such consultation procedures place on small businesses (such as hiring new staff) and argues that it is a valid area for review.<sup>71</sup> He cites Austria, Belgium, Denmark, Finland, Greece, Hungary, Switzerland and Turkey as examples of countries where employers with less than 20 employees are exempt from statutory consultation and notification procedures.<sup>72</sup>

For example, in Germany, the Protection against Unfair Dismissal Act<sup>73</sup> does not normally apply to enterprises employing less than 20 workers. In Australia, van Niekerk notes, recent amendments to labour legislation have the effect that businesses with up to 100 staff are exempt from unfair dismissal laws.<sup>74</sup> The stated purpose of the Australian amendment is to generate economic growth and provide

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<sup>67</sup> ILO Convention 158: Part 1; Methods of Implementation, Scope and Definitions. Article 1. The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manners may be consistent with national practice, be given effect by laws or regulations.

<sup>68</sup> Neither Italy nor Venezuela have ratified Convention 158; in ILO Digest, op cit 15 at note 59.

<sup>69</sup> *Buthlezi v Municipal Demarcation Board* [2004] 25 ILJ 2317 (LAC).

<sup>70</sup> van Niekerk, op cit (note 4) at 9.

<sup>71</sup> Idem, at 3.

<sup>72</sup> General Survey: ‘Protection against unjustified dismissal’, International Labour Conference 82<sup>nd</sup> Session 1995 at para 277; van Niekerk, op cit at 26.

<sup>73</sup> s 17-18 Protection Against Dismissal Act (PADA), 1996; citing ILO Digest, op cit at 158.

<sup>74</sup> van Niekerk, idem at 15.

more job opportunities – although van Niekerk cites an OECD Report conducted in 1996, which shows there were no comparative advantages to be had from the ‘denial or violation of core labour standards’.<sup>75</sup>

In the UK, statutory consultation and notification procedures apply only in dismissals concerning 20 or more employees and extend over 90 days. In South Africa for s189A dismissals the consultation period may last up to 60 days – comparatively less onerous for employers.<sup>76</sup> The most common waiting period, according to van Niekerk<sup>77</sup> is 30 days (Norway, Netherlands, Ireland, Denmark and Austria) but some countries extend consultation to 45 days (Italy and Poland), 75 days (Portugal) and two to six months (Sweden). The length of consultation periods in other countries compare favourably (ie are in alignment) with the requirements of the LRA, even where s 189A of the Act and its 60-day moratorium applies. The length of consultation under the LRA is not unduly onerous for South Africa’s employers compared with that in many other countries.<sup>78</sup>

Van Niekerk observes that managers can be excluded from unfair dismissal laws. At present the LRA draws no distinction between levels of seniority, and work security rights apply to all. He argues that selective application of legislative standards, a mechanism identified by Cheadle<sup>79</sup> in the Employment Equity Act,<sup>80</sup> may similarly be applied to unfair dismissals. For example, most managers are excluded from the hours of work provisions of the BCEA.<sup>81</sup>

Selective application, according to van Niekerk, has ‘never been seriously contemplated’ in respect of South African rights to employment security, and a review is ‘appropriate’ and ‘necessary’. One of the reasons for such a ‘failure’, as

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<sup>75</sup> Citing Bob Hepple (2005) at 14-15: van Niekerk, op cit at 5.

<sup>76</sup> UK: The definition of ‘redundancy’ is that the employee’s dismissal is attributable wholly or mainly to the fact that: – the employer has ceased or intends to cease to carry on that business in the place where the employee was so employed; or the requirements of that business for employees to carry out work of a particular kind in the place where the person affected was so employed have ceased or diminished or are expected to cease or diminish, citing s 139(1) Employment Rights Act, 1996: ILO Digest, op cit at 347.

<sup>77</sup> Citing OECD Report 1996 at 11: van Niekerk, idem.

<sup>78</sup> Ibid.

<sup>79</sup> Cheadle, op cit (note 3).

<sup>80</sup> Act 55 of 1998, Ch 1(1)(b): ‘designated employer’ excludes employers employing fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act.

<sup>81</sup> Rationale for exclusion of managers is that their bargaining power is usually greater. They are capable of negotiating their rights: van Niekerk, idem at 12.

van Niekerk puts it, 'is probably historical'.<sup>82</sup> In other words, the exclusion of African workers from the legal framework governing employment rights for more than half a century means that the tripartite alliance (employers, unions and government) will not contemplate a dualist or non-coherent dismissal system.

It is in this context that the employers' obligation to consult all workers when retrenchment is contemplated should be seen in South Africa. While a full discussion of the country's once racially exclusive labour laws is beyond the scope of this paper, it is worth mentioning a few important historical facts that van Niekerk omits.

First, the Industrial Conciliation Act 11 of 1924, the first so-called 'comprehensive' labour law in South Africa, excluded African workers from the definition of 'employee', and therefore from membership of registered trade unions, from direct representation on industrial councils and from conciliation boards.<sup>83</sup> The exclusion meant that they could be employed on inferior terms to those set by industrial councils or conciliation board agreements. Labour relations in South Africa were subject to this political and ideological 'vision' for more than 50 years.

Second, the Industrial Conciliation Act 28 of 1956 further revised South African labour legislation to bring it into line with apartheid. African workers were unofficially defined by the Prime Minister as 'drawers of water and hewers of wood'.<sup>84</sup> The Act entrenched racial division by prohibiting the registration of new 'mixed' unions and formally introduced 'job reservation' for white workers. This dual system continued throughout the 1970s until industrial unrest by excluded African trade unions made the status quo unworkable.

Finally, it was only in 1979 with the Wiehahn Commission of Inquiry into Labour Legislation that African workers were allowed to join trade unions and be directly represented on industrial councils or conciliation boards, ending the dual system of labour relations. In this way, the 1980s saw the emergence of a coherent system of labour law in South Africa. Because African workers were disenfranchised, their

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<sup>82</sup> van Niekerk, *ibid.*

<sup>83</sup> The definition of 'employee' in s 24 of the 1924 Act: du Toit Darcy et al, *Labour Relations Law, A Comprehensive Guide*, 5 ed (2006) at 7.

<sup>84</sup> Prime Minister Hendrik Verwoerd, architect of apartheid.

unions were drawn into broader political struggles until the Labour Relations Amendment Act 83 of 1988 was promulgated and tripartism began in earnest.<sup>85</sup>

The present Constitution entrenches rights to equality, labour rights, access to the courts and administrative justice for everyone. Any ‘selective application’ of employment security (as outlined in s 23 of the Constitution) could not be considered constitutionally ‘justifiable’, even though the legislative mechanism is accepted by the ILO and implemented in other democracies. A limitation on the Constitutional right to fair labour practices in South Africa cannot be justifiable if social justice is both the goal and the precondition of the Constitution, as van Niekerk states.<sup>86</sup>

A review of selective application of employment security is neither ‘appropriate’ nor ‘necessary’, as van Niekerk would have us believe. His argument is a response to Halton Cheadle’s unpublished paper ‘Regulated Flexibility and Small Business: Revisiting the LRA & BCEA’ (2006) but goes further in its recommendations for exclusion than Cheadle’s.

Cheadle, like van Niekerk, contends that the consultation procedures for dismissal based on operational requirements are ‘not suitable’ for small businesses:

They do not typically have the internal resources nor can they afford the external resources to advise them to follow the complex set of obligations and consultations before dismissal for operational requirements. It may be less onerous but without any loss of protection to exclude small business from the detailed retrenchment provisions in the LRA and to supplement the general duty in section to follow a fair procedure under section 188 with provisions in a code setting out a simplified procedure based on the principles that informed the more rigorous statutory procedure.<sup>87</sup>

While there may be something to be said for a simplified consultation procedure for enterprises with fewer than five or six people in economic crisis, it is worth reiterating Rubin’s point that small and medium-sized firms account for many, if not most, enterprises in the labour market.<sup>88</sup> Cheadle’s concept paper lacks substantive detail on which statutory elements should be changed.

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<sup>85</sup> du Toit, op cit at 13.

<sup>86</sup> van Niekerk, op cit at 6.

<sup>87</sup> Cheadle, op cit 29 at para 88.

<sup>88</sup> For example in the UK only 10 per cent of the total number of legal proceedings initiated for termination of employment in 1994 were considered unjustified and 53 per cent of these cases took place in enterprises employing fewer than 50 workers; ‘Great Britain Labour Force Survey’ (1994) cited in ILO Digest, op cit at 12.

One can only surmise from Cheadle's choice of words 'complex set of obligations and consultations' that he is referring to s 189 (3) (a)-(j) – the employer's obligation to issue a written notice to consult, because he does not cite any particular subsection as too onerous.

In addition, it is worth bearing in mind that Codes do not afford the same level of protection as statutes, and a Code setting out the simplified procedure, albeit a rigorous one, would not afford equal protection to employees as the existing statute. To quote Cheadle:

Codes do not impose duties but set standards of behaviour. Deviation from those standards do not give rise to any penalty but may lead to an adverse finding in the CCMA or the Labour Court unless the deviation can be justified. The primary mechanism is voluntary compliance...<sup>89</sup>

Codes also run the risk of being overtaken by jurisprudence if they are not regularly updated. Also, they inevitably lead to a loss of protection if they are the main mechanism of protection. For example, the present Code of Practice on Dismissal on Operational Requirements was written in 1999, before s 189A of the LRA was introduced, and has not been updated subsequently. It has been described by Roskam as saying 'nothing more than what is stated in s 189'<sup>90</sup> and 'not useful'.<sup>91</sup> While Roskam, in his concept paper, also states that a new Code should 'include a section on the applicable procedure required of small business employers' he too gives no substantive detail on the simplified redraft that he proposes. It is unclear how Cheadle, the co-architect of 'regulated flexibility' in South Africa, sees such a 'voluntary mechanism' *not* leading to a loss of protection for excluded workers. How will a 'regulated flexibility lite' for small businesses that merely 'sets standards' give effect to constitutional principles of social justice?

It should also be emphasised that the legislative flexibility Cheadle, van Niekerk and Roskam envisage for small businesses is generally found in the more developed parts of Western Europe and is underpinned by generous social security measures – provisions that are virtually non-existent in South Africa.

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<sup>89</sup>Cheadle, *idem* 7 at para 20c.

<sup>90</sup>Roskam, *op cit* 21 at para 5.3.

<sup>91</sup>*Idem* 2 at 2.2.

For example, in the UK a retrenched worker could expect to receive inter alia income support, housing benefit, child benefit and family tax credit.<sup>92</sup> Austria, France and the Netherlands have social plans.<sup>93</sup> In some countries, for example Denmark, there is a trade-off between low statutory protection against dismissal and high levels of income protection for those who lose their jobs.

South Africa, by contrast, has comparatively low income protection, particularly in terms of statutory severance pay (see section – page 33). Consultation, rigorously applied under s 189 and s 189A of the LRA, is the South African employee's prime source of protection against unfair dismissal.

Every employee has a constitutional right to fair labour practices in South Africa. Any limitation on this fundamental right will inevitably lead to excluded sections of the labour force experiencing inferior labour rights and work conditions. The 'selective application' of employment security rights is not a viable model for South Africa given the country's racist legacy. It would re-expose the historical fault-lines of dual labour practice and lead to worst international practice.

### ***5. Measures to avoid or minimise dismissal***

International labour standards, according to Neville Rubin, reflect the principle that the employer should only use termination of employment as a last resort<sup>94</sup> and that he or she should first consider all possible measures that would avoid dismissals.

However, South African labour law is less onerous for employers than Articles 21 and 22 of ILO Recommendation 166 because the LRA does not state that dismissal based on operational requirements may only be used as a last resort, notes Darcy du Toit.<sup>95</sup> It should be emphasised that s 189(2)(a) of the LRA stipulates measures to avoid or minimise dismissals only as a topic that must be considered in consultation.

The employer is obliged to have considered 'alternatives *before* proposing the dismissals and be able to give the reasons for rejecting each of those alternatives' under s 189(3)(b) of the Act in his or her written notice to the consulting party. The

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<sup>92</sup> Also free National Health Service, free nursery, primary, secondary education and concessions for the unwaged on local government services.

<sup>93</sup> ILO Digest, op cit 400-402 at table 4 (See Annexure 5).

<sup>94</sup> Rubin, op cit 545 at para 2.

<sup>95</sup> du Toit, *Business Restructuring and Operational Requirements Dismissals: Algorax and Beyond* (2005) 26 ILJ 595.



employees' representatives are then free to suggest other alternatives in consultation. These alternative possibilities must also be explored by the employer.

Although, Rubin observes, ILO Convention 158 does not indicate the substantive content of such possibilities – except for an explicit reference to ‘finding alternative employment’<sup>96</sup> either within the establishment or elsewhere – this is one of the key measures that employers can take to avoid dismissals.

In addition, it should be stressed that ILO Recommendation 166 goes further than South African legislation when it says that an employer’s decision to dismiss will only be considered ‘fair’ or ‘valid’ *if* the employer has sought to ‘avert or minimise’ dismissals and that the measures in Article 21 of the ILO Recommendation are among those that should be considered.

Such measures outlined in Article 21 include inter alia restriction of hiring, spreading the workforce, reduction of staff levels over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retaining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

According to Rubin, when Article 21 of the ILO Recommendation was drafted in the early 1980s, the measures to avoid dismissal were proposed in a climate of economic slowdown and aimed to find alternatives to dismissal that were voluntary.<sup>97</sup>

CCMA facilitators in South Africa have observed nearly 20 years later that there is a major difference between retrenchments which originate from an employer’s need to expand (aspirational changes) and those that stem from a firm’s poor financial performance, loss of markets and an inability to beat competition (distress changes). Aspirational changes are proposed in an atmosphere of confidence in the future and optimism for growth. The employer anticipates improved career prospects for its employees and may consider increased training, improved severance or retirement pay. In distress situations, by contrast, an employer is not necessarily able to offer more than the statutory minimum.<sup>98</sup>

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<sup>96</sup> Rubin, *ibid* at para 3.

<sup>97</sup> ILO Digest *op cit* at 29-31.

<sup>98</sup> CCMA, *op cit* (note 61) at 6-7.

The alternatives considered, therefore, depend on the facts of each case and the economic rationale for the employer's proposed changes. For example, in an aspirational situation, information from an employer that there are a large number of employees<sup>99</sup> may suggest to a facilitator or union that there are opportunities for voluntary retirement or retrenchment instead of compulsory retrenchment.

In distress situations, by contrast, employees may be willing to take unpaid leave or accept short-time. For example, since 1993 a series of innovative employment agreements based on the reduction of work hours have been developed in Germany. These agreements, negotiated in the motor industry at Volkswagen, Mercedes Benz and General Motors, ensured that the enterprises would not carry out retrenchment for a set period in exchange for a reduction of work time and wages, provided a monthly income was assured.<sup>100</sup>

Paying partial compensation for temporarily reduced hours is popular with employers, according to Rubin, because it saves them the cost of severance pay as well as the cost of recruiting and training a new workforce.

In the same way, internal transfers are relatively cost-free. In South Africa, s 189(3)(j) of the Act and question 5 of LRA Form 7.20 (in s 189A cases) ask employers how many employees have been dismissed for operational requirements in the past 12 months. This assists the facilitator (or union) to assess the scope for transfers to alternative jobs within the operation.<sup>101</sup> However, if no suitable vacancies exist, the possibility of 'bumping' – ie placing longer serving employees in positions held by shorter serving employees and retrenching the latter – must be considered in South Africa.

In *Amalgamated Workers' Union of SA v Fedics Food Services*,<sup>102</sup> it was held that:

There was an obligation on the employer to consider whether it should do so [bump] because if [it] was able to do so in a fair manner which was not injurious to itself and other employees, then it should have given serious consideration to doing so, to avoid the consequences of retrenchment.

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<sup>99</sup> Under LRA s 189A, first question on form LRA 7.20: How many employees does the employer employ?; s 189(3)(i): the number of *employees* employed by the employer.

<sup>100</sup> Digest, op cit at 29-31.

<sup>101</sup> CCMA, op cit at 5.

<sup>102</sup> [1999] 2 BLLR 123 (LC).

Similarly in *Porter Motor Group v Karachi*, the LAC held that s 189(2) of the LRA:

requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an *employee* as well to raise bumping as an alternative in consultation.<sup>103</sup>

With the exception of bumping,<sup>104</sup> South African courts have differed in their approaches to the appropriate level of scrutiny to ‘finding alternatives’ in s 189 dismissals. While ILO Recommendation 166 does not have the force of international law, du Toit notes, it has been persuasive when seeking to interpret the LRA and its guidelines have entered South African case law.

For example, in *SA Chemical Workers Union and other v Afrox*,<sup>105</sup> the LAC held that ‘an employer must seek appropriate measures to avoid dismissals, minimize their number, change their timing and mitigate their adverse effects’ – a reference to Article 13(1)(b) of the ILO Convention. The court said:

These are all indications that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a *last resort* when dismissing for operational reasons.

Five years later, in *CWIU v Algorax*<sup>106</sup>, the court drew a different conclusion:

[s 189 implies] that the employer has an obligation, if at all possible to avoid dismissals of employees for operational requirements altogether or to minimise the number of dismissals if possible and to consider other alternatives of addressing its problems without dismissing the employees and to disclose in writing what those alternatives are that it considered and to give reasons for rejecting each of those alternatives.

In short, ‘business efficiency rather than necessity is the [international] yardstick,’ according to du Toit.<sup>107</sup> Article 19<sup>108</sup> of ILO Recommendation 166 stipulates that no

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<sup>103</sup> [2002] 23 ILJ 348 (LAC).

<sup>104</sup> ‘Bumping’ comes from United States but is not an internationally accepted practice.

<sup>105</sup> [1999] 20 ILJ 1718 (LAC).

<sup>106</sup> [2004] 24 ILJ 1917 (LAC).

<sup>107</sup> du Toit, op cit (note 95).

<sup>108</sup> ILO Recommendation 166, at Article 19: All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned...

measure to avoid or minimise dismissal can be prejudicial to the ‘efficient operation’ of the business.

Consequently, the period over which the consultation process extends can be relatively more onerous for employers if there are urgent or entrepreneurial factors giving rise to the terminations contemplated.<sup>109</sup> A dispute about the fairness of such a dismissal cannot be referred to a bargaining council or the CCMA until 30 days after the date of the dismissal, or within 30 days of the employer making a final decision to dismiss under s191 (b) of the LRA. As noted above, facilitation under s189A of the LRA is essentially time-driven with 60 days between a notice of intention and issuing of an award or ruling – although if the parties reach agreement sooner the matter can be resolved.

As already discussed (see p18), comparative research shows that consultation periods are no lengthier in South Africa than they are in many other jurisdictions, even where s 189A of the LRA and its 60-day moratorium applies.

Although South African employees can use consultation to change the timing of dismissals under s 189(2)(a)(iii) of the LRA,<sup>110</sup> the courts are not sympathetic to ‘wilful foot-dragging’ by unions, according to Grogan.<sup>111</sup> Conversely, if more time is needed for consultation, the employer is wise to grant it.<sup>112</sup> Consultation is seldom deemed sufficient when it is rushed. To be ‘meaningful’, in terms of s 189(2) of the LRA, the consultation process must allow sufficient time for disclosure, consideration and dialogue.

In closing, both parties should aim to get the best deal they can through a process of mutual persuasion. Unions need to be proactive and suggest innovative alternatives that assist the employer and facilitator to avoid and/or minimise the number of retrenchments. Thousands of jobs have reportedly<sup>113</sup> been saved in this way under s 189A of the LRA since the amendment’s introduction in 2002.

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<sup>109</sup> The period of consultation under s 189 of the LRA is not defined but according to the Code of Good Practice should include the opportunity to meet and report back to employees, the opportunity to meet with the employer, and the request, receipt and consideration of information.

<sup>110</sup> LRA s189(3)(e): the time when, or the period during which the dismissals are likely to take effect.

<sup>111</sup> Grogan, op cit, at 462.

<sup>112</sup> s189(6)(a) LRA: 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.

<sup>113</sup> Levy, op cit (note 58).

### ***6. Measures to mitigate the adverse effects of dismissal***

The LRA places a statutory duty on consulting parties to consider ways they can ‘mitigate the adverse effects of the dismissals’ under s 189(2)(a)(iv) of the Act. This measure is given substantive content where the employer must in written notice consider at s 189(3) of the Act:

- (e) the time, when or the period during which, the *dismissals* are likely to take effect ...
- (g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed and;
- (h) the possibility of the future re-employment of the *employees* who are dismissed.

The LRA uses the words and concepts of ILO Recommendation 166, Articles 25-26 as a blueprint:

#### Mitigating the Effects of Termination

25. (1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible with training or retraining, where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers’ representatives concerned.

According to Rubin, the main responsibility for helping workers in retrenchment situations falls upon the competent authority, in collaboration with the employer and workers’ representatives where possible.<sup>114</sup> The aim, according to Rubin, is to introduce a degree of tripartite participation into the search for ways of mitigating the effects of dismissal. The intention of the ILO text is not to impinge on the employer. ‘Where possible’ is the language used by Article 25(1) of the Recommendation.

In South Africa such tripartite participation is given best effect under s 189A of the LRA with the appointment of a facilitator under the auspices of the CMMA. In alignment with ILO Recommendation 166, the LRA introduces tripartism without impinging on the employer’s ultimate decision. All the employer must do is to consider the possibility of mitigating the adverse effects. While consultation may initially seem onerous to employers, experience shows that ‘meaningful joint consensus’ can often be reached through the innovative suggestion of alternatives to

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<sup>114</sup> Rubin, op cit 548 at para 2.

dismissal that may benefit both the enterprise's long-term labour relations and its future prosperity.

According to Rubin the effective application of the ILO Article also depends on training.<sup>115</sup> More generous financial provisions for training are also contained in Article 26 (1) of the ILO Recommendation,<sup>116</sup> although in South Africa an employer is not obliged to offer retrenched employers special training to enable them to become capable of fulfilling the tasks of new vacancies, according to Grogan.<sup>117</sup> By contrast, in New Zealand, under common law the employer is required to consider alternative options, including training.<sup>118</sup>

Furthermore, in South Africa, adds Grogan, employers are not obliged to seek alternative work for retrenched employees with other employers. However, it is possible that a court may hold that fairness requires a company in a group to seek posts among corporate affiliates.<sup>119</sup> Article 25(2) of the ILO Recommendation says:

Where possible, the employer should assist the workers affected in the search for suitable employment, for example, through direct contacts with other employers.

Nor does the LRA expressly impose an obligation on employers to rehire retrenched workers, although the employee parties are entitled to be consulted on the possibility of it under s 189(3)(h) of the LRA.<sup>120</sup> The obligation to consider a possibility is far less onerous upon employers than an obligation to make an offer of alternative employment.

This lack of an obligation on employers to rehire retrenched workers in South Africa contrasts with China, where in collective dismissals, re-employment priority must be given to retrenched employees for up to six months after the redundancy.<sup>121</sup>

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<sup>115</sup> Rubin, *ibid* at para 5.

<sup>116</sup> ILO Recommendation 166, Article 26(1): With a view to mitigating the adverse effects of termination of employment for reasons of an economic technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with a training or retraining and with finding and taking up employment which requires a change of residence.

<sup>117</sup> *Bosal (Afrika) Pty Ltd v NUMSA obo Both and Other* cited in Grogan, *op cit* at 461.

<sup>118</sup> *GH Hale and Sons v Wellington, etc, Caretakers IUOW* (1991) 1 NZLR 151; cited in ILO Digest, *op cit* at 247.

<sup>119</sup> *Sikhosana & others v Sasol Sunthetic Fuels* (2000) 21 ILJ 649 (LC) cited in Grogan, *idem* at 462.

<sup>120</sup> Grogan, *idem* at 481-482.

<sup>121</sup> China: s 27 Labour Law (1995) cited in ILO Digest, *op cit* at 109.

The requirement is even more onerous for employers in Cyprus, where priority must be given to employees retrenched within the previous eight months.<sup>122</sup>

In Tunisia,<sup>123</sup> wage earners whose employment is terminated for economic reasons are given priority re-engagement<sup>124</sup> if the firm wants to re-engage wage earners with the same professional skills. This right can be exercised for one year. The order of re-engagement is determined according to the employee's length of service in the firm. The protection is even more onerous for employers in the Republic of Korea, where retrenched employees have priority of re-employment for two years, if the employer recruits similar workers.<sup>125</sup>

The LRA, by contrast, does not state how long a South African employer should keep open such an offer or the criteria according to which they should be selected for re-employment. However, a refusal by an employer to re-employ an employee is a 'dismissal' under s 186(1)(d) of the Act if an 'employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another'.

This means that in South Africa retrenched employees may challenge non re-employment as an 'unfair dismissal'. However, employers retain the right to choose whether retrenched employees are suitable for vacancies that may arise.<sup>126</sup>

If an employer has agreed to re-employ retrenched employees, he or she is obliged to do so. Grogan suggests that in the absence of an agreed period, the concept of 'reasonableness' should be applied.<sup>127</sup> In practice, re-employment is an important means of mitigating the adverse effects of dismissal and, according to a senior CCMA Commissioner, has saved many jobs.

Guidelines for rehiring can be found in ILO Recommendation 166 at Article 24. However, they are very flexible.

#### Priority of Rehiring

24 (1) Workers whose employment has been terminated for reasons of an

<sup>122</sup> Cyprus: s 22 Termination of Employment Law, 1967 cited in ILO Digest, op cit at 123.

<sup>123</sup> Tunisia: s 21-31 Labour Code of 1996: cited idem at 344.

<sup>124</sup> Under the conditions of their remuneration at the moment of dismissal: cited supra.

<sup>125</sup> Korea: s 31(4) Labour Standards Act, 1997: cited idem at 208.

<sup>126</sup> *SACCAWU & Others v Wimpy Aquarium*, [1998] 9 BLLR 965 (LC).

<sup>127</sup> 'Logic suggests that employees should be selected for re-employment according to the same principles that they were selected for retrenchment, only in the reverse, coupled with the suitability of the employee for the available position': Grogan, op cit at 482.

economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(1) Such priority of rehiring may be limited to a specified period of time.

(2) The criteria for the priority of rehiring, the question of retention of rights – particularly seniority rights – in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

The ILO guidelines are based on the idea that where an employer has to later hire staff again, out of fairness, a certain priority should be granted to the workers whose employment was terminated.<sup>128</sup> Rubin notes that the legislation of many countries establishes the principle of priority of rehiring as a duty, while in other countries it is included in collective agreements or other methods of implementation.<sup>129</sup> However, it is generally specified that priority goes to workers with comparable qualifications.

It should be emphasised that the LRA does not prescribe such measures but imposes a duty to consult about the possibility of rehiring under s 189(3)(h) and is far less onerous on employers than legislation in many other jurisdictions. There is a big difference between ‘should be given a certain priority’ for re-employment and ‘the possibility of’ being considered for future re-employment. While the LRA affords less protection to employees than the international labour standard, there is a duty on employers not to rehire unfairly under s 186(d) of the LRA.

### ***7. Selection criteria***

Employers in South Africa are generally given a free hand when it comes to selecting employees for retrenchment, and the courts intervene only to ensure that such dismissal has not been used as an opportunity to discard employees for reasons unrelated to operational requirements.<sup>130</sup>

On the other hand, it should be noted that choosing employees for retrenchment is the most onerous stage of consultation for employee parties. Inevitably, employees and union representatives are forced to name colleagues and draw up a hit-list.

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<sup>128</sup> Rubin, op cit 547 at para 1.

<sup>129</sup> Ibid at para 3.

<sup>130</sup> Code of Good Practice on Dismissal Based on Operational Requirements states that selection criteria that infringe a fundamental right protected by the Act can never be fair. It includes length of service, skills and qualifications. Generally, it states the test for fair and objective criteria will be satisfied by the LIFO principle.



The consulting parties are obliged to try and agree a method for selecting employees for retrenchment under s 189(2)(b) of the LRA. If no selection criteria are agreed, the criteria must be ‘fair’ and ‘objective’ under s 189(7)(b) of the LRA.

The principle of ‘last in first out’ (LIFO) commends itself to this purpose of objectivity, according to the Code of Good Practice on Dismissal Based on Operational Requirements,<sup>131</sup> but other criteria – such as qualifications, attendance record and productivity – which can also be objectively verified and applied equally, have been accepted as ‘fair’. Essentially, the method should be agreed between the parties where possible.

If criteria are established in advance, as advocated by the ILO, the risk of subjective decision is reduced. ILO Recommendation 166, Article 23(1) seeks to make the choice of workers affected by dismissal as objectively as possible and avoid the risk of arbitrary decision.

#### Criteria for Selection for Termination

23 (1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.<sup>132</sup>

Research shows that the criteria most often applied to selection for termination are occupational skills, length of service and family circumstances. Other criteria may sometimes be included, such as the difficulty of finding alternative employment.

In some countries the focus of selection criteria is on protecting the most vulnerable workers. This is accepted practice in Belarus, Benin, Bulgaria, Ethiopia, France, Mali, Mexico, Morocco, Portugal, Senegal and Tunisia.<sup>133</sup>

In other countries, legislation protects certain categories of employee, such as the disabled, from selection for retrenchment. Employers can also be encouraged to retain employees with greater numbers of dependants. This is the case in Ethiopia, Mexico, and Bulgaria. While in other jurisdictions, employee representatives or trade union officials enjoy priority for retention, or are absolutely protected.

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<sup>131</sup> (1999) GN 1517 GG 20254.

<sup>132</sup> Note balance of selection criteria ie ‘due weight’ both to interests of employers and employees.

<sup>133</sup> Rubin, op cit 546 at para 6.

In Bulgaria, family and material situation or health conditions of the employee should be taken into consideration. In cases where there are two employees with equal qualifications, the one with the more disadvantaged situation should not be dismissed. Similarly, where there are workers with equal qualifications, those with spouses on unemployment benefit or who are the sole breadwinners should be given preference for retaining the job.<sup>134</sup>

In Ethiopia,<sup>135</sup> preference against retrenchment is given to employees who have been disabled by a work-related injury, shop stewards and expectant mothers.<sup>136</sup>

Similarly, in France, criteria must take into account family responsibilities, particularly in the case of single parents, length of service, situation of employees whose re-entry into the labour market is difficult (disabled persons or elderly employees), as well as skills.<sup>137</sup> Likewise, in Senegal, selection criteria take social factors and seniority into account in cases of workers with equal aptitude.<sup>138</sup>

In South Africa, employers are given far greater flexibility over selection criteria than in the countries mentioned above. Perhaps more consideration should be given to the most vulnerable workers where possible. For example, if there are two employees with equal aptitude, family responsibilities should be taken into consideration so that single parents, sole breadwinners, employees with the most dependants, should be retained where possible.

Likewise, efforts should be made where possible to retain disabled employees, expectant mothers and elderly workers – employees least likely to find alternative employment. Such measures would be in accordance with the purpose of the LRA's s 1 to advance social justice and give best effect to ILO Recommendation 166 Article 23 – 'to give due weight to both the interests of the undertaking, establishment or service and to the interests of workers'.

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<sup>134</sup> s 329 Labour Code (1996) cited in ILO Digest, op cit at 78.

<sup>135</sup> s 29(3) of the Labour Proclamation No 42 of 1993: cited idem at 141

<sup>136</sup> Idem at 143.

<sup>137</sup> L321-6 Labour Code (1973): cited idem at 147.

<sup>138</sup> Senegal: The first employees to be dismissed will be the workers with the least aptitude for the jobs under s47(3)(b) of the Labour Code, modified by amendment in 1994. In the case of workers with equal aptitude, the workers with the greatest seniority will be kept on staff. Seniority in the enterprise is increased for the purpose of establishing the order of dismissals, by one year in the case of married workers and by one year for each dependant child. The employer must inform the staff representatives in writing, giving a list of the workers he or she proposes to dismiss with an indication for the criteria adopted: cited idem at 293.

Selection criteria for bumping<sup>139</sup> have largely been determined by national case law. Jurisprudence has established that specialised skills possessed by employees of shorter service may justify a departure from this local practice,<sup>140</sup> as does disruption to the business or placing an unreasonable burden on the employer.<sup>141</sup> Horizontal bumping should take place before vertical bumping.<sup>142</sup> This makes the process less onerous for employees, but requires employers to draw up a pool of possible candidates, including inter-departmental positions, and consider retraining. But it remains the employer's prerogative to choose staff for managerial posts, says Grogan.

### **8. Severance pay**

Severance pay is viewed as among the most onerous of social costs, particularly by employers who due to economic difficulties are forced to reduce their staff. The need to make severance payments can further jeopardise the firm's economic position.<sup>143</sup> However, there seems to be general agreement on the need to guarantee a minimum income to a worker while he or she looks for a new job.

In South Africa, an employee who is dismissed for reasons based on the employer's operational requirements is entitled to one week's remuneration for each completed year of continuous service, the minimum severance pay under s 41(2) of the Basic Conditions of Employment Act<sup>144</sup> (BCEA). Although the amount is in alignment with Article 12 of ILO Convention 158,<sup>145</sup> which states that the sum must be calculated inter alia, on length of service and the level of wages, South Africa's rate of statutory severance pay is comparatively low (see Figure 1 overleaf).

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<sup>139</sup> Bumping comes from the United States. It is not used in most countries.

<sup>140</sup> van Niekerk, *Contemporary Labour Law*, vol 2 (August 1992) at 1.

<sup>141</sup> Rycroft Alan, *Bumping as An Alternative to Retrenchment*, [1999] 20 ILJ 1489.

<sup>142</sup> Grogan, op cit at 472.

<sup>143</sup> ILO Digest, op cit at 25.

<sup>144</sup> Act 75 of 1997 (updated 2002).

<sup>145</sup> ILO Convention 158, Division E: Severance Allowance and other Income Protection. Article 12  
 1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to (a) severance allowance or other separation benefits, the amount of which shall be based inter alia on *length of service* and the *level of wages, paid directly by the employer or by a fund* [emphasis added] constituted by employers' contributions, or (b) benefits from unemployment insurance or assistance or other forms of social security such as old age or invalidity benefits, under the normal conditions to which such benefits are subject. 2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b). 3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

**Figure 1**

Twenty nine jurisdictions listed in the ILO Termination of Employment Digest award higher statutory severance payments than South Africa.<sup>146</sup> In approximate order, from most generous to least, with South Africa at the bottom:

<b>Country</b>	<b>Statutory severance pay</b>
Mexico	six months' wages for first year of service, 20 days for each extra year
Brazil	two months' for each year of service
Italy	one year's wages divided by 15.5 plus 1.5% for each year's service plus compensation for inflation
Chile	one month's wages for each year of service
China	one month's wages for each year of service
Colombia	one month's wages for each year of service
Iran	one month's wages for each year of service
Philippines	one month's wages for each year of service
Bangladesh	30 days' wages for each year of service
Korea	30 days' wages for each year of service
Nepal	30 days' wages for each year of service
Ethiopia	30 days' wages for first year of service, 40 days' wages for subsequent years, with a maximum of 12 months' wages
Dominican Republic	maximum of 23 days' wages for each year of service
Pakistan	20 days wages for each year of service
Cyprus	minimum two weeks to maximum four weeks' wages for each year of service
Egypt	half a month's pay for first five years of service, one month for each subsequent year
Syria	half a month's pay for each of the first five years of service, one month's pay for each subsequent year
Caribbean Community	two weeks' wages for first 10 years of service, three weeks wages for each subsequent year
India	15 days' wages for each year of service
Kenya	15 days' pay for each year of service
Mauritius	15 days' wages for each year of service
Jamaica	two weeks' for each year for first 10 years, three weeks for each year of service thereafter
Vietnam	half a month's salary for each year of service
Argentina	two weeks' for each year of service
Lesotho	two weeks' for each year of service
Zambia	two weeks' for each year of service
Cameroon	40% of monthly wage
Côte d'Ivoire	40% of monthly wage
Malaysia	10 days' wages for first year of service, 15 days' for each of the next four years of service
South Africa	one week's pay for each year of service

<sup>146</sup>See Annexure 5 on rates of severance pay: cited in ILO Digest, op cit (note 46) 399-402 at Table 4.

Nine of the countries are in Africa:

<b>Country</b>	<b>Statutory severance pay</b>
Ethiopia	30 days' wages for first year of service, 40 days' wages for subsequent years, with a maximum of 12 months wages
Egypt	half a month's wages for first five years of service, one month for each subsequent year
Kenya	15 days' wages for each year of service
Mauritius	15 days' wages for each year of service
Lesotho	two weeks' wages for each year of service
Zambia	two weeks' wages for each year of service
Cameroon	40% of monthly wage
Côte d'Ivoire	40% of monthly wage
South Africa	one week's wages for each year of service

Nine of the countries pay approximately one month's wages for each year of service – Bangladesh, Chile, China, Colombia, Iran, Italy, Korea, Nepal and the Philippines. The highest severance pay is in Mexico – six months' pay for the first year of service and 20 days' for each year of service, followed by Brazil at two months' pay for each year of subsequent service.

Three of the countries pay 15 days' per year of service – India, Mauritius, Kenya and Lesotho. The other countries, besides South Africa, paying one week for each year of service are the United Kingdom and Namibia. However, the UK has greater social security provision, in terms of old age and invalidity benefits in alignment with Article 12(1)(b) of ILO Convention 158.<sup>147</sup>

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<sup>147</sup> The provisions of ILO Convention 158 on severance pay duplicate those previously stated in Article 18 of ILO Recommendation 166 'Severance Allowance and Other Income Protection'.

In South Africa, severance pay is only paid for dismissal based on operational requirements, a limitation often regarded as deeply unfair by those dismissed for reasons related to capacity or conduct with years of seniority.<sup>148</sup> In some countries, the legislation makes severance pay an absolute right based on length of service. The right is acquired irrespective of the reason for termination of employment. Some countries regard severance pay as a right acquired by the worker that must always be paid, even in the case of voluntary resignation or serious misconduct, such as in Venezuela. This allowance is regarded in some countries as a type of mandatory savings scheme which is increased with years of service regardless of the reason for dismissal. This is far more onerous and burdensome for employers than provisions under the LRA. Severance pay plays an important role in income protection in many countries where a social security scheme does not provide such protection or where it is inadequate.<sup>149</sup>

South Africa is in alignment with many African countries with a French labour relations background, where inter-occupational agreements set a minimum level of compensation but make provision for collective agreements to modify fixed statutory amounts.<sup>150</sup> This contrasts with some jurisdictions where the amount is fixed, such as in the Czech Republic, although severance pay is usually still calculated according to level of wages and length of service.

Nonetheless, the maximum amount payable is sometimes restricted. For example, in Spain the limit is 12 months' wages and there may also be a specified minimum. In South Africa there is no ceiling. All employees, irrespective of their status, are entitled to severance pay if they are dismissed for reasons based on operational requirements.

The BCEA does not empower the Minister of Labour to exempt employers from the obligation to provide severance pay. A dispute about entitlement to the provision may be referred to a bargaining council or the CCMA but a CCMA Commissioner is

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<sup>148</sup> LRA s 188(a)(i).

<sup>149</sup> Severance pay as an obligation generally rests on the employer, whereas social security schemes are usually financed by public sources.

<sup>150</sup> Digest, op cit at 19.

not empowered to arbitrate disputes concerning claims by employees to severance pay in excess of the statutory amount.<sup>151</sup>

Severance pay is the last issue the parties are obliged to consult under s 189(2)(c) of the LRA, although the employer must propose severance pay in its written notice to the consulting parties under s 189(3)(f) of the Act.

Where severance pay is agreed in excess of the statutory minimum, the employer is obliged to pay that amount.<sup>152</sup> However, an employee who unreasonably<sup>153</sup> refuses an offer of alternative employment with the retrenching employer or another employer is not entitled to severance pay under BCEA s 41(4).<sup>154</sup>

However, in the final analysis, South Africa's severance payments are low compared with those in some other countries and cannot be considered unduly onerous for employers, even by national standards. One week's pay for each year of service is a minimal sum, especially in a country with little other income protection. The BCEA does not reflect loyal years of service with sliding scales of pay, as Jamaican law does or protect against inflation, as Italian law does. An amendment to s 41 of the BCEA may encourage voluntary retirement or retrenchment of employees with longer years of service.<sup>155</sup>

Nonetheless, the wide statutory definition of 'employee' in South Africa makes the application of severance pay relatively more widespread than in some other countries. The Digest table on severance pay shows qualifying periods vary widely. Some countries restrict severance pay to workers who have been employed for one year (South Africa, Benin, Mali, Peru and Venezuela), two years (Gabon), three years (Mexico), five years (Bolivia, in cases of voluntary retirement, and Malawi),

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<sup>151</sup> The Labour Court has held that severance packages calculated on a different basis may be discriminatory and therefore render a dismissal unfair; *Mathews v GlaxoKline SA (Pty) Ltd* (2006) 7 ILJ 1876 (LC) cited in Grogan, op cit at 475.

<sup>152</sup> *Barry and Africa Defence Systems (Pty) Ltd* [2004] 25 ILJ 1120 (CCMA) cited in idem at 475.

<sup>153</sup> Whether or not an employee's refusal of alternative employment is reasonable depends on the nature of the position, for example its location, status and other factors such as reduced income and inconvenience (eg relocation): Grogan, op cit at 480.

<sup>154</sup> BCEA, s 41(4): An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).

<sup>155</sup> CCMA, op cit at 4

10 years (Panama, if the worker is over 40 years of age) or even 20 years (Switzerland, where the worker must be over 50 years of age.)<sup>156</sup>

Generous application of severance pay in South Africa – low qualifying period and no ceilings – makes this otherwise limited statutory provision (only for retrenchment) relatively more onerous for employers, although it still cannot be considered a significant financial burden for most local employers.

### ***9. Notification of the administrative authorities***

Nineteen out of 68 countries listed in the ILO Digest table have a statutory duty to notify the administrative authorities of collective dismissals.<sup>157</sup> However, such notification, also a provision of ILO Convention 158, is not a statutory requirement<sup>158</sup> in South Africa except in the case of miners (see below).

Jurisdictions with a general statutory requirement to notify the administrative authority, according to the Digest, include: Brazil, Bulgaria, Colombia, Dominican Republic, Egypt (for all dismissals), Guinea, India (when the establishment has more than 100 workers), Kenya, Mauritius, Mexico (by arbitration committee), Namibia, the Netherlands, Pakistan (authorisation from the Labour Court needed except in an extreme emergency to close down; also has the power to suspend collective dismissals) and Zimbabwe (with tripartite committee).

Some of these countries not only require that the relevant authority be informed but they also require the authority's approval for a termination to be considered justified. For example, in Sri Lanka, any dismissal without the approval of the Labour Commissioner is null and void.<sup>159</sup> In addition, there is no machinery for appeal, as the decision is final.<sup>160</sup>

Similarly, in Colombia, collective dismissal requires prior authorisation from the Ministry of Labour and Social Security. The Ministry of Labour should decide on

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<sup>156</sup> ILO Digest, op cit at 24.

<sup>157</sup> See Annexure 5: ILO Digest, op cit 399-402 at table 4.

<sup>158</sup> Except if the matter later becomes a 'dispute'.

<sup>159</sup> Sri Lanka: s 5 Termination of Employment of Workmen (Special Provisions) Act (1990): cited in ILO Digest, op cit at 312.

<sup>160</sup> s 2f Termination of Employment of Workmen (Special Provisions) Act: cited in supra.



the matter within two months.<sup>161</sup> If the dismissal is found unfair the employer must pay significant compensation.<sup>162</sup>

Such notification is in alignment with international labour standards. Article 14 of ILO Convention 158<sup>163</sup> makes provision for the ‘competent authority’ to be notified in ‘accordance with national law and practice... as early as possible’. The ILO instrument requires employers to give the authority ‘relevant information, including a written statement of the reasons for termination, number and categories of workers likely to be affected and period over which it is to be carried out’.

However, according to Rubin, Article 14 of the Convention does not specify exactly when notification should be made, ie during or after consultation.<sup>164</sup> Notification is generally intended to inform the authority of contemplated terminations that might cause economic problems and place a burden on public expenditure in order to enable them to find solutions to the problems raised by such terminations.<sup>165</sup>

In the event of non-compliance with consultation and notification procedures, legislation and collective agreements generally make provisions for various forms of sanction that can be applied cumulatively, such as fines, compensation or even invalidation of the termination of employment. In some countries, authorisation of the competent authority will be refused if the legal provisions have not been met.<sup>166</sup>

Notification of the administrative authority for collective or any other dismissals is not required in South Africa (under the LRA) except in the retrenchment of miners. In this instance, miners are afforded special protection under the Mineral and

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<sup>161</sup> Colombia: s 66 of the Labour Code, Act 50 of 1990: cited in ILO Digest, op cit at 115.

<sup>162</sup> If the undertaking has taxable liquid assets of less than 1,000 minimum monthly wages, the amount of compensation is 50 per cent of that sum: cited in supra.

<sup>163</sup> ILO Convention 158: Division B. Notification to the Competent Authority, Article 14 (1): When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. (2) National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number or workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce. (3) The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

<sup>164</sup> Rubin, op cit 542 at para 1.

<sup>165</sup> Ibid at para 5.

<sup>166</sup> Ibid at para 9.

Petroleum Resources Development Act 28 of 2002 (s 52).<sup>167</sup> Under this Act, when the ‘holder of a mining right’<sup>168</sup> contemplates retrenchment of ‘10 per cent of the workforce or more than 500 employees’<sup>169</sup> (s 52b) they must notify the Minerals and Mining Development Board.<sup>170</sup> The Board will then investigate the ‘circumstances’ and ‘socio-economic and labour implications’ of the proposal and make recommendations to the Minister of Minerals and Energy under s 52(2) of the Act. The Minister, on the recommendation of the Board and after consultation with the Minister of Labour and Trade Unions, will make a directive under s 57(3) of the Act to the holder of the mining right. The employer then must comply with this directive and confirm in writing that the measures have been taken. If the directive is not complied with, the Minister of Minerals and Energy can apply to a court for the judicial management of the mining operation under s 52(b)-(c) of the Act. While this procedure is comparatively onerous for employers, it is in alignment with international labour standards.

Generally, in South Africa, s 189 of the Act leaves consultation up to the affected parties. However, s 189A(3) of the LRA allows both sides involved in large-scale

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<sup>167</sup> s 52 Mineral and Petroleum Resources Development Act (2002), Notice of profitability and curtailment of mining operations affecting employment. (1) The holder of a mining right must, after consultation with any registered trade union or affected employees or their nominal representatives where there is no such trade union, notify the Board.

<sup>168</sup> s 1 of the Mineral and Petroleum Resources Development Act, Definitions (1) ‘holder’, in relation to a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit, means the person to whom such a right or permit has been granted or such person’s successor in title

‘mining right’ means a right to mine granted in terms of s23 (1) ‘mine’, when used as a verb, means any operation or activity for the purposes of winning any mineral on, in or under the earth water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity included there to;

‘mineral’, stockpiles or in residue deposits, but excludes (a) water, other than water taken from means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone rock gravel, clay, soil and any mineral occurring in residue land or sea for the extraction of any mineral from such water; 9b) petroleum; or (c) peat

<sup>169</sup> Idem, s 52(b) if any mining operation is to be scaled down or to cease with the possible effect that 10 per cent or more of the labour force or more than 500 employees, whichever, is the less, are likely to be retrenched in any 12-month period (2) the Board must, after consultation with the relevant holder investigate – (a) the circumstances referred to in subsection 1 and (b) the socio-economic and labour implications thereof and make recommendations to the Minister. 3 (a) The Minister may, on the recommendation of the Board and after consultation with the Minister of Labour any registered trade union or affected person or their nominated representatives where there is no such trade union, direct in writing that the holder of the mining right in question take such corrective measures subject to such terms and condition as the minister may determine (b) the holder of the mining right must comply with the directive and confirm it in writing that the corrective measures have been taken. (c) If the directives contemplated in paragraph (a) are not complied with, the Minister may provide assistance or apply to a court for judicial management of the mining operation.

<sup>170</sup> established by s 57 of Mineral and Petroleum Resources Development Act (2002).

dismissals to request facilitation under the auspices of the CCMA.<sup>171</sup> As noted above, however, nearly a third of such facilitations are requested by employers. In closing, it should be stressed that the role of the CCMA is only to facilitate a ‘consensus-seeking process’ not to arbitrate – although the proceedings are conducted on a ‘with prejudice basis’.

The powers and duties of a facilitator are laid out in s 4 of Facilitation Regulations. However, if there is a dispute about disclosure of information, the facilitator may make an order directing an employer to produce documents that are relevant under s 5 of the Regulations. A facilitator cannot impose any ruling in terms of a settlement. The matter can only become a dispute if at the end of 60 days an agreement cannot be reached. If the matter goes to court, no person may call a facilitator to give evidence on any aspect of the facilitation.<sup>172</sup>

### ***Conclusion***

Research of ILO source material and analysis of ILO instruments on termination of employment dispel the myth that South African legislation for dismissal based on operational requirements is unique, unduly onerous and over-regulated for employers.

Evidence shows that the perceived constraints of mandatory consultation arising from the LRA are vastly over-stated. The consultation process may be onerous for employers (ie ‘difficult to do, or needing a lot of effort’<sup>173</sup>) but not unduly so – ie ‘to a level which is more than necessary, acceptable or reasonable’.<sup>174</sup> The South African statute does not, as often stated, put a bar on job creation, downsizing, efficiency or competitiveness.

It should be emphasised that much of South Africa’s law for dismissal based on operational requirements (and that of our global competitors), is imported from ILO Convention 158 and ILO Recommendation 166. These international instruments

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<sup>171</sup> In the UK, the Advisory Conciliation and Arbitration Service (ACAS) offers facilitation, but both parties must accept the service for it to take place. In South Africa only one party need request the statutory offer from the CCMA.

<sup>172</sup> s 7 Facilitation Regulations (2003): Status of facilitation proceedings, (1) A facilitation is conducted on a with prejudice basis (2) Despite sub-regulation (1) the parties may agree in writing that a part of the facilitation is to be conducted on a without prejudice basis (3) the part of the facilitation conducted on a without prejudice basis may not be disclosed in any court proceedings.

<sup>173</sup> Definition of ‘onerous’: *Cambridge Dictionary Online*.

<sup>174</sup> Definition of ‘unduly’: *idem*.

have served not only as a template or guide for South African lawmakers, but also for many others jurisdictions.

For example, the LRA's justification of dismissal uses the same universal terminology and concepts as that of the ILO, circa Geneva 1982-1985. This legislative appropriation of ILO standards is particularly apparent in the LRA's s 213 definition of operational requirements. It transpires that the concept is supra-national but was left undefined by the ILO and only explained at a conference. It was this explanation that was incorporated lock, stock and barrel into South African law. South Africa's national definition may be, in the opinion of many legal practitioners, bad, ugly and in need of clarification, but it is no more onerous than those of many other jurisdictions, of which it is a clone. The same construct has been more or less universally adopted from the ILO. As such and in its existing form, it gives employers ample flexibility to make the business decisions of their choice.

Analysis of ILO instruments also shows that South Africa's eloquently written objectives of consultation in s 189(2) of the LRA are little more than a codification of ILO standards. All the consultation measures dramatically referred to as 'the employers' burden' in our leading text books are directly imported from ILO Convention 158 and Recommendation 166.

South Africa, it transpires, has not reinvented the wheel when it comes to labour law for dismissal based on operational requirements, just reshaped a couple of spokes. A more unique part of the LRA is s 189(3)(a)-(j) with its built-in, step-by-step approach to written notice. While well-crafted, even ingenious with its provisions for swift disclosure, this subsection is still essentially a codification of ILO Convention 158 and Recommendation 166 – albeit an inspired one. The substantive detail of the LRA subsection contains no new elements and just gives effect to South Africa's national obligations as a member of the ILO under s 1(b) of the LRA and to fundamental rights conferred by the Constitution.

By contrast, s 189A of the LRA is truly innovative with its process-driven requirements for facilitation under the auspices of the CCMA in large-scale disputes. Each question on form LRA 7.20 contains a request for further and better disclosures, which are bound to be of assistance to a facilitator and the parties in finding their

way to an appropriate solution.<sup>175</sup> Paradoxically, this notionally more regulatory part of the Act is not perceived as onerous by business and is requested by at least 30 per cent of South African employers contemplating dismissal based on operational requirements. The amendment appears to have been a huge success since its inception six years ago and has apparently saved thousands of jobs with its creative solutions for finding alternative employment. Although this part of the LRA gives a more generous interpretation to ILO Recommendation 166 than the legislation of many other countries, it is still in alignment with international standards. Section 189A should be regarded as our own, home-grown model of best international practice.

More of a burden (ie 'difficult or unpleasant'<sup>176</sup>) for South African employers is the non-original s 189 of the LRA and its *general* application of consultation procedures for small and medium-sized businesses. While there may be valid arguments that the consultation requirements of s 189(3) of the LRA can sometimes be too onerous for small employers, comparative analysis of the law in different jurisdictions should not be used to whitewash over a dual system of labour relations that excluded Africans from the statutory definition of employee for more than half a century. The selective application of employment rights has no place in the modern South Africa and is out of alignment with the country's Constitutional and national principles of social justice for all.

Moreover, comparative research of the law in other countries illustrates that where limitations on employment rights are selectively applied, they are usually underpinned by income protection in the form of social security – almost non-existent in South Africa. The prime financial protection South African employees have against retrenchment is severance pay and even this is comparatively low and more limited than in many other jurisdictions.

The currency of mutual persuasion, formidable as it may seem to the uninitiated, is an international norm based upon tripartite participation through social dialogue and self-regulation. The obligation to consult is part of a new generation of rights (based

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<sup>175</sup> CCMA, *op cit* at 4.

<sup>176</sup> Definition of 'burden': *Cambridge Dictionary*.

on a culture of justification of action when the loss of livelihood is anticipated) that emerged throughout the world in the 1990s.

The LRA's provisions in s 189 are in full alignment with those of most of South Africa's global competitors and with prevailing international labour standards. In some instances – most notably those of rehiring, severance pay and notification of the administrative authorities – the national statute gives South African employers comparatively more flexibility than those in many others jurisdictions.

For example, South African employers are given pretty much a free hand to make the employment decisions of their choice when it comes to selecting who is to be retrenched, or who is to be rehired if business improves. In addition, there is no statutory notification of the administrative authorities in South Africa except in the retrenchment of miners.

In the final analysis, it is hard to see how the LRA and BCEA can be thought of as unduly onerous for employers in South Africa, when the legislation stops short of hitting them where it hurts most – their bank balances. Consultation may be formidable, challenging, time-consuming and complex for employers, but ultimately it is only an obligation to consider.

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