

BUSINESS RESTRUCTURING: SPILLS AND FILLS

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SUMMARY AND CONCLUSION

It is, in theory, potentially fair to “*wipe the slate clean and start again*” i.e. to declare affected positions redundant and require employees to apply afresh for the posts in the new structure.

But that is a potentially perilous course of action for an employer to embark upon – as many have discovered.

Of course such an operation will be closely scrutinized to ensure it is not a sham – a cover to conceal dismissals for poor performance or misconduct. Obviously this is not permissible.

Where the jobs in the new structure are more or less the same as in the old it has been held to be unfair to require employees to apply for the new posts – they should simply be appointed to the new posts.

An employer is obliged in such a restructuring process actively to seek to appoint existing employees to the new posts – with guidance and training if necessary. Existing employees must be given a chance to perform in the new structure – obviously within reason. An employer must “*go out of its way*” to accommodate existing employees.

The suitability of employees for new posts must be objectively determined, according to objective criteria.

An employer may restructure to improve efficiencies and to increase profits (or, for example, to become a “world class manufacturer”).

Where restructuring is effected to improve efficiencies and increase profits the duty to consult is more onerous on the employer.

A court will where appropriate second-guess an employer’s decision to declare a post or posts redundant – i.e. it will itself determine the fairness of the commercial rationale for the employer’s decision.

As far as procedural requirements are concerned:

- 1.1. Consultations must commence before the “clean slate” is announced;
- 1.2. group consultations will suffice (obviously where appropriate);
- 1.3. consultations must involve serious and reasoned consideration by the employer of the employee proposals;

Conversely employees have a duty to participate in the consultations and to apply for available posts (but the prior duty is on the employer to make posts available and guide, assist and if necessary train the employee).

One of the difficulties that arises from a review of the case law is the particular remedy that a court will afford an aggrieved employee who has been treated unfairly. In many of the cases compensation was awarded. However, in principle, an employee should be entitled to reinstatement. The precise form of such an order and how it may be given effect to is a matter that may cause some difficulty.

Finally, I agree with Rycroft that an employer intending to restructure by way of defining jobs and making all or a group of existing jobs redundant must be able to show: (i) a reasonable and commercial rationale for the decision to restructure; (ii) that the particular decision has been taken in a manner which is also fair to the employees to be retrenched; (iii) that the retrenchment of the employees is essential to achieve the purposes of the restructuring; (iv) that the criteria for appointment to the 'new' jobs are clear and justifiable, linked specifically to the new job descriptions; (v) that guidance is given to employees as to which of the restructured jobs they might

be eligible; (vi) that employees are given an opportunity in the interview to answer any concerns about past performance that might be used as a criterion for not appointing them to the job; and (vii) that the eventual selections are objectively justifiable.

Cases:

1. SA Mutual Life Assurance Society v Insurance & Banking Staff Association [2001] 9 BLLR 1045 (LAC).
2. Grieg and Afrox Ltd [2001] 8 BALR 799 (P); (2001) 22 ILJ 2102 (ARB).
3. Naicker v Q Data Consulting [2002] JOL 9348 (LC); (2002) 23 ILJ 730 (LC) Ltd.
4. Wolfaardt & another v Industrial Development Corporation of SA [2002] 11 BLLR 1127 (LC); (2002) 23 ILJ 1610 (LC).
5. Vancoillie v Sanlam Life Insurance Ltd (2003) 24 ILJ 1518 (LAC).
6. FAWU & others v SA Breweries Ltd [2004] 11 BLLR 1093 (LC).
7. SAA v Bogopa & others [2007] 11 BLLR 1065 (LAC); (2007) 28 ILJ 2718.
8. Van Rooyen & others v Blue Financial Services (SA) (Pty) Ltd [2010] JOL 25845 (LC).