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Is a Section 189(3) Notice Mandatory?

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Discussion on Padayachee v Serere and Others

INTRODUCTION

The retrenchment process in South Africa is governed by section 189 of the Labour Relations Act, 1995 ("**LRA**"), which sets out the requirements for fair dismissals based on operational requirements. One of the key characteristics of this process is the notice in terms of section 189(3) ("**s189 Notice**"), which serves to inform affected employees about the employer's intention to retrench and the statutory consultation topics. However, the question arises whether the failure by an employer to issue this notice renders a retrenchment procedurally unfair.

BACKGROUND FACTS

The case of *Padayachee v Serere & Others* (JR1162/21) [2024] was heard in the Labour Court of South Africa, Johannesburg. The applicant, Ms. Kogilambal Padayachee, had been employed from July 2015 as Head of Information Technology at Joburg Property Company ("**JPC**"). On 30 September 2019, she was retrenched due to JPC's operational requirements, following a corporate restructuring. Moreover, the restructuring was because Ms Padayachee's department was failing to present the necessary 'strategic information technology advice' (at paragraph 56) to the JPC. Ms Padayachee claimed that her dismissal was both procedurally and substantively unfair. She argued that the JPC had failed to issue a s189 Notice, which is required under the LRA, thereby rendering the retrenchment procedurally unfair.

The matter was first referred to arbitration, where the arbitrator ruled that the retrenchment was both substantively and procedurally fair, despite the absence of a section 189(3) notice. Dissatisfied with the outcome, the applicant sought to review the arbitration award and to have it set aside by the Labour Court.

IS A S189 NOTICE A MANDATORY REQUIREMENT FOR FAIR RETRENCHMENTS?

Section 189(3) of the LRA requires that an employer contemplating retrenchment must issue a written notice inviting the affected parties to consult with it on the proposed dismissals.

The purpose of the s189 Notice is to invite the affected parties to begin the process of consultation on the proposed retrenchments. The s189 Notice must include key aspects including, but not limited to, the reasons for the retrenchment, the number of employees anticipated to be affected by the dismissals, the proposed method for selecting the affected employees, any assistance that the employer proposes to offer to the affected employees, the alternatives the employer considered prior to the proposal of retrenchment as well as the reasons for rejecting those options and the possibility of future re-employment. The Labour Court considered whether the failure to issue a formal s189 Notice rendered the retrenchment procedurally unfair. The employer argued that there was substantial compliance with section 189, as the restructuring process had been openly discussed with the required trade unions, including the Independent Municipal and Allied Trade Union ("**IMATU**"), Ms Padayachee's trade union. Further, the restructuring was approved by the company's board and was supported by organised labour of which Ms Padayachee's trade union formed part. Moreover, Ms Padayachee's union representative was aware of the restructuring and participated in the consultation process.

THE LABOUR COURT'S FINDING

The Labour Court dismissed the review application, ruling that while a s189 Notice is generally mandatory, the absence thereof does not automatically render a retrenchment process procedurally unfair if there is substantial compliance with the consultation requirements.

The Labour Court reiterated that a fair reason for a substantively fair dismissal is based on operational requirements, which was emphasised in the case of *Havemann v Secequip (Pty) Ltd* (JA 91/2014) [2016] ZALAC. In this case, the Labour Appeal Court held that "*a fair reason is one that is bona fide and rationally justified, informed by a proper and valid commercial or business rationale*." Meaning, the reason that is put forward must be considered objectively fair.

Furthermore, the Court found that the employer engaged in meaningful consultations with the relevant trade unions, which included the applicant's trade union, IMATU. Since IMATU did not object to the process or demand a s189 Notice, the Court found that there was substantial compliance with the requirements of section 189. Moreover, Ms Padayachee's union was made aware of the restructuring and participated in the discussions, negating the need for a separate s189 Notice. Thus, the Court found that Ms Padayachee was not prejudiced by the absence of the s189 notice because she was already aware of the relevant reasoning for her retrenchment through her trade union's involvement. Furthermore, the Court confirmed that where an employee is represented by a trade union, the employer is not required to consult with the employee separately or issue an equal s189 Notice.

With regards to the procedural fairness of the dismissal, the Court held that the finding that the applicant's dismissal was procedurally fair even with the absence of the required s189 Notice, is that of a reasonable decision maker.

The court considered the circumstances under which the s189 Notice was not issued being those wherein IMATU had been consulted for purposes of the retrenchment as opposed to the applicant on her own. Moreover, the Court was presented with evidence of a letter addressed to IMATU in August 2019 wherein Ms Padayachee personally responded. The letter stated that Ms Padayachee and IMATU were privy to the reasons for the contemplated retrenchment for purposes of section 189(3) of the LRA and thus the s189 Notice was unnecessary. Further, there was no protest by Ms Padayachee or IMATU following the letter.

CONCLUSION

This case clarifies that while a s189 Notice is generally mandatory, it is not an absolute requirement in every retrenchment proceeding. If an employer has substantially complied with the consultation process and the affected employees or their representatives have been meaningfully engaged, the lack of a s189 Notice may not necessarily render the retrenchment procedurally unfair.

Notwithstanding, employers must still exercise caution and ensure that affected employees and their representatives are fully informed and consulted before implementing retrenchments. Employees and trade unions should be proactively engaging with employers and making an effort to safeguard their interests during a restructuring process, not thereafter. Given the "peculiar circumstances" of this case, the Labour Court's finding is "not a precedent that a section 189(3) notice is not mandatory" (at paragraph 103). Each case must be decided upon its own merits.

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