



RETRENCHMENT IN TERMS OF SECTION 189A

INTRODUCTION

This section applies to employers employing more than 50 employees if the employer intends retrenching:

- 10 or more employees, if the employer employs 50 – 200 employees;
- 20 or more employees, if the employer employs 201 – 200 employees;
- 30 or more employees, if the employer employs 301 – 400 employees;
- 40 or more employees, if the employer employs 401 – 500 employees; and
- 50 or more employees, if the employer employs 501 or more employees.

Or if the employer intends to dismiss the above number of employees either on one occasion or cumulatively over a 12-month period.

IDENTITY OF EMPLOYER

For the purposes of calculating the ratio of proposed retrenchees and previous retrenchees in the past 12 months as against the total number of employees employed, the legal entity of the employer must be identified. Large national chain stores or banks with numerous branches all form part of one corporate structure or juristic person.

The total workforce across all stores or branches must be calculated together to assess all whether the ratio will trigger s189A. Conversely, where a national chain store consists of numerous independent franchises across the country, each franchise will be a separate corporate entity or employer. Equally, if a holding company contemplates a retrenchment exercise, the employees employed by subsidiaries of the holding company are not included in the calculation of the ratio of retrenchees to the total workforce and vice versa.

PROCEDURES: FACILITATION

Both parties need to agree on the process of facilitation and notify the CCMA in writing by completing the LRA 7.20 form within fifteen (15) days.

The CCMA then needs to inform the parties in writing within seven (7) days of receiving the form of the following:

- The name of the facilitator; and
- The date of the first facilitation meeting.

CONDUCT OF THE FIRST FACILITATION MEETING

The facilitator must, at the first meeting seek to facilitate a n agreement between the parties on the following:

- The procedure to be followed during the facilitation;
- The date and time of additional facilitation meetings; and
- The information the employer is required to disclose.

A facilitator may conduct up to four (4) facilitation meetings with the parties; however, the director of the CCMA may give permission for additional meetings to be held.

POWERS AND DUTIES OF THE FACILITATOR

- To chair the meeting between the parties; and
- To decide on any issue of procedure that arises in the course of meetings between the parties.

The facilitator's decisions regarding the procedure for conducting facilitation, including the date and time, is binding on the parties.

If there is a dispute about the disclosure of information, the facilitator may make an order directing an employer to make such disclosure.

STATUS OF THE FACILITATOR

Facilitation is done on a with prejudice basis, but parties can agree in writing that parts be done on a without prejudice basis. The latter cannot be disclosed in any court proceedings, nor can the facilitator be called to give evidence of the facilitation proceeding.

Note: If a facilitator is appointed, the employer is not allowed to retrench for a period of sixty (60) days. After the 60 days has lapsed, the employer may give notice of retrenchment to employees affected or the union can give notice to strike or the union may decide to refer a

dispute concerning the substantive fairness of the retrenchment to the Labour Court.

STRIKES

If the employees or representative trade union decide to strike on the issue, the union or employees will need to follow the strike procedures in terms of s64.

NB: Once the matter has been referred to the Labour Court, the right to strike on the issue will be lost. The same will apply once the union or employees give notice to strike, in that the right to refer the matter to the Labour Court will be lost.

CONCILIATION

If no facilitator is appointed, the dispute may not be referred to the conciliator until thirty (30) days have lapsed. If the matter fails at conciliation or the 30 days expires and the matter still remains unresolved, the union can:

- Give notice to strike; Refer a substantive fairness dispute to the Labour Court. And the employer can give notice to dismiss in terms of the Basic Conditions of Employment Act.

GENERAL POINTS

- The parties can agree on different time periods for consultation/facilitation;
- The parties can agree to appoint a facilitator at any time, despite the procedure set out in point 1 above (facilitation); and
- At any stage, a consulting party can apply to the Labour Court to:
 1. Interdict the employer from dismissing employees prior to complying with a fair procedure;
 2. Direct the employer to reinstate the employee/s until there is compliance with a fair procedure; and
 3. Make an award of compensation.

RELEVANT LEGISLATION

Labour Relations Act, as amended, s189A

CCMA Info Sheet: Retrenchment in terms of s189A

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Regulations for the conduct of facilitation in terms of s189A