

Changing the retrenching goalposts

AN EMPLOYER who contemplates retrenching employees starts consulting about proposed retrenchments and follows the provisions of section 189 of the Labour Relations Act. Given the size of the organisation and the number of employees to be retrenched, this is the correct procedure to follow.

However, circumstances change and the employer now contemplates retrenching more employees, bringing the ambit of the retrenchments within the parameters of section 189A of the Labour Relations Act, which deals with large-scale retrenchments. The questions to be considered are: how should the situation be approached and what are the risks?

In the recent case of *Continental Tyre SA (Pty) Ltd v The National Union of Metal Workers of South Africa*, the Labour Appeal Court was called upon to consider the consultation requirements on an employer and the interplay between section 189 and section 189A of the Labour Relations Act.

Continental Tyre initially started consulting on retrenchments in its steel truck and extruder department (STED). Thereafter the consultations were extended to include the cross-ply department. At that stage the company indicat-

ed its intention of avoiding dismissal by finding reasonable alternatives for all affected employees.

Later it became clear that these alternatives were no longer possible because of a further reduction in daily production volumes. The company then initiated consultation in terms of section 189 of the Labour Relations Act. At that stage the number of employees whom it contemplated dismissing was less than 50. At a later stage Continental Tyre expanded the scope of the consultation exercise to another department and then issued a notice in terms of section 189A in respect of those additional contemplated retrenchments. It took the view that the earlier retrenchments had been finalised under the provisions of section 189.

The union brought an urgent application to the Labour Court to have the earlier dismissals declared invalid and for an order that Continental Tyre not give effect to those dismissals but include the affected individuals within the ambit of the section 189A consultation process. An order in those terms was granted by the Labour Court and the employer took that order on appeal. The Labour Appeal Court confirmed that if all the proposals for retrenchment were taken into account, more



than 50 employees were to be retrenched.

The union's case was that Continental Tyre had deliberately compartmentalised the retrenchment process into three to avoid having to comply with section 189A in regard to the first two phases. Its argument was that Continental Tyre must have foreseen that further retrenchments would be necessary and should have been dealt with in terms of section 189A.

The Labour Appeal Court found on the facts that at no stage during the earlier section 189 processes had the union challenged the commercial rationale behind

the employer's proposals. Until a very late stage Continental Tyre had sought to find alternatives other than retrenchments. When it issued the section 189A notice it made it clear that a number of alternatives had been considered before to deciding to retrench in terms of section 189A.

In the court's view "the contemplation necessary to trigger section 189 and section 189A of the act does not take place when the employer initially considers alternatives. In a case such as the present, where, for the relevant period, retrenchments were not even upon the 'contemplative agenda' it was only once the alternatives had

been discounted that the employer considered dismissal and was then obliged to consult."

In this case the section 189 processes commenced and continued almost to conclusion before the section 189A process began. They were separate processes. It may well be that a process begins under section 189 and when that process has just commenced the employer contemplates a larger process of retrenchments which would be covered by section 189A. If the employer then ignores the implications of section 189A, on the particular facts it could be held to have acted in a manner so as to avoid the scope of section 189A and thereby to have subverted the rights won by employees under the act. However, on the facts of this case it was not possible on a balance of probabilities to conclude that Continental Tyre initiated a section 189 process with regard to the STED and cross-ply departments when it had already contemplated retrenchments within the meaning and scope of section 189A. The Labour Appeal Court overturned the decision of the Labour Court.

When assessing whether or not there is a need to consult, when to start consulting and which section of the Labour Relations Act must be followed it is important for employers to understand the interplay between section 189 and section 189A of the act and exactly when the duty to consult kicks in. If the goalposts change along the way the employer may have to change the process. However, the law clearly says that an employer need only start consulting when it contemplates dismissals, so if the employer is still looking at alternatives that may avoid dismissals it does not yet have to start consulting.

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